ENGENDERING TRUST

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ANGELO: Believe me, on mine honor,
My words express my purpose.
ISABELLA: Ha? Little honor to be much believ'd,
And most pernicious purpose! Seeming, seeming!
I will proclaim thee, Angelo . . .
ANGELO: Who will believe thee, Isabel?
—William Shakespeare, *Measure for Measure*[1]

INTRODUCTION

As I prepared for this Symposium, nearly every person in the country was riveted to a news source and reeling from yet another brutal example of the "he said/she said" divide.[2] In Shakespeare's *Measure for Measure*, first performed over four hundred years ago,[3] Angelo, the repository of power in dissolute Vienna, demands Isabella's virginity in exchange for her brother's life.[4] When Isabela

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1. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 4.

2. *See* Sheryl Gay Stolberg & Nicholas Fandos, *Bret Kavanaugh and Christine Blasey Ford Duel With Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html [https://perma.cc/UQR2-RE77].

3. THE RIVERSIDE SHAKESPEARE 545 (G. Blakemore Evans ed., 1974).

4. *See id.* at 545–46.

responds by saying she will "proclaim" Angelo's "pernicious purpose," he replies, "Who will believe thee . . .?,"[5] a sobering reminder of how little has changed for women when gender intersects with power. Although these themes may seem removed from the topic of inheritance law—the law governing transfers of property on death—the trust structure, with its patriarchal origins and embedded power differentials, provides an opportunity to explore where gender and the law intersect, both historically and today.

We are all too familiar with the archetypical figures that appear when discussing property, power, and trust: the wise and entrepreneurial patriarch; the gold-digging stepmother, seeking a windfall; the deserving wife, mother, sister, entitled to lifetime support; the children, spendthrift sons and defenseless daughters, both in need of protection; and the snowy-haired, independent, and professional trustee.[6] These figures occupy some of our most stubborn myths about how marital trusts should keep the stepparent away from wielding control lest the corpus end up with someone who was not the settlor's "blood" relative[7]; how family trusts are best designed to keep property safe, now and forever, rather than transition it to younger generations[8]; and, more generally, how the "prototypical modern trustee" is an entity, serving as a corporate manager, and not an individual.[9] They are "myths," because they are grounded in both truth and fiction, and because they have taken on a life that is larger than their own.[10] When these myths and the language that surrounds them remain unmentioned,

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5. SHAKESPEARE, *supra* note 1.

6. *See* Deborah S. Gordon, *Mor[t]ality and Identity: Wills, Narratives, and Cherished Possessions*, 28 YALE J.L. & HUMAN. 265, 295–96 (2016); Allison Anna Tait, *Trusting Marriage*, U.C. IRVINE L. REV. 33–36 (forthcoming 2019) [hereinafter Tait, *Trusting Marriage*]; *see also* Martin D. Begleiter, *Grim Fairy Tales: Studies of Wicked Stepmothers, Poisoned Apples, and the Elective Share*, 78 ALB. L. REV. 521, 529–31 (2015).

7. *See* Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. 137, 150 (1991); Jeffrey Pennell, *Estate Planning for the Next Generations(s) of Clients: It's Not Your Father's Buick, Anymore*, 34 ACTEC J. 2, 10–12 (2008).

8. *See generally* JAMES E. HUGHES, JR., FAMILY WEALTH: KEEPING IT IN THE FAMILY (2004) (describing strength of this view and its accompanying harm).

9. *See, e.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 638 (1995) ("Private trustees still abound, but the prototypical modern trustee is the feepaid professional [institution].").

10. *See* Albert C. Lin, *Myths of Environmental Law*, 2015 UTAH L. REV. 45, 72; *see also* Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 3 (1992) ("Although we tend to think of myths as stories that hold out false promises, myths need not be misleading. Myths are also the stories that are told to pass on cultural values.").

unexamined, and unchallenged, this Article argues, women are more likely to suffer.

Part I provides background and context. It reviews the work scholars have done to explore the relationship between gender and inheritance law,[11] and then outlines the three characteristics of trusts—divided ownership, privacy, and temporal uncertainty—that define these instruments. Part II describes a survey of current case law used to explore issues of gender and trust and makes some general observations about the language, myths, and trends that appear in these cases.[12] Part III focuses on how, from the perspective of gender, the three dominant trust characteristics have evolved.[13] Section A discusses divided ownership from the perspective of fiduciary and settlor identity, examining who is being chosen and by whom to serve as trustee in these cases and what language is being used to describe this important role. Section B moves away from numerical trends to consider the impact of trustee identity and power from the perspective of privacy. Finally, Section C examines trust duration, which captures a larger problem having to do with "objectivity."

