

COMMITTEE REPORT: THE MODERN PRACTICE

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Have We Got It All Wrong?

Rethinking the fabric of estate planning

As estate practitioners, our mission is to provide our clients with an estate plan that maximizes the transfer of wealth to specified heirs in a way that will improve their life courses.¹ But, what if this goal is impossible to meet? What if, by maximizing the transfer of wealth, we aren't improving, but instead are diminishing the life courses of our clients and their heirs, as well as deteriorating society in the process? To this end, the more important questions that we seek to analyze are ones that every estate planner should pose to his clients: Would you prefer to pass as much wealth as possible to your descendants? Or, would you rather give your heirs the greatest chance of truly being happy, well adjusted, self fulfilled and successful?

Whose Objectives Are Being Served?

Let's consider, from a psychological and philosophical point of view, exactly whose objectives are being served when wealth transfers occur. Three possibilities are: (1) the client's; (2) the beneficiaries' for whom the plan is being created; and (3) society's at large (including government and charities).²

The client. In our experience, many clients assert that the act of creating an estate plan is a purely selfless endeavor and exclusively for the benefit of their descendants. This belief may stem from the fact that they won't be living when estate taxes will be due or when certain estate assets will be transferred. However, estate

planning may not be purely altruistic. Planning and implementing wealth transfers may fulfill the clients' psychological and emotional needs to be prudent about the assets they've worked so hard to maintain and to assure their legacies after death. Also, many clients who claim to create estate plans purely out of love for their heirs add contingencies before their heirs can benefit from their assets. Thus, even after their deaths, their preconditions take effect, a phenomenon commonly referred to as "dead hand control."³

The psychology behind dead hand control stems from a variety of sources, including the desire to be relevant forever and fear of death. By controlling the estate even after death, the client is able to fantasize about what life will be like after he dies, and how, even after death, he can exert great influence.⁴ Additionally, this exercise may have the effect of easing his mind about the future. For others, the need to control may be connected to pride in the assets earned over their lifetimes.

Fear and distrust of descendants may be another motivating factor that spawns dead hand control. Some people don't believe their descendants will use the inheritance in a meaningful way or will continue their way of doing things. In many cases, dead hand control may serve an important purpose, especially when the individual is actually correct about his descendants. However, each case is different and requires very deep and thoughtful self-discovery and assessment by the client and his estate planner (and perhaps the client's psychologist).

Whether or not our clients perceive the creation of their estate plans as fulfilling their own psychological need to control, most will agree that it's a prudent endeavor. They also believe that transferring as much wealth as possible to their descendants is the most desired outcome, and as planners, we reinforce this notion with the complex structures we set up to minimize taxes and protect assets. But, is the transfer of the

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maximum wealth really the most desirable outcome? Or, can an argument be made that maximizing the transfer of wealth actually isn't in the heirs' and society's best interests, and if our clients really believed this theory, they might plan things very differently?

The beneficiaries. On Jan. 9, 2015 *The New York Times* ran an article that discussed the murder of a wealthy "hedge-fund-running" father, Thomas Gilbert, by his 30-year-old son, Thomas Gilbert Jr. The murder occurred over a dispute about Gilbert Jr.'s trust fund allowance. The article raised the question of whether Gilbert Jr.'s behavior stemmed from being raised in an

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affluent household.⁵ It further cited academic research that affluent children have higher rates of depression, anxiety and elevated levels of substance abuse and delinquent behaviors (such as stealing).⁶

Psychological research indicates that wealth can rob young children of their search for their own identity and self-worth; they aren't forced to find out how they can be productive in society because they don't have the need or hunger to do so.⁷ As Andrew Carnegie once said, "The parent who leaves his son enormous wealth generally deadens the talents and energies of the son, and tempts him to lead a less useful and less worthy life than he otherwise would."⁸ Likewise, research suggests that being in the workforce isn't just about earning a paycheck, but also is a source of personal satisfaction and development, which affluent children may miss out on.⁹ It stands to reason that children who grow up expecting wealth without earning it themselves could lack motivation and self-confidence.

