TWENTY-FIRST CENTURY TRUSTS AND ETHICS: ESTATE PLANNING FOR COUPLES

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I. INTRODUCTION

Representing spouses jointly may seem natural to estate planning attorneys.1 Most casebooks discuss the ethics of joint representation as if it were the default for this type of practice.2 The American College of Trust and Estate Counsel (“ACTEC”) Commentaries on Rules 1.6 and 1.7 also seem to employ this presumption. This seems sensible at first glance: marriage is a partnership after all,3 and, especially in cases where the couple has joint children, the assumption might be that the couple’s estate planning goals are in harmony and can be achieved more efficiently and cost-effectively this way. Both the Model Rules and the ACTEC Commentary offer a routine procedure for explaining the confidentiality rules of joint representation, and agree that a signed statement can waive a conflict.4

Some practitioners, however, flatly refuse to engage in joint representation of couples, fearing potential confidentiality and conflict of interest problems. The literature addressing this ethics problem in spousal estate planning typically refers to the problem of the “unilat-

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2. See, e.g., SUSAN N. GARY ET AL., CONTEMPORARY TRUSTS AND ESTATES: AN EXPERIENTIAL APPROACH 27 (2d ed. 2014) (noting that “one of the most common situations that creates ethical concerns for an estate planning attorney” is joint representation).

3. This is generally understood to be the prevalent view of marriage today. See, e.g., Alicia Brokars Kelly, Rehabilitating Partnership Marriage As a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life, 19 Wis. Women’s L.J. 141, 148 (2004) (noting that “the ideal [of marriage] recognizes sharing and joint contribution as core components of marriage”).

4. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2019); AM. COLL. TR. & EST. COUNS., COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 101-02 (5th ed. 2016) [hereinafter ACTEC].
eral confidence.” This describes the situation where the couple seeks joint representation in estate planning, but at some point later in the process, one spouse tells the attorney something in confidence that is material to the representation.5 This may occasionally happen, but most practitioners agree that it is rare, and this particular dilemma does not concern me here. Rather, I want to re-orient the conversation by posing this more fundamental question: given the economic inequality between men and women, and between primary caregivers and primary wage-earners in today’s American family, can a couple—same or opposite sex—ever be assumed to be non-adverse in estate planning? Or would it be wiser to reverse this presumption? I pose this question in the context of the twenty-first century trust because I think that it in all of its permutations highlights the problems I identify.

II. BACKGROUND

The Model Rules of Professional Conduct offer the estate planning attorney little help in regard to potential conflict between spouses. Rule 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;

(4) each affected client gives informed consent, confirmed in writing.6

Because the Model Rules were not drafted with estate planning—or, some might argue, any transactional practice—in mind, the American College of Trusts and Estates Counsel (“ACTEC”) has prepared

5. See, e. g., Collett, supra note 1, at 685 (referring to this as the “unilateral confidence”).
Commentaries on the Rules geared toward trusts and estates attorneys. The ACTEC Comment to Rule 1.7 reads as follows:

It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plan . . . . In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them. Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer’s traditional role as the lawyer for the “family.” Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost-effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial . . . . Before, or within a reasonable time after commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). . . . In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure.7

The Comment goes on to urge attorneys to meet with each client separately in this situation to make sure they do not have adverse interests.8 The Rules and Comments seem to take this “joint representation-with-safeguards” as a norm. But should they? I suggest that it has never been appropriate, and that the explosion of asset protection trusts in the twentieth and twenty-first century makes it even less so.

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7. ACTEC, supra note 4, at 101-02.
8. Id. at 102.
III. STRUCTURAL ADVERSITY

The problem is that trust law has accelerated faster than the social, financial, and legal situation for women and for economically dependent and caregiving partners. While trust law now offers a myriad of ways for the financially independent spouse to “protect” assets from the other partner, the law offers no compensatory structures to alleviate the financial detriments that partner often suffers due to child and elder care, career sacrifice and deferral, and the resulting lost wages. This mismatch between accelerating trust law and our society’s uneven progress toward support for financially dependent caregivers creates the potential for adversity for couples in estate planning that ethics rules should not ignore.

