Love Among the Ruins: The Ethics of Counseling Happily Married Couples

*Teresa Stanton Collett**

I. INTRODUCTION

The hypothetical couples presented by the *Seattle University Law Review*[1] challenge lawyers to think about the nature of the client-attorney relationship and the attorney's role in acknowledging or defining the client's relationship with others. Like other transactional lawyers, estate planners find themselves counseling multiple clients, many of whom demand departure from the individualistic norms inherent in the current system of lawyer regulation.[2] As illustrated by the hypothetical couples presented for consideration in this symposium, many prospective clients defy the conventional wisdom of the times exemplified by Justice Brennan's description of marriage in *Eisenstat v. Baird*.[3] Rejecting the conception of marriage as "an association of two individuals each with a separate intellectual and emotional makeup,"[4] these couples offer their shared lives as evidence of a union that transcends the individuals, not as a replacement of the individuals, but rather as their completion.[5]

Yet estate planners are acutely aware of the fact that when family disputes arise, past sacrifices of individual interests are often repudiated and compensation is sought for the losses incurred.[6] These retrospective claims for compensation are not limited to those who directly

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* Professor of Law, South Texas College affiliated with Law of Texas A&M University. I am grateful for the comments and assistance I have received from Elisa Ugarte and Professors Catherine Burnett, James Musselman, Kevin Yamamoto, and Robert Tuttle.

1. 22 SEATTLE U. L. REV. 1, app. at 14 (1998).

2. *See* Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

3. 405 U.S. 438 (1972).

4. *Id.* at 453.

5. *See* POPE JOHN PAUL II, ON THE FAMILY (FAMILIARIS CONSORTIO) para. 13 (1981); James C. Dobson, *Focus on the Family: Who We Are and What We Stand For*, FOCUS ON THE FAMILY, Aug. 1993, at 10, 11; JOSEPH D. SOLOVEITCHIK & ABRAHAM R. BESDIN, REFLECTIONS OF THE RAV 121-22 (1979) (articulating the Jewish understanding of marriage).

6. *See, e.g.*, Lovett v. Estate of Lovett, 593 A.2d 382 (N.J. Super. Ct. Ch. Div. 1991).

benefited from the sacrifice. These claims often include advisors and counselors who, it has been argued, should have dissuaded the individual from compromising his or her good for the good of another.[7] Thus, the estate planning lawyer shares some of the trial lawyer's skepticism when confronted with clients proposing to compromise seemingly important individual rights and interests without apparent personal gain.

This Article explores the professional tension experienced by lawyers when clients embrace an ideal of marriage as "the two shall become as one," in a legal system that has repudiated this understanding in favor of the "reality" of marriage as an association dedicated to the individual fulfillment of the man and woman involved.[8] Part II describes the three purposes of estate planning that define the parameters of any proposed representation. Estate planning lawyers assist clients in minimizing taxes, directing gifts to particular beneficiaries, and insuring the continuing care of loved ones. The decision to accept or reject proposed representation often turns upon whether the client's needs and desires are within these accepted purposes of estate planning.

Parts III and IV of this Article provide respective analyses of the two hypothetical fact patterns presented in this symposium. Spouses in both hypotheticals express a desire to delegate decision-making to their mate. While Professors Cahn and Tuttle explore the possibility of the stronger spouse abusing the trust inherent in the proposed delegation,[9] this Article explores the impoverished decision-making that would occur if the delegation were intended to preclude participation. Respect for clients' autonomy and their understanding of the marital relationship requires that lawyers accept the clients' sense of the proper ordering of their relationships. However, the lawyer's responsibility to provide the best legal representation possible, combined with legal constraints embodied in the law of undue influence and postmarital agreements, warrants conditioning representation upon full participation of both spouses in the planning process, regardless of any delegation of ultimate decision making authority.

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7. *See* 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE §§ 31.5, 31.7 (4th ed. 1996).

8. *See, e.g.*, MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW (1989); Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1837 (1985); Naomi Cahn and Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 SEATTLE U. L. REV. 97, 112 (1998).

9. Cahn & Tuttle, *supra* note 8, at 116-22, 131-33.

II. THE PURPOSES OF ESTATE PLANNING REPRESENTATION

Except in cases of court appointment[10] or where representation would result in violation of the law,[11] American lawyers are largely free to accept or decline representation of prospective clients for almost any reason.[12] Lawyers often consider the following factors in selecting clients: (1) the client's apparent ability to pay any fees incurred;[13] (2) the type of legal assistance needed;[14] (3) an intuitive assessment of the future client-attorney relationship;[15] (4) the likelihood that the

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10. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1983) [hereinafter MODEL RULES] *with* MODEL RULES OF PROFESSIONAL RESPONSIBILITY EC 2-29 (1980) [hereinafter MODEL CODE].

11. MODEL RULES, *supra* note 10, Rule 1.16(a); MODEL CODE, *supra* note 10, DR 2-110.

12. "A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become a client . . . ." MODEL CODE, *supra* note 10, EC 2-26. *Cf.* MODEL RULES, *supra* note 10, Rule 6.2(c) cmt.: "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant." *See also* RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 26 introductory note (Tentative Draft No. 5, 1992) *and* THE AMERICAN LAWYER'S CODE OF CONDUCT cmt. to ch. III (The Roscoe Pound—American Trial Lawyers Found., Revised Draft 1982) (stating that "[e]xcept when ordered by a court to represent a client, a lawyer has complete discretion whether to accept a particular client."). A more extensive summary of the professional regulations on this issue can be found at Charles W. Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise*, *in* THE GOOD LAWYER 214, 217 (David Luban ed., 1983).

Antidiscrimination laws may act as an additional limitation on the lawyer's freedom to accept or reject prospective clients at will. *See* Stropnicky v. Nathanson, Docket No. 91-BPA-0061, Mass. Comm. Against Discrimination (opinion rendered February 25, 1997). This opinion is discussed extensively in Teresa Stanton Collett, *Regulating Lawyers' Client Selection: Eliminating Professional Discretion or Discrimination?* (unpublished draft manuscript in author's possession). *Cf.* Robert T. Begg, *Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 300 (1993) (arguing for limitations on the discretion of lawyers to reject clients on the basis of race, national origin, gender, and sexual orientation).

13. Linda J. Ravdin, *How to Have a Successful Law Practice and a Life—61 Ideas*, 41 THE ADVOCATE (Idaho) 8 (Jan. 1998). *See also* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 68 (1990).

14. FREEDMAN, *supra* note 13, at A-1 (discussing whether the matter is within the area of practice selected by the lawyer). *See also* Ravdin, *supra* note 13, at 8.

15. Ravdin, *supra* note 13, at 9 (advising lawyers to "pay attention to your guts and turn away people who make you queasy"). *See also* Margaret Downie, *The Ins and Outs of Representation*, 33 ARIZ. ATT'Y 42 (Mar. 1997) ("Of paramount importance is trusting your own instincts. If you get negative vibes from a prospective client or find yourself empathizing with the adversary during the initial consultation, take heed."). *Id.* Stephen Ellmann builds upon this intuition in part in his concept of client selection grounded in an ethic of care. *See* Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993):

> As we will see, vindicating the ethic of care in the choice of clients entails the lawyer's taking account of at least three features of the case she is considering, the import of which will sometimes coincide but sometimes conflict. First, the lawyer will want to consider the extent of the client need, for caring lawyers will seek to respond to need when they recognize it. Second, she will want to listen to her own feelings of

lawyer will be required to use tactics that the lawyer finds offensive;[16] (5) whether the lawyer believes that the client's claim or defense should be recognized by the law;[17] or (6) whether the lawyer believes that the matter is one worth devoting time to.[18] Each of these factors is relevant in estate planning practices, and has been discussed by various commentators.[19] All of these factors can be summarized in two questions. First, what is the client asking me to do?[20] Second, who is this client asking me this?

Estate planning lawyers answer the first question in their definition of the estate planning process. They tend to understand this process as having three primary purposes: minimizing estate taxes, insuring distribution of the property to particular individuals, and caring for present or future family members. While almost no lawyer would reject any of these as legitimate purposes of estate planning, each lawyer tends to emphasize one purpose over the others based

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> care for her potential client (or lack of them), not only because her feelings can affect the quality of her work but also, and perhaps more fundamentally, because actually caring is part of honoring the ethic of care. Third, she will look to the caring, or uncaring, quality of her client and of the tasks he wishes her to perform, for helping another to act uncaringly is a blow to the values of care.

Id. at 2685.

16. FREEDMAN, *supra* note 13, at 68.

17. *Id.* at 69. *See also* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090-1109 (1988).

18. FREEDMAN, *supra* note 13, at A-2. This factor has received significant attention in the scholarly literature. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 282-88 (1988); Monroe H. Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 56 (1991). Professor Freedman expands upon his argument that lawyers are morally accountable for their selection of clients in Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111 (1995). His claim that lawyers must justify their decisions has been challenged. *See* Michael E. Tigar, *Defending*, 74 TEX. L. REV. 101 (1995).

19. *See, e.g.*, Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295 (1997) (discussing the client's apparent ability to pay any fees incurred); Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 MEM. ST. U. L. REV. 521, 528-30 (1987); Martin D. Begleiter, *Attorney Malpractice in Estate Planning—You've Got to Know When to Hold Up, When to Fold Up*, 38 U. KAN. L. REV. 193, 273-74, 280-81 (1990) (discussing the type of legal assistance needed and intuitive assessment of the future client-attorney relationship); Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 REAL PROP. PROB. & TR. J. 313 (1996) (discussing the practice of providing for the surviving spouse and adult children in trust) (belief that client's conduct ought not be recognized by the law); Symposium, *Estate Planning for Artists: Will Your Art Survive?* 21 COL.-VLA J.L. & ARTS 15 (1996) (describing volunteer program of lawyers providing estate planning services to artists and the belief that the matter is one worth devoting time to).

20. *See In re* Estate of Koch, 849 P.2d 977, 996-97 (Kan. App. 2d 1993) (commenting that the function being performed by the lawyer is one of several factors to consider when analyzing the propriety of the lawyer's conduct).

upon his or her experience, skills, and the perceived objectives and needs of the client.

