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Trusting Marriage

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Marriage settlements are back. Complex trusts intended to protect family fortunes were once the centerpiece of wedding planning and family negotiations. In more modern times, these trust-based settlements ceded their popularity to premarital contracting and the prenuptial agreement. But in recent years, new trust forms with unprecedented asset protection features have prompted a resurgence of trust usage in marriage planning. Playing on notions of family money and legacy building, these new trusts function much like their predecessors, except in one noteworthy respect. Conventional trusts have always provided asset protection based on the notion of third-party freedom of disposition. The new marriage trusts give asset protection to trusts created by a first-party to the marriage. Accordingly, one spouse can create an asset protection trust—for his or her exclusive benefit using what is potentially marital property—without the knowledge of the other spouse. That individual spouses are seeking new ways to protect wealth is not necessarily surprising. Nevertheless, the new powers being given to individual spouses to shelter assets within marriage are alarming. In practice, the new trusts are disconcerting because they allow for a significant amount of unilateral decision-making. In theory, the new trusts are troubling because they disrupt the precarious equilibrium that exists between two competing "value-spheres": family wealth preservation and marital partnership. This Article proposes a distinctive framework, based on the notion of competing value-spheres, for assessing the growing phenomenon of asset protection trusts in marriage and concludes that these trusts represent an aggressive incursion of wealth preservation into the realm of modern marital partnership. That is to say, the new asset protection trusts undermine the values of personal trust and financial transparency within marriage.

TRUSTING MARRIAGE

Allison Tait*

> I would have everybody marry if they can do it properly; I do not like to have people throw themselves away; but everybody should marry as soon as they can do it to advantage.
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> ~ Jane Austen, *Mansfield Park* (1814)

> Equity will not feed the husband and starve the wife.
>
> ~ *Wetmore v. Wetmore,* 149 N.Y. 520, 529 (1896)

INTRODUCTION

Marriage settlements are back. Intricate trusts, especially popular with the landed aristocracy in early modern England, were once an integral part of wedding preparations and parental negotiations.[1] Elaborate arrangements specified a bride's dowry and carved out a small amount of the estate for her widowhood.[2] These agreements also stipulated what assets would return to the spouse's family of origin at death if there were no heirs to carry on the family line.[3] Building family fortunes and protecting legacies was the name of the game. Furthermore, families routinely took steps to insulate their assets from the reach of a spouse during marriage in case the spouse turned out to be an unabashed spendthrift. Summing up this approach, Samuel Johnson stated: "It is mighty foolish to let a stranger have [your estate] because he married your daughter."[4]

The trust, with its unique capacity for asset partitioning, was central to this type of estate planning.[5] The trust accommodated the desire of families to safeguard their fortunes by allowing assets to be made available for the benefit of one spouse

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1. Christopher Clay, *Marriage, Inheritance, and the Rise of Large Estates in England, 1660-1815*, 21 ECON. HIST. REV. 503, 504 (1968).

2. H.J. Habakkuk, *Marriage Settlements in the Eighteenth Century*, 32 TRANSACTIONS OF THE ROYAL HIST. SOC'Y 15, 20–21 (1950).

3. For discussion and debate on early-modern marriage settlements, see AMY LOUISE ERICKSON, WOMEN AND PROPERTY IN EARLY MODERN ENGLAND 79–114 (1993); EILEEN SPRING, LAW, LAND, AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND 1300 TO 1800, 123–48 (1993); SUSAN STAVES, MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660-1833, Chapter 6 (1990); Clay, *supra* note 1, at 507, 510; Habakkuk, *supra* note 2, at 22.

4. JAMES BOSWELL, BOSWELL'S LIFE OF JOHNSON 520 (1904).

5. On the use of trusts in these settlements, see generally LLOYD BONFIELD, MARRIAGE SETTLEMENTS, 1601-1740 (1883).

but not the other. Most commonly, a father created a trust for his child upon marriage. However, there were many variations: an aunt with no husband or children created a trust in her will for her favorite nephew or a grandfather created a trust for a granddaughter as a wedding gift. The connecting thread was that a family member created the trust with non-marital assets to benefit one spouse during his or her marriage.

In the twentieth century, these elaborate marriage settlements passed out of fashion, replaced by prenuptial agreements and premarital contracting.[6] In the last several decades, however, a new breed of asset protection trusts has proliferated and revitalized the use of trusts in marital financial planning.[7] And, as more and more states modify traditional trust rules, new types of asset protection trusts appear every day, playing on notions of family money and legacy building. Dynasty Trusts.[8] Legacy Trusts.[9] Millennium Trusts.[10] There is a "Bloodline Trust."[11] And one trust company even boldly markets a "Have Your Cake and Eat It Too" Trust (HYCET Trust®).[12] These trusts function much like their predecessors—except in one noteworthy respect. The new marriage trusts allow one spouse acting alone to create asset protection trusts for his or her personal benefit with assets that are potentially marital property.

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6. Prenuptial contracts are an alternate form of marriage settlement, and contracting has been the more usual method of protecting assets within marriage starting in the twentieth century. The first Uniform Premarital Agreement Act was introduced in 1983. Recent estimates suggest that between 3-5% of marrying couples have these kinds of contracts. *Interesting Prenuptial Agreement Statistics* (May 20, 2017), http://brandongaille.com/18-interesting-prenuptial-agreement-statistics [perma.cc/2HZR-3YMR] ("Only 3% of people who have a spouse or are planning on getting married in the near future have a prenuptial agreement.").

7. *See* Rachel Emma Silverman, *Beyond the Prenup: Families Increasingly Turn to Trust to Protect Assets, Inheritances From Ex-Spouses*, WALL STREET J. (Sept. 22, 2005), http://www.wsj.com/articles/SB112735445722148247 [perma.cc/6MYB-6QT8] (explaining that "[p]rotecting wealth from the financial ravages of divorce has long been a key concern of families").

8. *The Dynasty Trust*, WILMINGTON TR. CORP., https://www.wilmingtontrust.com/wtcom/index.jsp?fileid=3000303 [perma.cc/Z383-7CEV] (last visited July 16, 2017) (explaining that "a dynasty trust is an irrevocable trust designed so that it may stay in effect for multiple generations, creating a powerful estate planning tool for high-net-worth families").

9. Christopher Cline, *Why Use Legacy Trusts*, ABBOT DOWNING, https://www.abbotdowning.com/asset/ggckc8/LegacyTrusts.pdf [perma.cc/MCZ3 - NCWL] (last visited July 16, 2017) (explaining that legacy trust is a term for any trust that last perpetually).

10. *Trusts to Consider*, PEAK TR. COMPANY, https://www.peaktrust.com/trustee/trusts-to-consider/ [perma.cc/3TPQ-JA84] (last visited July 16, 2017) (explaining that "perpetual trust[s] (Millennium Trust) provide for a long-term trust that saves estate and gift taxes while increasing the family wealth, using Alaska jurisdiction").

11. *The Benefits of Bloodline Trusts Special Report,* BEGLEY L. GROUP, http://www.begleylawyer.com/2012/02/the-benefits-of-bloodline-trusts-special-report/ [perma.cc/UC2R-H9AY] (last visited July 16, 2017) (explaining that a bloodline trust is designed to keep money in the family protecting the inheritance of your children and their descendants).

12. *Have Your Cake and Eat It Too: The Hycet Trust*, JEFFERY M. VERDON L. GROUP, LLP, http://jmvlaw.com/hycet-trust/ [perma.cc/ABH4-AD4D] (last visited July 16, 2017) [hereinafter *HYCET*].

That individual spouses are seeking new ways to protect family wealth is not surprising. The new powers being given to spouses to shelter their own assets are, nevertheless, decidedly problematic both in practice and in theory. In practice, the new trusts are problematic because they allow for significant amounts of unilateral decision-making by one spouse in terms of trust creation and management. This unilateral decision-making authority may strip spouses of their rights by allowing one spouse to create a trust with assets that are potentially marital property. In this way, the new trusts financially endanger economically vulnerable spouses by manipulating the marital estate and removing family law protections crafted to address wealth and income asymmetries in marriage.[13]

In theory, the new marriage trusts are troubling because they disrupt the current equilibrium—already precarious—between family wealth preservation and marital partnership. In previous centuries, family wealth preservation, with its focus on minimizing wealth passing to the surviving spouse and maximizing bloodline inheritance, was the lodestar of all wealth management in marriage. In modern marriage, however, norms concerning marriage and money have evolved and economic partnership has replaced the duty of support as the conceptual touchstone of marriage. Accordingly, the spouse is no longer ancillary to wealth transmission and the idea of a surviving spouse inheriting the bulk of a married couple's wealth has become commonplace.[14] As a result, family wealth preservation values have been forced to compete and compromise with marital partnership values in the regulation of the marital economy.

Put another way, as marital partnership has gained traction and become increasingly embedded in marriage law, economic partnership and family wealth preservation have come to represent two forceful and often competing "value-spheres," each constituted by distinct ideals.[15] Each value-sphere conceives of wealth management and transfer differently, and each operates according to a particular regulatory logic: money has a distinct meaning in each realm. That these two different spheres exist is not an intractable problem; the landscape is replete with different value-spheres, each regulating a particular slice of life. It is, however, a problem when the rules of one value-sphere aggressively impose themselves on another. This is exactly what is happening with the new trust forms. Because the new marriage trusts not only facilitate spousal disinheritance but also enable this asset stripping to happen at the hands of a spouse rather than a third party, the new

13. Traditionally, the lack of economic protections in marriage disproportionately affected women and contributed to female impoverishment after divorce from or the death of a spouse. In many instances, however, women are consumers of these new trusts, shielding assets from their husbands in order to protect their own wealth. In addition, differences in income and wealth are also present in same-sex marriages, rendering both men and women in these marriages vulnerable as well. From this perspective, the gender of the economically vulnerable spouse is a secondary concern, although there is surely more to say about how the role of "economically vulnerable spouse" is likely gendered female.

14. Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 UNIV. OF MIAMI L. REV. 567, 573 (1995).

15. *See* discussion *infra* Section I.C.

marriage trusts represent an unwelcome incursion of family wealth preservation rules into the sphere of marital partnership.

In tackling the problems created by these new marriage trusts, this Article builds on several strands of scholarship. Scholars have addressed the gap between the partnership theory of marriage and inheritance law in the context of the elective share and Uniform Probate Code (UPC) reform.[16] These scholars have examined changes to probate rules and debated how well the new rules instantiate the value of economic partnership, which the UPC claims as a guiding value. This project shifts the theoretical focus from probate to trust law and subsequently looks at the inherent value conflict between trust and family law. This Article also contributes to an emerging body of scholarship analyzing recent developments in trust law, in particular, the appearance of the latest asset protection trusts. In this vein, scholars are addressing emergent legal questions related to domestic asset protection and dynasty trusts, including questions about choice of law, fraudulent transfer, and bankruptcy.[17] Scholars are exploring the normative correctness of states authorizing such trusts and the public policy questions involved.[18] This Article threads together these strands of scholarship in order to better understand how new trust forms are impacting wealth transfer between couples and within families and what the proper regulation of these trusts should be. Moreover, this Article proposes a distinctive framework, based on the notion of competing value-spheres, for assessing the current intervention of trust law into marriage law and concludes that first-party trusts are an invalid incursion of wealth preservation into the realm of modern marriage values.

This Article proceeds in three parts. Part One provides a broad history of the norms of family wealth planning and how they shifted in the latter half of the twentieth century. This Part begins with a description of the ways in which estate planning historically involved providing for heirs and gave little weight to spousal rights. Subsequently, I discuss evolving social norms and legal rules within marriage and the emergence of the partnership theory of marriage. After providing this background, I introduce the concept of value-spheres and propose a framework for analyzing the conflict between family wealth preservation and marital partnership based on these value-spheres. Part Two begins with an analysis of the basic

16. *See also* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce and Death*, 4 UTAH L. REV. 1227 (2005). *See generally* Gary, *supra* note 14, at 567 (1995).

17. *See* Nina Dow, *The Hide and Seek of Creditors & Debtors: Examining the Effectiveness of Domestic Asset Protection Trusts for the Massachusetts Settlor*, 27 QUINNIPIAC PROB. L.J. 170 (2013-2014); Charles D. Fox IV & Michael J. Huft, *Asset Protection and Dynasty Trusts*, 37 REAL PROP., PROB. AND TR. J. 287 (2002); Ronald Mann, *A Fresh Look at State Asset Protection Trust Statutes*, 67 VAND. L. REV. 1741 (2014); Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11 (1994-1995); Jay Soled & Mitchell Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 WASH. & LEE L. REV. 257 (2015); Stewart Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom*, 85 CORNELL L. REV. 1035 (2000); R.W. Taylor, *Domestic Asset Protection Trusts: The Estate Planning Tool of the Decade or a Charlatan*, 13 BYU J. PUB. L. 163 (1998-1999).

18. *See* Carla Spivack, *Beware the Asset Protection Trust*, 5 EUR. PROP. L.J. 105 (2016).

regulatory framework of marital trusts, how conventional forms operate to shelter marital assets, and how marriage law currently strives to balance family wealth preservation and marital partnership. Subsequently, I engage in an in-depth inquiry into the new marriage trusts—how they came to be, how they work, and how they are marketed—and analyze why they should provoke concern. I look in particular at the Qualified Terminable Interest Property trust (QTIP) and the domestic asset protection trust (DAPT). Following this discussion of the new marriage trusts, Part Three proposes several ways to prevent the new trusts from disrupting the delicate ecology of the marital economy, based on an understanding of what constitutes an appropriate scope of power for first-parties to a marriage. Ultimately, this Article suggests ways to balance the competing principles of family wealth preservation and marital partnership in this brave new world of trust creation and proposes strategies for creating a regulatory system that maintains the integrity of each value-sphere while promoting fairness to all parties.

I. A SHORT HISTORY OF MONEY AND MARRIAGE

The desire of families and fiancés to protect their assets from spouses and soon-to-be spouses is not new; it constitutes part of a venerable tradition of family wealth preservation. This Part provides a short historical overview of the norms of family wealth management and the marital economy. I begin by describing longstanding inheritance practices of keeping wealth within the family—that is, the individual spouse's family of origin—and how, only recently and due to major socio-cultural shifts, new inheritance presumptions and norms have emerged favoring spousal inheritance. Now, sharing norms are shaping marriage law. Nevertheless, families are still using trust law to circumvent spouses in wealth transfer, and traditional notions of family wealth preservation still drive a large part of estate planning. Consequently, a conflict has arisen between current economic partnership norms and the historical norm of family wealth preservation. I end this Part, then, by analyzing the problem of conflicting norms and values and presenting a theoretical frame for understanding conflict as well as reconciliation between these competing value-spheres.

A. The Long Rule of Family Wealth Preservation

Marriage, historically, has not been a story of economic partnership. Rather, marriage has been defined by economic dependence for the wife and a duty of support for the husband. Spouses were not entitled to claim a great share of marital wealth either during marriage or in widowhood, nor were they central to family wealth transfer. Wealth transfer, instead, focused on family wealth preservation and used planning documents, from trust-based marriage settlements to wills, to tie wealth to family bloodlines.

1. The Interrelation of Spousal Need and Family Wealth

Under coverture, a wife possessed a severely limited set of legal rights, and her property rights, in particular, were highly constrained.[19] Once a woman was married, any property that the woman brought to the marriage came under the control of her husband.[20] All money, clothing, jewelry, furniture, and other personal goods became the property of the husband, as did any leasehold land. A wife's dowry, or portion, also came under the control of her husband. A married woman retained title to her freehold, and in theory, the husband could not dispose of it without her consent. However, a wife had no right to any income the property produced.

In exchange for giving the bulk of her property interests over to her husband, the husband was bound by a duty of support. Sir William Blackstone described the duty as follows:

> The husband is bound to provide his wife with the necessaries by law as much as himself . . . . This duty to support her at his own home is by the Common Law independent of any statute. If she leaves him of her own accord the duty ceases. If he drive her away or fail to support her there, he is liable to those who furnish her with necessaries, either individuals or town authorities.[21]

Legal commentators and treatise writers were not always in agreement as to what level of support the husband owed his wife; nevertheless, providing at least a basic level of support was a clear marital duty.[22]

The duty of support, apart from marking the marital bargain, also signaled the importance of another key value: family wealth preservation. A husband's duty was to enrich his family of origin, not his marital family, unless there was a son to carry on the bloodline. Therefore, during marriage, a husband was not encouraged or expected to give anything beyond maintenance to his wife. His wife was meant, in her look and dress, to reflect his station in life and, therefore, to serve as a positive attribute and ornament.[23] However, the bulk of the husband's estate was not to be consumed but rather preserved for inheritance purposes—to keep the family estate, name, and legacy intact.[24]

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19. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 550–57, 551 (4th ed. 2005) ("Like most legal fictions it was not universally applicable."). For an overview of the complexity of coverture, see MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD (Tim Stretton & Krista Kesselring eds., 2013).

