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## Estate Planning and Trust Management for a Brave New World: It's All in the Family...What's a Family?

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Estate Planning and Trust Management for a Brave  
New World: It's All in the Family. . .  
What's a Family?

*R. Hugh Magill\**

*O, wonder!  
How many goodly creatures are there here!  
How beauteous mankind is! O brave new world,  
That has such people in't!*<sup>1</sup>

I. INTRODUCTION

The first phrase of the title of my presentation is intended to invoke two works of literature: Shakespeare's *The Tempest*, set upon Prospero's magical island, where it's difficult to distinguish the supernatural from the natural, illusion from reality.<sup>2</sup> Prospero's daughter, Miranda, is filled with wonder when she sees human beings for the first time as they embark upon the island after a shipwreck. She describes them as "goodly creatures" of this "brave new world."<sup>3</sup> Her wonder in encountering them is quickly put to nothing by her father, Prospero, who dismisses her by saying, "Tis new to thee."<sup>4</sup>

The second work, Aldous Huxley's existentialist novel *Brave New World*, published in 1932, is set in London in approximately 2540 AD.<sup>5</sup> Citizens are born in artificial wombs where they are predestined into one of five castes or classes.<sup>6</sup> The world encountered by Miranda and the one envisioned by Aldous Huxley seem to me to be drawing a little closer.

This is sufficient existentialist musing . . . let us consider a real family, one to whom I was introduced six or eight years ago by the Chairman of my company. The husband, a Traditionalist, was a retired CEO of several major American corporations. He was divorced and remarried. His second wife, a Boomer, was a successful professional. They

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<sup>1</sup> WILLIAM SHAKESPEARE, *THE TEMPEST*, act V, sc. I.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

<sup>6</sup> *Id.*

look like a fairly typical, blended American family: three children of the first marriage, Gen Xers; two children of the second, Millennials. On the family tree, they look like a two-generation family.

Demographically, however, this was a four-generation family, owing to the differences in the eras in which the members were born and raised. This family structure presents some challenges in estate planning and the allocation of financial wealth, which I will explore a little bit later. This mixture of four generations, a Traditionalist, a Boomer, Gen Xers and Millennials, in one family is one of several encounters that led to the research that forms the foundation for this lecture.

## II. GENERATIONAL ATTRIBUTES

Let us turn and consider the attributes of the generations whom we serve as clients today, from the Greatest Generation, which largely shaped our traditional paradigm of estate planning, to Millennials who are reshaping expectations and norms in a number of areas. The generational attributes and characteristics that I will share this morning are drawn from many sources — the Pew Research Center,<sup>7</sup> Paul Taylor's work *The Next America*,<sup>8</sup> research data from the Census Bureau<sup>9</sup> and the National Institutes of Health.<sup>10</sup> These observations are, of course, broad generalizations, and I hope that none will take umbrage if some seem far off the mark or others strike a little too close to home — they are never fully accurate.

We will consider five generations of Americans, from the GI and the Silent Generations (sometimes grouped together and called Traditionalists) down to Millennials. Alexis de Tocqueville observed in his seminal work, *Democracy in America*, that each generation is a new people.<sup>11</sup>

Whether or not there is such a thing as a generational persona is an issue debated by sociologists, but in the view of some scholars, there are four archetypal generational personas, and one of these will be attached to each of the four generations.<sup>12</sup>

Let us turn and look at the first generation, the Traditionalists, the grouping of the Greatest and the Silent Generation, whose lives were

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<sup>7</sup> PEW RESEARCH CTR., <https://www.pewresearch.org/> (last visited June 18, 2019).

<sup>8</sup> PAUL TAYLOR & THE PEW RESEARCH CENTER, *THE NEXT AMERICA: BOOMERS, MILLENNIALS, AND THE LOOMING GENERATIONAL SHOWDOWN* (PublicAffairs 2016).

<sup>9</sup> U.S. CENSUS BUREAU, <https://www.census.gov/> (last visited June 18, 2019).

<sup>10</sup> NAT'L INSTITUTES OF HEALTH, <https://www.nih.gov/> (last visited June 18, 2019).

<sup>11</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, VOLUME 2, 47 (Henry Reeves trans., 2006) (ebook).

<sup>12</sup> NEIL HOWE & WILLIAM STRAUSS, *MILLENNIALS RISING: THE NEXT GREAT GENERATION* (Vintage 2000).

grounded in and shaped by the depression and World War II. I will pose seminal questions for each of these generations. For Traditionalists, I ask, "Where were you on D-Day?" "How did you learn about D-Day?" You likely learned about it gathered in your living room around a wooden family radio.

A third of these Americans lived on farms, many in multigenerational households.<sup>13</sup> Spousal and parent-child relationships were narrowly defined. Tom Brokaw, the author of *The Greatest Generation*, said of this group, they were people of "towering achievement but modest demeanor."<sup>14</sup> Their character traits include duty — to nation, to Church, to job. Institutional commitment was very high — to marriage and to employers, and respect for institutional authority was also very strong. Their leadership and decision-making style tended toward paternalism and control, which has shaped this generation's approach to estate planning.

I turn next to my own generation, the Boomer Generation. We are sometimes known as the Woodstock Generation; Woodstock was our "coming out party." Our retirement party will be occurring steadily over the next dozen years: Boomers have been entering retirement for the last few years at the rate of 10,000 individuals per day; an average of 10,000 boomers will turn 65 every single day until 2030.<sup>15</sup> The aging of this generation will have a profound effect on our population demographics. The United States Census Bureau data indicate that in 2010, 13% of our population was over the age of 65.<sup>16</sup> By 2030 that percentage will rise to over 20%.<sup>17</sup>

This generation was shaped by 1960s turbulence, by the Vietnam War, and by tragic political events, including a presidential assassination, which contributed to their sense of identity. They learned about these events not on a radio but on a television, often with a grainy black-and-white picture. The parental model for this generation was evolving. The burgeoning institutionalization of food preparation, through both canned and frozen food, allowed women modest increases in time and autonomy. Children still knew that adults were in charge but strict obedience begins to give way to accommodation, particularly by the 1960s. Some political commentators and social commentators attribute today's highly polarized political environment to our upbringing: we choose

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<sup>13</sup> TOM BROKAW, *THE GREATEST GENERATION* 4 (Random House 1998).

<sup>14</sup> *Id.* at 11.

<sup>15</sup> See TAYLOR ET AL., *supra* note 8, at 15.

<sup>16</sup> JENNIFER M. ORTMAN ET AL., *AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES*, at 2-3 (2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

<sup>17</sup> See *id.*

sides. When we grew up, there were communists and capitalists; there were good guys and bad guys; there were winners and losers.

Institutional authority enjoyed a brief period of prominence but was utterly, and sometimes violently, rejected in the turbulence of the 1960s, and then reembraced as Boomers came to understand that institutions in a capitalistic society offered you the opportunity to make money.

Let us consider Generation X. Gen X was the first generation to grow up increasingly in two-career households. Sadly, dramatic increases in parental divorce rates are one of their defining characteristics. It's the first generation where digital technology begins to gain a foothold in the household. This kind of technological change led to the phenomenon that adults began to learn from their children. Gen Xers were also the first generation of latchkey kids, owing to the fact that many of their households were dual-income households. Latchkey kids came home, let themselves in the house, went to the fridge, got a carton of milk, then got a cookie, and sat down. And when they looked at the milk carton, what did they see? They saw a picture of a missing child.

The character traits of this generation include skepticism and suspicion of organizations, government, and authority. Their decisions rest upon a kind of functional and necessary independence and pragmatism. And having watched their parents' work-life imbalance, the role of work in relationship to life is very important for this generation.

Let us turn now to the Millennial Generation. I need to begin with an admission: I am the father of three; I am a colleague of many more; so I may have a bit of a selection bias. The Millennials are a remarkable generation, shaped by extraordinary forces. They witnessed 9/11; they helped to elect President Obama; they are the first generation of so-called digital natives; and they are the first generation to grow up in a much broader array of household structures.

While both of their parents typically worked, greater flexibility in work arrangements meant that Millennials were less likely to be latchkey kids. They have been raised by parents who are described as having "biological instincts in overdrive" leading to the moniker "helicopter parents." College deans now say that the hardest part of freshman orientation is not getting the students to stay, it's getting the parents to leave.

The character traits of Millennials include high self-esteem. We have heard the phrase that "every one of them gets a trophy," but I think it's important to point the trophy finger back at us, because it was Boomers who were giving them the trophies. They have an albatross of student loan debt, and they have higher levels of unemployment since the economic turbulence of 2008. Our retired chief economist Paul Kas-

riel once was asked, “Paul, how do you define full employment?” Paul paused and said, “That’s when both of my kids have a full-time job.”

Millennials are also described as a post-racial, post-gender generation.