A. *Estate Planning as Tax Planning*

Many lawyers believe minimizing estate taxes is the primary purpose and function of estate planning.[21] It seems self-evident that few people want the government to be a primary beneficiary of their estates, and those who do can certainly set forth such intent in their estate planning documents. Absent such an intent, most clients want to insure the passage of the greatest amount of wealth with the least amount of taxes.[22] This is accomplished in part by estate planning.[23]

Husbands and wives may transfer an unlimited amount of property to each other without incurring any federal gift or estate taxes.[24] Furthermore, as of 1998, $625,000 in property may be transferred by any individual free of federal gift and estate taxes.[25] This is known as the "unified credit deduction equivalent amount," or more simply the "credit deduction equivalent."[26] In 1998, therefore,

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21. GERRY BEYER, TEACHING MATERIALS ON ESTATE PLANNING (1995). "Since Congress enacted the modern federal estate tax in 1916, the primary focus of estate planning, and consequently estate planning courses, had been taxation." *Id.* at v. *See also* REGIS W. CAMPFIELD, ESTATE PLANNING AND DRAFTING para. 1100 (2d ed. 1997) ("Beyond that, keep in mind that there are two kinds of clients: (1) those whose motivation is solely tax planning and (2) those whose motivation is both tax planning and property management. . . . Rare is the client who does not care about tax minimization—despite saying things like, 'We're gonna spend it all.' No one really means this—except those who have little or no alternative."). *Id.*

22. Ordower, *supra* note 19, at 317.

23. I say "in part" because the wealth must be accumulated before there is any need to minimize transfer taxes.

24. I.R.C. § 2056 (1998).

25. $625,000 is the unified credit deduction equivalent amount, which is the amount an individual may pass by combined inter vivos and testamentary gifts free of federal estate and gift taxes. I.R.C. § 2010.

I.R.C. § 2010(a) and § 2505(a) provide a unified transfer tax credit of $192,800 against gift and estate taxes, which is the amount of tax that would be imposed, but for the credit, on lifetime and testamentary gifts of $600,000 based upon the tax rates in I.R.C. § 2001. I.R.C. §§ 2010(a), 2505(a). I.R.C. § 2502, for lifetime gifts, refers to the rate tables in I.R.C. § 2001. I.R.C. § 2502. Accordingly, for marital units owning combined assets less than or equal to $600,000, the death of a survivor owning all the unit's assets will not draw an estate tax. I.R.C. § 2010.

26. The Unified Credit was altered by the Taxpayer Relief Act of 1997 to shelter $1 million of taxable estate after the year 2005; it rises in seven steps, as follows, for decedents dying or gifts made in the year indicated. Because of the combination of the I.R.C. § 2011 state death tax credit, a larger amount can be sheltered at death, also as shown below, with typical significance being for marital deduction planning:

married couples with a combined estate of $625,000 or less have no need for planning to minimize federal gift and estate taxes.

If the aggregate wealth of the married couple is valued between $625,000 to $1.25 million, proper use of the individualized deduction for transfers of $625,000 or less, plus the unlimited marital deduction, allows the couple to ultimately transfer all of their property free of federal gift and estate taxes in 1998. At the death of the first spouse to die (the decedent), the estate is divided into two shares. Up to $625,000 of property is transferred either to beneficiaries other than the surviving spouse, or more often to the trustee of a "bypass" or "unified credit" trust.[27] This transfer is tax-free owing to the unified credit deduction. While the particular provisions of bypass trusts vary, such trusts often provide that all income is to be paid to the surviving spouse, and principal is to be distributed for the surviving spouse's benefit, as long as distribution is limited by an ascertainable standard.[28] In most cases, the trustee of the bypass trust can be the surviving spouse with no adverse tax consequences.[29] While such trusts give substantial protection to the interests of the surviving spouse, that protection is not the equivalent of ownership. The trust property therefore also transfers tax-free at the death of the surviving spouse. In this manner, the first $625,000 of the decedent's estate escapes federal taxation, both at the decedent's death and at the death of the surviving spouse.

	Exclusion Amount	Unified Credit Tax Credit	State Death	Total Tax Sheltered	Total Estate	S2001(c)(2) Endpoint
1998	$625,000	202,050	16,818	218,868	670,454	21,225,000
1999	650,000	211,300	17,939	229,239	698,485	21,410,000
2000 and 2001	675,000	220,550	19,304	239,854	727,174	21,595,000
2002 and 2003	700,000	229,800	20,666	250,466	755,555	21,780,000
2004	850,000	287,300	28,958	316,258	924,251	22,930,000
2005	950,000	326,300	35,367	361,667	1,038,700	23,710,000
after 2005	1,000,000	345,800	38,452	384,252	1,093,785	24,100,000

27. JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING § 2.45 (1992).

28. Ordower, *supra* note 19, at 321 (stating that "estate planning lawyers devise methods to prevent inclusion in the survivor's estate while keeping the property available for use by the survivor. The traditional 'by-pass' or 'unified credit equivalent' trust, which permits or requires the trust income to be distributed to the survivor and permits invitation of the corpus for the survivors benefit, as limited by an ascertainable standard, accomplishing this objective.").

29. *Id.*

All property remaining in the decedent's estate after the transfer of $625,000 to the by-pass trust or other beneficiaries is then transferred to the surviving spouse outright. This property passes tax-free since there is an unlimited marital deduction for any transfers of property between spouses.[30] Using this method, there is no estate tax due at the death of the first spouse, and only the property remaining in the estate of the surviving spouse at his or her death, with a value exceeding the amount of his or her unified credit deduction equivalent, is ever subject to federal estate tax.[31]

For married couples with a combined estate exceeding twice the applicable unified credit amount, there is no complete escape from federal gift and estate taxes.[32] Proper estate planning, however, can minimize taxes by arranging the timing and transfers of property.[33] This is most easily done when each spouse owns property of equal value. Individual estates of equal value eliminate the role of chance in planning since effective planning depends, in part, upon accurate predictions about which spouse will die first.[34] "Equal estates offer, without regard to the order of death, the flexibility to defer estate taxes by passing all property, other than the first [$625,000], to the survivor or to pay tax on part or all of the first-to-die's estate."[35] Typically, there is little tax advantage to transferring more than $3 million either outright to beneficiaries other than the surviving spouse, or to a bypass trust for the benefit of the surviving spouse.[36] This is because of the progressive nature of the federal gift and estate tax scheme. The larger the amount subject to taxation, the larger the percentage of tax imposed.[37] Only when the amount to be transferred to someone other than the surviving spouse exceeds $10 million are there advantages in paying the tax at the death of the first spouse to die.[38]

For those who understand estate planning as essentially tax planning, there is little to no need for these legal services when a married couple has a combined estate of $625,000 or less. Limited estate planning, requiring the use of fairly routine forms, is required

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30. I.R.C. § 2056.

31. PRICE, *supra* note 27, at § 5.9.

32. Unless, of course, they want to leave everything over $1.25 million to tax-exempt charities or the government.

33. Jeffrey N. Pennell, *Marital Deduction Planning Potpourri* (Nov. 17, 1997) SC28 ALI-ABA 1271.

34. Ordower, *supra* note 19, at 322.

35. *Id.*

36. *Id.*

37. PRICE, *supra* note 27, at § 5.9.

38. Ordower, *supra* note 19, at 322. *See also* I.R.C. § 2001(c)(2) (1998).

for estates of couples with combined assets of $625,000 to $1.25 million.[39] More elaborate planning is necessary to insure that couples owning property over $1.25 million pay the least amount of federal transfer taxes possible.

B. Estate Planning as Insuring Particular Distributions

An alternative understanding of estate planning is expressed in the opening story of a law school trusts and estates text.

> A wit in the Inns of Court once rationalized the peculiar combination of "probate, divorce and admiralty" jurisdiction in one division of the British High Court of Justice (this combination existing between 1873 and 1970) as based on "wrecks"—as he put it, "wrecks of wills, wrecks of marriages and wrecks of ships."[40]

The lawyer who specializes in probate litigation often sees such "wrecks"; estate plans that founder upon the shoals of greed and anger by various family members. Greed and anger induce people to challenge wills and trusts, not because they believe that the documents fail to express the intentions of the decedent, but because they see opportunities for financial gain or emotional satisfaction.[41]

When engaged in planning, probate litigators suggest all planning should be done in anticipation of a contest, regardless of the client's or lawyer's personal assessment of this particular family.[42] This is done by taking into account the legal assumptions and requirements regarding disposition of property. These requirements and assumptions are found in the law surrounding proper execution of documents, donative capacity, and the absence of undue influence and fraud. Wills or other estate planning documents that deviate from these

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39. By this I do not suggest that such planning should be engaged in without careful consideration of the proper approach to minimizing or eliminating taxes. *See* Robert E. O'Malley et al., *Lawyer Liability in Trusts and Estates Practice*, SC13 ALI-ABA 177 (1997) (discussing malpractice liability for failure to minimize taxes).

40. JOHN RITCHIE ET AL., DECEDENTS' ESTATES AND TRUSTS 1 (8th ed. 1993).

41. Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 427 (1997) ("Some parties to a dispute may be less concerned about property issues than about an opportunity to air grievances, to receive an apology, or to get an explanation for behavior that upsets them.").

42. *See* Steven J. Wohl, *Guidelines for Avoiding Estate Litigation*, 19 EST. PLAN. 67 (1992); Gerry W. Beyer, *Drafting in Contemplation of Will Contests*, 38 PRAC. LAW. 61 (Jan. 1992). "Any lawyer who counsels a client, negotiates on a client's behalf, or drafts a legal document for a client must do so with an actual or potential adversary in mind." Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 469 (1992).

requirements or assumptions are more likely to be successfully attacked.[43]

One assumption imbedded in the law is that people generally want the bulk of their property to go to family members. The cases describe these family members as the "natural objects of the testator's bounty."[44] While the exact scheme of disposition varies from state to state, in the absence of a will, generally the law in every state assumes that people want their property to go to their spouse and children or their descendants.[45] If someone dies leaving no spouse or descendants, then the law generally assumes the decedent would want the property to go to his or her parents,[46] and if the parents are dead, then to siblings.[47] After this point, state laws diverge sufficiently that generalizations are difficult, but every state continues to distribute property to blood relatives of the decedent in various proportions.[48] When a will or other dispositive document gives property to nonfamily

43. Jeffrey L. Crown, *!Battle Stations! Evasive, Defensive and Attack Maneuvers for Will Contests*, 23 INST. ON EST. PLAN., ¶ 600 (1989).

44. *See, e.g.*, Matter of Estate of Strozzi, 903 P.2d 852 (N.M. App. 1995); Meador v. Williams, 827 S.W.2d 706 (Ky. App. 1992); Matter of Brown's Estate, 640 P.2d 1250 (Kan. 1982).

45. Under current law, the single most common statutory provision is to give the surviving spouse a one-half share if only one child or issue of one child survives, and a one-third share if more than one child or one child and the issue of a deceased child survive. But there are variations, such as giving the surviving spouse one-half or one-third regardless of the number of children or descendants or giving the surviving spouse a child's share.

JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 71 (5th ed. 1996).

46. If there is no descendant, most states provide, as does the Uniform Probate Code, that the spouse shares with the decedent's parents, if any. If no parent survives, the spouse usually takes all to the exclusion of collateral kin, as the UPC provides, but in a number of states the spouse shares with brothers and sisters and their descendants.

Id.

47. "If the decedent is not survived by a spouse, descendant, or parent, in all jurisdictions intestate property passes to brothers and sisters and their descendants." *Id.* at 85.