Despite the contemporary commonly accepted view of marriage as an equal economic partnership, there are a number of social realities that undermine this vision. First, in the case of opposite sex couples, women are simply still not situated as economic equals to men.\(^9\) The female member of an opposite sex couple is statistically much more likely than the man to be the one who sacrifices career and earnings for caregiving of children and parents.\(^10\) This disparity results in lower savings, less retirement income, and lower social security benefits for women.\(^11\) Compounding this reality is the fact that, even in community property states, women who are financially dependent on their male partners have much less control over day-to-day management of family assets (retirement plan allocations, investment decisions, etc.) than the male primary earner.\(^12\) This disparity in control, followed by divorce or spousal survivorship, can lead to the former spouse’s impoverishment.

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\(^11\) See Alicie Adamczyk, Women Lag Behind Men in Retirement Savings—Here Are 3 Things They Can Do to Catch Up, CNBC Make It (Nov. 18, 2019, 3:14 PM), https://www.cnbc.com/2019/11/18/women-are-still-lagging-behind-men-when-it-comes-to-saving.html (noting that “women face many obstacles to saving and investing that their male coworkers may not: There is a persistent wage gap between men and women, and women leave the workforce more often than men to act as a caregiver. They also tend to live longer, meaning they actually need to save more than men do”).

Add to this the simple actuarial fact that women tend to outlive men, and the seeds of conflict take root and flower. But these disparities are not present just in opposite sex marriages. When same sex couples choose to have children, they often face the same dilemma of child care (even if they don’t, they may face, like many same sex couples, the dilemma of elder care). Because of the lack of affordable day care and workable family leave policies in this country, someone will probably have to take a financial hit which will make that person dependent, to one degree or another, on their partner.

Finally, studies show that there are often gender-based power differentials in heterosexual marriage – probably arising from this economic inequality. And this is the reality in violence-free “normal” families. Domestic violence is present in about twenty percent of marriages and intimate relationships, severely skewing power balances between the partners. Further complicating matters, the abuse in the relationship can be hard for an untrained observer to see. Very few estate planning attorneys have such training. This is unfortunate and adds to the concerns I express here: joint representation for a couple with domestic violence issues is clearly problematic, but may well proceed if the attorney is oblivious to it.

These likely disparities will matter in two crucial instances in the course of the couple’s lives: divorce, which will happen to half of them, and death, which will happen to all of them. Estate planning, now abetted by new trust forms, offers too many ways for the partners’ interests to diverge at these junctures. Indeed, one might call these life events “hinge moments” in people’s lives, the pivots on which a life

17. See Jennifer Casarella, What Are the Signs of Domestic Abuse, WEBMD (Mar. 13, 2020), https://www.webmd.com/mental-health/mental-domestic-abuse-signs#1 (noting that these signs are “not always as obvious as you might think . . . because domestic abuse is about controlling someone’s mind and emotions as much as hurting their body”).
may swing in a completely new direction.  

Estate planning through joint representation can negatively affect these moments by disempowering or affirmatively depriving the economically dependent spouse. I refer to this in the context of estate planning as “structural adversity,” by which I mean adversity resulting from inequality imposed by social forces external to any particular couple.

To summarize, then, the estate planning couple does not always consist of two financially independent people coming together to dispose of their estates in complete harmony and autonomy. In fact, it frequently does not. In the course of the initial consultation, of course, it may become clear that the two are in fact each financially self-sufficient, in complete agreement about their plans, and equal in power. The current rules, however, seem to presume this scenario. This presumption should be reversed to account for the many instances where it may not be the case.

This topic is particularly suited to a conference on the twenty-first century trust. The dramatic expansion of trusts in a myriad of ways magnifies all of the concerns I have outlined above. Asset protection trusts are advertised as a way to avoid taxes and creditors, including ex-spouses and children with support orders – and even regular old everyday trusts offer a way to keep assets out of the hands of a surviving spouse. In light of these expanding possibilities, I suggest that estate planning ethics need revisiting.