So how long are these generations likely to live? Life expectancy in the United States has been increasing dramatically since 1900.<sup>18</sup> Early reductions in infant mortality, accompanied by the introduction of antibiotics in the 1930s and the 1940s, followed by improved diets and lower levels of smoking, have led to the fact that in 2016, an American female could expect to live to the age of 81, and an American male to age 76.1.<sup>19</sup> And in a fascinating comparison over the last 118 years, a 20-year-old today is more likely to have a living *grandmother* than a 20-year-old was to have a living *mother* in 1900.<sup>20</sup>

### III. FAMILY DEMOGRAPHICS

Let us turn and begin to look at some of the demographic changes resulting from these generational attributes. The first is a dramatic change in the composition of U.S. households. Married couples constituted nearly 80% of households in the 1950s, but that group has recently dipped below 50%.<sup>21</sup> The fastest growing segment in our population is unmarried, heterosexual couples, either without children or with children.<sup>22</sup> Today, 18% of adults between the ages of 18 and 29 are married;<sup>23</sup> in 1960 59% of 18 to 29 year olds were married.<sup>24</sup> It is not just Millennials who are eschewing marriage: the number of cohabiting adults who are age 50 and older has increased 75% in the last 10 years.<sup>25</sup> Men’s and women’s marital status reflect a decreasing preference for marriage. If and when men and women do marry, both men and women

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<sup>18</sup> See Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2015*, NAT’L VITAL STATISTICS REPORTS, NAT’L CTR. FOR HEALTH STATISTICS, at 45-47 (2018), [https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67\\_07-508.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_07-508.pdf).

<sup>19</sup> U.S. Dep’t Health & Human Servs., *Health, United States, 2017: With Special Feature on Mortality*, NAT’L CTR. FOR HEALTH STATISTICS, at 4 (2018), <https://www.cdc.gov/nchs/data/abus/abus17.pdf>.

<sup>20</sup> TAYLOR ET AL., *supra* note 8, at 57.

<sup>21</sup> *Historical Household Tables, Table HH-1. Households by Type: 1940 to Present*, U.S. CENSUS BUREAU (2018), <https://www.census.gov/data/tables/time-series/demo/families/households.html> (last visited June 18, 2019).

<sup>22</sup> See Daphne Lofquist et al., *Households and Families: 2010*, U.S. CENSUS BUREAU, at 5, tbl. 2 (Apr. 2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

<sup>23</sup> TAYLOR ET AL., *supra* note 8, at 113.

<sup>24</sup> *Id.*

<sup>25</sup> Anthony Cilluffo & D’Vera Cohn, *Ten Demographic Trends Shaping the U.S. and the World in 2017*, PEW RESEARCH CTR. (Apr. 27, 2017), <https://www.pewresearch.org/fact-tank/2017/04/27/10-demographic-trends-shaping-the-u-s-and-the-world-in-2017/> (last visited June 18, 2019).

are usually older.<sup>26</sup> There is a correlation between educational level and marriage postponement,<sup>27</sup> but age at first marriage trends have been rising steadily over the last 30 or 40 years.<sup>28</sup>

Young adults today are more likely to marry someone of a different race and ethnicity,<sup>29</sup> a trend which tends to skew westward in the United States, to the western states, and particularly Hawaii, which has the highest rates of intermarriage.<sup>30</sup>

Summarizing all of this, sociologists would suggest that the paradigm of marriage is changing in fundamental ways. It's increasingly deferred or even bypassed by heterosexual couples, but embraced by same-sex couples, following recent United States Supreme Court decisions. For Traditionalists and Boomers, marriage was seen as a *cornerstone* experience: i.e., after dating, couples married. They then lived together, they had children, and finally they may have achieved some level of financial stability. But for Gen Xers and Millennials, marriage is increasingly seen as a *capstone* experience. They date, they are likely to live together, they may attain some financial security, they have children, and then marriage might follow as a capstone experience. A troubling footnote to these trends is that a teenager in the United States today has a smaller chance of being raised by both biological parents than in any other country in the world.<sup>31</sup>

These trends notwithstanding, the United States Supreme Court has continued to recognize marriage as both a basic civil right and an institution central to our human existence.<sup>32</sup> There is a growing group of sociologists and law professors, however, who regard marriage as a declining and indeed, an unimportant institution.<sup>33</sup> Even the American public is moving towards this view. In a 2010 Pew Research survey, 39%

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<sup>26</sup> *Historical Marital Status Tables, Table MS-2. Estimated Median Age at First Marriage, by Sex: 1890 to the Present*, U.S. CENSUS BUREAU (2018), <https://www.census.gov/data/tables/time-series/demo/families/marital.html> (last visited June 18, 2019).

<sup>27</sup> Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RESEARCH CTR. (Sept. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/> (last visited June 18, 2019).

<sup>28</sup> See *Historical Marital Status Tables, Table MS-2*, *supra* note 26.

<sup>29</sup> Miriam Jordan, *More Marriages Cross Race, Ethnicity Lines*, WALL ST. J., Feb. 17, 2012, <https://www.wsj.com/articles/SB10001424052970204880404577226981780914906>.

<sup>30</sup> TAYLOR ET AL., *supra* note 8, at 128.

<sup>31</sup> Kay Hymowitz et al., *Knot Yet: The Benefits and Costs of Delayed Marriage in America*, NAT'L MARRIAGE PROJECT U. VA. (2013), <http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf>.

<sup>32</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967); see also *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>33</sup> NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2009).

of Americans and 44% of Millennials said that marriage is becoming obsolete.<sup>34</sup>

This perspective has gained ground notwithstanding the extraordinary deference to and benefits of marriage legally. The United States Supreme Court cited fourteen benefits of marriage in its 2015 decision, *Obergefell v. Hodges*.<sup>35</sup> In 2004 a United States Government Accountability Office research study found that there were 1138 provisions of Federal Law that treated the relationship between two people who are married differently from any other relationship.<sup>36</sup>

#### IV. CHANGES IN FAMILY STRUCTURES

How are these generational attributes and relationship trends affecting family structures? Here is a snapshot of what a prototypical American family looked like (statistically) in the 1950s: A married, heterosexual couple with three biological children. In this case, however, it's actually not a 1950s family, it's a contemporary family whose photo appeared in a recent issue of *Costco Connection* magazine.<sup>37</sup> The husband and wife met at Costco, acquired many of the accouterments for their wedding at Costco, and celebrated their first anniversary at Costco. I must admit that I am a card-carrying Costco member. I didn't know though, in the era of internet dating apps, that couples were still meeting at the warehouse club. Most importantly, the wife is quoted in the magazine saying that she found her "Kirkland Signature brand husband at Costco."<sup>38</sup>

Notwithstanding Costco's delight with such committed customers, a married couple with three children, the 1950's most common, is actually now 7th on the list of American households.<sup>39</sup> The Census Bureau promulgated a fascinating study in 2016 based on the American Community survey.<sup>40</sup> This study identified 10,276 different household types in the United States. The most common household is a single individual; second, a married couple; third, a married couple with one child; and fourth, a married couple with two children.<sup>41</sup> Somewhere buried in the

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<sup>34</sup> See TAYLOR ET AL., *supra* note 8, at 144.

<sup>35</sup> *Obergefell*, 135 S. Ct. at 2623.

<sup>36</sup> Letter from Dayna K. Shah to Bill Frist (Jan. 23, 2004), U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT, <https://www.gao.gov/assets/100/92441.pdf>.

<sup>37</sup> Erica Evans & Jeremy Evans, *Love in Bulk*, COSTCO CONNECTION, Feb. 2018 at 110.

<sup>38</sup> *Id.*

<sup>39</sup> Nathan Yau, *Most Common Family Types in America*, FLOWINGDATA, <https://flowingdata.com/2016/07/20/modern-family-structure/> (last visited June 18, 2019).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*



data is a retired colleague of mine, Don Oomens, who was a Federal Estate Tax Return Reviewer with my Company. Don and his wife had 17 biological children. I think their family may be number 10,275.

Let us begin to consider how family structures are evolving. The Greatest Generation had traditional family structures. They usually had three children,<sup>42</sup> and if divorce occurred in traditional families, it was usually after the children were raised.<sup>43</sup> If there was a so-called *second act*, it was often by the husband. This phenomenon was one of the rationales behind the introduction of Qualified Terminable Interest Property and the QTIP Trust in 1981.<sup>44</sup> Mortality statistics indicated their husbands would generally predecease their wives, and husbands feared that their wives upon remarrying would divert family assets to the new spouse.<sup>45</sup> For the Traditionalist Generation, statistics didn't prove out the fear. For widowed women, 8% of them remarried, and it was generally eight years after the loss of their first spouse. For men, 20% remarried but they only waited four years to do so.<sup>46</sup>

For Boomers, earlier divorces have been more common. They hold more salutary views about the impact of divorce on children and there is less social stigma associated with divorce. A frequent result is remarriage and blended families. One-sixth of American children are growing up today in blended families,<sup>47</sup> and 40% of Americans have one or more step-relatives.<sup>48</sup>

The United States Supreme Court's recent decisions, *United States v. Windsor* (striking down DOMA)<sup>49</sup> and *Obergefell v. Hodges*<sup>50</sup> (guaranteeing the right to marry for same-sex couples) undergird the rapid growth of same sex marriages and the possibility of second parent adoption of children born to either spouse.