48. *Id.* at 86-87.

members, it is more likely to be challenged.[49] Specifically, wills are often challenged in at least one of three ways.

The first basis for a challenge is that the decedent lacked sufficient mental capacity to direct the disposition of his or her estate. The requisite degree of mental competence varies depending upon the actions at issue:

> It is hornbook law that less mental capacity is required to execute a will than any other legal instrument. The reasons for this lower standard stem from the concept of a will as the testator's last act, and from considerations of fairness which militate against depriving elderly or infirm testators of the right to dispose of their property. Additionally a will is not the product of a bilateral transaction between putative antagonists and does not require the sharpness of mind of persons involved in a business transaction.[50]

All that is necessary for the execution of a will is that the testator or testatrix understand and recollect the persons who would be the natural objects of his or her bounty, know the nature and extent of the estate to be devised, and understand the effect of the testamentary act.[51] While all jurisdictions recognize a lower threshold of competence for wills, jurisdictions differ in the required level of competence to execute other legal documents such as trust agreements[52] and durable powers of attorney.[53]

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49. A will leaving nothing or only nominal gifts to close family members, such as a spouse of many years or children[,] is ripe for a contest action, especially if the beneficiaries are distant relatives, friends, or charities. Juries are prone in close cases to invalidate a will which disinherits the surviving spouse and children, although "[i]t is not for courts, juries, relatives, or friends to say how property should be passed by will, or to rewrite a will for a testator because they do not believe he made a wise or fair distribution of his property."

BEYER, *supra* note 21, at 530 (quoting Stephen v. Coleman, 533 S.W.2d 444, 445 (Tex. Civ. App. 1976)). *See also* WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS § 7.6 (1988) (discussing this point as the "naturalness" of a will).

50. *In re* Will of Goldberg, 153 Misc. 2d 560, 582 N.Y.S.2d 617 (N.Y. Sup. Ct. 1992).

51. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 51 (2d ed. 1953).

52. *Compare In re* Estate of ANC, 133 Misc. 2d 1043, 509 N.Y.S.2d 966 (N.Y. Sup. Ct. 1986) (requiring contractual capacity for creation of *inter vivos* trust) *with* RESTATEMENT (SECOND) OF TRUSTS § 19 (1959) (stating that "[a] person has capacity to create a trust by transferring property inter vivos in trust to the extent that he has capacity to transfer the property inter vivos free of trust.").

53. *Compare* S.D. CODIFIED LAWS § 59-2-1 (Michie 1993) (requiring contractual capacity to execute a durable power of attorney) *with* N.C. GEN. STAT. § 32A-17 (1991) (anyone who is at least 18 years old may execute a health care power of attorney if he has the capacity and understanding required to make and communicate health care decisions). *See also* RESTATEMENT (SECOND) OF AGENCY § 20 (1958) (capacity to contract is not necessary to create agency relationship; capacity to consent to delegate powers is all that is necessary). Production Credit Ass'n v.

The second basis for a challenge, arising even in cases where the testator or donor has sufficient capacity, is that the estate plan may be the product of undue influence. Claims of lack of capacity and undue influence are often coupled in litigation, since limited capacity is evidence of the susceptibility of the testator to influence.[54] In order to successfully contest a will on the basis of undue influence, the contestant must show not only that the testator was susceptible to undue influence, but that the person accused of exercising undue influence had both the opportunity and motive to unduly influence the testator, and that the will was the product of the influence.[55] If the person accused of exercising undue influence was in a fiduciary relationship with the testator, the courts often will shift the burden of proof from those who seek admission of the will to the fiduciary, requiring the fiduciary to show that the gift was not a product of undue influence.[56]

Claims of undue influence are of particular concern to the estate planning attorney in the client selection process, since several attorney malpractice cases involve claims that either the attorney unduly influenced the client, or that the attorney allowed another to unduly influence the client.[57]

A third basis for contesting wills or other estate planning documents is that the transfers may be the result of fraud. "Fraud occurs where the testator is deceived by a misrepresentation, and does that which the testator would not have done had the misrepresentation

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Kehl, 434 N.W.2d 816, 818 (Wis. 1988).

54. MCGOVERN, *supra* note 49, at § 7.3.

55. DUKEMINIER & JOHANSON, *supra* note 45, at 161. *See also* MCGOVERN, *supra* note 49, at § 7.3. Trust agreements can also be set aside if it is established that the terms are the product of undue influence. *Id.* at § 7.5, n.10 (stating that "[t]he will standard has been imposed on will-like transfers like a revocable trust."). *See also* GEORGE T. BOGERT, TRUSTS § 9 (6th ed. 1987).

56. *E.g.* Bryan v. Norton, 265 S.E.2d 282 (Ga. 1980) (finding that pastor exercised undue influence over member of his congregation); Franciscan Sisters Health Care Corp. v. Dean, 448 N.E.2d 872 (Ill. 1983) (finding that attorney exercised undue influence).

57. Haynes v. First National State Bank of New Jersey, 432 A.2d 890 (N.J. 1981). *See* William M. McGovern, Jr., *Undue Influence and Professional Responsibility*, 28 REAL PROP. PROB. & TR. J. 643, 663-68 (1994); RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 31.7 (4th ed. 1996) ("Liability claims have been based on fiduciary breaches. The potential for liability exists if the lawyer undertakes to represent conflicting interests, such as the testatrix and a beneficiary. The presumption of undue influence can result in loss of the client's designated inheritance."). For a case reflecting remarkable hubris by the lawyer see *The Florida Bar v. Betts*, 530 So. 2d 928, 929 (Fla. 1988) (disciplining lawyer for guiding comatose client's hand in signing codicil reinstating client's daughter based upon belief that client should not have excluded her).

not been made."[58] The same standard is applicable to the creation of a trust.[59]

In agreeing to represent a prospective client, the estate planning lawyer must consider whether the client is competent to engage in estate planning,[60] and whether the lawyer's relationship with others precludes representation of this individual.[61] Failure to take account of either of these factors may nullify any plan the lawyer creates for the client, and render the lawyer liable for the plan's failure. Better to investigate those factors and reject such clients at the outset.

C. Estate Planning as Caring for Loved Ones

A third way of understanding the practice of estate planning is that it involves helping clients express their care and concern for others.[62] "The task, then, is disposition, oftentimes in favor of lineal descendants, in a way that is meaningful, perhaps expressing love and affection, or a sense of fairness or justice. . . . Professor Thomas L. Shaffer once explained one aspect of client motivation as living on through your property."[63] The same author later noted, "Finally, love is the root of almost all decision-making. We tend not to give

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58. DUKEMINIER & JOHANSON, *supra* note 45, at 197.

59. BOGERT, *supra* note 55, at § 9.

60. If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer should not prepare a will or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline.

AM. COLLEGE OF TRUST AND ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROF'L CONDUCT 133 (2d ed. 1995). *See also* Vignes v. Weiskopt, 42 So. 2d 84 (Fla. 1949) (finding it proper for lawyer to prepare and supervise execution of codicil for a client who was incurably ill and in extreme pain). *But see* Rathblott v. Levin, 697 F. Supp. 817, 818 (D.N.J. 1988) (motion to dismiss will not lie where plaintiff alleges that she was damaged by attorney's breach of the duty to "firmly establish . . . testamentary capacity and free will"). PRICE, *supra* note 27, at § 1.8 ("Before proceeding with an estate planning matter the lawyer should be satisfied that the client is competent and not acting under duress or a discoverable form of undue influence.").

61. "Some conflicts are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation." AM. COLLEGE OF TRUST AND ESTATE COUNSEL, *supra* note 60, at 89.

62. *See* THOMAS L. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 24 (2d ed. 1979) ("Property is used to keep the family together at least as much as the family is used to keep the property together.").

63. CAMPFIELD, *supra* note 21, at para. 1050. *See generally* THOMAS L. SHAFFER, DEATH, PROPERTY, AND LAWYERS 80-86 (1970) (discussing survey revealing that estate planning clients are concerned about inability to care for dependents and causing grief to relatives and friends).

property to those whom we do not love (although fairly often concepts of justice and fairness get mixed into the equation)."[64]

Estate planning lawyers who subscribe to this understanding of the estate planning process may select clients, at least in part, on the basis of the client's expressed motivation for engaging in estate planning. These lawyers also may agree to represent multiple clients more quickly because of their relational understanding of the person.[65] Instead of seeing multiple clients as individuals with competing or conflicting interests, these lawyers often see the potential for harmony in family relationships and view the family itself as a potential client.[66]

D. Summary

Each of these understandings of the estate planning process highlights important aspects of any representation in this area. As Regis Campfield has noted, "Rare is the client who does not care about tax minimization."[67] Even more rare is the client who is indifferent about whether his or her dispositive wishes are successfully carried out. Ultimately, the desire to transfer property to particular people in particular amounts is a manifestation of the client's relationship with those people, and usually those that benefit are the objects of the client's love or affection. Most estate plans encompass all three purposes. By accepting representation the lawyer agrees to seek to achieve these purposes for the client.

III. TAKING THE UNITY OF MARRIAGE SERIOUSLY

Having defined what the lawyer is being asked to do, he or she must next determine who it is that is asking. In the first hypothetical,

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64. CAMPFIELD, *supra* note 21, at para. 1051.

65. *See* Shaffer, *supra* note 2, at 963 (a shorter modified version of which can be found at Thomas L. Shaffer, *The Family as a Client—Conflict or Community?*, 34 RES GESTAE 62 (1990)); Gerald Le Van, *Lawyers, Families and Feelings: Representing the Family Relationship*, 5 PROB. & PROP. 19, 20-21 (Jan./Feb. 1991); Patricia M. Batt, Comment, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319 (1992); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994).

66. *See* Shaffer, *supra* note 2, at 963; Pearce, *supra* note 65, at 1253.

67. CAMPFIELD, *supra* note 21, at para. 1100.

> Beyond that, keep in mind that there are two kinds of clients: (1) those whose motivation is solely tax planning and (2) those whose motivation is both tax planning and property management. . . . Rare is the client who does not care about tax minimization—despite saying things like, "We're gonna spend it all." No one really means this—except those who have little or no alternative.

Id.

the lawyer is asked to represent Bob and Ruth in their estate planning.[68] They are newlyweds, having been married only six weeks. Each brings substantial wealth to the marriage. Bob has assets valued at $2 million and Ruth has assets valued at $5 million. Neither have children. This is Bob's first marriage and Ruth's second. Based upon Ruth's statements, it appears that both Bob and Ruth seek estate planning advice in order to minimize estate taxes and support the expansion of Bob's business. Both of these objectives are fairly common in estate planning practice and pose no unusual questions concerning acceptance of the representation.