In *Justice Engendered*, Martha Minow explains that the "special burden and opportunity" of the law is to create "opportunities for insight and growth," to "engender" justice by using language to help "remake the normative endowment that shapes current understandings."[14] I argue that an "engendered" approach to trust law uses perspective, rhetoric, and "subtexts"[15] to disrupt rather than ignore or reinforce existing social patterns and myths, to unearth embedded assumptions in language, and to *notice* when a particular vantage point is being used and "appreciate a perspective other than one's own."[16] I conclude that although some courts are taking this "engendered" approach toward trusts and trustees, there is work yet to do.

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11. *See infra* notes 17 and accompanying text.

12. *See infra* notes 64–67 and accompanying text.

13. *See infra* Part III.

14. Martha Minow, *The Supreme Court – 1986 Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 95 (1987).

15. *See* Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMAN. 1, 12 (2006); *see also* Gordon, *supra* note 6, at 295–96 & nn.247–55 (illustrating subtexts).

16. Minow, *supra* note 14, at 13–14.

I. BACKGROUND AND CONTEXT

I am far from the only scholar to be curious about gender and its relationship to inheritance law.[17] After all, in the fairly recent past, this field has yielded United States Supreme Court cases making significant changes in the social and economic roles of women, including *Reed v. Reed*[18] and, more recently, *United States v. Windsor*.[19] Although fiduciary investing was once subject to the overtly gendered "Prudent Man" rule from *Harvard College v. Amory*,[20] in the 1980s courts and legislatures adopted a modern investing standard for trustees that not only rejected the biased terminology but reimagined the rule completely.[21] Spousal rights on death have evolved from the demeaning system of dower,[22] which treated women as objects in need of care[23]

17. *See* Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts, and Estates*, 49 REAL PROP. TR. & EST. L.J. 317, 328–35 (2014) (describing scholarship in the area of wills, trusts, and estates that is concerned with gender, including unanswered questions); Daphna Hacker, *The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought*, 7 J. EMPIRICAL LEGAL STUD. 322, 350 (2010) (describing research). This Symposium is one of several focused on the topic. We also have seen publication of FEMINIST JUDGMENTS: REWRITTEN TAX OPINIONS (Cambridge University Press 2017, Crawford & Infanti, eds.), to be followed by other volumes in the series, including FEMINIST JUDGMENTS: REWRITTEN TRUSTS & ESTATES OPINIONS (Cambridge University Press, Gordon, Lewis, & Spivack, eds.) (forthcoming).

18. 404 U.S. 71, 76–77 (1971) (invalidating on Equal Protection grounds Idaho statute preferring men over women as estate fiduciaries).

19. 570 U.S. 744 (2013) (finding Section 3 of DOMA, which defined marriage for federal purposes as legal union between one man and one woman, unconstitutional and allowing decedent's estate full marital deduction for assets transferred to her wife). *But see* Lily Kahng, *The Not-So-Merry Wives of* Windsor*: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325 (2016) (arguing that claimed tax equality of *Windsor* is illusory).

20. 26 Mass. 446, 469 (1830).

21. *Id.* at 465; Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC J. 314, 316 (2010) (describing "quiet revolution" in trust investing); *see also* Stewart E. Sterk, *Rethinking Trust Law Reform: How Prudent Is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851, 856–59 (2010).

22. Dower entitled a wife to a one-third life interest in her husband's property on the husband's death. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1660 (2003); Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 174–76 (2014).

23. Fellows, *supra* note 7, at 149–50; *see also* Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 74 (2009).

and "vessels" for the bloodline,[24] to more gender-neutral systems,[25] the most progressive of which aspire to recognize marriage as an economic partnership.[26] Empirical and historical studies document how women made wills and trusts[27] even at times when the law limited their power to control property,[28] and scholars have shown how although women were once less likely to inherit property,[29] they played and can play a leading role in their family's estate planning decisions.[30] Casebooks in this field now highlight how gender matters in many different areas of succession and transfers on death.[31]

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24. Fellows, *supra* note 7, at 150; *see also* Janet Finch & Lynn Hayes, *Gender, Inheritance and Women as Testators*, *in* GENDER RELATIONS IN PUBLIC & PRIVATE: NEW RESEARCH PERSPECTIVES 121, 121 (Lydia Morris & E. Stina Lyon, eds. 1996) (describing view that marriage equated women with prostitutes, "needed only because their bodies were necessary to produce sons, but otherwise excluded from inheritance").