Another recent development is that of *three parent families*, where following a divorce, a second spouse can be granted parental rights in

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<sup>42</sup> Sharon E. Kirmeyer & Brady E. Hamilton, *Childbearing Differences Among Three Generations of U.S. Women*, No. 68, NCHS DATA BRIEF, at 1 (Aug. 2011), <https://www.cdc.gov/nchs/data/databriefs/db68.pdf>.

<sup>43</sup> *Breaking Down Divorce by Generation*, GOLDBERG JONES (Aug. 9, 2018), <https://www.goldbergjones-wa.com/divorce/divorce-by-generation/> (last visited June 18, 2019).

<sup>44</sup> I.R.C. § 2056 (b)(7).

<sup>45</sup> Economic Recovery Tax Act of 1981, Pub L. No. 97-34, 95 Stat. 172 (1981).

<sup>46</sup> Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21 (1994).

<sup>47</sup> Cilluffo & Cohn, *Ten Demographic Trends Shaping the U.S. and the World in 2017*, *supra* note 25.

<sup>48</sup> *A Portrait of Stepfamilies*, PEW RESEARCH CTR. SOC. & DEMOGRAPHIC TRENDS (Jan. 13, 2011), <https://www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies> (last visited June 18, 2019).

<sup>49</sup> *United States v. Windsor*, 570 U.S. 744, 745 (2013).

<sup>50</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

some states, either as a de facto parent (which is recognized in California<sup>51</sup>) or through third parent adoption, where the former spouse, the biological parent, does not need to relinquish parental rights. This structure is recognized judicially, at least in Minnesota<sup>52</sup> and the Province of Ontario.<sup>53</sup> Three (or more) parent families are recognized as an alternative in Section 613 of the Revised Uniform Parentage Act.<sup>54</sup>

Trends in artificial reproductive technology also make elective single parenting possible. There is a support group founded in New York in 1981 by a woman named Jane Mattes called Single Mothers by Choice.<sup>55</sup> Some single parents, though, are choosing to enter into co-parenting arrangements. A website founded in 2012 called Modamily helps match people interested in co-parenting, and at last count, it had over 20,000 members.<sup>56</sup> One proponent, a child psychologist, George Sachs, says, "This co-parenting process removes many of the mysteries of how your child will be raised."<sup>57</sup> Another, Jane Mattes, the founder of the website Single Mothers by Choice says, "It's really difficult to co-parent when you are madly in love with somebody. So it's more complicated when you don't have that bond."<sup>58</sup>

Striking advances in artificial reproductive technology now permit banking of reproductive material, making even posthumous reproduction possible. Storage of gametes and embryos is sometimes undertaken as a precautionary measure at the onset of disease, or in anticipation of military service, or increasingly today in connection with family planning. Utilization of reproductive material after the death of a spouse leads to the possibility of posthumous reproduction. State laws are by no

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<sup>51</sup> See CALIF. RULES OF CT. § 5.502(10) (2019).

<sup>52</sup> *La Chapelle v. Mitten*, 607 N.W.2d 151, 168 (Minn. Ct. App. 2000).

<sup>53</sup> *A.A. v. B.B.* (2007), 83 O.R. 3d 561 (Can. Ont. C.A.) (available at <https://www.canlii.org/en/on/onca/doc/2007/2007onca2/2007onca2.html>).

<sup>54</sup> UNIF. PARENTAGE ACT § 613(c) (Alternative B) (UNIF. LAW COMM'N 2017). The Uniform Act offers two versions of subsection c of section 613 for states choosing to enact it. Alternative A restricts parentage to two individuals, but Alternative B permits more than two individuals to be deemed a child's parents if it is in the best interest of the child to do so. "Alternative B is consistent with an emerging trend permitting courts to recognize more than two people as a child's parents. . . . Alternative B, however, stakes out a narrow, limited approach to the issue by erecting a high substantive hurdle before the court can reach this conclusion: a court can determine that a child has more than two legal parents only when failure to do so would cause detriment to the child." *Id.* § 613 cmt.

<sup>55</sup> Danielle Braff, *When is the Right Time to Start a Family on Your Own?*, CHI. TRIB., Mar. 26, 2016, <https://www.chicagotribune.com/lifestyles/sc-start-single-family-0329-20160331-story.html>.

<sup>56</sup> MODAMILY, <http://www.modamily.com/> (last visited June 18, 2019).

<sup>57</sup> Braff, *supra* note 55.

<sup>58</sup> *Id.*

means uniform regarding the inheritance rights of posthumous children.<sup>59</sup>

Several years ago as I was starting this research, I had a fascinating conversation with a friend. I was telling him about the research for this lecture, and he told me the following story. A friend of his who was a headmistress of a day school in the Northeast, every fall welcomed the incoming class, and met with each of the children individually to introduce herself and to welcome that child into the community. One of her common topics was “tell me a little bit about your family.” With one little girl, I will call her Suzie, she asked, “Suzie, do you have any siblings?” And Suzie said, “No, but I have five dibblings.” She thought, “What is a dibbling?” but, of course, she didn’t say this to Suzie. So later in the day, she approached Suzie’s teacher and said, “Suzie has five dibblings. What’s a dibbling?”

Here’s what a dibbling is: a donor-sibling. They are the descendants of one male genetic donor, who are related to each other by blood, either half blood or whole blood. They get together for play dates, they share birthdays, they may vacation together. This trend was noted in a *New York Times* article from 2012, about the process of discovering whether or not you have donor siblings or dibblings.<sup>60</sup>

These new family structures are enabled, in part, by extraordinary advances in artificial reproductive technology. There are presently 15 variables involved in artificial reproductive technology, including the possibility of using a hybrid egg produced by something called spindle nuclear transfer technique.<sup>61</sup> A child has been born in the United States who is genetically a descendent of three parents.<sup>62</sup>

Here are the most recent ART statistics in the United States. I have updated these statistics from Bruce Stone’s excellent materials from Heckerling several years ago. In the United States, there are over 250,000 artificial reproductive cycles each year, leading to over 65,000 live births, and over 75,000 infants.<sup>63</sup> The difference in the birth and infant statistics is the result of higher numbers of twins and triplets with these methods. There are one million embryos estimated to be in stor-

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<sup>59</sup> Note, e.g., UNIF. PROBATE CODE § 2-120(k) (UNIF. LAW COMM’N 2010).

<sup>60</sup> Tamsin Eva, *Donor Siblings, and a New Kind of Family*, N.Y. TIMES MOTHERLODE (July 1, 2012, 7:00AM) <https://parenting.blogs.nytimes.com/2012/07/01/donor-siblings-and-a-new-kind-of-family/>.

<sup>61</sup> Tina Hesman Saey, *First ‘Three-Parent Baby’ Born from Nuclear Transfer*, SCI. NEWS (Sept. 27, 2016, 6:14PM), <https://www.sciencenews.org/blog/science-ticker/first%E2%80%99three-parent-baby%E2%80%99born-nuclear-transfer>.

<sup>62</sup> *Id.*

<sup>63</sup> *Assisted Reproductive Technology (ART): ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/artdata/index.html> (citing figures for 2016 and 2017) (last visited June 18, 2019).

age in the United States,<sup>64</sup> and almost 2% of U.S. births in 2016 were the result of artificial reproductive technology.<sup>65</sup>

And, of course, where there is a new technology, there's going to be a new website and a new capitalist opportunity. There is a company in California called California Conceptions Donor Embryo Program which runs an embryo creation clinic. This company purchases genetic material from donors, from which they create embryos, and then offer these for sale to individuals for \$12,500 for three implantations, including a money back guarantee.<sup>66</sup>

This diversity of American family structures leads Paul Taylor, the author of *The Next America* to observe that "families now come in all shapes, sizes and constellations."<sup>67</sup> Let us step back and see how they array themselves in the United States. Thirty-one percent of American households are without children; 35% are traditional, heterosexual, married couples with children; and 34% are modern households.<sup>68</sup>

How will our engagement with contemporary families evolve to ensure that their wealth management and their wealth transfer goals will be achieved? The implications of these changes have often overwhelmed me in the last two years. Much good work is already being done in your practices and in the committees of the College. I would like to offer a few observations and pose a number of questions about the implications of these changes in the sections that follow. How will these families allocate wealth? How will their trusts evolve? What are the implications of much longer lifespans? And last, how will these families collaborate and make decisions?