20. ERICKSON, *supra* note 3, at 24–25.

21. 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND. If a husband did not provide for his wife, she had the right to charge in his name at stores run by sympathetic vendors and the vendors had the right, subsequently, to recover their costs from the husband.

22. *See generally* Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Twila Perry, *The Essentials of Marriage: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003).

23. STAVES, *supra* note 3, at 145–55.

24. Gary, *supra* note 14, at 571.

Accordingly, just as a husband's duty of support was circumscribed during marriage, it was likewise limited at death. As one scholar has reminded us: "Prior to this century, inheritance between spouses in Western Europe and the United States was rare."[25] This was because "[m]arriage was not seen as a reason for shifting family wealth, especially land, from one bloodline to another."[26] Marriage was meant to create alliances and heirs. Accordingly, the widow rarely ever had anything more than a life estate in the husband's property. Ideally, there was a firstborn son who would inherit the majority of the estate and take his place in the family line, continuing the name and legacy of the husband's family. After the widow's death, the husband's property reverted back to his birth family if it did not go to the couple's children.[27] As Susan Staves has commented: "[L]egal rules were motivated more by desires to facilitate the transmission of significant property from male to male and to ensure a basic level of protection for women and young children than they were . . . in increasing the autonomy of married women."[28]

2. A Widow's Share: Duty After Death

The conventional, default method for provisioning the widow was dower. Dower, also called "the widow's share," was "a moral obligation developed to secure maintenance for a wife upon her husband's death."[29] Dower was a property right that the bride acquired upon marriage in exchange for her other lost property rights and generally consisted of a life estate in one-third of the husband's freehold estate.[30] Dower rights extended back at least to the Magna Carta, which stated that "the wife and children were entitled to their 'reasonable parts,'"[31] conventionally interpreted to mean one-third of the husband's real and personal property.[32]

The dower right vested on the husband's death[33] and was intended to sustain a widow through her old age.[34] Because dower was intended solely as a mean of support in old age, the widow was entitled to nothing more than the lifetime use and enjoyment of whatever assets were designated for her support. She did not

25. *Id.*

26. *Id.* (quoting MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 239 (1989)).

27. Gary, *supra* note 14, at 571.

28. STAVES, *supra* note 3, at 221–22.

29. Mary Louise Fellows, *Wills and Trusts: The Kingdom of the Fathers*, 10 LAW & INEQ. 137, 146 (1991) (explaining that men had a right to curtesy and a life estate in all the lands even if there wasn't a child).

30. Often, a bride's dowry was calculated in relation to the amount of her dower.

31. Carole Shammas, *English Inheritance Law and Its Transfer to the Colonies,* 31 AM. J. LEGAL HIST. 145, 146 (1987).

32. Fellows, *supra* note 29, at 146.

33. SPRING, *supra* note 3, at 40; *see* OWEN DAVIES TUDOR, A SELECTION OF LEADING CASES ON REAL PROPERTY, CONVEYANCING, AND THE CONSTRUCTION OF WILLS AND DEEDS 42 (Butterworths 1856).

34. STAVES, *supra* note 3, at 45. Commentators also described the widow as possessing a "moral right" to dower. *Id.*

possess the right to sell, gift, or devise any of the property. Widowhood meant receiving a maintenance allowance "without any right to the ownership of capital."[35] Moreover, this lifetime right was subject to various factors and depended on "local custom, and if her husband was a copyholder, the approval of the lord. Her right to realty, usually a third of it, extended for life on some manors and only during widowhood or 'as long as she remained chaste' on others."[36]

Even with all of its limitations on a widow's financial interests, dower was still frequently contested because of competing claims to the land in question and complications if the widow remarried. For these reasons, among others, dower was often unpopular and critics abounded. Janet Loengard observed that "dower invoked conflicting sentiments" because, on the one hand, "[i]t was proper that a woman should have enough to live on and bring up her children after her husband died."[37] On the other, dower "ran counter to the strong desire, countenanced by the family structure of feudal England, to keep landholdings undivided and in the hands of the heir."[38] Provisioning of widows through dower was therefore not only restricted to a maintenance obligation but also subject to manipulation and contestation by husbands and heirs.

These contestations clarified that the rights of widows to family property were tolerated, at best, and that widows were often perceived as dependents "whose needs take assets away from the heroic job of accumulation."[39]

B. The Shift to Economic Partnership

The norms of dower, support, and family wealth preservation had prodigious traction and were the prevailing template for marital wealth transfer until well into the twentieth century. Spurred in particular by seismic changes in social and cultural norms in the 1960s and 1970s, the predominance of the duty of support and other coverture values finally began to fade. In their place, notions of economic partnership, household contributions, and asset sharing within marriage became increasingly important values in marriage law.[40] This Section details the shift.

1. Equitable Distribution as Economic Partnership

The explicit legal concept of economic partnership in marriage first emerged in the latter half of the twentieth century, primarily in conjunction with the decline of fault divorce and the ascendancy of equitable distribution. The idea of equitable distribution arose in policy papers and reports as early as 1963. In that year's *Report*

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35. Fellows, *supra* note 29, at 150.

36. Shammas, *supra* note 31, at 147.

37. Janet S. Loengard, *Of the Gift of Her Husband: English Dower and Its Consequences, in the Year 1200*, *in* WOMEN OF THE MEDIEVAL WORLD 254 (Julius Kirshner & Suzanne F. Wemple eds., Oxford 1985).

38. *Id.*

39. STAVES, *supra* note 3, at 203.

40. Gary, *supra* note 14, at 573

of the Committee on Civil and Political Rights to the President's Commission on the Status of Women, the authors observed:

> Marriage as a partnership in which each spouse makes a different but equally important contribution is increasingly recognized . . . . During marriage, each spouse should have a legally defined substantial right in the earnings of the other, in the real and personal property acquired through those earnings, and in their management.[41]

Seven years later, the Uniform Marriage and Divorce Act introduced the idea of equitable distribution. Aligned with the idea that fault was not to be a factor in either granting the divorce or awarding property, the prefatory note to the Act stated that property distribution at divorce was to be treated, as nearly as possible, "like the distribution of assets incident to the dissolution of a partnership."[42] Equitable distribution was designed specifically to address the problems inherent in the position of a homemaker upon divorce and to reward homemakers for their nonmonetary contributions to the marriage.[43]

California was the first state to enact no-fault divorce in 1970, spurring other states to do the same.[44] Change was not, however, particularly fast. It took decades for the majority of states to enact equitable distribution statutes. New York passed an equitable distribution law in 1980.[45] By 1983, twenty-two states had adopted similar statutes,[46] and by 2016, all states had adopted either equitable distribution or community property principles, and state legislatures had eliminated all title-based systems, generally embracing the idea of economic partnership within marriage.[47]

State courts, interpreting equitable distribution statutes in the course of divorce litigation, also moved towards institutionalizing the principle of marriage as an economic partnership. In *Rothman v. Rothman* (1974), the New Jersey Supreme Court observed: "Thus the division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways

41. PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS TO THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 47 (1963).

42. Unif. Marriage and Divorce Act, 9A U.L.A. § 307, 309 (1973).

43. *See* Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279, 286 (1989).

44. *See* Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, *in* DIVORCE REFORM AT THE CROSSROADS 6, 31 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (noting California was first state to abolish traditional fault-based grounds for divorce and to substitute factual finding of marriage breakdown in their place, and California no-fault divorce law became effective in 1970 in context of community-property marital regime).

45. Henry H. Foster, *Commentary on Equitable Distribution*, 26 N.Y.L. SCH. L. REV. 1, 1 (1981).

46. Mary Zeigler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 261 (2013) ("Equitable property division, rare in 1970. Became the norm in all but ten states by the mid-1980s. Whereas no states had property-division rules recognizing the contributions of homemakers in 1968, 22 states had adopted such a policy by 1983.").

47. In this remainder of this paper, I address only separate property states. In community property states, the landscape is quite different because both spouses have an immediate claim to certain forms of property even during marriage. I put aside that analysis for a different venue.

it is akin to a partnership."[48] And as an increasing number of states began to adopt equitable distribution statutes and state courts began to evaluate cases under these statutes, marriage as economic partnership became a mantra.[49] Just over ten years after *Rothman*, the North Carolina Supreme Court stated: "[O]ur Equitable Distribution Act . . . . reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship."[50] The idea of marriage as an economic partnership became, over the last decades of the twentieth century, the guiding value of divorce law.

2. The Broader Embrace of the Marital Unit

The major reforms in divorce law that resulted to the embrace of equitable distribution rules had a number of ripple effects. In particular, inheritance law began to transform in order to match the advances made in spousal rights at divorce. Beginning in 1969, UPC drafters began to address ways to bolster the elective share (the modern version of dower) and "the position of the surviving spouse . . . steadily improved everywhere at the expense of the decedent's blood relatives."[51] In 1990, seeking to address the growing strength of the economic partnership theory—and to equalize results for spouses at both divorce and death, so as to not provide less advantage at death than at divorce—the drafters of the UPC revisions took explicit steps to move the UPC toward economic partnership.

This move was, again, most visible in the changes made to the elective share.[52] The drafters stated:

> The main purpose of the [elective share] revisions is to bring elective-share law into line with the contemporary view of marriage as an economic partnership. The economic partnership theory of marriage is already implemented under the equitable distribution system applied in both the common-law and community-property states when a marriage ends in divorce.[53]

Implementing economic partnership meant redesigning the augmented estate and providing the surviving spouse with one half rather than one third of the

48. Rothman v. Rothman, 320 A.2d 484, 501 (N.J. 1974).

49. *See, e.g.*, Cassiday v. Cassiday, 716 P.2d 1133, 1136 (Haw. 1986) ("These decisions are consistent with the time-honored proposition that marriage is a partnership to which both partners bring their financial resources as well as their individual energies and efforts.").

50. White v. White, 324 S.E.2d 829, 831–32 (N.C. 1985).

51. Glendon, *supra* note 22, at 238.

52. EXEC. COMM. OF THE NAT'L CONF. OF COMM'R ON UNIF. STATE LAWS, AMENDMENTS TO UNIFORM PROBATE CODE 1 (2008) (the drafters explicitly stated that "[t]he main purpose of the revisions is to bring the elective share into line with the contemporary view of marriage as an economic partnership").

53. *Id.* ("The partnership theory of marriage, sometimes also called the marital-sharing theory, is stated in various ways. Sometimes it is thought of 'as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike . . . . Sometimes the theory is expressed in restitutionary terms.").

decedent's estate.[54] Because of these changes, Mary Ann Glendon has stated: "In the United States, the surviving spouse has clearly become the favorite in inheritance."[55]

At the same time the drafters made changes to the elective share, they also made changes to the intestacy rules and increased the surviving spouse's share of the decedent's estate. Based on new understandings about the presumed intent of a decedent, the UPC drafters granted the surviving spouse the whole of the intestate estate, if neither spouse had children from a previous relationship. This change, like the changes to the elective share, was made to bring inheritance law "into line with developing public policy and family relationships."[56]

The norm of marital partnership also spilled over into other related domains. Tax law, as early as 1948, introduced the idea of marital partnership with the joint return. Building on this, in 1981, Congress implemented the norm of marriage as an economic partnership into the tax code by approving an unlimited marital deduction. One scholar has remarked:

> The unlimited marital deduction reflected a decision to treat a husband and wife as one unit for the purposes of transfer taxation, a decision which paralleled the choice of the married couple as the proper unit for income taxation and solidified the concept that a husband and wife's property is really "theirs."[57]

In 2012, this concept of the marital unit was strengthened even further with the introduction of portability, allowing one spouse to transfer his or her estate tax exemption to the surviving spouse. The unlimited marital deduction and portability have solidified the "legal fiction" of the married couple as "an irreducible economic unit," and this notion has "become a first principle of taxation that is now deeply embedded in tax law and policy."[58]

In the majority of legal domains dealing with married couples, law and policy makers have attempted to instantiate the principle of partnership such that economic partnership in marriage has become—over the latter half of the twentieth century—the cornerstone of marriage law architecture. This has held true even as marriage has evolved, blended families formed upon second marriage have become the norm, and same-sex marriage has thrown gender roles into question.

54. While death and divorce are the two main mechanisms for termination a marriage, it is clear that they differ. UPC drafters, however, sought to incorporate partnership language not to mirror divorce but to make it such that the rewards and incentives for loyalty in marriage were not less than those offered by divorce law.

55. Glendon, *supra* note 22, at 242.

56. Unif. Probate Code Art. II, Part 1 Note (1990).

57. *See* Wendy C. Gerzog, *Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301, 308 (1995) (noting that at the same time, Congress enacted the QTIP).

58. *See* Lily Khang, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 330 (2016).

Partnership has replaced dependency as a marital ideal in both legal and social expectation.[59]

C. A Tale of Two Value-Spheres

The shift from family wealth preservation to economic partnership as the touchstone value in marriage and inheritance law has not been a minor sideways shift. This change represents a profound shift in perspective, in particular concerning the role of the surviving spouse in wealth transfer. Family wealth preservation—a mode that emphasizes providing marginal resources to the spouse and favoring heirs—and marital economic partnership represent two distinctly different ways of looking at family relations, wealth transfer, and the marital economy. Each mode conceives of resource management and distribution quite differently and within each mode a particular legal infrastructure supports the project. Trust law primarily supports family wealth preservation just as marriage law primarily supports economic partnership, and the two modes often encompass separate asset management strategies that are in tension with one another.

This mapping of differing modes of inquiry and sets of values—along with their related forms of resource management and asset distribution—has a conceptual basis in both sociology and philosophy. Max Weber set forth the idea of "value-spheres" in the early 1910s in his work, *Intermediate Reflections (Religious Rejections of the World and Their Directions)*, in which he identified various distinct social realms, each with its own modular set of values and norms. These spheres ranged from economic, political, aesthetic, erotic, and intellectual, and according to Weber, "the various value-spheres stand in irreconcilable conflict with each other."[60] Each sphere, Weber argued, had an inner logic that conflicted with the inner logic of the others. The religious sphere was, in his schema, inescapably in conflict with the economic sphere because each sphere valued goods and ideas

59. Partnership may, of course, mean different things and the cultural meaning of marital partnership has certainly evolved over time. The meaning of partnership invoked at divorce is primarily economic in the sense that all contributions to the marriage should be valued. Partnership, in many modern marriages, has become a deeper value in the sense that both partners contribute equally to most undertakings. Naomi Cahn and June Carbone describe this mew model of partnership: "This model rests on a new social script: a script that replaces women's dependence on their husbands with spousal interdependence . . . . It eliminates mutually exclusive roles assigned entirely by gender . . . most critically, it assumes joint responsibility – for both the family finances and any resulting children." NAOMI CAHN & JUNE CARBONE, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 93 (Oxford Univ. Press 2014). This social script contrasts with the "gender-full" marriages that concerned divorce courts in the 1970s and may be more representative of not only different but also same-sex marriages. Abbie E. Goldberg, *"Doing" and "Undoing" Gender: The Meaning and Division of Housework in Same-Sex Couples*, 5 J. FAM. THEORY & REV. 85, 88 (2013). Accordingly, the "social script" of partnership of marriage has not only persisted but become increasingly complex in meaning as it has become embedded in the social imagination.