You may object to everything I am saying on the grounds that the Rules and Comments both stipulate that the attorney explain to each partner separately the rules governing joint representation, specifically those governing material disclosures; the Commentary goes so far as to suggest that best practices would do this in writing. This does not address the many possibilities for adversity between the two partners in a couple, however. First, adversity may emerge down the road, and may not take the form of the much-touted “unilateral disclosure” – in fact, it may not even look like adversity. For example, in the course of the representation, one spouse may want to place assets in an asset protection or Qualified Terminable Interest Property (“QTIP”) Trust for perfectly solid estate planning reasons. Either form of trust, however, may harm the interests of the financially-de-

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20. In a different context, Henry M. Ordower urges estate planners not to impose “default settings” for estate planning, such as trusts, that disempower a surviving spouse. 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, 315 (1996).
ependent spouse on divorce or death of the other spouse. The parties’ interests now seem adverse, but such a development may not have been clear at the beginning. Further, marital relationships are the site of submerged power dynamics often invisible to the casual observer – and this is not to speak of actual domestic violence.

I’ll begin with that not-so-new trust: the QTIP Trust. What is the ethical duty of a lawyer tasked with preparing a QTIP Trust for a couple? As most of us know, a QTIP Trust allows the deceased spouse’s estate to take advantage of the marital deduction while leaving the surviving spouse only a life interest, with distributions often subject to the discretion of a trustee. This leaves the survivor – statistically likely to be the wife – with significantly less than a full interest in the property. As a practical matter, this limited interest may prevent her from making investments, getting loans, or simply spending what she wants. As an existential matter, it disempowers her as a person with control over her property and treats her like a child. More practically, it deprives her of the ability to use the bulk of the estate to influence the world around her through political or charitable gifts, for example – important incidents of property ownership. Not to speak of the fact that each spouse understands that the survivor’s estate will not benefit from the marital deduction, since it applies only to the estate of the first to die.

At the point it becomes clear that a QTIP Trust will be part of the estate plan, have the spouses become adverse? What are the attorney’s ethical duties at this point? Can she continue to represent them both? The spousal adversity of the QTIP Trust as an estate planning device is quite obvious to those who market them: One law firm suggests that the QTIP creator may want to “prepare” the spouse; one law firm suggests “[y]our spouse, for example, should know that income will flow life-long, but access to the trust principal will be limited.” Another advises that spouses may want to pick a good moment to discuss the QTIP because “[t]he surviving spouse typically resents the restrictions against unlimited access to principal.” The reality is that estate planners drafting QTIP – and other provisions for a surviving spouse – think about these things from a male first-to-die perspective. One (female) practitioner recommends a QTIP Trust in case the

22. See id. (noting that at the same time, Congress enacted the QTIP).
surviving spouse “marries the pool boy[].” \(^{25}\) Also typical is a Florida Bar Opinion in which a husband reveals privately to the estate planning lawyer that he wants to leave assets to his extra-marital paramour.\(^{26}\) Advice for estate planners often seems written from the perspective of a husband in a heterosexual marriage and not from that of a partner in an equal economic partnership. This point of view may operate subliminally to obscure the adverse nature of estate planning for marriages in which there is an economic imbalance.

In another not-so-new trust issue, there is the matter of the trust’s ability to siphon assets from the marital estate from which the survivor’s elective share is taken. At least sixteen states allow a spouse to remove assets from his or her estate by placing assets in a revocable trust during life.\(^{27}\) Most of us are familiar with the case of Gilles Shoukroun,\(^{28}\) who put about 400,000 dollars into a revocable trust for his daughter from a previous marriage, leaving a much smaller amount – plus his Toyota Highlander – to his then-wife, Kathleen Karsenty.\(^{29}\) Kathleen elected to take against the will, and argued that the trust assets should have been part of the elective share pot because Gilles had complete access to and control over them during his life.\(^{30}\) The Supreme Court of Rhode Island, however, ruled that if Gilles’ transfer was done in “good faith” – that is, as legitimate estate planning and not a “contrivance” to disinherit the wife – it should stand.\(^{31}\) If Gilles and Kathleen had engaged in joint estate planning – and there is no evidence that they did – would the attorney have had to withdraw at the point Gilles decided to use the revocable trust, which, probably unbeknownst to Kathleen, could serve to disinherit her? If the attorney had withdrawn from the joint representation at this point, how could the attorney have gone on representing one of the parties, having information adverse to the other party? Is there an ethical duty to explain to the spouse of someone putting assets in a revocable trust how that trust may disinherit him or her?