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<sup>64</sup> Elissa Strauss, *The Leftover Embryo Crisis*, ELLE, Sept. 29, 2017, <https://www.elle.com/culture/a12445676/the-leftover-embryo-crisis/>.

<sup>65</sup> Of the 3,941,109 babies born in 2016, 76,930 were born as a result of ART. See Nicholas Bakalar, *U.S. Fertility Rate Reaches a Record Low*, N.Y. TIMES, July 3, 2017, <https://www.nytimes.com/2017/07/03/health/united-states-fertility-rate.html>; *Assisted Reproductive Technology (ART) Data: National Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://nccd.cdc.gov/drh\\_art/rdPage.aspx?rdReport=DRH\\_ART.ClinicInfo&rdRequestForward=True&ClinicId=9999&ShowNational=1](https://nccd.cdc.gov/drh_art/rdPage.aspx?rdReport=DRH_ART.ClinicInfo&rdRequestForward=True&ClinicId=9999&ShowNational=1) (last visited June 18, 2019).

<sup>66</sup> See *California Conceptions Donor Embryo Program*, CAL. IVF FERTILITY CTR., <http://www.californiaconceptions.com> (last visited June 18, 2019).

<sup>67</sup> TAYLOR ET AL., *supra* note 8, at 156.

<sup>68</sup> See *America's Families and Living Arrangements: 2017, Table F1. Family Households, By Type, Age Of Own Children, Age Of Family Members, And Age Of Householder: 2017*, U.S. CENSUS BUREAU (2017) (available through the link at <https://www.census.gov/data/tables/2017/demo/families/cps-2017.html> (last visited June 18, 2019)).

## V. WEALTH ALLOCATION FOR CONTEMPORARY FAMILIES

Let us explore the first question by considering an even more basic one, the haves and the have-nots of estate planning: the testate and the intestate in the United States. There have been numerous studies in the United States, from Consumer Reports to academic studies, which generally find intestacy levels in the 50% to 70% range.<sup>69</sup> An academic study conducted in 2009 by Stanford law professor, Alyssa DiRusso, surveyed 324 respondents across 45 states, finding that 68% of them had no will, about 20% of them had a will drafted by counsel, 11% practiced self-help and 1% didn't even know.<sup>70</sup>

A more comprehensive review has been done in a longitudinal study at the University of Michigan.<sup>71</sup> Begun in 1990 under the auspices of the National Institute on Aging and the Social Security Administration, it is called the Health and Retirement Study ("HRS"). Every two years HRS surveys 20,000 Americans ages 50 and older on a wide range of issues relating to their health, their income, their living circumstances, and their production of and consumption of wealth in retirement.<sup>72</sup> Participants span a broad range of attributes socioeconomically, geographically and racially. One of the issues they survey is intestacy.

In general, HRS finds that 42% of their respondents have no will at the time they are surveyed,<sup>73</sup> and 38% will die without an estate plan in place.<sup>74</sup> These are lower levels of intestacy than generally found (likely due to the inverse correlation between age and intestacy) but there is a striking correlation between three attributes and substantially higher levels of intestacy. First, families with stepchildren: 49% of these respondents do not have a will.<sup>75</sup> Second, in families where there has been a breakdown in a relationship with an adult child — an emotional cutoff for at least a period of a year — 58% of these individuals do not have a will.<sup>76</sup> And last, sadly, among divorced respondents, almost two-thirds

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<sup>69</sup> A 2016 Gallup poll found a general intestacy rate in the United States of 56%. See Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP, May 18, 2016, <https://news.gallup.com/poll/191651/majority-not.aspx>.

<sup>70</sup> Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41-42 (2009).

<sup>71</sup> See U. Mich. Inst. for Soc. Res., *The Health & Retirement Study, Aging in the 21st Century: Challenges and Opportunities for Americans* (2017), <http://hrsparticipants.isr.umich.edu/sitedocs/databook/inc/pdf/HRS-Aging-in-the-21st-Century.pdf> [hereinafter *Aging in the 21st Century*].

<sup>72</sup> *Id.* at 10.

<sup>73</sup> Marco Francesconi et al., *Unequal Bequests* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 21692, 2015), <https://www.nber.org/papers/w21692.pdf>.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.* at 3-4.

do not have wills.<sup>77</sup> As we raise questions about the need for sophisticated estate planning in an era of very high transfer tax exemptions, I think there's an opportunity to build bridges with the matrimonial bar in addressing the estate planning needs of this latter group of clients. The other two are going to require some sensitivity and creativity. I will talk about that in a moment.

Why is it difficult for these individuals, those with step families, families with emotional cutoff, and divorced individuals to undertake estate planning? For divorced individuals, I suspect that many may be war-weary following the completion of a divorce. Another reason is more foundational: I think it is harder for these individuals to answer estate planning's fundamental questions. First, who will inherit?; second, how much?; third, when should family members receive their inheritance?; fourth, should it be left outright or in trust?; and fifth, who will step into our shoes? These are weighty questions for every client, but I believe they are more challenging for the individuals with higher intestacy levels . . . and for contemporary families.

Another issue arises in considering wealth allocation for contemporary families: will they leave their wealth equally among their descendants? Economists have been intrigued for years by the issue of wealth allocation, and they are puzzled by the fact that families tend to allocate wealth equally among children. They have developed a number of economic theories to rationalize their expectation that individuals would not generally leave wealth equally among collateral descendants.<sup>78</sup> The first is called the *altruist* model which suggests that parents want to leave wealth in a way that equals things out among children of different means.<sup>79</sup> The second, called the *exchange* model indicates that parents would leave wealth to compensate those who have cared for them — wealth in exchange for services.<sup>80</sup> And the third, the *evolutionary* model, implies that parents will leave wealth to children who are likely to beget grandchildren — funding for the production of heirs, so to speak.<sup>81</sup>

Some academic researchers, though, attribute equality in wealth allocation to a different phenomenon. They say that attorneys are fearful about unequal distributions, and discourage them because of the risk of litigation.<sup>82</sup>

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<sup>77</sup> *Id.* at 10.

<sup>78</sup> *See id.* at 5.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 6.

<sup>82</sup> *Id.* at 7.

Fortunately, mother knows best. Ninety-two percent of American mothers, when surveyed, respond by saying that they intend to leave their wealth equally to their children.<sup>83</sup>

Questions about wealth allocation in the United States are possible, indeed, because of a central tenet of American law — *freedom of disposition*. Our clients are free to allocate their wealth in any way they wish, subject to limited public policy restraints. Immigrants to the United States may find this freedom a bit puzzling, even discomforting. Some come to appreciate this freedom. Others may hew back to the country of their origin, and its cultural, legal or religious dictates regarding the disposition of wealth. The increasing diversity of our population presents an opportunity to develop an understanding of different systems of wealth allocation, facilitating representation of a more diverse array of clients.

Let me return now to the family with which I began today's presentation. What I didn't discuss previously was the compression in age gaps between the members of this family. The father, the Traditionalist, is 15 years older than his Boomer spouse, and she is only about 15 years older than her stepchildren, the Gen Xers, and they are roughly 15 years older than their half siblings, the Millennials descended from the second marriage.

The wife is concerned in the planning process about the traditional approach of deferring the children's inheritance until she has died — the life estate/remainder construct. She fears that her stepchildren will see her as an impediment to their inheritance, and they will frequently be renting the movie, *Throw Momma from the Train* on Netflix. The plan that arose out of many discussions with this couple combined lifetime gifts — accelerating the children's inheritance — complemented by testamentary transfers to provide for the wife and the grandchildren, thus rejecting the traditional life estate/remainder approach to wealth transfer. A critical element of this plan was the conversation between the parents and children about the estate plan: the children were advised that their lifetime transfers would constitute their entire inheritance, so they did not have to await their stepmother's passing.

Let us consider the role of family dialogue in the estate planning process. The dispositions of wealth by the Greatest Generation were generally not accompanied by discussions about wealth and wealth transfer. These were things that families didn't talk about. Contemporary and Boomer families, though, need and want to discuss these issues, but they need help in the process. They do not have a model to follow,

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<sup>83</sup> Audrey Light & Kathleen McGarry, *Why Parents Play Favorites: Explanations for Unequal Bequests* 3 (Nat'l Bureau of Econ. Res., Working Paper No. 9745, 2003), <https://www.nber.org/papers/w9745.pdf>.

and they can benefit from our counsel about how to have these kinds of conversations.

The plan that we just considered for one wealthy, blended American family raises a host of issues that I think will have general utility in planning for contemporary issues: from wealth sufficiency to the advisability of working together to maintain a shared asset, such as this family's cottage. Issues this family faced and their advisors' approach suggest an evolution is underway in our approach to both estate planning and trust management. What is this new approach looking like?