60. Max Weber, *Religious Rejections of the World and Their Directions*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY (Hans Heinrich Gerth & Charles Wright Mills ed. & trans., 1991); RICHARD SWEDBERG & OLA AGEVALL, THE MAX WEBER DICTIONARY: KEY WORDS AND CENTRAL CONCEPTS (2nd ed. 2016) (Stanford Univ. Press 2005).

differently. This proliferation of value-spheres led, in Weber's estimation, to "polytheism" and value fragmentation, forcing individuals to choose among a plurality of narratives and modes.[61]

This notion of plurality and spheres carried over into Michael Walzer's concept of spheres of justice.[62] In his seminal work, *Spheres of Justice: A Defense of Pluralism and Equality*, Walzer states that there are various spheres of value and meaning that operate in the world and that each sphere not only conceives of goods differently but also distributes those goods in a way unique to that sphere.[63] Goods can exist in multiple spheres, but in each sphere the good takes on a particular meaning. Bread, for example, means something different in the spheres of the marketplace, the home, and a place of worship.[64] Moreover, not only does meaning change between spheres, so does what constitutes appropriate behavior and resource distribution. Accordingly, "[m]oney is inappropriate in the sphere of ecclesiastical office . . . [a]nd piety should make for no advantage in the marketplace, as the marketplace has commonly been understood."[65] There is not, then, one single standard of appropriate distribution or regulation; rather, "there are standards . . . [in] every distributive sphere."[66] These different spheres exist synchronously, like the marketplace and the temple. They can also exist in the same domain but across historical moments since "[s]ocial meanings are historical in character; and so distributions, and just and unjust distributions, change over time."[67]

The fact that multiple spheres exist simultaneously is not necessarily problematic. In fact, Walzer argues that the existence of a number of spheres is beneficial, because it allows for plural values to co-exist and even flourish without the values of one sphere dominating the others. Multiple spheres are, for Walzer, key to the formation and maintenance of a healthy, pluralistic society. Problems do occur, however, when one sphere attempts to assert the rules of that sphere, and thereby its dominance, in a separate and distinct realm.[68] As an example, Walzer invokes a surgeon who "claims more than his equal share of wealth"[69] based not on his skill as a surgeon but his social class or his educational background. When the rules meant to govern one distribution scheme begin to govern other schemes, the result is a form of tyranny. As Blaise Pascal stated: "The nature of tyranny is to

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61. *Id.*

62. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 8.

63. *Id.*

64. *Id.*

65. *Id.* at 10.

66. *Id.*

67. *Id.* at 9.

68. This description of the problem relies on Blaise Pascal, who in his *Pensées* wrote that "[t]he nature of tyranny is to desire power over the whole world and outside its own sphere." *Id.* at 19.

69. *Id.* at 17.

desire power over the whole world and outside its own sphere."[70] When this happens, plurality and complex equality fail.

This theory of value-spheres lays the groundwork for a rich understanding of the distinctive modalities of family wealth management and marital partnership, where they co-exist and where they compete. To begin, the two value-spheres of family wealth preservation and marital partnership co-exist as two particular historical idioms within marriage law. That is to say, family wealth preservation and economic partnership represent two stages of historical evolution in the social meaning and legal management of marriage. And, because the transition from older to newer is incomplete, elements of family wealth preservation still inhere in marriage law. The two sets of values are in tension based on change over time. Marriage law has, however, found a way to maintain some internal boundaries between these two value sets, thereby allowing them to co-exist in relative accord and allowing for the due consideration of both families and spouses.

Marriage law does this by allowing family wealth preservation, but based primarily on notions concerning the donor's right to gift property and freedom of disposition. For example, the most well-known exception to marital property is that gifts and bequests to one spouse from a third party, such as a parent, are considered the separate property of the recipient even within marriage.[71] Third parties—parents, grandparents, any relative with financial means and generous impulses—can give gifts, including the beneficial ownership of a trust interest without that gift becoming marital property. Accordingly, most trust interests are generally not marital property nor are they included in calculations for spousal support unless the recipient has a present and enforceable interest—and sometimes not even then.[72] The limiting principle is that the gifted assets come from and are gifted by a third party, thereby exempting them as marital property because the assets are not a product of a collective spousal effort or the "active labor, skill, or industry of either spouse."[73] Within the sphere of marriage, then, historical marriage law, essentially family wealth preservation, coexists—sometimes a little precariously—with modern marriage law, which focuses on partnership.

In addition to this internal tension, the value-spheres of family wealth preservation and marital partnership are also in external tension in the contemporary legal setting as they operate within the fields of trust and marriage law. While family wealth preservation, as a historical value, continues to inform and shape marriage law to some degree, family wealth preservation continues to be the guiding—some might say core—value in trust law. Family money, therefore, means

70. *Id.* at 15.

71. In addition, soon-to-be spouses can contract around almost all marital property rules if they so choose in ante-nuptial agreements, that courts tend to uphold unless formed under circumstances of extreme duress or coercion. For discussion of these rules, see Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623 (2008).

72. For further discussion of these rules, see *infra* Section II.A.2.

73. *See* Motro, *supra* note 71, at 1637.

something entirely different in the domain of trust law than it does in the domain of marriage law. The advent of the new marriage trusts has highlighted this conflict between the value-spheres of trust and marriage law, just as it has underscored the ways in which conflict between value-spheres can be disruptive and harmful.

The new trust rules, in particular, unsettle the precarious equilibrium between family wealth preservation and marital partnership by transgressing the of third-party involvement. Whereas the current stasis between the value-spheres is based on assets being exempt only when a third party gifts those assets, the new trusts allow one spouse to create a trust and shelter assets from the other. No longer is the donor a parent, relative, or even generous friend. This time, the donor is a direct member of the marital partnership. And this partner is authorized to create a trust and fund it with potential marital assets without having a conversation with, or even necessarily notifying, the other marital partner. The new marriage trusts, consequently, represent an aggression upon marital partnership and constitute an overreaching attempt by family wealth values to exert authority over resource distribution within marriage.

II. MODERN MARRIAGE SETTLEMENTS

Marriage, and the creation of a new household, has historically been an important moment for financial negotiation and asset structuring because marital property rights intersect with the finances of both spouses and their families of origin. Trusts have traditionally played a key role in this planning, prized for their ability to protect assets from creditors, including spouses. In this Part, I describe how trust forms, both old and new, are put to use in marriage and family wealth planning as spouses seek to limit their personal financial liability—as well as the financial liability of their families of origin—within marriage. First, I explore something old: how the traditional forms of trust have successfully kept assets out of the control of spouses, both at death and divorce, based on notions of donor freedom. I subsequently describe the solutions, based on notions of control and ownership equivalence, which uniform law offers to this problem of asset sheltering in marriage. Lastly, I analyze something new: how the new marriage trusts provide heightened levels of asset protection by giving spouses themselves the power to form asset protection trusts. In this realm, there are few suggestions or models for legal solutions to the problem of fraud on marital property, as there are with conventional trusts.

A. Something Old: The Enduring Utility of Trusts

Trusts have long been a mechanism for sheltering assets from a beneficiary's creditors, including spouses. The hallmark of these asset protection trusts has always been that third parties created them or, if created by the spouse, that they were irrevocable and the settlor-spouse had given up all control over the assets. Both historically and currently, less control generally equals more asset protection. Current marriage law has attempted to maintain and enforce these boundaries in order to permit certain forms of family wealth preservation while creating equity within marriage. Given the patchwork of state laws, however, certain imbalances persist, and some state laws clearly favor family wealth preservation. Nevertheless, as this Section demonstrates, marriage law, as well as uniform probate and trust law, offers solutions to equalize the power of the two competing value-spheres.

1. Death: Trusts and the Widow

The property rights of surviving spouses have always been some of the most important and deeply entrenched marital inheritance rights. The elective share, based on old dower rules, is the default method of provisioning a widow and is a widow's insurance against disinheritance. If the decedent spouse makes no provisions for his surviving spouse—or if he even disinherits her—she can still elect against his estate after his death, taking anywhere from one third to one half of the estate. Trusts, however, have always complicated the story and helped the decedent spouse keep money out of the hands of the surviving spouse at death. Trusts, used in this way, facilitate spousal disinheritance and exemplify an ethos of family wealth preservation.

a. "No Dower of a Trust" and the Life Estate

Two features primarily defined the dower right in its basic historical form: the use of the probate estate, excluding trusts, as the measure of the estate and the limitation to a lifetime interest. Trusts—both historically and still currently, in some states—allow one spouse to undermine the elective share rights of the other spouse and also restrict the surviving spouse's property rights to a life estate.

Under conventional rules, there was "no dower of a trust"[74] because trusts took the assets out of the husband's probate estate. Consequently, a husband could place his lands in trust and thereafter the land was no longer subject to dower claims.[75] Trusts were thought to be particularly useful in this respect because a widow's dower was considered to be a "great clog to alienations."[76] Furthermore, some commentators believed that dower was also inconvenient because it was "too generous to women."[77] Detractors reasoned that "it was inappropriate for a 'young woman of little or no fortune' to get one-third of the estate of a wealthy groom."[78] The enactment of the Statute of Uses in 1536 was intended to end the practice of

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74. STAVES, *supra* note 3, at Chapter 2.

75. In the preamble to the Statute of Uses, concern for defrauded widows barred from dower by the rule concerning uses is mentioned as one reason for enacting the statute.

76. SPRING, *supra* note 3, at 48 (citing 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 137); *see also* STAVES, *supra* note 3, at 32. Landowners argued "dower made land titles uncertain because a purchaser was exposed to the risk that a widow of some remote prior owner would demand her dower from the subsequent purchaser upon that remote owner's death." Fellows, *supra* note 29, at 147.

77. Fellows, *supra* note 29, at 147.

78. *Id.*

using trusts to strip a widow of her dower rights.[79] Nevertheless, landowners continued to find ways to use trusts to keep assets safe from creditor spouses.[80]

It was not until 1969 that the Uniform Probate Code (UPC) replaced dower and curtesy (the surviving husband's entitlement) with the gender-neutral statutory elective share for the surviving spouse.[81] The elective share in most states provided almost exactly what dower had—the right to one-third of the decedent spouse's probate estate. And the surviving spouse's elective share could still be substantially defeated by the use of a trust. The 1969 version of the UPC attempted to deal with this problem, which the drafters called spousal disinheritance or "fraud on the spousal share," by adopting the concept of the augmented estate,[82] or a probate estate that is "augmented" with certain non-probate assets over which the decedent spouse had control. With each revision the UPC has taken additional steps to safeguard the elective share from fraud by refining how the augmented estate works and what assets it captures. Nevertheless, in many states, trusts can still successfully transfer assets out of the probate estate and, consequently, out of reach of the surviving spouse.

Trusts have also been used to ensure that the surviving spouses did not have more than a life estate in the decedent spouse's estate. With dower, trusts were unnecessary, as dower was never anything more than a life estate. Widows were to receive small maintenance sums that reflected both the husband's desire to preserve money for the heir as well as the general belief that women lacked the "rationality required for the active management of property."[83] When property came to the widow outside of dower, trusts were frequently used to make sure that she had no more than a life estate and that the remainder went to the heir or back to the family of origin.

Ultimately, dower and the elective share are security for the surviving spouse against disinheritance and impoverishment; public policy measures put in place to keep widows minimally resourced through private channels. Nevertheless, in the name of family wealth preservation, the trust has a long history of undermining these protections in order to preserve an even greater share of assets for family and heirs.

b. The Elective Share: Still Cheating the Probate Estate

Despite consistent improvements made by the UPC to stem spousal disinheritance and counterbalance family wealth preservation, state law still varies greatly on whether assets held in trust are includable in calculating the surviving

79. SPRING, *supra* note 3, at 47.

80. *See* SPRING, *supra* note 3, at 48; STAVES, *supra* note 3, at 37–49.

81. UNIF. PROBATE CODE § 2-113. Some states still have dower rights, but they are statutory. *See* Gary, *supra* note 14, at 575.

82. The duty of support continues in modern marriage law; it is now gender-neutral. *See* June Carbone & Naomi Cahn, *Whither/Wither Alimony?*, 93 TEX. L. REV. 925 (2015).

83. STAVES, *supra* note 3, at 226.

spouse's elective share. When assets in trust are not included, the decedent spouse can transfer substantial assets in trust before death to someone other than the surviving spouse and prevent the surviving spouse from reaching these assets. In other words, the "no dower of a trust" rule has not gone away.

A substantial minority of states still limit the elective share to one third of the probate estate, without adding in—or "augmenting"—the probate estate with any nonprobate transfers. Surviving spouses in these states have an uphill battle contesting the exclusion of nonprobate transfers and, ultimately, decedents have the ability to not only funnel assets to their heirs and other family members but also to effectively disinherit spouses.

In a 2011 case from Wyoming, for example, the state supreme court concluded that a surviving spouse was not allowed to reach assets transferred via revocable inter vivos trust for purposes of calculating the elective share. "Simply put," the court remarked, "the Wyoming Probate Code does not incorporate the augmented estate concept."[84] The Supreme Court of Alabama likewise, in *Russell v. Russell*, concluded that a surviving wife had no right to include assets transferred by her husband through an inter vivos revocable trust in the determination of her elective share. The court stated that, "in enacting its Probate Code in 1982, Alabama rejected the UPC's augmented-estate concept . . . . Thus, we have no statutory authority for the proposition that a surviving spouse is entitled to a share of assets that were validly transferred by the decedent during his lifetime."[85] The husband was able to transfer the bulk of his estate, consisting primarily of shares in the family business, to a trustee, leaving only the very minimal residue of his estate to his wife.[86]

In these states, the decedent spouse can shield assets from the reach of a surviving spouse using even revocable trusts, one of the most basic estate planning tools. These states prioritize preserving the estate plan of the decedent and, by implication, family wealth preservation at the expense of martial partnership.

c. Designing a Better Augmented Estate

Other states, to the benefit of surviving spouses, have decided to include certain non-probate assets in calculating the elective share, thereby creating an "augmented" estate. One approach has been to list the includable assets in the statute. In states that take an enumerated approach, like Iowa, problems arise when the asset is not listed.[87] An alternate approach, taken by the UPC, is to leave the

84. *In re* Estate of George, 2011 WY 157, ¶ 44, 265 P.3d 222, 230 (Wyo. 2011) (The husband had, through the trust, provided for the family business to pay a small annual salary to his widow and to maintain her health insurance. The wife received some voting stock in the company—the trustee, however, was the one authorized to vote her stock.).

85. Russell v. Russell, 758 So. 2d 533, 538 (Ala. 1999), *overruled by* Oliver v. Shealey, 67 So. 3d 73 (Ala. 2011).

86. *Id.* at 534.

87. *In re* Estate of Myers, 825 N.W.2d 1, 7–8 (Iowa 2012) (concerning whether a payable-on-death account was includable).

particular assets unspecified and determine in each instance whether the decedent retained "dominion and control" over the assets.[88]

The UPC model for the elective share—designed to reflect marital partnership—offers a clear way forward in the ongoing effort to temper the force of family wealth preservation in marriage. In states that follow the UPC approach, trusts over which the decedent had control cannot defeat the elective share.[89] Family wealth preservation is still possible, especially using irrevocable trusts to transfer assets to heirs. Nevertheless, UPC rules limit the opportunity for aggressive family wealth preservation and provide a model for those states looking to balances the equities of family wealth preservation and marital partnership based on the concept of control.

2. Divorce: Hiding Money in Plain Sight

Trust forms also serve to limit one spouse's interest in the other's wealth at divorce. The separate estate—the original self-settled asset protection trust—facilitated asset protection for women and their families actually within marriage, before married women were able to own property. After the separate estate, discretionary and spendthrift trusts were used to the same effect for family wealth holders. In this Section, I begin with a discussion of how these basic asset protection trusts have been used as a standard tool for family wealth preservation. I conclude this Section with an analysis of a recent divorce case that provoked great debate in Massachusetts and that clearly demonstrates not only the value of discretionary trusts in shielding assets, but also the strong and continuing importance of third-party donor rights.

a. The Return of the Separate Estate

The separate estate was a trust that existed as early as the sixteenth century in England and allowed married women to own and control property during marriage.[90] Married women could own property in these trusts because the wives held equitable, and not legal title, to the assets held in trust. Because a married woman did not possess legal ownership of the assets, they were subsequently not available to creditors including husbands. The separate estate was a valuable tool for families and women who wanted to protect their assets from the financial

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88. The Uniform Probate Code elective share section therefore specifies that the augmented estate is composed of (1) the decedent's net probate estate; (2) the decedent's non-probate transfers to others; (3) the decedent's non-probate transfers to the surviving spouse; and (4) the surviving spouse's property and non-probate transfers to others. All of these assets are aggregated, and the surviving spouse's share is then taken from the "marital property" portion of this augmented estate. GARY, *supra* note 14, at 585–86; Raymond O'Brien, *Integrating Marital Property into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617, 633 (2010).