In the twenty-first century, there is a new offspring in the trust family: Asset Protection Trusts (“APTs”) and their spinoff, Domestic

\(^{25}\) Natalie C. Annis, Special Ethical Considerations and Concerns in Estate Planning and Trust Administration, in ETHICS FOR TRUSTS AND ESTATES PRACTITIONERS (2013), available at 2013 WL 4188069, at *5.


\(^{27}\) See generally Angela M. Vallario, The Elective Share Has No Friends: Creditors Trump Spouse in the Battle over The Revocable Trust, 45 CAP. U. L. REV. 333 (2017) (noting that sixteen jurisdictions allow the use of a revocable trust to disinherit a spouse).

\(^{28}\) Karsenty v. Schoukroun, 959 A.2d 1147 (Md. 2008).

\(^{29}\) Karsenty, 959 A.2d at 1153-54, 1178.

\(^{30}\) Id. at 1151.

\(^{31}\) Id. at 1172.
Asset Protection Trusts (“DAPT’s”). These trusts allow the settlor to create trusts for him-or-herself with spendthrift clauses protecting the trust assets from the settlor’s creditors. It has been possible for over a century to equip trusts for third-party beneficiaries with the traditional spendthrift clause. There are several infamous American cases where courts have upheld these clauses to bar collection from the beneficiary’s creditors, including creditors who won jury awards against the beneficiary for child molestation, paralyzing someone in a drunk driving accident, and beating an elderly woman to death during a robbery. You may think this is morally or ethically wrong, or you may be willing to accept it in the name of testamentary freedom – but the reality is, the third-party spendthrift trust is now boilerplate.

Many states do allow an exception to spendthrift restrictions for child and spousal support creditors, so-called super creditors, however. Not so the new crop of APTs and DAPTs. They allow a settlor to place her own assets out of reach of creditors in the same way as the traditional spendthrift trust did for third-party beneficiaries. As of this writing, sixteen states have legalized this type of trust. There are many reasons to worry about these trusts; here I focus only on those applicable in a spousal estate planning context. Firms that market these trusts advertise their potential to “shield” assets from creditors, among them – and most frequently mentioned – are spousal

32. For a general discussion of these trusts, see Cherish D. Van Mullem, Shield Assets Kept Nearby with Asset Protection Trusts, 45 EST. PLAN. 32 (2018).
33. See Sheffel v. Krueger, 782 A.2d 410, 412 (N.H. 2001) (refusing to create a judicial exception to spendthrift protection for tort creditors, because “[w]here the legislature has made specific exemptions, we must presume no others were intended”).
37. ALA. CODE § 19-3B-503(b)(1) (2020); ARIZ. REV. STAT. ANN. § 14-10503 (2020); CAL. PROB. CODE § 15305 (West 2020); FLA. STAT. § 736.0503(2)(a) (2020); GA. CODE ANN. § 53-12-80(d) (2020); LA. REV. STAT. ANN. § 9:2005(1) (2019); MO. REV. STAT. § 456.5-503(2) (2020); NEB. REV. STAT. § 30-3848(b) (2020); N.H. REV. STAT. ANN. § 564-B:5-502 (2020); N.M. STAT. ANN. §46A-5-503(B) (2020); N.D. CENT. CODE § 55-13-03 (2019); OHIO REV. CODE ANN. § 5805.02(B)(1) (2020); OKLA. STAT. tit. 60, § 175.25(B)(1)(a) (2020); OR. REV. STAT. § 130.310(2) (2020); S.D. CODED LAWS § 55-16-15(1) (2020).
and child support creditors.\textsuperscript{39} They are also advertised as a better alternative to prenups because there is no need to negotiate their terms with the other party.\textsuperscript{40} In other words, firms sell these trusts as a way, among other things, to avoid asset division and support payments after divorce by shielding assets from the settlor’s spouse and children.