Let us turn first to estate planning. In an era of dramatically increased transfer tax exemptions, our focus may be less centered on transfer taxes and more oriented to family goals (accomplished in a tax efficient matter). The planning process is becoming less paternalistic and colloquial, and evolving into one that is more engaging and adaptable to family composition; one that is less narrow culturally to one that is more cognizant of diverse cultural perspectives; and finally one that adds to its perspective on the balance sheet an enlarged understanding of each family's total wealth.

Fiduciaries are encountering a similar paradigm shift where a focus on unchangeable grantor intent may be moving toward expressions of intent that are more aspirational and flexible.

#### VI. ISSUES IN THE DESIGN OF TRUSTS FOR CONTEMPORARY FAMILIES

I would like to turn now to the design of trusts themselves. It's axiomatic to this group that trusts prescribe the ways in which financial wealth will be managed for beneficiaries by codifying grantor intent in a trust agreement, one which is interpreted within its own four corners. Within those corners, there has often been a divide between grantor intent and beneficiary expectations. The divide which trusts must navigate has always been large, but I would suggest that today it's even larger owing to the differences in generational attributes of today's grantors, Traditionalists and Boomers, and the attributes of their beneficiaries, Gen Xers and Millennials. Changes in marital practices and family structures may also accentuate these differences. The good news is that the divide is less constrained by the impact of transfer taxes.

Let us consider the reasons why trusts exist and how these find expression in the trust agreement. Those of us who serve as in-house fiduciary or trust counsel review a great number of trust agreements, but rarely do we see trusts that *explicitly* state their purpose. Rather we infer that purpose by reference to various provisions relating to the four basic elements of a trust: its custody, administration, management, and distribution functions. That inference often leads to predictable conclusions:



e.g., a trust which mandates income distributions to a spouse is likely to be a QTIP Trust under Internal Revenue Code Section 2056 (b)(7), or a trust with Crummey withdrawal provisions is probably an irrevocable life insurance trust, complying with Code Section 2514(e). More troubling may be the inference that a trust with ascertainable discretionary standards (such as *health, education, maintenance and support*) implies that the grantor intended only modest benefits for her beneficiaries.

On a deeper level, what if grantors were encouraged and equipped to communicate to both their fiduciaries and their beneficiaries about why they entrusted their financial capital to the trustees and for their beneficiaries? That communication might take the form of something we call a Statement of Intent. Such a Statement can assist fiduciaries with the challenges of mediating the divide between grantor intent and beneficiaries' expectations. That divide is sometimes substantial enough that it leads to attempts to terminate a trust and, of course, it leads to more routine conflicts in the administration of trusts.

The early termination of a trust may be permissible as long as it doesn't run afoul of a trust's *material purpose*. This concept harkens back to an 1889 Massachusetts case which laid the foundation for the Claflin doctrine.<sup>84</sup> That doctrine has found ample expression in the provisions of the Uniform Trust Code, where a number of actions require a fiduciary to elucidate a trust's material purpose.<sup>85</sup> What might be gained if a trust's material purpose were less a matter of inference and one more of explicit expression?

This is the concept behind a Statement of Intent, and such a Statement would be directed to two audiences. First, the trustee. For a trustee, a Statement of Intent is neither an external letter of wishes nor internal precatory language. Rather it is language within the trust document itself which expresses the grantor's unique personal rationale for that trust's purpose. It also addresses the grantor's views about the life span of the trust and may speak to the fiduciary in its exercise of various discretionary powers.

In a period where fiduciary responsibility is being more widely allocated, there is often more than one fiduciary. Among them are trust protectors who often hold latent powers whose exercise may lie decades in the future; what will guide them in the exercise of those powers? I believe that a Statement of Intent could be an excellent source of guidance.

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<sup>84</sup> Claflin v. Claflin, 20 N.E. 454, 455-56 (Mass. 1889).

<sup>85</sup> See, e.g., UNIF. TRUST CODE § 111 (UNIF. LAW COMM'N 2000) (Non-Judicial Settlement Agreements), § 411 (Modification or Termination by Consent), § 412 (Modification or Termination Because of Unanticipated Circumstances).

The second and perhaps more important audience is the trust beneficiaries themselves. It's easy to forget that trusts are a form of communication and, indeed, often the last communication from a grantor. How many times have we seen beneficiaries thumbing through a trust agreement looking for something? The cynic in us would say we know exactly what they are looking for: They are looking for their name and a dollar sign after it. I think some of them are looking for something more elusive. They are looking to see whether or not the grantor said something to them. We must remember that there are no two-way conversations at the graveside.

A Statement of Intent addressed to beneficiaries is neither an ethical will (that's something outside the trust document that conveys family values) nor is it a family mission statement. Rather a Statement of Intent speaks to why family wealth is held in trust, providing insights about family values, and expressing hopes for the beneficiaries. We, of course, cannot author these but we can encourage our clients to do so. A good resource is a recent article in *Trusts and Estates* magazine by Raymond Odom, "Statements of Wealth Transfer Intent" which discusses Statements of Intent and offers guidance on their content and preparation.<sup>86</sup>

Statements of Intent are especially important in this era of perpetual trusts, which is made possible, of course, by the widespread repeal of the rule against perpetuities, recently refueled by the doubling of gift and GST tax exemptions. Perpetual trusts will "speak" to multiple generations of beneficiaries, many of whom will never have met their grantor. That audience of beneficiaries will grow ever larger.

We began a study in 2011 looking at asset growth in trust portfolios, trust design and distribution history, taxation of trust earnings and last, family growth.<sup>87</sup> Several colleagues who participated in formulating the study are in the audience today. We focused on family growth by looking at the total fertility rate in the United States. By the fifth generation in a typical American family, their perpetual trust would have 28 living beneficiaries.<sup>88</sup> And if the trust were to last as long as one of our clients hoped, (a dynasty trust he established in the late 1990s, intended to last 600 years, which in many respects seems unimaginable) in 600 years, the 19th generation of this family would give birth to 524,288 benefi-

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<sup>86</sup> Raymond C. Odom, *Statements of Wealth Transfer Intent*, 151 Tr. & Est., May 2012, at 56-62.

<sup>87</sup> R. Hugh Magill, *Long-Term Trust Design: Drafting for the Long Haul*, N. Tr. Co., [http://www-ac.northerntrust.com/content//media/attachment/data/brochure/1205/document/Professional\\_Advisor\\_Forum\\_Outline\\_050212.pdf](http://www-ac.northerntrust.com/content//media/attachment/data/brochure/1205/document/Professional_Advisor_Forum_Outline_050212.pdf) (May 2, 2012).

<sup>88</sup> *Id.* at 5.

ciaries.<sup>89</sup> That trust will be functioning more like a pension plan or a small, private social security system.

Trusts designed to *run past the rule* will have to have a very thoughtful set of beneficial interests: from income and discretionary principal distributions, to withdrawal rights, to powers of appointment, the “bells and whistles” of a trust which are vitally important to all beneficiaries.

Among these are discretionary distributions, the standards for which are, of course, the heart of a trust. These standards span a continuum, from the very narrow (such as *emergencies*) to the very broad (such as *pleasure*). The distinction between ascertainable and non-ascertainable standards has fulfilled an important purpose in insulating trustee/beneficiaries from the risk of estate tax inclusion, but at what cost? Informal surveys that we have conducted with estate planning attorneys would indicate that there is a wider use of ascertainable standards than what is necessary for tax purposes.

Fiduciaries who must cope with new circumstances, new family structures, many of which grantors could not anticipate, welcome broader discretionary standards, and the greater flexibility they allow in achieving the purposes of the trust.

Let me offer a final observation on substantive trust design concerning spray or sprinkle trusts. I believe that these trusts have limited utility for contemporary families. We all understand their advantages: they permit unequal but equitable distributions; they offer efficiencies in the comingling of assets; they are very useful for minor beneficiaries of the same degree. But they present fiduciaries with multiple challenges. One of these is that of competing fiduciary duties, such as the duty of confidentiality as to each beneficiary and the duty to provide information to all beneficiaries. Spray trusts can also present insurmountable difficulties in building a trust portfolio which is well suited to each beneficiary's unique risk tolerance and marginal tax rate. I have a simple rule of thumb about spray trusts: if beneficiaries can't live together in the same house, they shouldn't live together in the same trust.

We all know that there is a wide range of general trust provisions which are often based upon standard form language. Several of these provisions could benefit from reevaluation when drafting trusts for modern families. Let me just highlight one or two. First, the administration of a trust during the period when a grantor becomes disabled: Some would say it is the most difficult period in a trust's administration. Management of a trust during that phase is often one where dependents seem to incarnate themselves spontaneously, raising the issue of how to determine whether or not these newcomers are really dependents. Does

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<sup>89</sup> *Id.*

the trust agreement allow the trustee the latitude to either recognize them or exclude them in a way that is consistent with the reshaping of the American family and its relationships? Is the standard discretionary language aligned with each grantor's unique intent regarding her family and its support?