89. UNIF. PROBATE CODE §§ 2-210 to -214.

90. Allison Tait, *The Beginning of the End of Coverture*, 26 YALE J.L. & FEMINISM. 165 (2014).

vagaries of a new husband and circumvent the property-based disabilities imposed on married women by coverture.[91]

A bride's family could establish a separate estate trust for her benefit before or during marriage. Before marriage, parents generally established a separate estate for the bride as part of the marriage planning. During marriage, wives frequently became the beneficiaries of separate estate trusts through bequests made by family members.[92] In addition, women could establish these trusts for themselves as long as they did so before marriage. Accordingly, women often created separate estates for themselves in anticipation of second marriages, using their jointure or widow's share from the first marriage.[93] The separate estate was, in this way, the original self-settled asset protection trust, as well as an early planning tool for blended families. With a separate estate, women could protect assets for the benefit of children from the first marriage in order to keep these offspring from being dependent on the largesse of a stepparent.

The separate estate declined in use and utility as legislatures began enacting Married Women's Property Acts in both England and America.[94] Once married women could own property during marriage, the immediacy of need for financial protection within marriage dissipated. The desire of great families to secure their wealth and shelter assets from future spouses, however, did not.

b. Mapping the Rise of the Spendthrift Trust

Spendthrift trusts,[95] which protect assets from creditor claims, date back in the United States to the end of the nineteenth century, when the U.S. Supreme Court put its imprimatur on the form in *Nichols v. Eaton*.[96] The case turned on a widow's will and her son's bankruptcy. Mrs. Sarah Eaton established a testamentary trust for her children with the proceeds from her estate, specifying that if the bankruptcy of one of her sons would render the income "payable to some other person, then the trust . . . should immediately cease."[97]

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91. For discussion and an overview of the separate estate, see *id.*

92. *Id.*

93. Amy Erickson remarks, "a second-time bride was older, perhaps wealthier, and wiser at least in the ways of legal coverture than she had been the first time around." ERICKSON, *supra* note 3, at 123.

94. RICHARD CHUSED, MARRIED WOMEN'S PROPERTY LAW: 1800-1850.

95. A spendthrift trust, in its most basic form, is a trust containing a provision stating that the beneficiary cannot voluntarily alienate her interest in the trust. Because of this restriction, creditors cannot attach the beneficiary's interest nor can they obtain a court order to attach a future distribution. This holds true even if the beneficiary is entitled to mandatory distributions and has funds available to satisfy creditors. *See* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 695–96 (Aspen Publishers, 9th ed. 2013). This is as opposed to pure discretionary trusts. With those trusts, a creditor can obtain a court order to attached future distributions. Spendthrift trusts are against public policy in England.

96. Nichols v. Eaton, 91 U.S. 716, 717–22, 723 (1875); *see* Adam Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 6 (1995). The spendthrift trust had a longer history in England. The spendthrift trust was, at the time of Nichols, not tolerated under English law.

97. *Nichols*, 91 U.S. 716 at 723.

Not long after the mother died, one son declared bankruptcy and "made a general assignment of all his property to Charles A. Nichols for the benefit of his creditors."[98] Leaning on the doctrine of freedom of disposition, the Court sided with the mother over the creditors, stating:

> Why a parent . . . [who] wishes to use his own property in securing the object of his affection . . . from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.[99]

The decision was immediately criticized. John Chipman Grey, a vociferous critic, boldly stated: "[S]pendthrift trusts have no place in the system of the Common Law."[100] Nevertheless, the spendthrift trust was further grafted into American law seven years later with *Broadway National Bank v. Adams*,[101] in which the Massachusetts state supreme court affirmed the right of a donor to dispose of his property as he saw fit over the rights of creditors.[102]

Subsequently, the spendthrift trust became a useful tool that helped families shelter assets from creditors, including spouses.[103] Only fourteen years after *Broadway Bank*, a Texas appellate court upheld the use of a spendthrift trust to keep assets held in trust for the benefit of the husband from being counted as community property.[104] In *McClelland v. McClelland*, Dora McClelland sued her ex-husband seeking rental income from property that had been left to her ex-husband by his father. The court concluded that if "the income arising from the estate was not available" to the husband, then it was not available to wife as community property upon divorce. To allow the wife an interest in the trust income, the court reasoned, would be to diminish and harm "the right of the testator."[105]

Now, spendthrift provisions are standard boilerplate language in trust forms, and drafters routinely include them in all kinds of trusts.[106] Ordinary creditors can

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98. *Id.* at 727.

99. *Id.* (holding that the mother had a legal right to establish for the benefit of her son a testamentary trust that terminated the son's right to assets if and when he became insolvent). The holding did not, therefore, establish the validity of spendthrift trusts. The dicta did. Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV. 179, 188 (1993).

100. *See* GARY, *supra* note 14, *passim*, summarized at 213.

101. Broadway Nat'l Bank v. Adams, 133 Mass. 170, 170 (1882).

102. *Id.* at 173 ("The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose.").

103. Bradley v. Palmer, 61 N.E. 856, 881–82 (1901) (explaining that the mother created a spendthrift trust for her son, who was an extravagant spender and an alcoholic, and stated specifically that "in no case shall any of such income be applied to the support or maintenance of my said son's wife; and the same shall never be amenable to any order or judgment of a court which his said wife might obtain for alimony, support, or for any other cause.").

104. McClelland v. McClelland, 37 S.W. 350, 358 (Tex. Civ. App. 1896), *writ refused.*

105. *Id.*

106. Spendthrift trusts have become so ubiquitous that in Delaware, for example, all trusts are presumptively spendthrift, and in New York all trusts are presumptively spendthrift with respect to

only recover what they are owed once a distribution has been made. The Uniform Trust Code (UTC) has, however, attempted to balance the equities at divorce by deeming ex-spouses with divorce decrees to be "exception creditors," who may obtain an order attaching either present or future distributions from the trust, although they may not compel a distribution.[107]

Spendthrift trusts created by third parties can keep family wealth out of the hands of a spouse with the insertion of just one small provision barring the beneficiary's alienation of his trust interest. In a UTC state,[108] however, an ex-spouse may have some recourse, if she has a support order. The UTC, accordingly, has strengthened marital partnership, giving it increased substance when weighed against family wealth preservation.

c. "Mere Expectancies": Hiding Assets in Plain Sight

To compound protection against creditors, settlors create trusts that contain not only spendthrift provisions but also significant amounts of trustee discretion. Because income from these trusts is not guaranteed to the beneficiary and is distributable only at the trustee's discretion, the money in trust is not available to creditors unless and until the beneficiary actually receives a distribution. The validity of these trusts, like the spendthrift trusts, was affirmed by American courts around the turn of the nineteenth century on the basis of donor freedom. In the famous *Hamilton v. Drogo* case, a New York court protected money put in trust for William Drogo, Duke of Manchester, by his mother from creditors, concluding: "In the present case no income may ever become due to the judgment debtor. We may not interfere with the discretion which the testatrix has vested in the trustee any more than her son may do so."[109] The creditors were out of luck until a distribution was made to Drogo.

Discretionary trusts still play a large role in family wealth preservation and are especially useful at divorce.[110] Modern courts generally consider beneficiaries of a discretionary spendthrift trust to possess nothing more than a speculative interest in the trust assets—a "mere expectancy"—because they do not have a guaranteed right to distributions from the trust. Five states—New Jersey, Missouri, Pennsylvania, Texas, and Wisconsin—include trust interests in the marital estate at divorce only if the beneficiary has a present possessory interest or the right to

income. *See* DUKEMINIER & SITKOFF, *supra* note 95, at 696. Only three states bar the enforcement of these kinds of provisions.

107. UNIF. TRUST CODE § 503. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion.

108. There are currently thirty-three UTC states.

109. Hamilton v. Drogo, 150 N.E. 496, 497 (1926).

110. *See* Jonathan W. Wolfe, *How a Trust May Impact Your Divorce Case*, 38 FAM. ADVOC. 14, 15 (Fall 2015) (noting that while some states have "a breadth of precedent" governing this issue, other states have few, if any, reported decisions).

withdraw trust assets.[111] Massachusetts courts generally maintain that any interest in a discretionary trust is non-includable in the marital estate: "[A] party's beneficial interest in a discretionary trust . . . because of the peculiar nature of such a trust . . . is too remote or speculative to be so included."[112] The Colorado Supreme Court, elaborating on this rule, concluded in *In re Marriage of Jones* that, "unlike a vested retirement plan, the beneficiary of a discretionary trust has no contractual or enforceable right to income or principal from the trust, and cannot force any action by the trustee unless the trustee performs dishonestly or does not act at all."[113]

Divorcing spouses looking to pierce a trust and make the income available for spousal or child support payments have somewhat better success in states that have enacted the UTC. Here again, ex-spouses with divorce judgments are exception creditors. With discretionary trusts, the UTC states that a court may order a distribution to satisfy a court order for either spousal or child support, but only to "[t]he extent a trustee has not complied with a standard of distribution or has abused a discretion."[114] The potential for a court order to reach into a discretionary trust is limited, however, as a court cannot direct a trustee to distribute more than the standard set by the trust terms would have necessitated.

Discretionary and spendthrift trusts can, consequently, enable a high degree of family wealth preservation based on the rights of the third-party donor. UTC rules that make ex-spouses exception creditors recalibrate the balance of power, but—as the case study in the next section demonstrates—third-party assets and a lack of ownership equivalence remain deciding factors.

d. "Family Wagons Circled the Family Money"

The Massachusetts case of *Pfannenstiehl v. Pfannenstiehl* was a recent and highly contested example of how discretionary trusts work. The couple married in 2000 and during the marriage, the husband worked as an assistant bookstore manager at one of his father's subsidiary corporations, earning approximately $170,000 annually.[115] In 2004, the husband also began receiving distributions from a trust that his father established for his benefit.[116] In the same year, the wife, who had been in the Army Reserves, retired from that job at the behest of her husband, who wanted

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111. *Id.* New Jersey courts, for example, have continuously held that a beneficiary spouse's trust interest does not constitute marital property unless the beneficiary has acquired "unimpaired control and totally free use and enjoyment" of the trust assets. *See* Mey v. Mey, 79 N.J. 121, 125 (1979)*; see also* Paulson v. Paulson, 783 N.W.2d 262, 271 (N.D. 2010); Friebel v. Friebel, 510 N.W.2d 767, 769 (Wis. Ct. App. 1993).

112. *See* D.L. v. G.L, 811 N.E.2d 1013 (Mass. App. Ct. 2004).

113. *In re* Marriage of Jones, 812 P.2d 1152, 1156–57 (Colo. 1991) (concluding "[t]o the extent that it has already not done so, the trial court on remand should consider the wife's interest in the trust as an economic circumstance" and a discretionary factor when allocating property and awarding support).

114. UNIF. TRUST CODE § 504.

115. Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105, 106 (2016).

116. *Id.*

her to stay at home with their special needs daughter. The wife began working as an ultrasound technician on a part-time basis and, at the time of the divorce, was earning approximately $22,672 annually.[117]

At issue in the couple's divorce proceedings was whether the present value of the husband's interest in the trust—an irrevocable discretionary spendthrift trust—could be considered part of the marital estate.[118] The trust benefitted an open class, comprised of the father's "living issue" and provided for distributions to beneficiaries at the discretion of the trustees, "to provide for the comfortable support, health, maintenance, welfare and education of each or all members of such class."[119] At the time of the divorce trial, there were eleven living issue who were beneficiaries and the trust had a value of approximately $25 million.[120]

The trial court judge valued the husband's interest in the trust to be one-eleventh of the trust value, or approximately $2 million. On appeal, the court affirmed this inclusion of the husband's trust interest in the marital estate and its valuation.[121] The court noted that the husband's monthly distributions from the trust, which had arrived regularly since the trust's creation, stopped "precisely on the eve of the husband's divorce filing."[122] The other beneficiaries, in contrast, continued to receive their distributions. The court stated: "[T]he spendthrift provision is being invoked as a subterfuge to mask the husband's income stream and thwart the division of the marital estate in the divorce."[123] The court also noted that one of the trustees was the husband's brother, the other the family attorney: "To use understatement: the record shows the 2004 trust was not administrated impartially by the two trustees."[124] What had happened, the court concluded, was that "as the divorce began, 'the proverbial family wagons circled the family money.'"[125]

The Massachusetts supreme court, however, disagreed with the lower court rulings. Returning to the conventional analytic framework, the court concluded that the husband's trust interest was "so speculative as to constitute nothing more than [an] expectanc[y]," and consequently it was not includable in the marital estate.[126] The court remarked:

> Interests in discretionary trusts generally are . . . too remote for inclusion in a marital estate, because the interest is not "present [and] enforceable";

117. *Id.* She earned another $7,428 in rental income.

118. Pfannenstiehl v. Pfannenstiehl, 55 N.E.3d 933 (Mass. 2016).

119. *Id.*

120. *Id.* at 2.

121. *Id.*

122. Pfannenstiehl v. Pfannenstiehl, 37 N.E.3d 15, 17 (Mass. App. Ct. 2015), *review granted*, 47 N.E.3d 684 (Mass. 2015), and *vacated and remanded*, 55 N.E.3d 933, 934 (Mass. 2016).

123. *Id.*

124. *Id.* at 21.

125. *Id.*

126. Pfannenstiehl v. Pfannenstiehl, 55 N.E.3d 933, 934 (Mass. 2016). (quoting Adams v. Adams, 945 N.E.2d 844, 859 (Mass. 2011).

> the beneficiary must rely on the trustee's exercise of discretion, does not have a present right to use the trust principal, and cannot compel distributions.[127]

Commentators have vigorously debated the outcome of the *Pfannenstiehl* case. Trust lawyers have supported the outcome, pleased that the court did not undo the trust's asset protection features.[128] The husband's lawyer stated his satisfaction with the ruling based on donor intent: "[The husband's father] did not intend . . . for an ex-spouse to get part of his estate, and that's what the court is upholding."[129] Another commentator wrote: "This is a relief to those who draft trusts for the purpose of 'asset protection.'"[130] On the other hand, commentators have also noted: "The equities of this case appear to favor Diane."[131] In addition, questions about the independence of the trustee, the decanting of the trust, and the ability of the court to encompass separate property into the marital estate using Massachusetts's hotchpot approach have continued to cast doubt on the result.

Pfannenstiehl demonstrates that discretionary spendthrift trusts continue to be an effective mechanism for keeping assets out of the marital estate. The effectiveness of this trust form in protecting assets, however, is clearly based on the donor intent of the third party coupled with the beneficiary's lack of ownership interest. This is marriage law's current resting point in creating balance between marital partnership and family wealth preservation.

B. Something New: Asset Protect, Version 2.0

In the last several decades, prodigious changes to trust law in a number of states have created new opportunities for family wealth preservation and asset protection that go far beyond what already exists. In this Section, I analyze how these new trusts break the old rules, enabling spouses to assert unilateral control over possible marital assets, thereby disrupting the tenuous settlement between trust wealth preservation and economic partnership.

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127. *Id.* at 940.

128. *See, e.g.*, Robert J. O'Regan, *Pfannenstiehl: Out of a Mistake Comes Clarity*, WEALTHMANAGEMENT.COM (AUG. 9, 2016), http://www.wealthmanagement.com/estate-planning/pfannenstiehl-out-mistake-comes-clarity [perma.cc/QDY8-D7L4].

129. Michael Levenson, *SJC Rules Heir Can Refuse to Pay $1.4m to Ex-wife*, BOSTON GLOBE (Aug. 05, 2016), https://www.bostonglobe.com/metro/2016/08/05/high-court-rules-scion-wealthy-family-doesn-have-pay-wife/cLDKzM7oTGbkvvVNM5O3dK/story.html [perma.cc/FJ7K-VDGF].

130. Matthew Solomon, *Words Matter: Pfannenstiehl Overruled by Supreme Judicial Court*, ISRAEL, VAN KOOY & DAYS, LLC, http://www.yourfamilymatterslawblog.com/words-matter-pfannenstiehl-overruled-by-supreme-judicial-court/ [perma.cc/DYQ7-PH7P] (last visited July 15, 2017).

131. Harry S. Margolis, *Does Pfannenstiehl Case Undermine Asset Protection in Massachusetts?*, MARGOLIS & BLOOM, LLP, (Sept. 22, 2015), http://www.margolis.com/our-blog/does-recent-divorce-undermine-centuries-of-spendthrift-trust-law [perma.cc/6HYP-LWRD].