What is unusual, and may give the estate planner pause, is the position that Ruth takes concerning her relationship with her husband. As the hypothetical tells us, Ruth intends to defer to her husband in all things out of obedience to her understanding of Scripture. She explains that this understanding encompasses not only her duty of submission, but her husband's duty of servant leadership.[69] In her judgment, submission is both prudent and religiously required.

The hypothetical tells us that Ruth's description of the relationship is given in response to "the lawyer's uncomfortable (or sardonically amused) look." The lawyer's response to her proposed deference is, at least in part, the product of conflicting understandings of marriage. While Ruth and, hopefully, Bob seem to understand marriage as a covenant that is both permanent and mutually supportive, this is not the understanding of marriage embodied in contemporary American family law.

Today there are primarily two definitions of marriage competing for legal recognition.[70] The common law courts recognized marriage as the life-long union of one man and one woman for the purpose of procreation.[71] Blackstone defended this understanding of marriage

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68. *See* Hypothetical I, 22 SEATTLE U. L. REV. 1, app. at 14 (1998).

69. For an explanation of the husband's duty under a concept of servant leadership, see STU WEBER, TENDER WARRIOR: GOD'S INTENTION FOR A MAN (1993).

70. *See* Christopher Wolfe, *The Marriage of Your Choice*, FIRST THINGS, Feb. 1995, at 37.

71. The deceased man was a man in the decline of life, with a handsome fortune and a grown-up family of sons and daughters. With him the primary object of marriage—the procreation of children—had been long accomplished, and the secondary one—the avoiding of fornication—does not appear to have much concerned him.

Holmes v. Holmes, 1 Abb. U.S. 525, 1 Sawy. 99, 12 F. Cas. 405, 413 (C.C.D. Or., Apr. 12, 1870). *See also* Adams v. Howerton, 486 F. Supp. 1119 (D.C. Cal. 1980), *aff'd on other grounds* 673 F.2d 1036 (9th Cir. 1982) (rejecting a claim that homosexual unions should be recognized as marriages for immigration purposes).

> [T]he main justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race. Plaintiffs argue that some persons are allowed to marry and their union is given full recognition and

based on its consistency with Biblical passages describing the divine law governing marriage.[72] Subsequent commentators have defended this definition by arguing that procreation within a permanent union is necessary for the well-being of the spouses and the proper development of children.[73] They also argue that permanence and exclusivity within marriage are necessary for the good of the body politic, which requires a particular moral character of citizens if government is to be premised upon democratic principles.[74]

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constitutional protection even though the above stated justification—procreation—is not possible. They point to marriages being sanctioned between couples who are sterile because of age or physical infirmity, and between couples who make clear that they have chosen not to have children. Plaintiffs go on to claim that sanctioning such unions within the protection of legal marriage, while excluding their union, constitutes an illegal discrimination against them. In my view, if the classification of the group who may validly marry is overinclusive, it does not affect the validity of the classification. In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society's paramount goals.

Id. at 1124. *See also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974):

> [I]t is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations. The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.

Singer, 522 P.2d at 1195.

72. Blackstone wrote:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything . . . upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

William Blackstone, *Of the Rights of Persons*, *in* 1 COMMENTARIES OF THE LAWS OF ENGLAND 430 (Univ. of Chicago Press ed. 1979) (1765) (citations omitted).

73. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 79-80; Schneider, *supra* note 8, at 1820; GLENDON, *supra* note 8.

74. Reynolds v. United States, 98 U.S. 145 (1878):

> Upon it [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

In the 1960s, American courts and legislatures moved away from this understanding of marriage as convenant.[75] Lawmakers became persuaded that the common law definition of marriage was too restrictive with its emphasis on duty and permanence. Courts and legislatures began to craft a contractual model of marriage, premised upon the couple's ability to independently define the rights and duties within the marital relationship.[76] Abandoning the idea that marriage was a lifetime commitment subject to dissolution only for grave reasons,[77] lawmakers began to recognize or expand the application of no-fault and mutual-consent divorce statutes.[78] In the place of permanence, the new rules seemingly require the continuing consent of both spouses to sustain the legal recognition of any marriage. "For so long as you both shall live" was transformed into "for so long as you both shall love."[79]

Id. at 165-66. For a contemporary defense of monogamy in the context of recognizing same-sex unions as marriage, see Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

75. GLENDON, *supra* note 8, at 149.

76. *See generally* MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981). The author speaks of the "new family" as:

> [A] convenient way of referring to that group of changes that characterizes 20th century Western marriages and family behavior, such as increasing fluidity, detachability and interchangeability of family relationships. . . . The new family is a concept that represents a variety of co-existing family types.

Id. at 3-4. *See also* Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121, 150-51 (1985) ("Whereas marriage once served a variety of institutional functions, the current marriage is a vehicle for personal happiness and fulfillment. . . . [T]he traditional goal of permanence in marriage no longer represents the norm [for marriages][;] . . . the high divorce and remarriage rate reflects the personal fulfillment function of marriage."). *See, e.g.*, Gross v. Gross, 464 N.E.2d 500, 504-06 (Ohio 1984) (describing courts changing attitudes toward enforcement of prenuptial agreements regarding divorce); Posner v. Posner, 233 So. 2d 381, 385 (Fla. 1970) (holding prenuptial provisions regarding property division at divorce are enforceable). *Cf.* Schulz v. Fox, 345 P.2d 1045 (Mont. 1959) (enforcing note and mortgage given during marriage on condition that the spouse would not contest a divorce). *See* cases collected in Roberty Roy, Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation*, 53 A.L.R.4th 22 (1988).

77. GLENDON, *supra* note 8, at 149.

78. *Id.*

79. Under the most generous assessment possible, the societal impact of these changes have been mixed. The new laws have led to multiple sequential marriages and the impoverishment of many women and children after divorce. *See* Daniel D. Polsby, *Ozzie and Harriet Had It Right*, 18 HARV. J.L. & PUB. POL'Y 531 (1995); Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191 (1993); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985) (discussing the negative social and economic effects of the divorce revolution on women and children); DIANE MEDVED, THE CASE AGAINST DIVORCE (1989) (describing numerous interviews with divorced individuals who recognize the costs exacted by the breakup of their marriages); ROBERT N. BELLAH ET AL., THE GOOD SOCIETY 257-61 (1991).

Social scientists report that while many Americans support the idea of personal freedom inherent in the contemporary contractual understanding of marriage, most yearn for a return of the commitment and permanence exemplified by the covenant model of marriage.[80] In fact, most live in permanent and committed marriages.[81] In our particular case, Ruth has expressed her acceptance of the covenant understanding of marriage. More specifically she has embraced a religious conception of marriage that promises that a couple is joined together, not only by their commitment and individual capacities to give and receive love, but also by the grace of God who sustains the union.[82]

Ruth's reference to Scripture in conjunction with her statement that "she intends to defer to her husband in all things," reflects a belief that God both sustains and orders the relationship between husband and wife. In accepting and conforming to what she believes to be God's plan for marriage, she expresses both her faith in God and her faith in her husband.[83] Unlike Professors Cahn and Tuttle, who

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But see STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992) (suggesting that much of the harm to the family is caused by social and market indifference rather than marital dissolution).

80. ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 85-112 (1986). "If love and marriage are seen primarily in terms of psychological gratification, they may fail to fulfill their older social function of providing people with stable, committed relationships that tie them into the larger society." *Id.* at 85. *See also* ANDREW M. GREELEY, FAITHFUL ATTRACTION: DISCOVERING INTIMACY, LOVE AND FIDELITY IN AMERICAN MARRIAGE 240-41 (1991).

81. In 1989, two-thirds of Americans were married to their first spouse, and "a little more than four-fifths of those who are married have or have had only one spouse—the difference being those who have divorced and not remarried." GREELY, *supra* note 80, at 35.

82. "But from the beginning of creation, God made them male and female. For this reason a man shall leave his father and mother [and be joined to his wife]. And the two shall become one flesh. So they are no longer two but one flesh. Therefore what man has joined together, no human being must separate." *Mark* 10:6-9.

83. This understanding of a divine order within marriage has been addressed by numerous religious authorities. An explanation of this order that is representative of this understanding is provided by Pope Pius XI in his encyclical, Christian Marriage (*Casti Connubii*) (1930):

> Domestic society being confirmed, therefore, by this bond of love, there should flourish in it that "order of love," as St. Augustine calls it. This order includes both the primacy of the husband with regard to the wife and children, and the ready subjection of the wife and her willing obedience, which the Apostle commends in these words: "Let women be compliant to their husbands as to the Lord, because the husband is the head of the wife, as Christ is the head of the Church."
>
> This deference, however, does not deny or take away the liberty which fully belongs to the woman both in view of her dignity as a human person, and in view of her most noble office as wife and mother and companion; nor does it bid her obey her husband's every request, if not in harmony with right reason or with the dignity due to the wife; nor, in fine, does it imply that the wife should be put on a level with those persons who in law are called minors, to whom it is not customary to allow free exercise

would rely upon the lawyer to insure Bob's faithfulness,[84] Ruth relies upon God to insure their mutual faithfulness. She has chosen to submit to Bob's authority, not because Bob demands it, but because she believes that God wills it.

It is important to note that her understanding of God's will includes not only her duty to defer to her husband, but Bob's duty to exercise his authority consistent with a deep love for her. Bob has substantial duties under this understanding of Scripture. To love "as Christ loves the Church" is no standard of conduct embraced by the selfish or weak-willed. It requires selfless devotion and total willingness to sacrifice for the good of another. Ruth might well argue that if Bob proves faithless to this trust, it is God who will hold him accountable, and far more effectively than she (and certainly more effectively than her lawyer).

One of the fundamental questions posed by Ruth's expressed intentions is the extent to which people remain free to embrace this understanding of marriage when ordering their affairs within a legal system that rejects this understanding as the governing norm. Any lawyer who accepts representation consistent with her request must consciously anticipate the legal system's skepticism about the assumptions inherent in the relationship Ruth describes and craft legal

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of their rights on account of their lack of mature judgment or of their ignorance of human affairs. But it forbids that exaggerated liberty which cares not for the good of the family; it forbids that in this body which is the family the heart be separated from the head, to the great detriment of the whole body and the proximate danger of ruin. For if the man is the head, the woman is the heart; and as he occupies the chief place in ruling, so she may and ought to claim for herself the chief place of love.

Id. at 25, 27.

Marriage is the uniting of one man and one woman in covenant commitment for a lifetime. It is God's unique gift to reveal the union between Christ and His church, and to provide for the man and the woman in marriage the framework for intimate companionship, the channel for sexual expression according to biblical standards, and the means for procreation of the human race.

The husband and wife are of equal worth before God, since both are created in God's image. The marriage relationship models the way God relates to His people. A husband is to love his wife as Christ loved the church. He has the God-given responsibility to provide for, to protect, and to lead his family. A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ. She, being in the image of God as is her husband and thus equal to him, has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation.