Another area for reconsideration is that of trust investments. The Prudent Investor Act (which was promulgated in 1994) could not possibly anticipate developments in socially responsible investing; but beneficiaries, particularly Millennials, are increasingly interested in and strongly devoted to the ethical aspects of investing, and they expect their trustees to follow suit.<sup>90</sup> Socially responsible investing is a complex issue for fiduciaries, but trusts for younger generations of beneficiaries will do well to address this issue.

Let me close this topic with some imagery about the role of trustees. In simpler times, the trustee's role seemed relatively straightforward. Grantor intent was expressed in a trust agreement which endowed the trustee with a set of fiduciary responsibilities. These responsibilities were to be exercised for two sets of beneficiaries to whom the trustee owed duties: the current and the remainder beneficiaries. It seems simple, but so much has changed.

Today fiduciary responsibility is being reallocated broadly pursuant to statutes such as administrative or directed trustee statutes, the most recent of which was promulgated by the Uniform Law Commission.<sup>91</sup> There is an increasing array of statutory powers, including new discretionary powers, which trustees may exercise in order to adapt a trust to wide ranging and changing circumstances. Trust documents now often grant trustees broad powers to fundamentally alter much of a trust's original design. The fiduciary's domicile looks suspiciously like a mystical pentagram. Fortunately, it's only a hexagram: there are three points of fiduciary obligation (to the grantor and to current and remainder beneficiaries) and three sources of fiduciary authority (emanating from the trust agreement and trust statutes). The complexity of this alignment is much needed as trustees navigate a period of vast demographic change.

## VII. LONGEVITY TRENDS

This more complex fiduciary landscape arches over what seems to be an inexorable trend of increasing life expectancies of both grantors

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<sup>90</sup> Adam Shell, *Millennial 401(k)s: A Peek Inside Their "Socially Responsible" Investments*, USA TODAY, May 11, 2018, <https://www.usatoday.com/story/money/2018/05/11/millennials-socially-responsible-investing/580434002/>.

<sup>91</sup> UNIF. DIRECTED TRUST ACT (UNIF. LAW COMM'N 2017).

and their beneficiaries. The upward trend in life expectancy presents extraordinary challenges. First is how and by whom will our elderly be cared for. Throughout history, elders have been cared for by younger relatives, in intra-generational family systems. A growing challenge globally is that there are not enough younger family members who can either provide that care directly or subsidize it through transfer payments to government systems that finance the costs of elder care. The ratio of younger children to older people globally has been decreasing steadily since the 1960s.<sup>92</sup> This phenomenon is the result of very low levels of reproduction in Western Europe, Japan, and especially China, with its disastrous one-child policy. In China, this has led to a phenomenon called an inverted family tree - four grandparents, two parents, and one child. The phenomenon is so severe that Chinese parents are now allowed to take legal action against children if they fail to maintain contact or send money.<sup>93</sup> The need for elder care will be exacerbated by a rising incidence of dementia, which sadly accompanies longer lifespans.

An intriguing aspect of this phenomenon of elder care is the difference in cultural perspectives about who should be responsible for the elderly: the elderly themselves; their families; or the government. There are dramatic differences among countries and cultures. In Pakistan, for example, 77% of respondents believe that elder care is a family responsibility.<sup>94</sup> In South Korea, on the other hand, 53% say elders should take care of themselves.<sup>95</sup> In Russia, 63% expect the government to fulfill this responsibility.<sup>96</sup> In the United States, 46% say the elders themselves should be responsible for their own wellbeing, 28% say families and 24% say government.<sup>97</sup>

We have been fortunate in the United States that the total fertility ratio, while significantly lower than its peak in the late 1950s, is holding close to the replacement level.<sup>98</sup> Only in the last couple of years has the rate dipped below 2 to about 1.8. It's important to note, though, that these favorable reproduction data in the United States are driven signif-

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<sup>92</sup> *World Population Prospects: The 2010 Revision, Volume I: Comprehensive Tables* (2011), UNITED NATIONS DEP'T ECON. & SOC. AFFAIRS (POPULATION DIV.), [https://www.un.org/en/development/desa/population/publications/pdf/trends/WPP2010/WPP2010\\_Volume-I\\_Comprehensive-Tables.pdf](https://www.un.org/en/development/desa/population/publications/pdf/trends/WPP2010/WPP2010_Volume-I_Comprehensive-Tables.pdf).

<sup>93</sup> TAYLOR ET AL., *supra* note 8, at 83.

<sup>94</sup> Rakesh Kochar et al., *Attitudes About Aging: A Global Perspective*, PEW RESEARCH CTR., at 20 (2014), <https://www.pewresearch.org/wp-content/uploads/sites/2/2014/01/Pew-Research-Center-Global-Aging-Report-FINAL-January-30-20141.pdf>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Gretchen Livingston, *Is U.S. Fertility at an All-Time Low? It Depends*, PEW RESEARCH CTR. (Jan. 18, 2018), <https://www.pewresearch.org/fact-tank/2018/01/18/is-u-s-fertility-at-an-all-time-low-it-depends/> (last visited June 18, 2019).

icantly by two phenomena: immigration and immigrant reproduction. At current rates, 88% of United States population growth through 2065 will be driven by immigration and immigrant reproduction.<sup>99</sup>

Another way to look at this phenomenon of the relationship of elderly to other members of society is through the lens of dependency ratios, which show the balance of older individuals (ages 65 and older) to younger and middle-aged adults (ages 15-64), and the balance of children (ages 0-14) to younger and middle-aged adults. Old-age dependency ratios have been rising steadily since the 1950s, while child dependency ratios have been in decline.<sup>100</sup>

These statistics do not bode well for elder care in the United States, but there may be a solution: technology entrepreneur and artificial intelligence researcher Martine Rothblatt says, "Grandma and Grandpa need and deserve an attentive caring, interesting person with whom to interact. The only such person who can be summoned into existence to meet this demand are *manufactured software persons with robotic bodies, empathetic, autonomous robots with a physicality that mimics a flesh and blood person.*"<sup>101</sup> While I hope to age gracefully, I don't relish the notion of being cared for by a robot.

There are some difficult implications in these trends for Boomers and their children. First, the economic and employment challenges of the last ten years have brought many Millennials back to the nest. Millennials, though, will have more than ample opportunity to return the favor as their parents retire and rely upon Social Security and Medicare, the costs of which will increasingly be borne by the younger generation. Third, due to increasing lifespans and inadequate retirement savings, Boomers will be living out that old bumper sticker that says, "I am spending my children's inheritance." And fourth, owing to the widespread conversion of defined benefit pension plans to defined contribution plans, Millennials will have to fund their own retirements. And last, if they are fortunate to inherit something from their parents, there is a decent chance that a good portion of it will be income in respect of a decedent.

Before Millennials receive these inheritances though, they will have to see their parents through the difficulties near the end of their lives. We

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<sup>99</sup> *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RESEARCH CTR. (Sept. 28, 2015), <https://www.pewhispanic.org/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/> (last visited June 18, 2019).

<sup>100</sup> *World Population Prospects: The 2012 Revision, Highlights and Advance Tables* (2013), UNITED NATIONS DEP'T ECON. & SOC. AFFAIRS (POPULATION DIV.) at 20, 30-32, [https://population.un.org/wpp/Publications/Files/WPP2012\\_HIGHLIGHTS.pdf](https://population.un.org/wpp/Publications/Files/WPP2012_HIGHLIGHTS.pdf).

<sup>101</sup> MARTINE ROTHBLATT, *VIRTUALLY HUMAN: THE PROMISE—AND THE PERIL—OF DIGITAL IMMORTALITY* 67 (2014).

know that there's too often inconsistency between what the elderly wish in those last chapters of life and what actually transpires. We also know about the importance of advance directives and the critical role they play in reducing that inconsistency. As lawyers, we see the conflict that can arise in families who must work through these issues. There is little research on this kind of intra-family conflict, but what there is suggests that a substantial portion of these families will be drawn into sustained interpersonal conflict. Why is this?

The first reason, I think, is probably obvious. There is often a lack of discussion about these issues in families. These are very difficult issues to discuss, and such a discussion may be compounded by the increasing complexity of contemporary family structures, as well as the natural evolution of any family: we raise children to be independent; they leave the nest; they may migrate to different states; they marry, enlarging the family; they may leave a faith tradition or join another faith tradition. End of life issues often bring family members crashing back together to discuss and decide these very weighty issues, too often without guidance and without the benefit of prior discussion.