1. QTIP Trusts: Bringing Back the Life Estate

While trusts have long been used to limit a surviving spouse's property claims, now there is a newer and increasingly popular mechanism for limiting a surviving spouse's interest in the decedent's estate: the Qualified Terminable Interest Property (QTIP) trust. QTIP trusts allow one spouse to unilaterally elect to put assets—even potential marital assets—into a trust that simultaneously restricts the surviving spouse to a life estate and qualifies for the unlimited marital deduction. In this Section, I discuss the origin of the QTIP trust, how these trusts work to strip a surviving spouse of both financial agency and marital property rights, and how QTIPs are marketed to a masculinist sense of wealth preservation.

a. QTIPs and the Divorce Revolution

In 1981, when the U.S. Congress enacted the Economic Recovery Tax Act (ERTA), the guiding theory for a number of changes was the "decision to use the marital unit as the proper unit of taxation."[132] One of the major features of the Act was the introduction of the unlimited marital deduction.[133] No longer would there be a limit on how much spouses could transfer to one another free of any transfer tax at death. ERTA also authorized QTIPs as part of this "marital unit" scheme.[134]

Previous to the authorization of QTIPs, to qualify for the marital deduction one spouse had to give the other spouse full control of the property. Life estates and other terminable interests did not qualify for the deduction. QTIPs offered an exception to this rule, allowing the decedent spouse to limit the surviving spouse's interest in the property to a life estate while still qualifying the property for the marital deduction. Moreover, the rules of election adopted at the time allow one spouse to place assets in a QTIP unilaterally, without the consent or knowledge of the other spouse. Based on this combination of restricted ownership and unilateral decision-making, Wendy Gerzog has remarked that "it was a rather Herculean leap in logic that led Congress to state that the QTIP provisions reflect the shared decision-making of a husband and wife in a marriage."[135]

Looking past the "marital unit" language, Congress enacted QTIPs against a social backdrop of increasing divorce, remarriage, and general marital instability. Between 1970, when no-fault divorce first appeared on the legal landscape, and 1981, when ERTA was enacted, divorce rates had skyrocketed and no-fault divorce was changing both cultural norms with respect to marriage as well as longstanding

132. Gerzog, *supra* note 57, at 306.

133. I.R.C. § 2056(a).

134. The Economic Recovery Tax Act (ERTA) of 1981, Pub. L. No. 97-34, § 403(d)(1), 95 Stat. 172, 302-03 (1981); I.R.C. §§ 2056(b)(7)(B)(i), 2523(0(2); *see also* Treas. Regs. §§ 20.2056(b)-7(b), 25.2523(0-1(b).

135. He wants his cake (i.e., the tax benefit of deferral), and he wants to eat it, too (i.e., to control who will finally receive the underlying property)." Gerzog, *supra* note 57, at 319; *see also* O'BRIEN, *supra* note 81, at 630.

patterns of wealth transfer.[136] Second and third marriages were becoming common occurrences and the QTIP allowed spouses—usually husbands—to provide a life estate interest to a second or third spouse, eliminating concern about what that surviving spouse would do with the bulk of the money. The QTIP provided a mechanism for ensuring that stepparents would not disinherit children from first marriages and that the decedent spouse could provide for multiple sets of dependents without interference. As one senator explained during the Congressional debates: "The property owner would like to be sure that upon the death of his spouse his children by a prior marriage or marriages share in his property, including the marital deduction property."[137]

The QTIP was the necessary result of the divorce revolution—a tool for managing multiple marriages and the complications of estate planning that ensued from these blended families. In addition, the QTIP has become a useful tool for family wealth preservation by allowing asset preservation and playing into outdated stereotypes about women, widows, and wealth.

b. Disinheriting Spouses Unilaterally

One of the greatest problems with QTIP trusts, from a marital partnership perspective, is the fact that they allow one spouse to unilaterally elect QTIP treatment of assets. If one spouse decides to set up the QTIP as an inter vivos transfer, he can make the gift to the trust unilaterally; alternately, he can empower his executor (assuming it is someone other than his surviving spouse) to make the election at his death. The surviving spouse may have no input whatsoever and certainly none is required.[138]

Surviving spouses are left, in such cases, with little remedy other than to contest the QTIP election, an uphill battle, or take the elective share instead.[139] The latter option can be as difficult as the former, as *In re Estate of Karnen*, a case from the Supreme Court of South Dakota in 2000, demonstrates. In that case, despite a longstanding marriage, because the wife unilaterally created a QTIP, the husband had only a life income in their marital estate and no assets to leave his heirs at his death.

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136. *See* Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1255–60 (2015).

137. Gerzog, *supra* note 57, at 310.

138. *See* Gerzog, *supra* note 57. One law firm suggests that the QTIP creator may want to "prepare" the spouse. "Your spouse, for example, should know that income will flow life-long, but access to the trust principal will be limited." *QTIP Trusts Still Offer Advantages*, HOGAN TAYLOR, http://hogantaylor.com/qtip-trusts-still-offer-advantages/ [perma.cc/WX82-USHM] (last visited July 16, 2017). Spouses may want to pick a good moment because "The surviving spouse typically resents the restrictions against unlimited access to principal." *QTIPs Made Easy*, IVKD LAW, http://ivkdlaw.com/the-firm/our-articles/divorce-and-estate-planning/qtips-made-easy/ [perma.cc/N6WP-HF5X] (last visited July 16, 2017).

139. *See* Donna Litman, *The Interrelationship Between the Elective Share and the Marital Deduction*, 40 REAL PROP., PROB. AND TR. J. 539–65 (Fall 2005).

The couple married in 1947 and had no children, living happily together for fifty years until the wife's death in 1997.[140] The bulk of their assets were titled in the wife's name and, toward the end of her life when the wife executed a will, she bequeathed all these assets to her husband. She gave him the ranch she had owned at the time of marriage, which had been their marital home, as well as an estate valued at over $2 million.[141] Not long after, the wife's health began to fail and Norwest Bank was appointed conservator of her estate. For tax planning purposes, the Bank revised her estate plan and threw out the first will. Subsequently, the Bank created one trust in the amount of her estate tax exemption and placed the residue of the estate in a QTIP.[142] The husband was named the sole income and principal beneficiary of both trusts. After his death, the remainder of both trusts was to go to the wife's heirs.[143]

Despite being able to access both income and principal in the trusts, the husband elected to take his statutory share after his wife's death. The court observed that the husband wished "to attain a fee interest in a portion of the estate assets, rather than merely the life interest . . . [in order] to pass something on to his heirs."[144] The court was sympathetic to this desire, remarking: "[W]e understand how Andrew might feel that he is entitled to fee ownership in a share of the estate after fifty years of marriage."[145] Nevertheless, the court concluded that the husband was not entitled to take his elective share because it was "overfunded," that is to say the amount made available to him via the will was more than he would receive under the elective share.[146] Accordingly, the trial court denied the husband's petition to take his elective share. Adding insult to injury, the South Dakota Supreme Court remarked that the husband's claim failed because "[t]he goal of our elective share statutes is to protect a surviving spouse from disinheritance, rather than reward him or her for contributions made to the economic partnership of an enduring marriage."[147]

QTIP trusts make the old new again. They revitalize estate planning that limits the property rights of the surviving spouse in order to better provision other family members. Furthermore, because of unilateral decision-making and the possibility of fraud on marital property, QTIPs completely fail to account for marital partnership. As a result, QTIPs dislocate the balance between family wealth preservation and economic partnership.

140. *In re* Estate of Karnen, 607 N.W.2d 32, 34 (S.D. 2000).
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 36.
146. *Id.*
147. *Id.* This despite being adopters of the UPC.

c. Marketing the QTIP to Men

As enacted, the QTIP provisions were "couched in politically correct, gender neutral terms" and statistics, as well as caselaw, show that women as well as men are consumers of the financial product.[148] Nevertheless, women have for various reasons been QTIP consumers at a lower rate than men since the authorization of these trusts.[149] Men's wealth holdings are greater than women's, making wealth transfer planning a larger concern. Moreover, in different-sex marriages, life expectancies suggest that men will be in the position of "first-to-die" and therefore are forced to think about how a surviving spouse will manage assets left. Even if the woman happens to be the wealth holder, however, Lily Khang observes that a woman may be "less likely than her male counterpart to marry a series of younger spouses and therefore . . . less likely to use a QTIP trust."[150] Khang also predicts that women in same-sex marriages would be less attracted by the QTIP and are "even less likely than heterosexual women to use QTIP trusts for a 'Donald Trump arrangement.'"[151] Consequently, and responsive to this data, QTIP marketing speaks directly to men and revives timeworn notions about women, their financial literacy and spending habits.

Decidedly gendered, QTIP advertisements generally cast the husband as the decedent and the wife as the surviving spouse—the problematic actor to be reined in through QTIP rules.[152] QTIP marketing materials stress three points in promoting the trust form. First, that the surviving spouse may be an *evil stepmother*, who will not provide for her stepchildren if given full control of her inheritance. Second, that the surviving spouse may be financially unsophisticated and not *good with money*; and third, that the money is *your* money, so you should be able to do what *you* want with it, preserving it for future generations. Like the QTIP itself, these gender stereotypes undermine the idea of spouses as equal partners in marriage and promote consideration of the widow as a drain on family wealth. Furthermore, QTIP marketing directly undermines the concept of marital property and shared wealth.

True to the concerns that originally motivated the authorization of the QTIP, law firms and estate planners today continue to advertise the QTIP as a vehicle for protecting a spouse's money in the age of blended families. Advertisements focus on the fear that a surviving spouse will disinherit her stepchildren, given the opportunity. One estate planner provides a vivid example of why someone, a

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148. Gerzog, *supra* note 57, at 305

149. Khang, *supra* note 58, at 352 ("For 1995 decedents for whom estate tax returns were filed, 20% of male decedents used QTIP trusts while 8% of female decedents used QTIP trusts. In the same year, male decedents used QTIP trusts for assets valued at $13.3 billion while female decedents used QTIPs for assets valued at $3.2 billion." Other studies show that the gap might be decreasing and women might be catching up to men in their consumption of QTIPs.).

150. *Id.* at 352–53.

151. *Id.*

152. *See* Allison Tait, *Commentary on* U.S. v. Windsor, *in* FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Cambridge Press 2017); Khang, *supra* note 58, at 352;.

husband might want to create a QTIP: "[With a QTIP], Jennifer has no power to change the beneficiaries named in the QTIP. Mr. Q can rest peacefully, knowing that his children from his first marriage will receive the assets remaining in the trust after the death of Jennifer."[153] The Wilmington Trust estate planning advisors phrase it similarly, if more elegantly: "The restrictive ownership provisions of a QTIP trust are particularly useful for second marriages since you may want to ensure that the amounts held in the trust will ultimately pass to your children or family and not the children or family of your second spouse."[154] In this way, they point out, a QTIP trust will "provide for your spouse after your death while protecting your assets for future generations."[155] Another estate planner likewise states that a QTIP allows the decedent spouse to say to widow as well as children: "I took care of you both."[156] Taking a page from the dower handbook, these characterizations of the QTIP focus clearly on a wealth transfer strategy of supporting the widow with a life estate and enriching the heirs with the bulk of the inheritance.

Another compelling reason to use a QTIP, according to advertisements, is to quell the fear that the surviving spouse will over-consume the assets or otherwise misuse them, due to her financial and investment incompetence.[157] One law firm advertises: "Control of the assets by a trustee will reduce the chance of depletion through squandering or unwise investments by the surviving spouse."[158] Another law firm, vividly setting forth the case for creating a QTIP using the Simpsons, observes:

> The one potential fly in the ointment that could prevent Homer's children from inheriting much, if any, assets in the Family Trust is that their inheritance is dependent on Marge not spending it all and/or not making bad investments that decrease the value of the assets held in the Family Trust.[159]

There might also, estate lawyers suggest, be "bad actors" involved. In these cases, the QTIP's financial paternalism is a welcome safeguard: "The surviving spouse might become vulnerable to bad financial advice or scammers, or be

153. *How a Q-TIP Trust Protects Your Surviving Spouse, and Other Members of Your Family*, JOHN L. ROBERTS, http://estateplansplus.com/html/trusts_qtip.html [perma.cc/P7AH-R6NP] (last visited July 16, 2017).

154. *Wealth Planning: The Benefits of QTIP Trusts*, WILMINGTON TR., http://library.wilmingtontrust.com/wealth-planning/the-benefits-of-qtip-trusts [perma.cc/LU7G-2GQA] (last visited July 16, 2017).

155. *Id.*

156. Charles Delafuente, *A Guiding Hand for Bequests, Beyond the Grave*, N.Y. TIMES (Oct. 16, 2012), http://www.nytimes.com/2012/10/17/business/qtip-trust-guides-bequests-beyond-the-grave.html [perma.cc/RK3M-78UZ].

157. Khang, *supra* note 58, at 353.

158. HOGAN TAYLOR, *supra* note 120.

159. *What Is Qualified Terminable Interest Property Trust aka QTIP?*, KEYT LAW, LLC, http://www.keytlaw.com/arizonawills/2013/07/qtip/ [perma.cc/M2VK-CMZ3] (last visited July 16, 2017).

subjected to influence by other family members who have their own interests in mind. The QTIP trust insulates the spouse and the inheritance from these bad actors."[160] Women, it is clear from this perspective, are not sufficiently proficient with money and asset management to be given full ownership of property and inheritance.

Compounding the problematic nature of these descriptions, QTIP advertisements also indiscriminately characterize QTIP assets as belonging solely to the decedent spouse—*your estate*, *your money* —and fail to acknowledge the concept of shared assets, marital property, or economic partnership. Hence, one estate lawyer was quoted in a story about QTIPs in the *New York Times* as saying that QTIPs "could prevent a second wife from 'running off with the assets' of a deceased husband."[161] The estate planner admits that this is, for better or worse, "a stereotypical example."[162] However, estate planners routinely trade in these stereotypes, declaring that QTIPs have the power to limit the agency of a "spouse who may wish to leave *your* money to his or her children,"[163] or a spouse who remarries, letting the "the new spouse take[] marital ownership of *your* estate."[164] Without discussion of how the trust creator's estate might actually be part of the larger marital estate, QTIP advertisements and literature embody dated notions of marital property ownership and play on the fears, as well as the entitlements, of high-wealth spouses.

Ultimately, a typical advertisement blends all these concerns together and offers up the QTIP as a total solution:

> You could simply will your assets to your spouse and hope that he or she will then pass them on to your heirs. But suppose the spouse has children from another marriage: will they also get a piece or even most of your estate? Or suppose your spouse is terrible with money and you wonder whether your estate will survive long enough to make it to your children . . . . The QTIP can be a perfect remedy for these concerns.[165]

The problem is that this marketing strategy—to say nothing of the legal contours of the trust itself—is "rooted in the prejudices and stereotypes of the 1960s and can only be explained as . . . gender-biased [and] paternalistic."[166] Going

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160. ROBERTS, *supra* note 153.

161. Delafuente, *supra* note 156.

162. *Id.*

163. *Trust Basics*, PRESSER L. FIRM, http://www.assetprotectionattorneys.com/Domestic_Asset_Protection/Irrevocable_Trusts.aspx [perma.cc/2KHK-Z7YY] (last visited Jan. 23, 2017) (emphasis in original).

164. Gary Plessl & Kevin Houser, *Do You Need a Trust for Your Estate Plan?*, NEXTAVENUE (May 13, 2015), http://www.nextavenue.org/do-you-need-a-trust-for-your-estate-plan [perma.cc/6VUL-Z8KA].

165. *Id.*

166. *See* GERZOG, *supra* note 57; Joseph M. Dodge, *A Feminist Perspective on the Qtip Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729 (1997-1998) ("There is no doubt that the QTIP device diminishes the autonomy of wives and widows, who statistically are the usual beneficiaries of QTIP trusts. The wife or widow is deprived of any power to control the disposition of the property,

even further, the QTIP and the way in which it is marketed signal a return to the supremacy of family wealth preservation and the days of dower, when the husband's task was to "ensure that his widow [would] not squander the estate or disinherit the decedent's children."[167]

2. Self-Settled DAPTs: Spouses Hiding Assets from Spouses

While QTIP trusts give one spouse the ability to limit the financial reach and power of the other spouse at death, there are also new trust forms that allow one spouse to shelter assets from the other at divorce. This Section provides a brief description of how these trusts work and a history of how these trusts have been authorized by state legislatures across the country. Subsequently, the Section offers an analysis of not only how the trusts are beginning to show up on court dockets but also how they are being sold as an alternative to prenuptial agreements.

a. Domesticating Asset Protection Trusts

Almost a century after the last gasps of the separate estate, self-settled asset protection trusts are back. These trusts allow the settlor to be a beneficiary (and even a trustee, under certain circumstances). That is to say, one spouse can place assets in trust and then not only receive distributions as the beneficiary of the trust, but also serve as one of the trustees charged with exercising discretion over those distributions. Furthermore, the assets in trust will be protected from creditors, including spouses. This development is surprising, to say the least, because—apart from the separate estate, which rested on unique policy grounds[168]—self-settled trusts have never been asset protection trusts.