The Baptist Faith and Message (revised by the Southern Baptist Convention, June 10, 1998) <http://www.sbcnet.org/bfm18.htm>.

84. Cahn & Tuttle, 22 Seattle U. L. Rev. 131-33 (1998).

safeguards to protect her intentions.[85] Of course, this assumes that the law would even recognize her right to delegate decision-making to her husband. If not, the lawyer's willingness to undertake the representation on Ruth's terms is largely irrelevant.

Delegation of personal and financial decision-making is recognized under statutes creating durable powers of attorney.[86] The durable power of attorney for healthcare and the financial durable power of attorney are standard tools of estate planning. These instruments allow the principal to entrust important decisions to an agent.[87] By including the language of durability required under local law, the

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85. The need for legal recognition of the more traditional understanding of marriage forms one basis for the current political movement for legislative recognition of covenant marriage. *See* Wolfe, *supra* note 70, at 37; Katherine Shaw Spaht, *Beyond Baehr: The Definition of Marriage and How to Recapture It's Meaning*, _ BYU J. PUB. LAW __ (1998) (forthcoming).

86. *See, e.g.*, ALA. CODE § 26-1-2 (1992); ALASKA STAT. §§ 13.26.332-.358 (Michie 1996); ARIZ. REV. STAT. ANN. § 14-5501 (West 1995 & Supp. 1996); ARK. CODE ANN. §§ 28-68-201 to -203 (Michie 1987); CAL. PROB. CODE §§ 4124-4130, 4150-4155 (West 1998); COLO. REV. STAT. § 15-14-501 (1997); CONN. GEN. STAT. ANN. § 45a-562 (West 1993); DEL. CODE ANN. tit. 12, §§ 4901-4905 (1995); D.C. CODE ANN. §§ 21-2081 to -2085 (1997); FLA. STAT. ANN. § 709.08 (West Supp. 1998); GA. CODE ANN. §§ 10-6-3 to -39 (Harrison 1994); HAW. REV. STAT. ANN. §§ 551-D-1 to -7 (Michie 1993); IDAHO CODE §§ 15-5-501 to -507 (Supp. 1997); 755 ILL. COMP. STAT. ANN. §§ 45/1-1 to 45/4-12 (West 1993); IND. CODE ANN. §§ 30-5-1-1 to 30-5-10-4 (Michie Supp. 1998); IOWA CODE ANN. §§ 633.705-.706 (West 1992); KAN. STAT. ANN. §§ 58-610 to -617 (1994); KY. REV. STAT. ANN. § 386.093 (Michie 1994 & Supp. 1996); LA. CIV. CODE ANN. art. 3027 (West Supp. 1994); ME. REV. STAT. ANN. tit. 18-A, §§ 5-501 to -506 (West 1998); MD. CODE ANN., EST. & TRUSTS §§ 13-601 to -603 (1991 & Supp. 1997); MASS. ANN. LAWS ch. 201B, §§ 1-7 (Law Co-op. 1990 & Supp. 1998); MICH. COMP. LAWS ANN. § 700.495 (West 1995 & Supp. 1998); MINN. STAT. ANN. §§ 523.01-.25 (West 1990 & Supp. 1998); MISS. CODE ANN. §§ 87-3-101 to -113 (Supp. 1997); MO. ANN. STAT. §§ 404.700-.735 (West 1990 & Supp. 1998); MONT. CODE ANN. §§ 72-5-501 to -502 (1997); NEB. REV. STAT. §§ 30-2664 to -2672 (1995); NEV. REV. STAT. § 111.460 (1997); N.H. REV. STAT. ANN. §§ 506:6-:7 (1983 & Supp. 1996); N.J. STAT. ANN. §§ 46:2B-8 to -19 (West 1989 & Supp. 1998); N.M. STAT. ANN. §§ 45-5-501 to -502 (Michie 1995); N.Y. GEN. OBLIG. LAW §§ 5-1501 to -1506 (McKinney Supp. 1998); N.C. GEN. STAT. §§ 32A-8 to -14 (1995); N.D. CENT. CODE §§ 30.1-30-01 to -05 (1996); OHIO REV. CODE ANN. §§ 1337.09-0.9.1 (Anderson 1993 & Supp. 1997); OKLA. STAT. ANN. tit. 58, §§ 1071-1077 (West 1995 & Supp. 1998); OR. REV. STAT. §§ 127.005-0.15 (1997); PA. STAT. ANN. tit. 20, §§ 5601-5608 (Supp. 1998); R.I. GEN. LAWS § 34-22-6.1 (1995); S.C. CODE ANN. §§ 62-5-501 to -503 (Law. Co-op. 1987 & Supp. 1997); S.D. CODIFIED LAWS ANN. §§ 59-7-2.1 to -2.4 (Michie 1993); TENN. CODE ANN. §§ 34-6-101 to -109 (1996); TEX. PROB. CODE ANN. §§ 481-506 (West Supp. 1998); UTAH CODE ANN. § 75-5-501 (1993 & Supp. 1997); VT. STAT. ANN. tit. 14, § 3051 (1989); VA. CODE ANN. §§ 11-9.1 to -9.4 (Michie 1993 & Supp. 1997); WASH. REV. CODE ANN. §§ 11.94.010-.900 (West 1998); W. VA. CODE §§ 39-4-1 to -7 (1997); WIS. STAT. ANN. § 243.07 to -.10 (West Supp. 1997); WYO. STAT. ANN. §§ 3-5-101 to -103 (Michie 1997).

87. *See* UNIF. PROBATE CODE § 5-501 to 5-505 (1997), The Prefatory. Note in this section says "The National Conference included sections 5-501 and 5-502 in Uniform Probate Code (1969) (1975) concerning powers of attorney to assist persons interested in establishing non-court regimes for the management of their affairs in the event of later incompetency or disability." *Id.*

instrument creating the power of attorney enables the agent to make decisions even after the principal becomes incapacitated.[88] As an outgrowth of the common law governing agency relationships, the holder of a durable power of attorney acts as a fiduciary for the principal.[89] However, unlike the powers of many other fiduciaries that are set out by statute,[90] in most states the powers of the holder of a durable power of attorney are primarily defined by the terms of the instrument appointing the agent.[91] Subject to only a few limitations, reason and creativity set the boundaries on these transfers of decisional authority. This is illustrated by the fact that durable powers of attorney can be used to empower an agent to decide such matters as the terms of the principal's medical care[92] or his or her place of residence.[93] With authorization, the agent under a financial durable power of attorney can transfer real and personal property,[94] claim the principal's benefits under various government programs,[95] and make gifts of the principal's property.[96] Ruth's statement that she intends to defer to her husband in all things seems consistent with the ability to invest broad powers in an agent under a durable power of attorney.

The arrangement Ruth proposes is also similar to the delegation of authority commonly made in business situations. Shareholders of a closely held corporation often delegate managerial decisions to corporate leadership.[97] Both Rule 1.13 of the Model Rules of Professional Conduct and the case law surrounding closely held

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88. "For most jurisdictions, the answer [to whether the durable power of attorney would be recognized] lay in conferring 'durability' on powers of attorney through statute (though it appears that some states have accomplished as much judicially). However they have come to recognize it, all 50 states and the district of Columbia now recognize the validity of durable financial powers of attorney." Paul L. Sturgul, *Financial Durable Powers of Attorney: A Primer*, 41 PRAC. LAW. 21, 24 (July 1995).

89. "An agent is a fiduciary with respect to matters within the scope of his agency." RESTATEMENT (SECOND) OF AGENCY § 13 (1957).

90. Randall D. Van Dolson & G. Warren Whitaker, *Gifts by Agents Under Durable Powers of Attorney*, 9 PROB. & PROP. 32 (Sept./Oct. 1995).

91. *Id.*

92. *See* Dale L. Moore, *The Durable Power of Attorney as an Alternative to the Improper Use of Conservatorship for Health-Care Decision Making*, 60 ST. JOHN'S L. REV. 631 (1986); Mark Fowler, Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985 (1984).

93. Sturgul, *supra* note 88, at 32.

94. Sturgul, *supra* note 88, at 29-30.

95. *Id.*

96. *See* Van Dolson & Whitaker, *supra* note 90.

97. *See* Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994).

corporations recognize the propriety of such an arrangement.[98] Representation of partnerships poses an even more similar case, in that under traditional partnership law there is no entity separate and independent of the partners,[99] and the actions of each partner can create binding obligations on the others.[100] Ruth's proposed arrangement also bears some similarity to common arrangements between insured and insurer, where there is a contractual agreement that any settlement of litigation will be subject to the approval of one of the parties.[101] In such cases the ultimate decision-maker is the client who has the contractual right to accept or reject settlements.[102]

In their article, *Dependency and Delegation*, Professors Cahn and Tuttle express great reluctance to recognize Ruth's general delegation of decision-making authority to her husband. They agree that the "delegation in the marital and commercial contexts appear to be indistinguishable."[103] Yet they argue that delegation in the marital context is different because the vulnerability created by the delegation

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98. *See* Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756 (Ct. App. 1993); Skarbrevik v. Cohen, England, & Whitfield, 282 Cal. Rptr. 627 (Ct. App. 1991); Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645 (Mich. Ct. App. 1981); Sturm v. Sturm, 574 N.E.2d 522 (Ohio 1991); *In re* Conduct of Brandsness, 702 P.2d 1098 (Or. 1985); *In re* Brownstein, 602 P.2d 655 (Or. 1979). *See also* Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward a Realistic Ethic*, 74 CORNELL L. REV. 466 (1989); Note, *An Expectations Approach to Client Identity*, 106 HARV. L. REV. 687 (1993).

99. Adams v. State, 189 So. 2d 354 (Ala. 1966); Ohio Casualty Ins. Co. v. Fike, 304 So. 2d 136 (Fla. App. 1974); Abbott v. Anderson, 106 N.E. 782 (Ill. 1914); McKinley v. Long, 88 N.E.2d 382 (Ind. 1949); Hughes v. Gross, 43 N.E. 1031 (Mass. 1896); Twin City Brief Printing Co. v. Review Pub. Co., 166 N.W. 413 (Minn. 1918); Byers v. Schlupe, 38 N.E. 117 (Ohio 1894); State v. Savan, 36 P.2d 594 (Ore. 1934); Martin v. Hemphill 237 S.W. 550 (Tx. Com. App. 1922). *But see* Cody v. J.A. Dodds & Sons, 110 N.W.2d 255 (Iowa 1961) (superseded by statute as stated in Carlson v. Carlson, 346 N.W.2d 525 (Iowa 1984)); Caswell v. Maplewood Garage, 149 A. 746 (N.H. 1930).