25. *See* Lawrence Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 74 IOWA L. REV. 223, 239, 247–53 (1991); *see also* Dubler, *supra* note 22, at 1687 (describing "stunning" language of formal equality used by the New York Estates Commission in lengthy critique of dower); Fellows, *supra* note 7, at 138–39 (describing evolution of Western women's property and inheritance rights).

26. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. L. REV. 83, 151 (1994); Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 584–89 (1995); Margaret Valentine Turano, *UPC Section 2-201: Equal Treatment of Spouses?*, 55 ALB. L. REV. 983, 984 (1992); Waggoner, *supra* note 25, at 247–48.

27. Tait, *Trusting Marriage*, *supra* note 6, at 7–9; *see also* Kristine S. Knaplund, *Women and Wills: An Empirical Analysis of the Married Women's Property Act and Its Remarkable Resonance Today*, 45 RUTGERS L. REC. 216 (2017–18).

28. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *430 (describing couverture); Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 387 (1994) (same).

29. *See* 2 BLACKSTONE, COMMENTARIES *208 (ancestral lands passed to eldest male); MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 42, 158 (1986) (sons more likely than daughters to be left property). *But see* Deirdre G. Drake & Jeanette A. Lawrence, *Equality and Distributions of Inheritance in Families*, 13 SOC. JUST. RES. 271, 282–83 (2003) (surveying eighty-nine adults to assess inheritance distributions based on principles other than equality, including gender, need, and reciprocity, and finding little difference in how daughters and sons were treated).

30. *See* Ezra Hasson, '*Where There's a Will, There's a Woman': Exploring the Gendered Nature of Will Making*, 21 FEMINIST LEGAL STUD. 21, 22–34 (2013); Pennell, *supra* note 7, at 10–11; *see also* Hacker, *supra* note 17, at 328–34 (providing a comprehensive overview of empirical scholarship on how gender affects intestacy and wills law).

31. *See, e.g.*, ALFRED L. BROPHY, DEBORAH GORDON, NORMAN P. STEIN & CARYL YZENBAARD, EXPERIENCING TRUSTS & ESTATES 379–403 (2017) (undue influence); THOMAS P. GALLANIS, FAMILY PROPERTY LAW 931–34 (5th ed. 2011) (marital trust planning); SUSAN GARY, JEROME BORISON, NAOMI R. CAHN & PAULA A. MONOPOLI, CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES 62–70, 104–10

While these advances are noteworthy, inheritance law retains significant vestiges of its patriarchal past.[32] For example, notwithstanding dower's demise, most jurisdictions continue to follow rules that purport to be gender neutral but disproportionately disadvantage women, frequently within the framework of marriage.[33] As feminist legal scholars have explained, concepts like "objectivity" and "neutrality," which are attractive for their clarity and predictability,[34] only exist for those who sit in a position of power and whose characteristics, morals, and behavior align with majoritarian norms.[35] Anyone who does not occupy such a privileged position will be disadvantaged, literally or figuratively, by an "objective" approach that fails to consider how biological, historical, and sociological realities can affect more vulnerable people in disproportionately negative ways.[36] Applying these ideas to the spousal right of election, which replaced dower and allows a surviving spouse to elect some share of a decedent spouse's estate, Mary Louise Fellows argues that the elective share is far from neutral when applied.[37] Women live

(2011) (intestacy statutes); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 127–35 (10th ed. 2018) (unworthy heirs); DANAYA C. WRIGHT, THE LAW OF SUCCESSION, WILLS, TRUSTS, AND ESTATES 523–24 (2013) (QTIP planning).

32. Fellows, *supra* note 7, at 137–39.

33. *See* Tait, *Trusting Marriage*, *supra* note 6, at 5 & n.11 (noting that demographic, wealth, relationship, and power differences often mean that the more vulnerable spouse is female but not always); *see also* Dubler, *supra* note 22, at 1652, 1669–71 (recognizing that the elective share was the mechanism by which the "law held tight to dower's ideological as well as economic functions"); Turano, *supra* note 26, at 997 ("Even with the advent of election statutes, . . . the husband still had the right during the marriage to manage and dispose of the couple's property, leaving the wife nothing to inherit."). As has been widely recognized, marriage is not necessarily the economic partnership that was celebrated in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015). *See, e.g.*, Allison Anna Tait, *The Return of Couverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 100–01, n.4 (2016) (compiling criticisms of Justice Kennedy's vision of marriage).