The traditional rule for asset protection has been that, in order for a beneficiary's interest to be protected, the trust needed to be created by a third party. The policy reason has always been thus:

> To hold otherwise would be to give unexampled opportunity to unscrupulous persons to shelter their property before engaging in speculative business enterprises, to mislead creditors into thinking that the settlor still owned the property since he appeared to be receiving its income, and thereby work a gross fraud on creditors who might place reliance on the former prosperity and financial stability of the debtor.[169]

This traditional rule is codified in the Uniform Trust Code, which states that an individual cannot shield assets from creditors, including spouses, by placing them

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and the property is usually in trust, which deprives her of administrative control. QTIP trusts implement the husband's dead-hand control.").

167. Khang, *supra* note 58, at 353.

168. The separate estate looks different from a public policy point of view because it was a necessary way of giving married women property rights at a time when they had none.

169. G.T. Bogert, TRUSTS § 40, at 155–56 (6th ed. 1987); *see also* Henery J. Lischer, *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP., PROB. AND TR. J. 479 (2000).

in a trust for her own benefit.[170] Accordingly, "even if the trust is discretionary, spendthrift, or both, the settlor's creditors can reach the maximum amount that the trustee could under any circumstances pay to the settlor or apply for the settlor's benefit."[171]

This longstanding rule began to crumble in the 1980s when the Cook Islands amended governing law to allow for self-settled asset protection trusts in order to attract foreign capital.[172] The Cayman Islands, Belize, Nevis, the Channel Islands, the Isle of Man, and other offshore jurisdictions followed suit, "and the great Offshore Boom of the 1990s came like a tidal wave."[173] These trusts were known as "Foreign Asset Protection Trusts" (FAPTs).[174] Unhappy with the loss in trust business that resulted, American states fought back. In 1997 Alaska enacted legislation that allowed for the first Domestic Asset Protection Trusts (DAPTs). Ninety days later, the Delaware legislature did the same, stating that the new rules were "intended to maintain Delaware's role as the most favored domestic jurisdiction for the establishment of trusts."[175] Since that time, sixteen other states have passed legislation authorizing DAPTs.[176] These states compete with one another and with offshore trust companies for business, and are ranked annually by various law practices and legal commentators according to the strength of the asset protection that they offer.[177]

In these rankings, one particularly important factor is how much protection state DAPT laws provide against creditor spouses, and states offer various

170. UNIF. TRUST CODE § 505 (2000).

171. DUKEMINIER & SITKOFF, *supra* note 81, at 703. The reporter for the Restatement on Trusts wrote, "it is well settled that where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditor can reach his interest." *See* Ritchie W. Taylor, *Domestic Asset Protection Trusts: The "Estate Planning Tool of the Decade" or a Charlatan?*, 13 BYU J. PUB. L. 163, 167 (2013).

172. Sterk, *supra* note 17, at 16. To that end, the statute included a number of measures that made the Cook Islands a favorite trust situs for settlors seeking to avoid creditor claims.

173. Jay Adkisson, *A Short History of Asset Protection Trust Law*, FORBES, (Jan. 26, 2015), https://www.forbes.com/sites/jayadkisson/2015/01/26/a-short-history-of-asset-protection-trust-law/#605ecd2f3fb4 [https://perma.cc/LD83-ND5Z].

174. *See* FOREIGN ASSET PROTECTION TRUSTS, https://www.lodmell.com/asset-protection/foreign-trusts [perma.cc/5CVM-L9HZ] (last visited July 23, 2017).

175. DUKEMINIER & SITKOFF, *supra* note 81, at 705. Alaska and Delaware have not been shy in expressing their respective desire to become the leading trust jurisdiction-not only domestically but also as an alternative to the offshore jurisdictions which have garnered so much world-wide business in the last several years. John K. Eason, *Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations*, 52 FLA. L. REV. 41, 53 (2000).

176. Hawaii, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Wyoming, and West Virginia have also enacted legislation validating APTs. Following the 1986 creation of the GST exemption, states have similarly raced to change or abolish the rule against perpetuities and compete for dynasty trust business. Roughly $100 billion in trust assets has migrated into states that have provided for dynasty trusts.

177. STATE RANKINGS CHARTS, https://www.oshins.com/state-rankings-charts [perma.cc/4HC3-CQP7] (last visited July 16, 2017); Ashlea Ebeling, *Comparing Domestic Asset Protection Trust States*, FORBES (July 6, 2016), http://www.forbes.com/sites/ashleaebeling/2016/07/06/comparing-domestic-asset-protection-trust-states/#7caed6a765fe [perma.cc/4VXK-E7HY].

competitive opportunities to shield assets from marital property and spousal support claims. Nevada, for example "has apparently chosen to be even more competitive by providing for no statutory creditor exceptions [including spouses] to the self-settled spendthrift trust features of its legislation."[178] Oklahoma laws, likewise, bar spouses from access to trust assets at divorce, as does Wyoming.[179] Wyoming DAPT law even shields trust assets from spousal and child support claims when the settlor is thirty days or more in default.[180] Other states give more weight to spousal claims, but doing so lowers their ranking and may make their jurisdiction less attractive for trust formation purposes.

DAPTs, then, are a financial instrument that specifically promise asset protection to divorcing spouses—contrary to general concepts not only of marriage law but also public policy. And, by enabling one spouse to actively shelter assets from the other, DAPTs force economic partnership to give way to family wealth preservation of a new and particularly objectionable sort.

b. Family Conflict/Conflict of Law

Whether or not these protections hold up in court is, of course, another question and one that has yet to be thoroughly tested. Because of the state competition for business, one of the first legal issues arising with DAPTs is choice of law. Because states advertise their DAPTs as having unique forms of asset protection, trust agreements generally contain provisions stating that the trust is subject exclusively to the law of the state in which it was created.[181] Spouses have, however, been challenging these exclusive provisions during divorce proceedings, in the hopes of eliminating some of the most aggressive asset protection provisions and rendering the trust assets subject to inclusion in the marital estate.

Such was the case in *Dahl v. Dahl*. In that case, Charles and Kim Dahl were married and lived in Utah for almost eighteen years before filing for divorce and beginning proceedings that the district court called a "train wreck."[182] Charles was a cardiologist and Kim had worked for a short time at the beginning of the marriage before becoming a stay-at-home parent and the primary caretaker of two children.[183] In 2002, four years before Charles filed for divorce, he created the Dahl Family Irrevocable Trust in Nevada, naming himself as beneficiary, his brother C. Robert Dahl as Investment Trustee, and the Nevada State Bank as a co-trustee. Nevada was listed as place of domicile in the trust's choice of law provision. Charles funded

178. *See* Edward D. Brown & Hudson Mead, *Divorce and the Self-Settled Trust: Insights Into How-and Where-Clients Might Protect Their Trust Assets From Financial Risk of a Future Divorce* 2, FEATURE: EST. PLAN. & TAX'N (Feb. 2014), http://www.barryengel.com/pdf/divorce-self-settled-trust.pdf [perma.cc/7BLV-6YHD].

179. STATE RANKINGS CHARTS, *supra* note 177.

180. *Id.*

181. *Id.*

182. Dahl v. Dahl, 2015 UT 23, ¶ 5, 345 P.3d 566, 575.

183. *Id.* at ¶ 3, 345 P.3d at 575.

the trust with 97% of a Utah LLC, Marlette Enterprises—a real estate investment company that he owned and that was valued at approximately $1 million. In the following year, the couple jointly transferred deed to their primary residence to the trust.

When the marriage failed and the couple began divorce proceedings, Kim sought a share of assets in trust, claiming they were marital property. The Utah district court held that Kim had no enforceable interest in trust assets not only because of the choice-of-law provision but also because the trust was irrevocable.[184] On appeal, however, the Utah Supreme Court disagreed. Kim's interest in the marital home was undeniably marital property, the court observed, and there was an open question as to what, if any, percentage of the real estate company was marital property.[185] Charles admitted that at least some part of the trust assets were marital property and, consequently, the court stated: "Thus, to the extent that the Trust corpus contains marital property, Utah has a strong interest in ensuring that such property is equitably divided in the parties' divorce action."[186] The court therefore denied enforcing the trust's choice-of-law provision and applied Utah law instead.

Applying Utah law, the court concluded that the trust assets were reachable and subject in part to equitable distribution, primarily because the court determined that the trust was revocable—not irrevocable as Charles claimed. The trust agreement stated: "The Trust hereby established is irrevocable. Settlor reserves *any power whatsoever* to alter or amend *any* of the terms or provisions hereof."[187] As William Lapiana and others have pointed out: "[T]his provision may contain a typographical error—if one substitutes 'no' for 'any,' the phrase not only reads as more natural but makes sense as a provision in an irrevocable trust."[188] The court never ruled, then, on whether or not the assets would have been reachable by Kim had the trust been irrevocable, and a drafting error may have cost Charles dearly.

Another similar case, *IMO Daniel Kloiber Dynasty Trust*, likewise involved a family business and a marital property dispute, both entwined with a protracted legal battle over the assets in trust.[189] In the *Kloiber* case, the trust was a dynasty trust, a

184. *Id.* at ¶ 13, 345 P.3d at 577.

185. *Id.* at ¶¶ 26-27, 345 P.3d at 579. In addition, Ms. Dahl claims to have conveyed to the Trust her interest in Marlette Enterprises and other marital property with a value of at least $2 million.

186. *Id.* at ¶ 22, 345 P.3d at 578.

187. *Id.* at ¶ 30, 345 P.3d at 580.

188. William Lapiana, *The Domestic Asset Protection Trust at Divorce* ("The lesson from *Dahl* is that the key to achieving asset protection through a Nevada asset protection trust is to ensure that Nevada law will be applied to the trust.").

189. For more on the divorce, see Jay Adkisson, *Delaware Anti-Suit Injunction Nixed as to Dynasty Trust in Kloiber*, FORBES (Aug. 18, 2014), http://www.forbes.com/sites/jayadkisson/2014/08/18/delaware-anti-suit-injunction-nixed-as-to-dynasty-trust-in-kloiber/6/#6bb14c77328b [perma.cc/94WX-WC5J].

particular form of a DAPT.[190] And, although the trust was created by a third party (the father), several features of the case mirror first-party-settled DAPT cases, in particular the deep involvement of the husband/beneficiary with the trust, his control over the trust, and the transfer of his business—a quasi-marital asset—into the trust during the marriage.

The trust in question was a Delaware Dynasty Trust, that Glenn Kloiber had created in 2002 with PNC bank for the benefit of his son, Daniel Kloiber. As the primary beneficiary, Daniel had the right to withdraw up to five percent of the net fair market value of the trust estate annually.[191] Daniel was also given special powers of appointment[192] and was named as a "special trustee," with sole authority to direct the trustee in regards to investment decisions, distributions, and trustee removal and selection.[193] The trust, therefore, offered maximum asset protection and tax benefit while still giving Daniel significant control over the assets.

Glenn initially funded the trust at creation with the small sum of approximately $15,000. Less than a year later, Daniel sold 99.45% of his shares in the company he had founded and co-owned, Exstream Software, Inc., to the trust for "an unsecured promissory note with a face amount of $6 million."[194] By 2008, the trust had sold all of this stock for approximately $310 million.[195] Consequently, although a third party (the father), technically created the trust, it looked much more like a self-settled DAPT because of the trustee powers and beneficiary rights that Daniel held coupled with the fact that the majority of the trust assets were proceeds from the sale of his company.[196]

When the couple separated in 2010 and Daniel filed for divorce, Beth argued that the trust assets were marital property. The divorce was being litigated in Kentucky, where the couple resided, and the Kentucky court presiding over the divorce entered a Status Quo order, providing: "[N]either party shall sell, encumber, gift, bequeath or in any manner transfer, convey or dissipate any property, cash,

190. Dynasty trusts are like traditional third-party created asset protection trusts, but they are created in jurisdictions that offer enhanced asset protection and exemption from the rule against perpetuities.

191. "In addition, the Trustee 'shall pay to or apply for [Dan's] benefit' such amounts as 'shall be necessary or advisable from time to time for [Dan's] health, education, support and maintenance.' *Id.* § 1.1.3. The Trustee also may use funds from the trust estate to provide and maintain a personal residence for Dan. *Id.* § 1.1.7." *In re* Kloiber, 98 A.3d 924, 929 (Del. Ch. 2014).

192. That permitted him to appoint the principal of the trust estate to the "wife of the Grantor's son," to his blood relations, or to a charitable organization. *Id.*

193. The Special Trustee possessed powers including the following: "Sole authority to direct the Trustee with respect to investment of the trust estate, *id.* § 9.1; Sole authority to direct the Trustee with respect to Special Holdings, *id.* § 9.2; Sole authority to direct the Trustee with respect to discretionary distributions, *id.* § 9.3; and Sole authority to remove and replace the Trustee, *id.* § 9.4." *Id.* at 931–32.

194. *Id.* at 932.

195. *Id.*

196. Jocelyn Margolin Borowsky & Richard W. Nenno, *Myths and Facts About Kloiber*, MARTINDALE.COM (Apr. 12, 2017), https://www.martindale.com/family-law/article_Duane-Morris-LLP_2242706.htm [perma.cc/8DD3-MLJV].

stocks or other assets currently in their possession or control of another person, company, legal entity or family member."[197] After the court issued these orders, Daniel resigned as Special Trustee—transferring the power to his son—and PNC filed a petition seeking a declaration that the Delaware courts had exclusive jurisdiction over matters pertaining to the administration of the trust. Daniel and PNC argued that the relevant Delaware rules provided that: "*The Court of Chancery shall have exclusive jurisdiction over any action brought with respect to a qualified disposition.*"[198] Daniel and PNC argued for "the 'exclusive jurisdiction' of this court to the exclusion of all other courts in the world, including the Kentucky Family Court."[199]

Unpersuaded by PNC's argument, the Delaware court concluded that the statutory language about "exclusive jurisdiction" meant only that the Delaware Court of Chancery possessed exclusive jurisdiction with respect to other Delaware courts. The statute, the court remarked, "is allocating jurisdiction among the Delaware courts. The state is *not* making a claim against the world that no court outside of Delaware can exercise jurisdiction over that type of case."[200] In conclusion, the court remarked: "This case differs from a situation where parties have agreed voluntarily by contract to an exclusive forum. Beth did not execute the Trust Agreement, nor is there any indication that she chose explicitly or implicitly to become bound by its terms."[201]

After much back and forth, the final divorce settlement severed some portion (an undisclosed amount) of the assets in trust in order to form a new trust for Beth, and the question of whether any portion of the trust assets were marital property was thus avoided. This end result, while leaving open the legal question of marital assets in trust, represented a blow for the husband as well as the trust company.[202] In this respect, the result hints at the possibility that family wealth preservation will not completely overtake marital partnership.[203] The question, however, is still far from settled. Moreover, the clear trend is for states to adopt these types of asset

197. *In re* Kloiber, 98 A.3d 924, 933 (Del. Ch. 2014). A subsequent order additionally prohibited Daniel from "taking action to facilitate, request or procure any change in any of the liquid, cash or cash equivalent investments within the [dynasty trust], or within the entities within the [dynasty trust]."

198. *Id.* at 938 (citing 12 Del. C. § 3572(a)) (emphasis added in opinion).

199. *Id.*

200. *Id.* at 939 (concluding not only that Delaware did not have exclusive jurisdiction, but also that Delaware did not have primary jurisdiction).

201. *Id.* at 940 (citing Garretson v. Garretson, 306 A.2d 737, 740 (Del. 1973)).