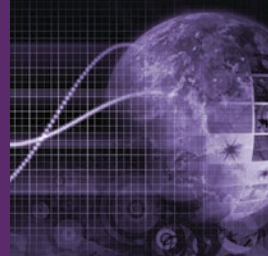
Perhaps even more troubling is the research that indicates that affluent children entering adulthood may also be sheltered from the basic everyday frustrations of life,

such as changing light bulbs, shoveling snow or making their own meals. This sheltering could likely slow their maturity while they retain unfettered power over people whom they employ, as well as those looking to benefit from their fortune.¹⁰

Estate planners may argue that outright transfers of wealth are the problem and not transfers of wealth into trusts. Trusts with strict distribution provisions may reduce a beneficiary's lack of motivation because he can't simply secure a distribution from the trust whenever he wants one. Similarly, incentive trusts that set forth required goals and behaviors, which when accomplished, trigger a distribution, may mitigate the potential spoiling of a beneficiary. A settlor may create any rule or contingency he wants, for example, a beneficiary completing higher education, starting a business or maintaining a status quo (such as not committing a crime or using drugs). A settlor may also link distributions to the amount a beneficiary earns through his occupation. This may drive a beneficiary to work harder and motivate him further. However, some practitioners are critical of this planning tool because it may create resentment, is a recipe for litigation and, in some situations, may be difficult to monitor. Furthermore, clients should also be mindful that even trusts that are fully or partially discretionary may work only to protect those assets from creditors' claims, but may not be in the best interests of a beneficiary who feels entitled to live off of the trust at the expense of meeting his true potential.

If large transfers of wealth, whether outright or in trust, have the potential to create generations that lack motivation and maturity, not to mention unhappy individuals with poor self-esteem, it raises the question of whether excessive transfers of wealth should be considered a good estate plan. Perhaps many of the plans we're recommending are harmful for the beneficiaries, as well as society at large.

Society. Aside from clients who are naturally philanthropically inclined, our experience is that the needs of society seldom enter the framework when discussing estate planning with our clients. After all, the primary concern for most individuals is the well being of their own families and not humanity. In contrast, the Buffett-Gates Giving Pledge encourages billionaires to make a commitment to give most of their



wealth to philanthropic causes. As of December 2015, 141 billionaires or former billionaires signed the pledge.¹¹ This begs the question of what will become of the descendants from those families who aren't so philanthropically inclined and the descendants of those who signed up for the pledge, who are still leaving exorbitant amounts to their heirs.

On Jan. 19, 2015, *CNN.com's* top news story stated, "The richest 1% will own more than all the rest by 2016," based on a study by the international agency Oxfam. But, the story didn't discuss what will become of the heirs of this unprecedented wealth. This quandary has become a hot topic for wealthy parents who are now rethinking the way they raise their children. Some have offered their children trips around the world—not for the purpose of exposing them to European cultures—but rather to expose them to poverty, slums and orphanages as a way to gain perspective on their privileged way of life.¹²

In fact, the very purpose of creating the federal estate tax was to prevent massive amounts of wealth from passing between generations.¹³ Theodore Roosevelt, who was a believer in estate taxes, said: "We grudge no man a fortune in civil life if it is honorably obtained and well used. It is not even enough that it should have been gained without doing damage to the community. We should permit it to be gained only so long as the gaining represents benefit to the community."¹⁴ The premise underlying the purpose of the estate tax and Roosevelt's statement is that bloated fortunes will do little to advance, and will more likely impair, the beneficiaries' life courses and would be better served aiding humanity.

The Vanderbilts, one of the wealthiest families in America's history, saw their vast fortune disappear within a few generations.¹⁵ William Kissam Vanderbilt, grandson of Cornelius Vanderbilt, who retired to look after his yachts and thoroughbred horses said, "inherited wealth is a real handicap to happiness ... It has left me with nothing to hope for, with nothing definite to seek or strive for."¹⁶ His sentiments are now bolstered by academic research demonstrating the lack of motivation and incidences of mental health issues in affluent children.

Ways to Mitigate

Hard work and philanthropy may be the two most effec-

tive ways to mitigate the perils of prosperity.¹⁷ Work can help level the playing field, ignite descendants' interests, increase their self-worth and help them learn to deal with deadlines and inevitable everyday frustrations. Philanthropy can make heirs see that their fortunes can be used to benefit worthy causes and may help foster a sense of responsibility.