100. Ball v. Carlson, 641 P.2d 303 (Colo. App. 1981); Stratemeyer v. West, 466 N.E.2d 306 (Ill. 1984); Backowski v. Solecki, 316 N.W.2d 434 (Mich. App. 1982); Waite v. Salestrom, 294 N.W.2d 338 (Neb. 1980); Cook v. Brundidge, 533 S.W.2d 751 (Tex. 1976); Holloway v. Smith, 88 S.E.2d 909 (Va. 1955); Marszalk v. Van Volkenburg, 604 P.2d 501 (Wash. App. 1979). *See* REVISED UNIF. PARTNERSHIP sec. 301.

101. *See generally* Symposium, *The Law of Bad Faith in Contract and Insurance*, 72 TEX. L. REV. 1583 (1994); RESTATEMENT (THIRD) OF LAW GOVERNING LAW, § 215 Compensation or Direction by Third Person (proposed Final Draft No. 1, 1996).

102. *See* Smedley v. Temple Drilling Co., 782 F.2d 1357 (5th Cir. 1986).

103. Cahn & Tuttle, *supra* note 8, at 106.

is not the product of grudging negotiations[104] and it is more broad-ranging.[105]

While the first distinction is clearly correct, at least in the case of Ruth and Bob,[106] the second distinction, that of broad-ranging vulnerability, seems to be more a characteristic of marriage than a product of delegation within marriage. Professors Cahn and Tuttle concede this point, but argue that some limits should be imposed on Ruth's assumption of vulnerability. It is these dangers that Ruth avoids by maintaining her independence in decision-making. Yet if independence is the proper response to "the inherent dangers of intimacy itself," it is difficult to understand why anyone should ever enter into marriage.

The continuing viability of marriage may be explained in part by the fact that exploitation has no place in an authentic understanding of marriage. Professors Cahn and Tuttle agree. As they define it, marriage properly understood "is a special relationship in which people assume special responsibilities for each other . . . because of the commitment that grows out of a shared life. Marital intimacy requires almost unlimited dependence and trust between the spouses."[107]

The positive potential inherent in such dependence and trust is foundational to marriage as defined by various religious communities. Marriage "constitutes the most intimate of all human relationships, where the most fragile of hearts can experience the wonder of human acceptance and giving, and thereby grow as nowhere else."[108] It is "an existential commitment, a uniting of two lonely, incomplete souls to share a common destiny with its joys and sorrows. . . . It is a metaphysical fusion."[109] It reflects a "deeply personal unity, the

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104. *Id.* at 113 ("For the [business] partners, their vulnerability to one another is a necessary evil, something to be endured for the sake of the ultimate goals of the enterprise. . . . Mutual interdependence in marriage is not something to be endured in order to achieve the goods of marriage. Instead, such interdependence and its attendant vulnerability should be counted among the constitutive goods of marriage.").

105. "But while commercial partners' vulnerability is limited and instrumental, spouses' vulnerability is constitutive of their relationship and (relatively) unlimited." *Id.* at 112.

106. I suspect that many the provisions of some prenuptial and postnuptial agreements are exactly the product of such grudging negotiations: if the spouse could eliminate the provision while retaining the benefits of the larger deal, they would do so.

107. Cahn & Tuttle, *supra* note 8, at text accompanying nn.54-56 (quoting in part Carl Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 248, 256).

108. Dobson, *supra* note 5, at 10, 11 (evangelical Christian organization that has over 2.6 million subscribers to its monthly publications).

109. SOLOVEITCHIK & BESDIN, *supra* note 5, at 121-22 (articulating Jewish understanding of marriage).

unity that, beyond union in one flesh, leads to forming one heart and soul; it demands indissolubility and faithfulness in definitive mutual giving."[110] Ruth appears to share this understanding of marriage, thus it is reasonable for her to conclude that the potential for total communion between husband and wife outweighs the risks inherent in vulnerability and self-giving.

Professors Cahn and Tuttle accept this conclusion only after the lawyer has taken steps to protect Ruth against what they suggest may be the result of self-deception.[111] They argue that because marriage has "historically fostered inequality" Ruth's delegation of authority to her husband cannot be autonomous.[112] In reaching this conclusion, Professors Cahn and Tuttle rely on a general reading of legal history[113] and what they refer to as "the psychological complexities of the intimate nature of marriage."[114] Their reliance on generalities fails to take into account the particulars of Ruth and her situation.

In supporting their skepticism about Ruth's delegation of authority is the fact that Ruth and Bob have been married only six weeks. The relatively untried nature of the union raises legitimate concerns about an overly romantic view of marriage. Yet this concern is offset by other facts given in the hypothetical. Ruth has a degree in finance and worked as a loan officer at a bank prior to her first marriage. This suggests that she is not totally ignorant of the possible consequences of empowering Bob to make all their financial decisions. Her characterization of the relationship as a "bargain" implies at least some recognition that she may be surrendering what many think of as her natural right to a particular type of equality with her husband.[115] Finally, the fact that she has been married before, and that the first marriage ended in her husband's death rather than divorce, suggests that Ruth may have personal experience upon which to base her assessment of what contributes to a successful marriage.[116] Consider-

110. POPE JOHN PAUL II, *supra* note 5, at para. 13.

111. Cahn & Tuttle, *supra* note 8, at 125-26.

112. *Id.* at 117.

113. *Id.* at 120.

114. *Id.* at 117.

115. Confronted with such an argument, she might well argue that, although the best measures of success are God's satisfaction with her life and the happiness of her family, in worldly terms her inheritance of $5 million from her first husband is strong evidence that her approach works. *See* Mark Gauvreau Judge, *America's Sexual Right Turn*, INSIGHT, June 2, 1997, at 10.

116. The tentative tenor of this statement is based on the fact that we cannot conclude with absolute certainty that Ruth's first marriage was successful. The fact that it ended at her husband's death, rather than by divorce, is some evidence of success, but this fact alone does not define the success of the marriage.

ing all of these facts together, on what basis does the lawyer refuse to respect Ruth's understanding of her marriage relationship?

As a general rule, the judgments of adults concerning the ordering of their personal affairs are entitled to respect.[117] Yet when those judgments are not the product of reason, it may be proper, even necessary, to disregard them in order to protect the person.[118] It is this "duty to protect" that acts as the foundation of Professors Cahn and Tuttle's argument that Ruth's delegation should be subject to careful scrutiny by the lawyer.[119]

In assessing the legitimacy of such scrutiny, it is important to understand both the risks of harm posed by the limited form of paternalism advocated by Professors Cahn and Tuttle, as well as the benefits they seek to achieve. Professors Cahn and Tuttle acknowledge that their proposal risks reinforcing stereotypes about wives, and treating spouses differently than strangers.[120] They argue that these harms (to the extent that they are properly understood to be harms) are mitigated by the possibility that the lawyer may accept Ruth's delegation, after proper scrutiny and subject to certain limitations on the representation when such delegation is present.[121] In those cases when the lawyer accepts representation and one spouse has delegated decision-making to the other, Professors Cahn and Tuttle would require that the lawyer (1) have clearly identified the nature and extent of risks incurred by the delegation; (2) monitor the actions of the agent spouse and communicate any questionable proposals or actions to the delegating spouse; and (3) inform the clients that the delegation is fully revocable at any time.[122] The requirement that her decision be subjected to such scrutiny, and the possibility that the lawyer will reject her delegation are small constraints on Ruth's autonomy in

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117. This is the basis for Rule 1.14 of the Model Rules of Professional Conduct:

> When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

MODEL RULES, *supra* note 10, Rule 1.14(a)-(b).

118. *See generally* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 638-44 (1982).

119. Cahn & Tuttle, supra note 8, at 121.

120. *Id.* at 120, 124.

121. *Id.* at 121-22.

122. *Id.* at 122-24.

Professors Cahn and Tuttle's view. They argue that these constraints are a small price to pay for the capacity of these limitations to insure the authenticity of Ruth's choice,[123] and to protect against the inequality that is almost inherent in contemporary marriage.[124]

In requiring that the lawyer approve of Ruth's decision, Professors Cahn and Tuttle suggest that the lawyer must protect against what they perceive to be a form of false consciousness by Ruth. A major danger of building legal rules on assumptions of false consciousness is that the assumptions may be wrong.[125] First, any claims of superior knowledge depend upon accurate interpretation of past and present experiences. This, in turn, requires a complete record of past experiences free of any bias from the reporter of those experiences. No such record of the relationships between husbands and wives exists. When complete factual records exist, the facts must be sufficiently analogous to warrant basing judgments about the proposed action on past experience. In the context of reviewing marital decisions, closely analogous circumstances are rarely available because each marriage is, in large part, the unique result of the individuals involved and their particular circumstances.

Even when sufficiently analogous facts exist to provide an adequate basis for decisions, the goals and purposes people pursue through marriage are diverse and complex. Differing assessments of any particular action may result not from a different understanding of the facts, but from different values attached to various aspects of the anticipated outcome. The reality of these different values is exemplified in the multiple definitions of marriage competing for legal recognition.[126]

Finally, even where the lawyer and client have a shared understanding of the facts and the purposes of the proposed action, there is some educational value in allowing people to make their own mistakes.

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123. *Id.* at 121.

124. *Id.* at 119. This assessment of the price paid assumes a definition of equality that Ruth does not share. Confronted with feminist rhetoric concerning the historical injustice of gender roles, Ruth may well reply that the historical record of the relationship between husbands and wives might be alternatively interpreted as reflecting that women are grasping shrews who drive their husbands to unreasonable efforts in satisfying their longings, rather than the contemporary reading that men are loutish brutes who consistently abuse their rights and fail in their duties within marriage. However, Ruth might caution, to account for history in such a way would render an equally false portrayal of marriage, different only from the more radical feminist accounts in that men would be identified as the victims of centuries of oppression. Either extreme risks distorting marriage by misguided attempts to reconstruct the institution with the timber of justice and law, when it is intended to be built with the bricks of mutual self-sacrifice and love.

125. Kennedy, *supra* note 118, at 638-44.

126. *See supra* text accompanying notes 70-84 and 97-102.

While this last point is limited to those mistakes where the harm is not so grave as to preclude future decision-making by the person in the context of an ongoing marriage, the knowledge to be achieved by failures of trust is necessary if the person is to continue in the relationship without the constant intervention of others seeking to "protect Ruth from herself." To the extent that she will be called upon to execute whatever documents are drafted affecting her interests, she will necessarily have knowledge of the results of her delegation of authority to Bob. This knowledge will then contribute to her future decisions about her relationship with him.

These hidden dangers in the paternalism advocated by Professors Cahn and Tuttle are unaccounted for. Nowhere do they address the lawyer's inadequate knowledge of the couple's relationship or their understanding of marriage. More importantly, they fail to define their conception of equality in marriage, and they do not acknowledge that their characterization of the contemporary marriage relationship as inherently unequal is deeply contested in American society.[127] The contested nature of any definition of equality in marriage, as well as characterizations of contemporary marriage, counsel great caution on developing constraints on seemingly voluntary choices within marriage, especially when those choices are justified by reference to widely accepted internal goals of marriage or reliance upon divine authority.