202. Steven J. Oshins, *Beware of Rights of Beneficiary's Divorcing Spouse in Delaware*, INFORMA (Nov. 1, 2016), http://www.wealthmanagement.com/estate-planning/beware-rights-beneficiary-s-divorcing-spouse-delaware [perma.cc/AAW9-HFUV].

203. Courts have found against granting jurisdiction to the state of trust settlement in others creditor contexts. Notably in *In re Huber*, a case about a real estate developer trying to shield his assets through the use of a DAPT. At least one commentator has argued that these types of trusts should be protected as a matter of supporting trustor intent. *See* Brendan Duffy, *In States We "Trust": Self-Settled Trusts, Public Policy, and Interstate Federalism*, 111 NW. U. L. REV. 205 (2016).

protection trusts and the more states that adopt them, the less important the jurisdictional question will be.

c. New and Improved Prenuptial Agreements

Despite these recent court challenges, the enhanced protections that DAPTs offer against spousal claims in the event of divorce mean that estate and financial planners are heavily marketing DAPTs as a new and improved alternative to prenuptial agreements. In fact, trust-based premarital arrangements are quite literally being marketed as direct competitors to contract-based prenuptial agreements. The contract-based way of doing things, so the story goes, involved awkward and prolonged drafting and there were many obstacles to successful negotiation. According to one estate lawyer: "Prenuptial agreements are good, but there are numerous personal and legal issues that deter couples from actually executing a prenuptial agreement."[204] DAPTs, according to the same narrative, present a better and more compelling opportunity to engage in significant family wealth preservation because of the robust asset protection offered by the DAPT at divorce *and* because one soon-to-be spouse can create a DAPT without the knowledge of the other.

A major selling point for trust companies and estate planning firms in all of the nineteen states that allow DAPTs is the exceptional asset protection they can offer at divorce.[205] Delaware trust companies advertise "extra breaks, including stronger protection from creditors and potential exclusion of assets in divorce proceedings."[206] Another law firm suggests the use of DAPTs, because "utilizing Domestic Asset Protection Trusts in the pre-marital planning process greatly reduces the chances of a successful attack resulting in the equitable distribution of property brought to the marriage."[207] Some estate planners, in a more whimsical vein, give names to their financial products. For example, the "Ultimate Cowboy Cocktail" is a Wyoming LLC that is owned by a Wyoming Asset Protection Trust and administered by a Wyoming Private Trust Company, and it is advertised as

204. Richard Shapiro et al., *Domestic Asset Protection Trusts v. Prenuptial Agreements*, BLUSTEIN, SHAPIRO, RICH & BARONE, LLP (Oct. 14, 2016), https://www.mid-hudsonlaw.com/blog/domestic-asset-protection-trusts-v-prenuptial-agreements/ [perma.cc/B89F-UK3J]. Of course, "The safest bet, say advisers, is to combine asset-protection structures with prenuptial agreements—what lawyers call the 'belts and suspenders' approach."

205. These states include Alaska, Connecticut, Delaware, Hawaii, Indiana, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

206. *Dynasty Trusts Let U.S. Wealthy Duck Estate, Gift Taxes Forever*, BLOOMBERG NEWS (July 28, 2011), http://www.fa-mag.com/news/dynasty-trusts-let-us-wealthy-duck-estate-gift-taxes-forever--7913.html [perma.cc/VQR4-R5Q4]. In states that have not adopted the UTC, local rules do not generally dictate any exceptions for spouse creditors.

207. *Use of Asset Protection Trusts in the Pre-Marital Planning Process*, MCKONLY & ASBURY, http://www.macpas.com/use-of-asset-protection-trusts-in-the-pre-marital-planning-process/ [perma.cc/S2JX-SWHB?type=image] (last visited July 16, 2017).

offering strong asset protection during divorce proceedings.[208] Marketing for Nevada trust companies is simple: "Nevada is one of two states that have no exception creditors. This includes divorcing spouses."[209] Doubling down on this focus on asset protection at divorce, trust companies and law firms also consistently characterize spouses as overreaching and unduly entitled.

In addition to emphasizing heavy-duty asset protection, trust companies and estate planners also market DAPTs by highlighting that—unlike prenuptial agreements—they can be created by one fiancé without the knowledge of the other. From this perspective, DAPTs are a good alternative to pre-marital contracts because they help fiancés avoid "awkward" conversations about money and the retention of separate property. A dynasty trust in Delaware, for example, serves "as a substitute for prenuptial agreements, offering protection of the pre-marital estate of an individual without negotiations over a prenuptial agreement."[210] One estate lawyer explains the problem with prenuptial agreements: "The bottom line is that while many couples are delighted to share their lives together when entering into a marriage, they may feel uncomfortable sharing information about their net worth."[211] A commentator writing in the American Bar Association newsletter also describes the utility of the DAPT by underscoring the "low-stress" angle: "This technique is very appealing to many individuals who, although [they] would like to protect their assets from their future spouse . . . would like to do so quietly and without any hassle."[212]

Putting a more positive spin on the desire to avoid potentially uncomfortable conversations about finances, estate planners and trust firms also promote the DAPT as the "romantic" alternative. Prenuptial agreements, the advertisements pronounce, kill the romance and joy of wedding planning. DAPTs, on the other hand, keep the romance alive. The following is typical of the DAPT promotion literature:

> [O]ne individual can enact premarital asset protection planning without his or her fiancé's involvement. Due to the unromantic pitfalls of negotiating a family property settlement the week of the wedding, some proactive

208. The Seven Tiers of Asset Protection Planning: http://appersondev.melloncg.net/images/7_Tiers_of_Asset_Protection_Planning.pdf [perma.cc/9LT9-C8RZ] (#5 is the Cowboy Cocktail and #6 is the Ultimate Cowboy Cocktail).

209. *The 4 Things You Need to Know About a Nevada Asset Protection Trust*, PREMIER TRUST, https://premiertrust.com/2016/12/30/the-4-things-you-need-to-know-about-a-nevada-asset-protection-trust/ [perma.cc/M68T-C9QZ] (last visited July 17, 2017).

210. Northern Trust, Delaware Trusts: Safeguarding Personal Assets (2019), https://www.northerntrust.com/documents/white-papers/wealth-management/research/delaware-trusts-safeguarding-personal-wealth.pdf?bc=25683840 [perma.cc/5SJ5-XE3H].

211. Shapiro, *supra* note 204.

212. Kalimah Z. White, *Domestic Asset Protection Trusts: An Alternative to Prenuptial Agreements* 2 (Feb. 2006), http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/domestictrust.html [perma.cc/W9B7-4657]. Of course, "The safest bet, say advisers, is to combine asset-protection structures with prenuptial agreements—what lawyers call the 'belts and suspenders' approach."

> individuals are avoiding the prenup altogether. The domestic asset protection trust is the single best alternative a single person can take to protect his or her assets from divorce.[213]

A Dallas estate lawyer also focuses on the romance aspect, stating: "Many wealthy individuals choose to forgo a prenup altogether, for fear that it will dim the ardor of romance—and for them a premarital trust is a good alternative."[214] And another trust lawyer echoes this sentiment: "As a practical matter, asking a future spouse to enter into a prenuptial agreement often causes discomfort to blossoming love relationships."[215]

DAPT marketing, then, underscores the fact that these trusts are highly suitable for marriage planning and that they offer benefits in terms of secrecy and efficiency that contract-based forms of marriage settlement do not. This marketing strongly stresses family wealth preservation over marital partnership and treats the spouse or soon-to-be spouse as nothing more than a potential liability and drain on family resources.

III. SAFEGUARDING MARITAL ECONOMIES

It is clear that QTIPs, DAPTs, and some dynasty trusts represent a new kind of incursion against marital partnership. What remains is the question of how to recalibrate the balance between family wealth preservation and marital partnership. In this Part, after describing the insufficiency of current protections, I propose several solutions to help rebuild the integrity of both the family wealth preservation and marital partnership value-spheres by placing constraints on what one spouse can do unilaterally in terms of trust creation and funding. In particular, I suggest ways to better regulate the ability of one spouse to engage in asset preservation through various forms of disclosure and consent requirements. The new marriage trusts—the "have your cake and eat it too"[216] type of trusts—should not be allowed to operate as unrestrained vehicles for spousal disempowerment and marital fraud.

A. The Current Limits of Trust Creation: Fraudulent Transfers

As things currently stand, there are some constraints on and limits to what one spouse can transfer into trust during marriage. The most common challenges to these transfers that disinherit spouses and defraud the marital estate arise from the fraudulent transfer doctrine, which "represents the dominant approach for identifying and remedying sham transactions."[217] Fraudulent transfers may be challenged pursuant to the Uniform Fraudulent Transfer Act (amended in 2014 to

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213. *Divorce Asset Protection,* ASSET PROTECTION PLANNERS, http://assetprotectionplanners.com/articles/divorce//[perma.cc/GR2R-DVWF] (last visited July 16, 2017).

214. *Id.*

215. Shapiro, *supra* note 201.

216. *HYCET*, *supra* note 12.

217. Alexander Boni-Saenz & Reid Kress Weisbord, *Sham and Remedial Doctrines*, 22 TR. & TR. 850, 852 (2016).

become the Uniform Voidable Transactions Act), which states that transfers will be void if they were made with the intent to defraud or if "badges of fraud" are present.[218] The fraudulent transfer doctrine enables recovery for a spouse in the case of extreme behavior and actual fraud. There are, however, problems that remain. The following two sections explain the limits of the doctrine and what types of cases still fall between the cracks, leaving a disinherited or impoverished spouse with little recourse.

1. "Badges of Fraud" and the Surviving Spouse

One substantial problem with using the conventional fraudulent transfer standard is the difficulty of proving intent to defraud. As a result, courts are commonly faced with the problem of identifying indicia of fraud, or what most courts call "badges of fraud." And, in the context of estate planning, spouses are generally allowed great latitude before something becomes a badge of fraud. For example, courts do not think it is necessarily inappropriate that one spouse transfers assets to someone other than his spouse in the course of estate planning, especially if the recipient is a child or other relation.

Typical is the case of *Karsenty v. Schoukroun*, in which the surviving spouse claimed that assets transferred from the decedent spouse to his daughter using a revocable trust were fraudulently transferred.[219] The proper question, the court remarked, was whether the transaction was a "sham" and therefore invalid.[220] As a threshold matter, the court stated, "[A] surviving spouse must show that the decedent retained an interest in or otherwise continued to enjoy the transferred property."[221] If the decedent retained an interest, the court then would look to see if the decedent had a sound estate planning reason for making the transfer in such a way as to retain an interest. Factors in the analysis also included the degree to which the transfer "deprives a surviving spouse of property that she or he would otherwise take as part of the decedent's estate,"[222] and "the familial relationship between the decedent and the person or persons who benefit by the challenged *inter vivos* transfer."[223] The court noted in particular the legitimacy of transfers providing for children from a previous marriage.[224] Looking at the question from this perspective, the court concluded that the transfer from the decedent to his daughter

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218. Fifteen states have enacted the UVTA, http://www.uniformlaws.org/Act.aspx?title=Voidable%20Transactions%20Act%20Amendments%20(2014)%20 %20Formerly%20Fraudulent%20Transfer%20Act [perma.cc/Y87E-SLR9]. Only Rhode Island is a DAPT state. *See* Amy Amundsen, *Domestic Asset Protection Trusts in Divorce Litigation*, 29 AAML 1, 25 (2016).

219. Karsenty v. Schoukroun, 959 A.2d 1147, 1158 (Md. 2008).

220. *Id.*

221. *Id.*

222. *Id.* at 1176.

223. *Id.* at 1179.

224. *Id.* (explaining that these types of transfers within blended families, the court said, were to be viewed "differently than they would view a similar transaction in a single-family unit").

from a previous marriage was done in good faith and that "the court must respect the estate planning arrangements of the decedent."[225]

For a transfer to be fraudulent, the circumstances are usually quite extreme. In an Arkansas case, *In re Estate of Thompson*, the court set aside a transfer after concluding that it was made with the intent of disinheriting the surviving spouse.[226] At the outset, the court noted that Arkansas law was "well settled" in that the surviving spouse's elective interest vested only in property that the deceased spouse owned at the time of death.[227] The court went on to remark, however, that because "the surviving spouse's right to an elective share is inviolate," the court would set aside any transfers found to be made with fraudulent intent.[228] The trial court had found fraudulent intent based on the fact that the husband had transferred more than $6 million to a revocable trust just prior to his death in 2010, leaving his spouse nothing more than a bequest of $100,000 that was contingent upon her not contesting the will.[229] The trial court also determined that, in previous iterations of his estate plan, the husband had provided generously for his spouse and that it was only in the final version of his will that he had redrafted the terms "in order to leave her basically nothing."[230] Concluding that the decedent's actions had been meant to disinherit the surviving spouse in retribution for placing the decedent in a care facility, the court allowed the trust assets to be included in the decedent's probate estate "for the limited purpose of calculating the elective share."[231]

Transfers, then, are not fraudulent if there is a legitimate estate planning aim. This is particularly true when blended families come into play and the surviving spouse is perceived or assumed to have financial interests that differ from the decedent's children. Fraudulent transfer rules can, then, serve as a nominal safeguard for a surviving spouse's financial interests. They do not, however, fully safeguard economic partnership at death.

2. Fraudulent Transfers at Divorce

The fraudulent transfer doctrine also protects spouses at divorce. Typical statutes render void transfers made "with intent to delay, hinder, or defraud creditors, purchasers, or other persons of or from what they are or may be lawfully

225. *Id.* at 1172.

226. *In re* Estate of Thompson, 434 S.W.3d 877, 881–82 (Ark. 2014).

227. *Id.* Arkansas law gives a surviving spouse the right to elect to take a share of the estate of his or her deceased spouse against the will of the deceased. *See* ARK. CODE ANN. § 28–39–401. This elective share is the equivalent of the spouse's dower or curtesy rights, as well as any homestead rights and statutory allowances.

228. *In re Estate of Thompson*, 434 S.W.3d at 883.

229. *Id.* at 884–85.

230. *Id.* at 885.

231. *Id.* at 887*, reh'g denied* (June 19, 2014) (explaining that the court also noted that "[t]he intent to defeat the marital rights or the elective share will not invalidate any other lawful purpose of the trust").

entitled to,"[232] and this includes spouses as creditor. As with transfers made as part of estate planning, however, it is difficult for one spouse to prove actual intent to defraud. Therefore, courts maintain the focus on "badges of fraud" and, with divorce, look in particular to timing.[233]

In a 2003 case before the Supreme Court of Wyoming, for example, the court was called upon to evaluate transfers that the husband made into an Offshore Asset Protection Trust (OAPT) in the Bahamas. The court noted that "common badges of fraud include . . . lack or inadequacy of consideration, close familial relationship or friendship among the parties, retention of possession or benefit of the property transferred, the financial condition of the transferor both before and after the transfer, the chronology of events surrounding the transfer, the transfer takes place during the pendency or threat of litigations, and hurried or secret transactions."[234] The husband had created a family trust in the Bahamas in November of 1995, when the couple was having marital difficulties, and "transferred a substantial portion of the marital assets to the trust."[235] One year later, the wife filed for divorce and in April of 1997 the couple definitively separated. After the creation of the trust and up until the divorce hearings, the husband continued to makes transfers into trust. During the divorce proceedings, the wife challenged these transfers as fraudulent.

Considering the previous list of badges of fraud, the court agreed with the wife. The court found particularly troubling the fact that the husband had created the trust and retained significant control over the assets. The trust allowed the husband to be named as a beneficiary, and the husband retained control over distributions to the extent that income was taxable to him and "the family trust assets would be included in his estate should he die."[236] The timing and creation of the trust were also suspect, given that the husband created the trust "in secret"[237] only after the marital troubles began and continued to transfers assets into it up until the time of the property division hearing. Consequently, the court affirmed the trial court ruling that the transfers were made with the intent to defraud the wife.[238]

The biggest problem with the fraudulent transfer doctrine is that only the most egregious types of transfers are penalized—after the fact—and one of the most determinative factors tends to be timing. If the couple is separated and divorce

232. VA. CODE ANN. § 55-80 (West 2019); *see* Buchanan v. Buchanan, 585 S.E.2d 533, 535 (Va. 2003).

233. "Circumstantial evidence of intent in these cases also often takes the form of certain badges of fraud. We have defined badges of fraud as "a fact tending to throw suspicion upon the questioned transaction, excites distrust as to bona fides, raises an inference that a conveyance is fraudulent and by its presence usually requires a showing of good faith." Breitenstine v. Breitenstine, 62 P.3d 587, 592–93 (Wyo. 2003).