34. Katharine T. Bartlett, *Objectivity: A Feminist Revisit*, 66 ALA. L. REV. 375, 376–77 (2014).

35. *Id.* at 378–84; Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

36. *See* Deborah L. Rhode, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 147 (1997); Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 594–99 (2000); Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 588 (1996).

37. Fellows, *supra* note 7, at 142–43, 152–56 (anything short of full and shared ownership of marital property devalues women's contributions to the marital partnership); *see also* Brashier, *supra* note 26, at 152 ("If states wish to view marriage as an economic partnership in which contributions of each spouse should be recognized, then they must adopt community property principles, not forced share statutes that provide recognition of spousal contributions only to the survivor when the marriage is terminated by death."); Laura A. Rosenbury, *Two Ways to End A Marriage: Divorce*

longer, earn less, and devote more time to responsibilities of the home, so they are more likely to be the non-propertied spouse electing against a deceased husband's estate.[38] Moreover, like dower, the elective share rests on an ideology that envisions the electing spouse as dependent and in need of support rather than as an economic partner.[39] As such, it often equates outright ownership with a life interest, makes property ownership contingent on survival, and makes the non-propertied, electing spouse the *disruptor* of donative freedom rather than an owner of the property in her own right.[40] The spouse who holds title to property can, and frequently does, use non-probate devices to evade the surviving spouse's elective share rights[41]; men took this approach, often in fear that women would remarry and divert assets to second spouses

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or Death, 2005 UTAH L. REV. 1227, 1233 ("[T]he partnership theory of marriage, while seemingly more egalitarian, may also reinforce wifely sacrifice . . . . The partnership theory thereby reinforces traditional gender role expectations allocating wage work to men and care work to women."). Community property regimes, where each spouse has an equal right to own and dispose of property earned during the marriage, exist in only a minority of states. Fellows, *supra* note 7, at 152 (discussing how an "overwhelming majority of the states" have rejected community property regimes).

38. Fellows, *supra* note 7, at 152; Brashier, *supra* note 26, at 150; Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301, 305 & n.11 (1995) [hereinafter Gerzog, *Marital Deduction QTIP Provisions*]; *see also* Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421, 423 (1992) (using game theory to "explore how women might systematically do worse than men with respect to acquiring property"). Although Gerzog's census data stems from 1992 and earlier, more recent census reports show similar numbers. In 2017, 11.1% of men over sixty-five were widowed, compared to 32.6% of women in the same age range. *See America's Families and Living Arrangements: 2017*, U.S. CENSUS BUREAU (2017), https://www.census.gov/data/tables/2017/demo/families/cps-2017.html [https://perma.cc/9AAJ-5SAL] (Table A1. Marital Status of People 15 Years And Over, By Age, Sex, and Personal Earnings: 2017). These numbers coincide with a report from DHHS Department of Aging stating: "Widows accounted for 33% of all older women in 2017. There were more than three times as many widows (8.9 million) as widowers (2.5 million)." *See* ADMIN. FOR CMTY. LIVING, 2017 PROFILE OF OLDER AMERICANS 4 (2018), https://www.acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2017OlderAmericansProfile.pdf [https://perma.cc/7AS3-LUH5].

39. Brashier, *supra* note 26, at 105–12, 111 n.95.

40. *See* Fellows, *supra* note 7, at 151–52 ("The elective procedure reinforces the historical tradition of viewing the wife's claims as a burden on the rest of the family rather than as a worthy owner.").

41. 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, 333 (2017) ("A revocable trust is a popular estate planning tool used to disinherit a spouse in sixteen jurisdictions."). *But see* Begleiter, *supra* note 6, at 547–50 (discussing two elective share cases where surviving husbands barred from electing against wives' trusts).

or families even though widowers were far more likely than widows to remarry.[42] Thus, the transition from dower to the elective share highlights "both the radical potential of inheritance law reform to disrupt traditional gendered understandings of marriage, as well as the conservative potential of inheritance law reform to fortify the traditional, private family and reinforce the law's ability to define women's rights within the framework of marriage."[43]

Along these same lines, the QTIP marital trust, which allows a tax benefit to any decedent spouse who conveys to a surviving spouse less than full power over property, similarly perpetuates gender inequity in the guise of objectivity.[44] Wendy Gerzog has argued that QTIP trusts share many of the same flaws as elective share laws.[45] More specifically, they allow the propertied spouse (usually the husband) to direct where the property will go, so that the non-propertied spouse (usually the wife) has no power over the property at death.[46] QTIP trusts also purport to convey the tax savings available through the marital deduction to the marital "partners" when the benefit inures only to the husband.[47] The rules are ostensibly objective, although the original language of the statute and its legislative history belie this neutrality.[48] Application of the rules negatively affects women due to biology, earning and wealth patterns, and estate planning preferences.[49] And yet, QTIPs remain a popular planning device for married couples (and estate planners).[50]

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42. Pennell, *supra* note 7, at 10; Debra S. Judge, *American Legacies and the Variable Life Histories of Women and Men*, 6 HUM. NATURE 291, 296 (1995).