Yet even if Professors Cahn and Tuttle's call for lawyer paternalism should be rejected because of its grounding in disputed, or even objectionable, presuppositions about marriage, that does not mean that the lawyer should blithely accept Ruth's proposed delegation of authority to her husband. Rather, the modest limitations they seek to impose on acceptance of the representation should be sustained, not because the spouse granting the authority should be presumed to do so under a false conception of gender roles, nor because the spouse receiving the authority is more likely than not to abuse it, but because the quality of representation by the lawyer will necessarily be diminished if either spouse fails to fully participate.

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127. *See* F. CAROLYN GRAGLIA, DOMESTIC TRANQUILITY: A BRIEF AGAINST FEMINISM (1998):

> Those of us who concluded that our marriages and families would thrive better if we devoted ourselves to home and children rather than market production find our belief validated by studies showing that "when women can support themselves, there is a lesser degree of bonding between husband and wife and more relaxed sexual mores" and that "the higher the relative degree of power attributed by respondents to the male partner, the lower the rate of marital dissolution."

Id. at 25.

As Professor Price has observed in his treatise on estate planning:

> In formulating an estate plan the lawyer and the client should give priority to sound planning to the welfare and security of the client and his or her family. A host of primarily nontax factors need to be considered in the process, including the age, health, ability, marital status, wealth, and feelings of the members of the client's family.[128]

Absent Ruth's full participation in the estate planning process, the lawyer will be limited in his or her ability to understand and consider the nontax factors impacting any estate plan.[129] For example, we might assume that Bob and Ruth want each to be the sole beneficiary of the other's estate, based upon some studies that show such a preference by testators generally.[130] However, when confronted with the question of how to dispose of the property of the survivor, Bob may only be able to answer in terms of his desires concerning his estate. He might be able to answer the question, "And if you and Ruth die in the same accident, how should the property be disposed of?"; but it seems unlikely that he would be able to give a detailed answer to the question, "And if you die first, and Ruth receives all of your property, who would she want to give the property to upon her death?"

Proper treatment of the tax factors also may be difficult under the arrangement that Ruth proposes. To the extent that the lawyer views the primary purpose of Bob's and Ruth's estate plan as minimizing transfer taxes, he or she should recommend the couple consider a gift of $1.5 million from Ruth to Bob. This is necessary in order to equalize the estates, which will reduce the overall effective tax rate on their combined estates.[131] However, to make such a recommendation to Bob and Ruth knowing that it is Bob, the proposed recipient of the property, who will decide whether the transfer should be made is troubling. It is particularly troubling in light of the hypothetical's silence concerning Bob's conception of his duties within marriage. While Ruth articulates a vision of servant leadership to be pursued by her husband, the fact pattern does not indicate either Bob's agreement

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128. PRICE, *supra* note 27, at § 5.5.

129. Barth v. Reagan, 564 N.E.2d 1196 (Ill. 1990) (recognizing that an attorney who sent all correspondence to the husband and wife clients jointly, but who met only with the husband, had potential liability to the wife for failure to communicate directly with her, but reversing the jury's decision for the clients because of a lack of expert testimony).

130. *See, e.g.*, Ruth L. Fellows et al., *Public Attitudes About Property Distribution at Death and Interstate Succession in the United States*, 1978 A.B.F. Res. J. 319, 349-64.

131. *See supra* text accompanying notes 32-37.

or expression of any view concerning this point. Absent a shared understanding of marriage and his duties as a husband, the risks escalate significantly that Ruth will be harmed by her delegation of decision-making to Bob.[132]

Even if the lawyer assumes that Bob shares Ruth's vision of marriage and accepts the duty to love and care for his wife "as he would care for his own body,"[133] it is almost impossible for the lawyer to counsel Bob in making the decision to accept a $1.5 million gift from his wife. As Ruth's husband, Bob would owe her fiduciary duties.[134] The facts surrounding her delegation of decision-making would merely serve to heighten those duties. In deciding to accept or reject the gift, Bob must be guided by Ruth's best interest, but he may have conflicting interests of his own. He might want to reject the gift as contrary to his own self-image as a self-made entrepreneur.[135] Or he may believe that the family would benefit by preserving her separate assets in order to insure their immunity from any creditor claims that may arise from his business activities.[136] Or he may want to reject the gift as evidence of his love for Ruth, independent of her wealth. Yet conventional wisdom among tax planners argues in favor of

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132. Professors Cahn and Tuttle agree that "if we assume that both spouses agree and act on this unlimited trust in each other then each will do nothing that could harm the other, and delegation may be entirely appropriate. . . . On the other hand, not only do few marriages approach this ideal (even when they try), there is an enormous potential for inequality within marriage and for abuse of each partner's vulnerability." Cahn & Tuttle, *supra* note 8, at 112.

133. *Ephesians* 5:28-30.

134. Confidential relations are presumed to exist between husband and wife, and, in his dealings with his wife, the husband, if he obtains an advantage over her, must stand unimpeached of any abuse of the confidence presumptively reposed in him by the wife and resulting from the marital relation, and, failing in this, he must bear the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained.

In re Cover's Estate, 204 P. 583 at 588 (Cal. 1922). *See generally* 41 Am. Jur. Husband and Wife § 99 (2d ed. 1995) ("The husband and wife relationship is confidential in nature, which includes, but is not limited to, a fiduciary duty between the spouses. Thus, if there is any misrepresentation or concealment of material facts, or any suspicion of deceit of undue influence, a court may declare a transaction between husband and wife void and restore the parties to their original rights.").

135. Gerald Le Van has noted this identification of person and corporation as typical in the entrepreneurial personality. *See* Gerald Le Van, *Passing the Family Business to the Next Generation Handling Conflict*, 22 INST. ON EST. PLAN. ¶ 14-1 (1988). "In one sense his business is the founder's alter ego, his self-image. He may have trouble distinguishing his self-image from the business. If his children make good faith suggestions for changes in the business, he may take them as personal criticism." *Id.* at ¶ 14-9.

136. *See* Howard D. Rosen, *Ethical Consideration in Asset Protection Planning*, 9 TAX MGMT. FIN. PLAN. J. 249 (1993).

equalizing the estates.[137] How does the lawyer counsel Bob on these issues without Ruth's full participation in the discussion?

In some ways, the issues are clearer if Bob wants to accept the gift. If Bob directs and accepts the gift, the primary worry of the lawyer would be about accusations that the transfer was primarily motivated by Bob's self-interest rather than a desire to minimize the family's overall tax burden. This is familiar ground to the estate planner versed in undue influence cases.[138] The legal task then becomes creating an evidentiary record of the proper motivation of the clients in making the transfer that is sufficient to overcome any presumption that Bob or the lawyer breached their fiduciary duties to Ruth or exercised undue influence in advising or accepting the gift of $1.5 million.[139]

As this discussion illustrates, Ruth's proposed delegation to Bob complicates, but does not defeat, the lawyer's ability to achieve two of the purposes of estate planning: tax planning and insuring a particular distribution. However, it is the third purpose of estate planning that is most clearly implicated by her request. In seeking to defer to Bob, Ruth is expressing love for her husband and her God. The lawyer should not discourage this based on some competing concept of gender equality or marriage. However, the lawyer should evaluate the effect of Ruth's proposed delegation on the lawyer's ability to provide competent representation. Because her participation is necessary in order for the lawyer to provide the best possible representation, it is professionally proper for the attorney to require that Ruth participate in the representation. Such a requirement is consistent with Ruth's stated commitment to being a wife such as the one described in

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137. *See supra* notes 32-36 and accompanying text.

138. *Cf.* Hedger v. Reynolds, 216 F.2d 202 (2d Cir. 1954) (widow entitled to constructive trust over remaining life insurance proceeds after payment of secured note due to husband obtaining consent to change beneficiary only for purposes of securing note); De Bernard v. De Bernard, 120 A.2d 176 (Pa. 1956) (setting aside transfer of the wife's property into tenancy by the entirety with her husband because the wife established that the transfer was based upon the husband's misrepresentations). *See* Pascale v. Pascale, 549 A.2d 782 (N.J. 1988); Whitney v. Seattle-First National Bank, 579 P.2d 937 (Wash. 1978); Lovett v. Estate of Lovett, 593 A.2d 383 (N.J. Super. Ct. Ch. Div. 1991). Although Ruth would probably execute any documents conveying property, the lawyer probably should also consider cases involving gift-giving under durable powers of attorney. *See* Fender v. Fender, 329 S.E.2d 430 (S.C. 1985); Bryant v. Bryant, 882 P.2d 169 (Wash. 1994); LeCraw v. LeCraw, 401 S.E.2d 697 (Ga. 1991). Additional cases are collected and analyzed in Patricia A. Nelson-Reade, *Powers of Attorney and Non-Tax Gifting Consideration*, 11 ME. B.J. 178 (1996), and in Hans A. Lapping, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 ELDER L.J. 143 (1996).

139. *See generally* Steven J. Wohl, *Guidelines for Avoiding Estate Litigation*, 19 EST. PLAN. 67 (1992); Beyer, *supra* note 42; Crown, *supra* note 43.

Proverbs, who "opens her mouth in wisdom, and on her tongue is kindly counsel."[140]

IV. UNITY IN RELATIONSHIP WITH OTHERS

Joe and Susan, the second hypothetical couple, present different challenges to the estate planner in deciding whether to accept the proposed representation.[141] Married approximately six years, Susan is expecting their first child. Joe expects to quit his job and stay home with the baby because Susan, a doctor, earns ten times the amount that he earns as a construction supervisor. The value of their combined estate is approximately $800,000, $50,000 of which is Joe's separate property. The remaining $750,000 is described as "Susan's net value," although the hypothetical facts do not provide sufficient detail to discern whether the property was accumulated during the marriage, and thus subject to claims that it is marital property.

The immediate objective of the prospective clients is representation regarding a release of any claims Joe might have or acquire against the medical practice that Susan is a member of (or seeks to join). Such requests are fairly common when professionals join professional corporations or associations. By obtaining this release, the practice group hopes to avoid inclusion in any bitter divorce or estate litigation concerning the proper distribution of property accumulated by Susan. The release may also be consistent with legal or professional limitations as to who can own interests in the medical practice group. For instance, if the group conducts its practice as a professional corporation, state law may prohibit ownership of shares by nonprofessionals. Requiring a release of claims by spouses is simply one way to ensure compliance with the law.

Depending on the breadth of the release, it is possible that Joe loses little by signing it. If state law does not recognize any ownership interest in professional associations or corporations when asserted by nonprofessionals, the release may simply act as a contractual "backup" to an outcome that is presently preordained by the state law of business associations. It is true that if state law on this issue changes, the release may preclude Joe from asserting a claim directly against the practice group, but the value of what is essentially a "supplemental insurance policy" for the practice group is significantly less than if the release is a release of claims that the courts would presently recognize. This decreased value is significant in two ways. First, there is an

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140. *Proverbs* 31:26.