An interesting case study involves Pablo Picasso's granddaughter, Marina Picasso, who lived on the edge of poverty during her childhood and later inherited a significant portion of her grandfather's estate. On Feb. 4, 2014, *The New York Times* published an article regarding

Hard work and philanthropy, as well as investing in human capital, must start when children are very young.

her plans to sell off her grandfather's art to broaden her philanthropy.¹⁸ Although most of the article focused on the worries of the art market, it discussed the juxtaposition of her childhood versus her current wealth. She recalled her father Paulo (Picasso's estranged son) begging Picasso for money and admitted that planning the sale is an aggressive effort to "purge herself" of Picasso's legacy. Regarding her difficult childhood, she said: "I think because of it I developed my sense of humanity and my desire to help others."¹⁹ Although she became suddenly wealthy at the age of 21 on the death of her grandfather, her struggles early in life forged her path towards philanthropic giving. Now that her five children are grown (three of whom were adopted from Vietnamese orphanages), Marina devotes her time to humanitarian work.

Communication

The Institute for Preparing Heirs (IPH), an innovative training company that helps financial advisors, estimates that only one-third of wealth transfers are successful. They define "successful transfers" as those in which



family harmony is intact after the transfer.²⁰ The IPH's studies of the so-called "successful transfers" found that those families had a family mission statement and interactive discussions about the overall purpose of their wealth. Thus, according to the IPH, getting as many family members as possible to buy into the family mission, goals and purposes of wealth may elevate the chances of successful transfers.

In "Changing the Playbook" by Marvin E. Blum, p. 34, this issue, Marvin discusses the importance of preparing heirs for the responsibilities associated with receiving an inheritance.²¹ He uses the analogy of a large mansion resting on a tiny foundation to explain

Leaving descendants more assets than is necessary for their basic needs may be detrimental.

how unrealistic it is to expect unprepared heirs to handle a substantial inheritance. He believes that creating an education strategy will widen the proverbial foundation.

Human Capital

Successful transfers of wealth include a main ingredient far more valuable than money: human capital. "Human capital" is defined as the collective skills, knowledge and other intangible assets of individuals, such as habits, personality attributes and creativity, which embody the ability to perform in the world to produce economic value (that is, skills and experiences that are unique to an individual).²² It's what a person wants his descendants to know about his life and values; how that information could help the next generations; and the transmission of a skill set, experience and values. A transfer of wealth versus an investment of human capital is analogous to giving a man a fish or teaching a man how to fish.

One of the best examples of the investment in human capital is Walt Disney. Walt was one of five children—

four boys and a girl. He lived most of his childhood in Marceline, Mo., where he began drawing, painting and selling pictures to neighbors and family friends. While Walt's family wasn't wealthy, they noticed his ability to draw and cultivated his talent by sending him to take night courses at the Chicago Art Institute to improve his drawing skills.²³ Walt's family gave him the opportunity to create his lasting legacy.

While the maximization of wealth transfers is likely the clients' goal when they meet with estate planners, they may not realize that a more thorough analysis of their values, coupled with an open dialogue with their descendants, could lead to a better overall plan and the transfer of human capital or the skills and life experiences that are unique to them and their family. A mission statement can be one part of creating a successful transfer of wealth and may aid in the transfer of human capital. Transmitting this mission might also include meetings and communications from our clients to their descendants on a variety of topics, including: (1) how to handle life's challenges; (2) general words of wisdom and advice from ancestors; (3) family history and experiences; (4) values and ethics; and (5) religion.

The concept of transferring human capital by means other than traditional estate plans isn't a new phenomenon. Ethical wills have been around for hundreds of years and recently regained popularity.²⁴ An ethical will is a non-legal document, sometimes referred to as a "legacy letter," in which a client may express an array of personal thoughts and directives, not just about his wealth but also about his personal values and life lessons. It's a way to have family members understand the reasons the client chose to dispense his assets in a certain way and may assist in ameliorating potential conflicts. Although ethical wills started as an oral tradition by the Jewish people²⁵—which was later formalized into written documents—they've now entered the 21st century with PowerPoint presentations that include a slideshow of photographs. There's even an iPhone app dedicated to creating ethical wills.²⁶

Family mission statements and ethical wills are supplements that can be extremely useful in turning a dry or packaged estate plan into a dialogue about the client's values and ultimately lead to a transfer of human capital from one generation to the next. Ideally, this process should create a fuller understanding for those charged with protecting and fulfilling their legacies.