There is, though, a little welcome news for many of us: there is a correlation between education level and cognition. For all of us who are lawyers and all who hold advanced degrees, the good news is that the more education you have the less cognitive decline you will experience throughout all stages of life.<sup>102</sup>

We have been exploring difficult topics and need to lighten it up just a little bit. So, let us talk about mortality. According to the Psalmist, "the length of our days is threescore years or perhaps, threescore years and ten or perhaps, fourscore."<sup>103</sup> The person known to have lived the longest in recent history was a supercentenarian named Jeanne Calment.<sup>104</sup> She died in France in 1997 at the age of 122.<sup>105</sup>

There is a group of Americans who are not interested in mortality; rather they are interested in overcoming it. Let me group them into four categories. I call them *evangelists*, *optimists*, *pessimists* and *realists*. Who are they? The *evangelists* are the so-called transhumanists, the *optimists* are the immortalists, the *pessimists* see the need for cryopreservation, and the *realists* are biologists and medical doctors.

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<sup>102</sup> *Aging in the 21st Century*, *supra* note 71, at 42.

<sup>103</sup> *Psalm* 90:10 (King James).

<sup>104</sup> Carl Zimmer, *What's the Longest Humans Can Live? 115 Years, New Study Says*, N.Y. TIMES, Oct. 5, 2016, <https://www.nytimes.com/2016/10/06/science/maximum-life-span-study.html>.

<sup>105</sup> *Id.*

One of the evangelists, transhumanist and U.S. presidential candidate Zoltan Istvan, and his friends are driving their Immortality Bus around the country. Here is a quote from Zoltan himself:

I am hoping that my Immortality Bus will become an important symbol in the growing longevity movement around the world. It will be my way of challenging the public's apathetic stance on whether dying is good or not. By engaging people with a provocative, drivable giant coffin, debate is sure to occur across the U.S. and hopefully around the world. The next great civil rights debate will be on transhumanism.<sup>106</sup>

Let me turn to the immortalists. They are a different breed. They are highly intelligent, they have deep convictions, and many have extraordinary wealth. Here are several observations from immortalists. Martine Rothblatt, the Founder of Sirius XM, CEO and Chairwoman of United Therapeutics says, "Clearly, it is possible through technology to make death optional."<sup>107</sup> Aram Sabeti, a technology guru in Silicon Valley, says that "the proposition that we can live forever is obvious, it doesn't violate the laws of physics, we will achieve it."<sup>108</sup> And last, Dave Asprey, the CEO of Bulletproof, observes that "I decided I was just not going to die."<sup>109</sup>

What are the goals of this movement? One group believes that humans will overcome mortality through DNA manipulation. In this view, mortality is just a coding problem, and once we've learned how to recode DNA, we will solve biological mortality. Another group believes that humans will merge with artificial intelligence and transcend biological limitations.<sup>110</sup>

What are some of the organizations behind this? One is the National Academy of Medicine, which has instituted a project called the Grand Challenge in Healthy Longevity, with an award of \$25 million for breakthroughs in longevity research.<sup>111</sup> Another is the SENS Research Foundation.<sup>112</sup> SENS is an acronym for Strategies for Engineered Negligible Senescence. Unity Biotechnology, which is doing research on se-

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<sup>106</sup> Mark O'Connell, *600 Miles in a Coffin-Shaped Bus, Campaigning Against Death Itself*, N.Y. TIMES MAG., Feb. 9, 2017, <https://www.nytimes.com/2017/02/09/magazine/600-miles-in-a-coffin-shaped-bus-campaigning-against-death-itself.html>.

<sup>107</sup> Tad Friend, *Silicon Valley's Quest to Live Forever*, NEW YORKER, Apr. 3, 2017, <https://www.newyorker.com/magazine/2017/04/03/silicon-valleys-quest-to-live-forever>.

<sup>108</sup> Dara Horn, *The Men Who Want to Live Forever*, N.Y. TIMES, Jan. 28, 2018, <https://www.nytimes.com/2018/01/25/opinion/sunday/silicon-valley-immortality.html>.

<sup>109</sup> Friend, *supra* note 107.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*



nescence, recently raised \$116 million in capital from investors, including Jeff Bezos and Peter Thiel.<sup>113</sup> And last is Google, which launched its subsidiary, Calico, in 2013 with \$1 billion in funding.<sup>114</sup> Calico's work is closely guarded, but it's believed to be performing research on the biomarkers of aging.<sup>115</sup>

Let us turn to cryopreservation; we need some pessimism. The pessimists believe that they may run out of time before the solution to mortality is achieved and thus, they intend to have themselves cryopreserved. There are three organizations which provide these services worldwide.<sup>116</sup> Two of them are based in the United States: the Alcor Life Extension Foundation<sup>117</sup> and the Cryonics Institute.<sup>118</sup> The Alcor Foundation and the Cryonics Institute are both 501(c)(3) non-profit organizations, founded in the 1970s, each of which has about 150 patients in cryopreservation.

If you choose to be cryopreserved, you're going to want to ensure that you stay that way<sup>119</sup> and, when you come back, you have some spending money. So we are seeing a rather steady stream of cryopreservation trusts.<sup>120</sup> Allow me to share some language in these trust agreements, drawn directly from these trusts and only slightly modified to protect confidentiality. Their purposes include funding for cryopreservation and storage of *digital mind images*. A digital mind image is purported to be a comprehensive, digital replica of one's mind, which at some point in the future will be able to be downloaded into a bionic "person," who will then have the mind of that predecessor.

One such trust states that "during cryopreservation, the grantor will no longer be living but the grantor will nevertheless not be dead." Another trust would permit distributions to the grantor's Bionic Analog Version, or BAV, and this trust contemplates that if multiple BAVs of the grantor are revived, each will be entitled to discretionary distribu-

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See CRYONICS INST., <https://www.cryonics.org> (last visited June 18, 2019); ALCOR LIFE EXTENSION FOUND., <https://alcor.org/> (last visited June 18, 2019); KRIO RUS, <http://kriorus.ru/en> (last visited June 18, 2019).

<sup>117</sup> *About Alcor: Our History*, ALCOR LIFE EXTENSION FOUND., <https://alcor.org/AboutAlcor/index.html> (last visited June 18, 2019).

<sup>118</sup> *About Cryonics*, CRYONICS INST., <https://www.cryonics.org/about-us/> (last visited June 18, 2019).

<sup>119</sup> Angelique Chrisafis, *Freezer Failure Ends Couple's Hopes of Life After Death*, GUARDIAN, Mar. 16, 2006, <https://www.theguardian.com/science/2006/mar/17/france.internationalnews>.

<sup>120</sup> *The Alcor Patient Care Trusts*, ALCOR LIFE EXTENSION FOUND., <https://alcor.org/AboutAlcor/patientcaretrustfund.html> (last visited June 18, 2019).

tions, and each may live rent free in any trust property. It makes me wonder: how many BAVs can you have living in one home?

Most of these trusts are designed to terminate when the grantor is revived, and for one of these, the grantor posits that he “may be revived in this world or another world.” My company has offices around the world but we haven’t yet contemplated placing one on another planet. In yet another trust, upon revival, the grantor “will be considered to be a different legal person.” This grantor had better hope that it’s not more than 37.5 years after his initial demise or else he will become his own grandpa for GST tax purposes.

A final observation on these trusts: all of our laws (e.g., property, trust, tax, insurance) are designed for the living or the dead, but not the in-between. These trusts attempt to navigate those uncharted waters, the consequences of which are, at best, uncertain, and at worst, perilous.

Biologists and medical doctors do not share the view of immoralists. In their view, the best hope for this work and for our species is not to extend lifespans but to lengthen our years of healthy living, resulting in *improved health spans*.

Why have I taken us on this detour? Well, first, we needed a little break from some of the traditional trust and estate issues. More importantly, I think it is important to consider that estate planning, our fundamental craft, rests upon the biological fact of mortality. That fact in turn is grounded upon the theological tenets of every major world religion: we are mortal because of moral failure. In surveys of generational attributes, one intriguing statistic is the rate of religious disaffiliation. It has increased steadily across the generations, to the point where today, among Millennials it is in the 35% to 40% range.<sup>121</sup> I have the concern that not too far in the future, there will be a group of potential clients who see no need for estate planning, because they believe that they will live forever. Of course, until then, there are apps to keep you going *digitally* after you’re gone such as Twitter LivesOn<sup>122</sup> and something called DeadSocial.<sup>123</sup> Those are not on my iPhone.

#### VIII. COLLABORATION AND DECISION-MAKING FOR CONTEMPORARY FAMILIES

Given the extraordinary changes in the structure of families and the attributes of the individuals who inhabit these structures, how will today’s families come together to make decisions that every family must

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<sup>121</sup> TAYLOR ET AL., *supra* note 8, at 164.