Again, this raises the question of adversity in joint representation in spousal estate planning. For example, certain professions in particular find these trusts attractive: those in the medical profession, fearing giant malpractice awards, and physicians in high-risk sectors of medicine, such as obstetrics.\textsuperscript{41} This fear might appear reasonable and even mutually advantageous to a spouse of someone in this field. That spouse might not know about the barriers to spousal recovery also embedded in the trust. If such a trust turns out to become a component of a couple’s estate plan, does this create a conflict for the attorney, knowing how it can disadvantage the non-settlor spouse?\textsuperscript{42} Or is it, again, safer to refuse joint representation in the first place?

What about contracts to make wills? Spouses might seek an arrangement in which the survivor of them promises to devise the remaining marital property a certain way; this could appeal to those in second or third marriages who have children from prior relationships. Or, a contract to devise might arise from one spouse’s promise to care for the other at the end of life in exchange for receiving the decedent’s estate after death. Contracts to make wills are enforceable in most states if they are in writing, either as part of the will in question or separately. But courts are split as to whether these contracts trump elective share laws or not.\textsuperscript{43} This is legal information which may create a conflict between spouses, one of whom assumes the contract will be enforced. In a related vein, the UPC is clear that mutual or joint


\textsuperscript{42} This ignores the question of whether it is even ethical for an attorney to recommend such a trust if she does not practice in a state that allows it. In such a case, is the DAPT against the state’s public policy?

wills do not constitute contracts. Could this give rise to conflict? Does one party benefit at the expense of the other from the lack of enforceability of provisions of the will? Given the uncertainty of these contracts in courts, and the distinct likelihood that a court will refuse to enforce such a contract, is there a potential conflict between the two parties to the contract? Does the attorney have a duty to advise the promisee that a court may not enforce the contract if the promisor breaks his word?

IV. CONCLUSION

Overall, I have tried here to unseat the assumption that couples are generally not adverse in estate planning and that joint representation should be the norm. Because of the still economically unequal position of caregivers and women in our society, there is such a thing as structural adversity. Structural adversity is present in couples not because of anything specific to their relationship—such as the literature of the “unilateral confidence” assumes—rather it arises from the way men, women, and caregivers are situated in society in relation to wealth.

This insight indicates that a revision of the ACTEC instructions about joint representation might be appropriate. This revision might look like this:

It is often appropriate for a lawyer to represent one spouse separately in connection with estate planning when one of the spouses is not financially independent. “Financially independent” means that the spouse has significant assets in his/her own name, paid work with sufficient remuneration to support that person in a lifestyle similar to that existing in the marriage, or some other independent source of sufficient support. In instances where both spouses are financially independent, the clients may be better served by joint representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. In such cases, the fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them, but the lawyer should be careful to avoid situations where one spouse might have estate planning goals that are adverse to the long term interests of the other spouse. In particular, this is a possibility when either spouse has children from prior marriages he or she might

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45. See generally, e.g., Borelli v. Brusseau, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993) (declining to enforce a contract in which a husband had promised to leave his estate to his wife if she cared for him during his final illness).
also wish to benefit, or where one spouse has significantly greater assets or earning capacity than the other spouse. Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the “family,” but this should not allow the lawyer to ignore the vulnerability of the less well-off spouse. Multiple representation is appropriate when, in the judgment of the lawyer, taking into account the financial dependence of one of the spouses, the interests of the clients in cooperation, including obtaining cost-effective representation and achieving common objectives, clearly predominate over their limited inconsistent interests.

Such guidance for attorneys takes into account – and draws the lawyer’s attention to – what I have called structural adversity. In doing so, it would better serve the ethical goals of zealously representing each spouse.