Timing

Although it's now commonplace, the creation of an estate plan when a person is in good health is a historically new phenomenon. In the Middle Ages, there was a direct personal connection to death due to increased mortality rates and deadly plagues. The phrase, "memento mori," a Latin term that means "remember you must die," was frequently used.²⁷ In the late 18th century, the creation of death bed wills became more common. As a result, they included more personal and immediate hands-on provisions than the packaged documents of today.²⁸ Only in recent decades, with increased life expectancies coupled with the prevalence of marketing by the estate-planning industry and the rise of individual wealth, has the mindset shifted towards creating an estate plan well in advance of illness or old age.²⁹

Of course, trying to change the course of a family's path later in life when descendants may already be spoiled might be too late. In reality, hard work and philanthropy, as well as investing in human capital, must start when children are very young. But, there's no reason to compound the problems by transferring excessive wealth that might cause more harm than good.

Better Off With Less?

If our clients wish to create the most successful and beneficial estate plans for their families, research suggests that heirs may be better off with less wealth. As planners, we need to be aware of this critical data and raise these issues in candid conversations with our clients. Additionally, more learning, focus and research on this topic is necessary. While the greater use of mission statements, ethical wills, incentive trusts, open family dialogue and teaching descendants hard work and philanthropy may help, we must face the reality of what the data suggests: Leaving descendants more assets than is necessary for their basic needs may be detrimental. Instead, the transfer of human capital from one generation to the next may be the link towards a successful transfer of values and long lasting, self-sustaining prosperity, and this transfer should begin long before the estate-planning documents are signed. 

Endnotes

1. Charles W. Collier, *Wealth in Families* (Harvard University 2006).
2. Disclaimer: Although we represent affluent clients for whom we struc-

ture plans and draft documents with the express goal of maximizing wealth transfers, rethinking the very purpose of estate planning is a worthwhile endeavor for our own knowledge and awareness as professionals. More importantly, armed with this insight, we can educate our clients about the true ramifications of their planning on their loved ones.

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4. *Ibid.*, at pp. 515-516.
5. Ron Lieber, "Growing up on Easy Street has Its Own Dangers," *The New York Times* (Jan. 9, 2015).
6. *Ibid.*
7. Kay S. Hymowitz, "Parenting the Privileged, Dynastic Wealth Can Hurt Children. Can Philanthropy Help?" *Philanthropy Magazine* (Winter 2013).
8. Andrew Carnegie, *The Gospel of Wealth, and Other Timely Essays*, The Century Co. (1900).
9. *Supra* note 7, at p. 6.
10. *Ibid.*, at p. 5.
11. The Giving Pledge, <http://givingpledge.org/index.html>.
12. *Supra* note 7.
13. Boris I. Bittker, Elias Clark and Grason M.P. McCouch, *Federal Estate and Gift Taxation* (Ninth ed. 2005).
14. Donald J. Davidson, "The Wisdom of Theodore Roosevelt," *Open Road Media* (Nov. 9, 2010).
15. Natalie Robehmed, "The Vanderbilts: How American Royalty Lost Their Crown Jewels," *Forbes* (July 14, 2014).
16. *Ibid.*, at p. 1.
17. *Supra* note 7, at p. 6.
18. Doreen Carvajal, "Picasso's Granddaughter Plans to Sell Art, Worrying the Market," *The New York Times* (Feb. 4, 2015).
19. *Ibid.*, at p. A1.
20. *Supra* note 7, at p. 9.
21. Marvin E. Blum, "Changing the Playbook," *Trusts & Estates* (February 2016), at p. 34.
22. "Human capital," *Dictionary.com*, <http://dictionary.reference.com/browse/human-capital>.
23. "D23," Walt Disney Archives, *About Walt Disney*, <https://d23.com/about-walt-disney/>.
24. Constance Gustke, "The Ethical Will, an Ancient Concept, Is Revamped for the Tech Age," *The New York Times* (Oct. 31, 2014).
25. Rabbi Jack Reimer, "Writing and Reading Ethical Wills," www.myjewishlearning.com/article/writing-and-reading-ethical-wills/.
26. *Supra* note 22.
27. Karen J. Sneddon, "Memento Mori: Death and Wills," 14 *Wyoming L. Rev.* 2011 (2014).
28. *Ibid.*, at p. 518.
29. *Ibid.*, at p. 519.