<sup>122</sup> Will Coldwell, *Why Death is Not the End of Your Social Media Life*, GUARDIAN, Feb. 18, 2013, <https://www.theguardian.com/media/shortcuts/2013/feb/18/death-social-media-liveson-deadsocial>.

<sup>123</sup> *Id.*

make? Some of these decisions are really easy and enjoyable, such as making birthday and vacation plans (“Are we are going to Cabo or Cannes this year?”). Some are more challenging, such as those relating to the management of family foundations, shared assets, or family businesses (“Who gets to use the cottage over July 4th?” “How much money should we allocate to impact investing?” “Should we fire Junior because he’s violated our employment policy . . . for the fifth time?”). And others, such as end-of-life decisions, are the most difficult ones we will face in our lives (“Should we maintain Mother’s life support?”).

These latter decisions have always been and always will be difficult, but for many in prior generations, they were made paternalistically. Today, though, the oldest generation must overcome the culture and habits of paternalism if they want Gen Xers and Millennials to be engaged. To do so, families must engage younger family members in their decision-making and cross the generational divide which may separate family members. As counsel, fiduciaries, and advisors, we are frequently called upon to help families bridge this gap.

The dialogue surrounding family wealth today is changing. In older generations, there was often no discussion about family wealth, but there were expectations and there were reactions to it. Boomers, though, are posing thought-provoking questions about wealth (“What meaning will we derive from our wealth?” “How will our children oversee family enterprises and manage them?” “When and how should we discuss wealth with our children and educate them about its responsibilities?”). Several years ago, another lawyer and I led a panel discussion at Northwestern University’s Family Enterprise Institute, where we welcomed 100 closely-held business-owning families to a two-day symposium on a number of issues that affect family businesses, such as succession, estate planning, etc. In our presentation we wanted to explore the role that wealth played, qualitatively, in these families.

Two of the questions we posed to the older generation (who would have been Traditionalists), and their responses to those questions have always stuck with me. The first question we asked was, “at what age do you believe children should inherit the bulk of their financial wealth?” We gave them the ages of 18, 21, 25, 30 and 35. They began to vote and we were stunned that 53% of them said age 21. This was puzzling; perhaps this reflected an entrepreneurial view of wealth: capital should be transferred to the next generation of entrepreneurs to facilitate its continued investment. Ten minutes later, we posed a related question: at what age should families begin to discuss inheritance with their children? We gave them the same ages: 18, 21, etc. up to 35. They began to vote, and this time 56% said age 25. *Give them the money first and talk about it later.*

Boomers, though, are very interested in these conversations. They are facing support responsibilities; they covet advice on how to provide for elderly parents, and children, often at the same time. And in one of the most poignant issues we must address, they may become responsible for the ongoing care of a disabled adult sibling. Two generations ago, an American who was born disabled would not have a normal life expectancy. One generation ago, that individual may have lived longer, but usually lived in an institutionalized setting. Today, however, these individuals have lived lives of relative independence under the watchful care of their parents. As those parents age, how will they resolve the issue of who will provide continuing care for that child?

Modern families will also need counsel on how to allocate their financial wealth to and among a more diverse group of beneficiaries.

As the late Charlie Collier, author of *Wealth in Families*<sup>124</sup> has recognized, these issues and the family relationships they impact represent the greatest challenge for our families today. Charlie was the Senior Development Officer at Harvard University, a much sought-after family advisor who led for a number of years, with Kathy Wiseman, a wonderful postgraduate training program at Georgetown University at the Bowen Center for the Study of the Family.

Charlie is the individual whose multi-faceted concept of wealth suggests that we need to enlarge our wealth definitions beyond the balance sheet. When we discuss wealth, we usually think of only financial wealth, but in Charlie's view, families have four forms of wealth: Human capital — family members' gifts and attributes; Intellectual capital — how family members learn, relate to each other and achieve; Social capital — how families relate to their communities through volunteerism, philanthropy, or political involvement; and last, Financial capital — how will financial wealth enhance and grow the other forms of family wealth?

Each family's wealth is grounded in a unique set of values and aspirations. These find expression in various individual and shared activities and practices and, to the extent that families work together and share responsibility for those aspects of their wealth, family communications and governance become increasingly important. So how can contemporary families lay the best foundation for their work together? I would offer a five-factor approach. First, what's at stake, what kind of matter is at issue? Second, who are the members of our family; how do *we define family*? Third, who gets to be at the table? Fourth, what structures (if any, in some cases) surround our decision-making on particular issues? And fifth, where does the buck stop?

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<sup>124</sup> CHARLES W. COLLIER, *WEALTH IN FAMILIES* (3d ed. 2012).

Let me explain the metaphor of the table with a brief story. I was working with a wealthy couple, a Boomer couple, a few years ago. This family was worth \$150 million, the father and mother were in their 50s, and they had concerns about the impact of this wealth upon their Millennial children, a typical concern. We discussed their concerns and offered to work with them to develop a plan for educating their children about their wealth. To commence this process the father sent me a substantial PowerPoint presentation, a 24-page deck full of his observations about capitalism, independence, entrepreneurship, taxes, etc. I thought to myself, "I don't think the family had much to do with putting these principles together," but it was clear that both the father and mother wanted to share the insights with their children, but didn't know how to do so.

One issue which concerned them was where would they have this vital conversation. They asked, "Should we have it in your office or should we have it in our lawyer's office?" I responded with a simple question: "Where do you have the most important conversations in your family?" to which they both responded, "We have them at our dining room table." I then said, "That's where you'll have this conversation." They, indeed, went on to have that conversation (the first of many which followed) and these conversations laid the foundation for a much greater understanding of and engagement around the disposition of their wealth. What I drew from experience was the metaphor of the table at which these conversations occur.

In prior generations, the Study was the place where dad made his decisions. When Mom and Dad conferred, they may have made decisions at the Kitchen table. When the entire family discussed issues, they probably gathered around the Dining Room table. As family issues and affairs become more complex, however, families are likely to move to the Conference table, and finally they may be meeting in the Boardroom. As the family grows in size, as intergenerational participation expands, and governance and decision-making structures become more formal, the settings where families confer and make decisions must follow suit. This is necessary to ensure alignment with family goals, fairness, and conflict minimization, goals we all understand. We mustn't forget, though, that many of the most personal issues that families address should draw them back to the Dining Room and the Kitchen tables.

The discussions and dialogue around these issues is what we call *family wealth in action*, and I want to close with a story. I was fortunate to work with Charlie Collier 8 or 10 years ago, to advise a family in the midst of selling a closely held business. The father was wise to recognize that the sale of their business would be a seminal event within his fam-

ily, and he asked them to gather together around the holidays so that they could have a conversation about the impact of moving from a closely held business family to a family with liquidity and marketable assets.

Charlie and I worked to develop a plan involving a dinner with the family around their Dining Room table on the first evening, where we got acquainted and laid the foundation for a family session the next day. What occurred the next day has had a profound impact upon me. Charlie and I sat with this family in a conference room, at a U-shaped table. The father and son-in-law (who was the company's CFO) both had their laptops, as they were in the midst of negotiating the sale.

As the father and mother (nicknamed the *lion* and the *lioness* by their children) and children gathered around this table, we began by asking the father to "tell us a little bit about your family." The father began slowly to talk about his family, and as he began to share family stories, I realized that the pencils had gone down, the children were leaning in, and they were hearing important things.

An hour or so into this family storytelling the father began to speak about an aunt who had a particularly difficult life journey, and as he reflected on the challenges she had faced, he became overwhelmed and he broke down. I thought to myself, "Oh, my gosh, we have goofed up here, we have gone off the rails," but Charlie remained unruffled, saying, "We have been at this for a while, let's take a little break." So Charlie went out one door as I went out the other door. The *lioness* (whom I had met the first time at dinner the night before) beelined after me, and as she approached me, I saw that she, too, was weeping. She grabbed both of my hands and she said two things I have not forgotten: "*I have never heard these stories before,*" and "*I have never seen this side of him.*"

What was happening in that room? This family was deepening their understanding of their *family system*, and they were using an age-old technique, as aged as our race, the telling of stories, to understand where they have come from, who they are, and what they value. This "work" would lay the foundation for how their financial wealth would inform the wellbeing of their family for generations to come.

While the composition of the families we serve today is undergoing dramatic change, each family is, of course, a group of individuals: individual human beings drawn together by love (and for the families we serve, by financial wealth) addressing the issues we all face over the course of our lives. As we counsel these families, we stand beside them at the intersection of their *heritage* (their distinctive place among the generations of their family) and their *legacy* (the yearning that there might be something permanent from their labors).

As counsel, as fiduciaries, we accompany each of these families, and we guide them at this vital intersection of heritage and legacy. It is what some would call a liminal space, a threshold. What a privilege it is and honor, as Fellows of the American College of Trust and Estate Counsel, to accompany and guide families at this intersection.