141. *See* Hypothetical II, 22 SEATTLE U. L. REV. 1, app. at 16 (1998).

increased likelihood that the practice group may waive the requirement that Susan obtain the release if Joe refuses to sign it. Second, the value of the interests that Joe releases by signing the document is highly speculative.

The hypothetical facts give no detail as to Susan's position related to the proposed release. The fact that she has presented the request to Joe and accompanied him to the attorney's office suggests that she has, at least tentatively, decided that the release is desirable. But this is not a foregone conclusion. It is possible that she has practical and moral reservations about the request of the practice group, and wants an attorney to explain to both her and Joe the significance of the release. A third position she may hold is that the release is clearly undesirable, but she wants to know how to accommodate the legitimate interests of the medical practice group while preserving her husband's rights. Absent information about Susan's desires, it is difficult to assess whether Joe's and Susan's interests are adverse or complementary.

Only if we assume that Susan wants Joe to execute the release does it become relevant that Joe directed the attorney to rely upon Susan's decisions, even in matters relating only to Joe's assets. Like Ruth in the first hypothetical fact pattern, Joe is attempting to delegate the financial decision-making to his spouse. However, his justification for the delegation differs from Ruth's in that his delegation seems premised upon a concept of "burdens borne" rather than submission to God's authority. Under the burdens borne principle, individuals who bear the greatest burden of complying with a decision should have the greatest say in making that decision.[142] Joe's delegation of decision-making on financial matters is premised upon Susan's greater burden in generating the family's income and assets and his perception of a concomitant right to make decisions about the proper stewardship of that income and assets.

Implicit in his delegation may be an acknowledgment that he is incapable of assessing the value to the family of associating with this particular medical practice group. The hypothetical tells us that Susan loves her work, but it does not indicate whether that love is a product of working with these particular physicians, or more generally the product of being a doctor. To the extent that Joe's refusal to execute the release is a "deal killer," it is Susan that will bear the most immediate and heaviest burden in the refusal of the practice group to

142. *Cf.* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 344 (1988) (describing the "own-mistakes" principle requiring that groups be allowed to make their own mistakes in order to secure the goods internal to political action).

either admit her or allow her to continue to practice with them. While dependent upon Susan for the income necessary to provide for family needs, Joe does not suffer the same harm. If Susan can practice elsewhere and make the same amount of money, it is possible that Joe will suffer no economic detriment from his refusal to execute the release. This does not mean Joe will not suffer any harm from his refusal. Clearly, he may suffer due to his wife's unhappiness over her exclusion from the medical practice group, and that burden may be significant, even substantial, but it is not commensurate with the harm Susan may bear. Viewed in this light, Joe's delegation of decision-making seems reasonable.

Professors Cahn and Tuttle analyze Joe's delegation differently, in large part due to a broader reading of the hypothetical facts. They understand the proposed release to include a waiver of any interest that Susan may acquire in the medical practice group.[143] Much of their analysis is driven by concern that execution of the release will preclude Joe from asserting any right to inclusion of the value of Susan's interest in the practice as an asset of the martial estate subject to equitable division in a divorce proceeding,[144] or distribution under the terms of her will or Joe's elective share in a probate proceeding.[145] To the extent that the release runs to Susan as well as to the medical practice group, these are legitimate concerns. Under this understanding of the facts, the execution of the release would be governed by local law concerning postmarital agreements. While increasingly accepted by the courts, these agreements are subject to careful scrutiny. All jurisdictions recognizing such agreements require that there be full disclosure of the nature and extent of the assets subject to the agreement,[146] and

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143. Cahn & Tuttle, *supra* note 8, at 121 (stating that Susan "might want to remain a member of the practice without thinking about the possibility of her dying first, and leaving Joe without any claims to her share of the medical practice"), 122 ("This would be particularly important in the second hypothetical where Joe, the delegating spouse, may not understand the extent of his rights in assets that his wife has acquired during marriage, even if the assets are separately titled.").

144. *Id.* at 121 ("Alternatively, if she [Susan] is at the early stages of considering a separation or divorce from Joe, but has not yet told him, then she will intentionally prevent him from having any claims to the assets of the practice.").

145. *Id.* ("[S]he might want to remain a member of the practice without thinking about the possibility of her dying first, and leaving Joe without any claims of her share of the medical practice.").

146. *See In re* Estate of Harber, 449 P.2d 7, 16 (Ariz. 1969) (en banc) ("[M]arital partners may in Arizona validly divide their property presently and prospectively by a post-nuptial agreement, even without its being incident to a contemplated separation or divorce," provided it is fair and equitable and is free from fraud, coercion or undue influence and that "wife acted with full knowledge of the property involved and her rights therein."); *In re* Estate of Lewin, 595 P.2d 1055, 1057 (Colo. App. 1979) ("Nuptial agreements, whether executed before or after the

many jurisdictions require that both parties be separately represented in the negotiations.[147] It seems virtually certain that no jurisdiction would enforce a postmarital agreement waiving all rights to the primary and most valuable asset acquired during marriage, when the consent to that agreement was obtained through delegation to the spouse benefiting from the agreement. Thus the law governing postmarital agreements provides more stringent protections for Joe than the modest restrictions on legal representation proposed by Professors Cahn and Tuttle.

V. CONCLUSION

Deference without continued participation by either spouse in estate planning complicates the lawyer's job tremendously. Such delegation suffers from the same defect found in Blackstone's famous maxim, "The two shall become as one, and the one is the husband."[148] His maxim, like complete delegation, suggests that the delegating spouse is absorbed into the identity of the other in marriage. This is false. Rather than losing themselves in the other, husbands and wives find their completion in each other. Paradoxically, each

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marriage, are enforceable in Colorado [and a] nuptial agreement will be upheld unless the person attacking it proves fraud, concealment, or failure to disclose material information."). *See also In re* Estate of Loughmiller, 629 P.2d 156, 162 (Kan. 1981) (postnuptial agreements, fairly and understandingly made, are enforceable); *In re* Estate of Gab, 364 N.W.2d 924, 925-26 (S.D. 1985) (holding postnuptial agreement to protect inheritance rights valid if properly fairly disclosed and spouse enters into freely and for good consideration); Button v. Button, 388 N.W.2d 546, 550-51 (Wis. 1986) (holding postnuptial agreement must meet requirements of fair and reasonable disclosure, entered into voluntarily and freely, and substantive provisions fair to each spouse); Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972); Darius v. Darius, 665 N.Y.S.2d 447 (N.Y.A.D. 3 Dept. 1997); Mormello v. Mormello, 682 A.2d 824 (P. Super. 1996); Tibbs v. Anderson, 580 So. 2d 1337 (Ala. 1991); D'Aston v. D'Aston, 790 P.2d 590 (Utah App. 1990). *But cf.* Ching v. Ching, 751 P.2d 93, 97 (Haw. Ct. App. 1988) (holding that general rule that property agreements should be enforced absent fraud or unconscionability applies to prenuptial, but not to postnuptial, agreements).

147. Tibbs v. Anderson, 580 So. 2d 1337, 1339 (Ala. 1991) (stating that, in order for an agreement to be valid, the one seeking to enforce the agreement "has the burden of showing that the consideration was adequate and that the entire transaction was fair, just and equitable" from the other party's point of view or "that the agreement was freely and voluntarily entered into . . . with competent, independent advice and full knowledge of [any] interest in the estate and its approximate value."); *cf.* Mormello v. Mormello, 682 A.2d 824, 827-28 (Pa. Super. 1996) (holding that parties do not have to obtain independent counsel prior to entering a prenuptial agreement).

148. By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing. . . . Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

Id. (quoting William Blackstone, *supra* note 72, at 430 (citations omitted)).

becomes more fully themself by his or her union with the other.[149] Estate planning, by its nature, is concerned with perpetuating their union through preserving the resources necessary to care for each other throughout life, and continuing that caring relationship into the future by gifts to beneficiaries.

Both Ruth and Joe seek to entrust their spouses with the decisions concerning their financial affairs. Ruth seeks to delegate decision-making in obedience to her understanding of God's will. Joe seeks to delegate decision-making because of a desire to ensure adequate freedom for his wife in her efforts to provide economic security for the family. These motives are rational and directed toward the family's well-being.

Lawyers should not disregard the clients' desires based upon competing conceptions of spousal relationships. To do so disregards the dignity of the delegating client without adequate warrant in facts or in law. The hypothetical cases illustrate the way that married couples' lives are interwoven. Each couple creates a tapestry of their lives together through their actions and their shared understanding of those actions. When confronted with alternative understandings of marriage and family, estate planners must seek to understand the clients, not undermine them.

In both of the hypothetical cases, the lawyer's proper response is to respect the desires of the clients. But respect does not mean unquestioning acquiescence. Respect requires that the lawyer explore the meaning the clients attach to their proposed delegation and attempt to understand both their intentions and goals. Only with such information can the lawyer begin to decide whether he or she is willing to enter into the collaborative enterprise that we call legal representation.

After coming to understand the clients' desires, the attorney must assess whether the manner of representation is limited by positive law, as it may be by the law concerning postmarital agreements or undue influence, or by professional norms. Both will give structure to the client-attorney relationship, precluding some forms of representation while encouraging others.[150] If the positive law and professional norms pose no barriers to the proposed manner of representation, the lawyer must then decide whether he or she is willing to represent these

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149. *See* Teresa Stanton Collett, *Same-Sex Marriage: Asking for the Impossible?*, __ CATH. L. REV. __ (1998) (forthcoming).

150. *See* Teresa Stanton Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence*, 28 REAL PROP. PROB. & TR. J. 683 (1994).

particular clients under these particular circumstances while respecting the clients' delegation of authority.

Lawyers can often accommodate clients' desires to defer to or include others in decision-making;[151] but rarely, if ever, should lawyers accommodate a desire not to participate. It is the lawyer's moral duty and concomitant right to practice law in such a manner that he or she believes serves the needs of the client. This is rarely possible when the client refuses to interact with the lawyer.

The lawyer's need and right to guidance concerning the circumstances and objectives of representation provides a legitimate foundation to reject nonparticipation by clients. Requiring clients to participate in the representation while acknowledging their right to defer in decision-making poses little threat to the client's deeply held beliefs or conceptions of marriage. Rather, it recognizes that there are many ways to understand marriage and the marital relationship, rejecting any idea that the lawyer has either the right, or duty, to ignore the client's understanding of marriage in favor of another based upon disputed concepts of sexual equality. In seeking participation while accepting delegation, the lawyer protects the clients' dignity and their rights while preserving the lawyer's right to provide effective representation. This should be the goal of all legal representation.

151. *Compare* Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994), *with* Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994).