234. *Id.* at 593.

235. *Id.*

236. *Id.* at 590.

237. *Id.* at 594.

238. *Breitenstine*, 62 P.3d at 593. For another example, see Buchanan v. Buchanan, 585 S.E.2d 533, 535 (Va. 2003).

proceedings are in the works, courts are much more likely to conclude that a questionable transfer is fraudulent. However, if one spouse makes a transfer during an intact marriage, it likely will not be flagged and treated as a fraudulent. A better alternative is required.

B. Rejecting Unilateral Decision-making

More useful than the focus on fraudulent transfers, and more apt in the marriage context, is a regulatory framework premised on limiting the powers of one spouse to act unilaterally at any point in preparation for or during marriage. Economic partnership within marriage necessitates certain forms of joint decision-making, and financial and estate planning should ideally be collaborative terrain or, at the very least, consultative. Economic partnership entails both spouses not only knowing about wealth planning activities that impact the couple but also having a voice with respect to the selection of various financial products. A set of rules limiting unilateral action would help to re-establish the current boundary that separates family wealth preservation from economic partnership, and support the conventional demarcation of these two value-spheres. This section suggests several ex ante methods for increasing and enhancing joint decision-making about marital wealth.

1. QTIPs: Choosing Collaborative Decision-Making

Rejecting unilateral decision-making in the case of QTIPs is a modest fix: the title-holding spouse or that spouse's executor should not be able to put assets in trust or make the QTIP election without the consent of the other spouse. Currently, the donor spouse or the donor's executor can choose to make the QTIP election regardless of what the surviving spouse wants.[239] If the QTIP is an inter vivos trust, the donor spouse makes the election by filing a gift tax QTIP election form; if the QTIP is created at the donor's death, the executor makes the election when filing the federal estate tax form. In either situation, the spouse has no official role in the process and her consent is neither required nor even recommended. Wendy Gerzog has previously proposed the seemingly simple solution that the surviving spouse be the one to make the election. Gerzog states:

> If the widow, rather than the donor or executor, held the QTIP election power, she would have greater involvement in the QTIP process, and the marital nature of the provisions would be stronger. In addition, this change

239. I.R.C. §§ 2056(b)(7)(B)(v), 2523(0(4). In the context of estate tax marital deduction, the executor must make the election on the last timely-filed return. In the case of the gift tax marital deduction, the donor must make the election on the last timely-filed gift tax return. Once the election is made, it is irrevocable. *See* Treas. Regs. §§ 20.2056(b)-7(b)(4), 20.2056(b)-7(c), 25.2523(f)-(b)(3); *see also* Gerzog, *supra* note 57 ("However, there is no requirement that the donee spouse participate in any way in this decision.").

would demonstrate more effectively that the QTIP provisions attempt to protect the transfer of "their" property from current taxation.[240]

Making the surviving spouse the one to elect for QTIP treatment of a trust—or requiring her consent in some form—would recognize marital partnership and instantiate joint economic decision-making on the couple's part. In addition, this modification would recognize the fact that, in many cases, the trust assets are marital property.

QTIPs could still serve their purpose by facilitating estate planning in blended families and family wealth preservation could continue almost unabated—except for the required procurement of spousal consent.

2. DAPTs: Constraining the Self in Self-Settled

The same principle of reforming rules that authorize unilateral action should also be applied to DAPT creation and regulation within marriage. DAPTs that allow one spouse to unilaterally create the trust and shelter assets directly contravene the notion of economic partnership and represent an inappropriate intervention of wealth preservation into the marital economy. Consequently, as states both enact and modify DAPT rules and as courts begin to address their asset protection capacities, values of collaborative decision-making and consent should be placed front and center. Aligned with the notion of marital partnership, states should require affirmative spousal consent for transfers into DAPTs and, in the absence of affirmative spousal consent, these transfers should be subject to judicial scrutiny at divorce in order to determine whether they consist of marital property.

To begin, one spouse should not be able to create or transfer assets into a DAPT during marriage without notice and consent. Estate planners generally recommend: "[A] DAPT should not be established when your client's life is in turmoil and this would include immediately prior or after a divorce action has been initiated."[241] DAPTs, they suggest, should be funded "either well before entering into the marriage or [in some states] during a stable marriage."[242] Cautions against trust formation during or just previous to divorce are not sufficient, however, to regulate unilateral trust creation and wealth decision-making within marriage. Currently, South Dakota is the only DAPT state with a statutory requirement for this type of notification. In South Dakota, marital property transferred into the DAPT is protected at divorce, but only if the spouse received notice in the form provided by the statute or provided written consent after having received

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240. Wendy C. Gerzog, *Solutions to the Sexist QTIP Provisions*, 35 REAL PROP. PROB & TR. J. 97, 107 (2000); *see also* Gerzog, *supra* note 57, at 327; Wendy C. Gerzog, *Illogical and Sexist QTIP Provisions: I Just Can't Say It Ain't So*, 76 N.C. L. REV. 1597, 1600 (1998).

241. *A Legal Guide to Domestic Asset Protection Trusts and Divorce*, LAWFIRMS, http://www.lawfirms.com/resources/divorce/a-legal-guide-domestic-asset-protection-trusts-divorce [perma.cc/LZ3C-VXAF] (last visited July 16, 2017).

242. Brown & Mead, *supra* note 178.

substantially similar notice.[243] The statue directs that any letter of notice contain the following language, in capital letters and at the top of the letter:

> YOUR SPOUSE IS CREATING A PERMANENT TRUST INTO WHICH PROPERTY IS BEING TRANSFERRED. YOUR RIGHTS TO THIS PROPERTY MAY BE AFFECTED DURING YOUR MARRIAGE, UPON DIVORCE (INCLUDING THE PAYMENT OF CHILD SUPPORT OR ALIMONY OR A DIVISION OR DISTRIBUTION OF PROPERTY IN A DIVORCE), OR AT THE DEATH OF YOUR SPOUSE.[244]

The notice must also describe the property being transferred.[245] The spouse may request a copy of the trust document and is advised to seek independent legal counsel.[246] Failure to object after notice is construed as consent.[247] Amending the rule and requiring affirmative consent as the default would further improve fairness between spouses and enhance partnership rules. Without written consent, no transfers of marital property made unilaterally into a DAPT during marriage—not just those made in anticipation of divorce—should receive asset protection.

These rules would not preclude spouses from using DAPTs or even from creating them during marriage. It would only prevent secret transfers into trust with marital property. With notice and consent, spouses should be free to manage their assets as they see fit, and a recent DAPT case from Nevada demonstrates this principle in action. The spouses in *Klabacka v. Nelson* married in 1983, signed a separate property agreement (SPA) in 1993, transmuting their community assets into separate property, and in 2001 funded two separate self-settled asset protection trusts, each with the separate assets of one spouse.[248] As the court remarked: "Suffice it to say, the parties have substantial trust issues."[249] Nevertheless, both parties were aware of the transactions and not only did both parties consult counsel prior but the wife also consulted additional outside counsel prior to her signing.[250]

At divorce, the wife argued that the trusts were not validly created and that the SPA did not hold at divorce. The court disagreed, referencing the ongoing consent both parties had given and the knowledge both had about the management of their wealth.[251] This case highlights that partnership entails conversation, notice, and consent—not necessarily asset sharing. Partnership encompasses the right of

243. S.D. CODIFIED LAWS § 55-16-15(2)(b).

244. S.D. CODIFIED LAWS § 55 16-15(3)(a); *Codified Laws*, S.D. LEGISLATURE, http://www.sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=55-16-15 [perma.cc/MB3L-2WAH]. No notice is required for separate property.

245. S.D. CODIFIED LAWS § 55-16-15(3)(b).

246. S.D. CODIFIED LAWS § 55-16-15(3)(a).

247. *Id.*

248. Klabacka v. Nelson, 394 P.3d 940, 943 (Nev. 2017).

249. *Id.*

250. *Id.*

251. *Id.* (concluding that if, through tracing, any community property was in either trust the district court was to make an equal distribution of that community property).

spouses to engage in private ordering and asks only that these private arrangements be agreed upon mutually, after discussion and consultation.

3. Quasi-Marital Property: Minding One's Own Business?

To add another layer of protection to marital property rights, one spouse would not only be required to provide notice to the other when creating or transferring marital assets into a DAPT but also when transferring separate property. In some states—Alaska, Mississippi, Ohio, Tennessee, Utah, and Wyoming—a settlor looking to create a DAPT must provide a sworn affidavit stating that he has full rights and title to the trust property and, therefore, unfettered authority to create a trust with the assets.[252] Furthermore, it is standard practice for estate planners to ensure that a settlor holds full and clear title to the property being transferred into trust. Nevertheless, these kinds of measures are not always sufficient to protect against the transfer of quasi-marital property into a DAPT. As such, specific additional measures are needed to protect spousal rights in property that might technically be the separate property of one spouse during the marriage but that might be quasi-marital at divorce because of the active contributions of the non-owner spouse.[253]

This kind of problem arises most commonly with assets subject to an increase in value because of spousal contributions. A family business or personal business interest is the classic example and one that appears repeatedly in the caselaw. In *Dahl,* for example, the husband funded the Nevada DAPT with his interest in the real estate investment company that he owned.[254] In *Kloiber*, the husband transferred 99.45% of the shares of Exstream Software, Inc., a document management company that he founded with a friend, for an unsecured promissory note with a face amount of $6 million.[255] The trust then sold the shares for over $300 million dollars. In both cases, the husbands had the ability to transfer shares because they were technically separate property when the trust was funded. Nevertheless, in both cases, there was a significant possibility that any increase in value to the company was marital property.

This same problem arises both at death and divorce. In *In re Estate of Littleton*, for example, husband and wife were married for thirty-six years at the time of the husband's death. Five years before he died, the husband transferred the bulk of his assets, consisting mostly of rental property, into a trust. The trust terms provided that the wife receive "personal items, home furnishings and the monthly cash sum of $4,000.00 for her lifetime."[256] Unhappy with this outcome, the wife chose to assert her elective share rights, alleging that her share was $1.2 million, a sum she

252. *See* Amundsen, *supra* note 218.

253. This problem is obviated by community property rules. I assume in this discussion that we are talking about separate property states.

254. Dahl v. Dahl, 345 P.3d 566, 576 (Utah 2015).

255. *In re* Kloiber, 98 A.3d 924, 932 (Del. Ch. 2014)

256. *In re* Estate of Littleton, 313 P.3d 1062, 1064 (Okla. Civ. App. 2013).

produced by including the value of one particular car lot she claimed was marital property. The court, then, had to determine whether the car lot property was "joint industry during coverture (JIDC) property,"[257] a form of marital property. Evidence showed that the husband had acquired the car lot before marriage. However, the court observed, the wife "may have acquired an interest in the enhanced value of Decedent's separate property through *either Decedent's or her efforts, skills or funds* during the marriage."[258] The court consequently remanded the case for further proceedings to inquire into the wife's contributions.

In these situations, an affidavit stating the husband had all rights to the property would not have caught the quasi-marital nature of the property being transferred. Notice of the transfer to the spouse would, on the other hand, help ensure the knowledge as well as the consent of the non-owner spouse. Notice, then, should be sent to the spouse when separate, not just marital, property is being transferred into a DAPT. Notice would help increase transparency about the ways in which assets are managed within marriage and could help prevent secret transfers of special assets like business shares. To compound protections afforded by notice requirements, these special assets—like family businesses—should be subject to scrutiny at divorce to help ensure that marital property is not inappropriately sheltered from a spouse who contributed to its value.

In order to better actualize economic partnership, spouses should be informed about asset transfers of not just marital but also separate property, particularly separate property that is subject to appreciation in value. In some cases, the property will legitimately be separate property, but the harm of providing additional information to a spouse is much less—and of a different order—than the harm of secrecy.

4. Protecting the Margins

Finally, because economic partnerships do not necessarily begin at the actual moment of marriage, there should be look-back periods to ensure that one spouse did not transfer assets into trust the day before the wedding in a "romantic" attempt to shelter wealth. This is particularly important because many couples begin to commingle funds and engage in joint financial planning once they agree to marry but prior to the actual marriage.

Other areas of law provide models for look-back periods, designed with a similar intention—to uncover sham transfers made with the intent to defraud. The Internal Revenue Service (IRS) includes in the decedent's gross estate certain transfers made within three years of the death for purposes of wealth transfer

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257. *Id.* at 1065 (The court began its analysis stating: "When a court is asked to determine whether property is separate or marital, the same rules apply whether the issue is raised in a divorce or upon the death of a spouse").

258. *Id.* at 1066.

taxation.[259] Medicaid has a five-year look-back period and individuals seeking eligibility must disclose all financial transactions they were involved in during a period of five years prior to application to determine whether the applicant transferred any assets for less than fair market value.[260] Finally, in bankruptcy law, there is a two-year look-back period meant to reveal fraudulent transfers, in which the property owner transfers property at less than fair market value or transfers assets into trust in order to keep them out of the bankruptcy proceedings.[261]

This same principle should also apply in the context of self-settled trusts and marriage—and does in some states. In Michigan, Hawaii, and Alaska, if the trust was created within thirty days of the marriage, the trust assets can only be "shielded against any property settlement if the settlor provides written notice to the spouse of such funding."[262] This approach shields the non-wealth holding spouse from unilateral action during wedding planning and preparation, and is an approach all DAPT states should adopt. Taking this concept further, states could also extend the timeframe from the one month immediately preceding marriage to the entire period in which a couple is planning and preparing for marriage. While it would not always be easy to determine at what point notification would be required, at the very least notification of the soon-to-be spouse could be required if the couple has become engaged and is planning to be married.[263] Instituting this kind of look-back period indexed to engagement would mean that individuals using DAPTs as pre-nuptial agreements would be either forced to disclose the creation of a trust in anticipation of marriage or to create the trust early enough that there would be no possible fraud or unwarranted secrecy.

To ensure that DAPTs are not merely vehicles for asset sheltering and that they serve a legitimate purpose, DAPT states should make sure that economic partnership rules balance out the enormous power of wealth preservation that these trusts currently enable.[264]

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259. Under § 2036 (transfers with retained life estate), § 2037 (transfers taking effect at death), §2038 (revocable transfers), or § 2042 (life insurance).

260. 42 U.S.C. § 1396p(c)(1)(A).

261. Under the Bankruptcy Code, the look back period is two years. 11 U.S.C. § 548. However, many states have adopted the Uniform Fraudulent Transfer Act (UFTA), which allows creditors to look back four years to find a fraudulent conveyance.

262. Brown & Mead, *supra* note 175, at 3.

263. There is a difficult question here of where to draw the line. However, since the focus here is marriage planning and marriage settlements, an apt line to draw is at engagement, when there is a clear agreement between the individuals and an intention to be married. Of course, this might provide incentives to skip the engagement before the marriage, but this is still the likely better approach than using either an arbitrary measure of time or delving into questions of nonmarital partnership.

264. Rules developed more generally to instantiate partnership for trusts should still apply as well. Spouses should, aligned with Uniform Trust Code rules, be considered exception creditors. See discussion *infra*.

CONCLUSION

Family wealth preservation was the longstanding rule of law in marriage. Only recently have norms changed and, as the idea of marital partnership has gained traction, the spouse has moved from the shadows of the dower house into the spotlight. While the idea of economic partnership in marriage has become increasingly accepted, however, family wealth preservation norms persist. Current marriage law accommodates the goals of both wealth preservation and economic partnership by allowing for various forms of wealth preservation but limiting these forms mostly to third-party interventions, based on the notion of freedom of disposition. Now, new marriage trusts threaten to undo this carefully composed arrangement by giving robust asset protection to spouses who create self-settled trusts during or in anticipation of marriage. Providing new and unparalleled opportunities for one spouse to shelter assets and defraud the other spouse of marital property, these new trust forms disrupt the ecology of marital sharing and financial collaboration, enabling family wealth preservation to annex economic partnership terrain. Consequently, a renewed focus on rules that limit the ability of spouses to act unilaterally in marriage to shelter assets and conceal information will help correct the growing imbalance between the competing value-spheres. Without a course correction, inequities in the marriage economy will burgeon as marriage rules absorb family wealth preservation rules, rendering spouses as obstacles and irritants in the great project of wealth transfer and legacy building.