43. Dubler, *supra* note 22, at 1652.

44. *See* Fellows, *supra* note 7, at 158; *see also* Wendy C. Gerzog, Estate of Clack*: Adding Insult to Injury, or More Problems with the QTIP Tax Provisions,* 6 S. CAL. REV. L. & WOMEN'S STUD. 221, 246–47 (1996) [hereinafter Gerzog, *Adding Insult to Injury*]; Gerzog, *Marital Deduction QTIP Provisions*, *supra* note 38, at 322–27; Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. Rev. 1729, 1731 (1998); *cf.* Pennell, *supra* note 7, at 10 ("More than any other element of traditional estate planning, I believe this presumed distrust—the lack of control over the marital bequest—reflects thinking of the G.I. generation of men about their widows.").

45. Gerzog, *Marital Deduction QTIP Provisions*, *supra* note 38, at 320–25.

46. *See id.* at 309–11, 322–23.

47. *Id.* at 309–10, 320.

48. *See* Fellows, *supra* note 7, at 142, 152, 157–59; Gerzog, *Marital Deduction QTIP Provisions*, *supra* note 38, at 318–19, 322–25.

49. *See* Gerzog, *Marital Deduction QTIP Provisions*, *supra* note 38, at 325; Gerzog, *Adding Insult to Injury*, *supra* note 44, at 225, 246–48; *cf.* Judge, *supra* note 42.

50. Pennell, *supra* note 7, at 10 ("Our traditional planning boxes assume that the client does not trust the surviving spouse. Many planners do not even as the question."); *see also* Dodge, *supra* note 44, at n.30 (finding that QTIPs are the most

Scholars have described the many other ways that gender inequities appear in wills law, intestacy doctrines, and non-probate transfer laws affecting property transmission at death. Revocation-on-divorce statutes, which are touted as more in line with "majority" preferences in fact have a gendered history and erode women's rights upon divorce and death.[51] Will-drafting manuals, estate planning documents, and estate planning attitudes have embraced male language and preferences.[52] While many intestacy statutes now prefer the surviving spouse, intestacy dynamics reflect patterns of dominance and subservience that disadvantage non-majorities and women.[53] Because women are more frequently victims of abuse who kill their abusers, slayer rules that bar killers from inheriting but pay no heed to the abuser's conduct disadvantage women.[54] And undue influence law, a malleable doctrine anyway, reflects disturbing patterns of gender bias, especially when the named beneficiaries do not conform to the courts' normative agendas.[55] To quote from Carla Spivack's forthcoming book, "[p]roperty laws disadvantage women at key stages of their lives: when cohabiting with a man instead of getting married, signing a prenuptial

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common form of marital deduction planning); Karen J. Sneddon, *Not Your Mother's Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535, 1573 (2015) (arguing that choices that "reference the wealth of traditions and past experiences," including drafting assumptions and societal expectations, "should not dictate the present").

51. Naomi R. Cahn, *Revisiting Revocation Upon Divorce?*, 103 IOWA L. REV. 1879, 1898 (2018).

52. *See* Alyssa A. DiRusso, *He Says, She Asks: Gender, Language, and the Law of Precatory Words in Wills*, 22 WIS. WOMEN'S L.J. 1 (2007) (discussing gender and testator language); Sneddon, *supra* note 50, at 1569–72 (discussing will forms and gendered language); *see also* Danaya Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 354 (2017); *cf.* Shelly Kreiczer-Levy & Meital Pinto, *Property and Belongingness: Rethinking Gender-Biased Disinheritance*, 21 TEX. J. WOMEN & L. 119 (2011) (arguing against the practice of gender-biased disinheritance).

53. DiRusso, *supra* note 23, at 73–77.

54. Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247, 268 (2011).

55. Brian Alan Ross, Note, *Undue Influence and Gender Inequity*, 19 WOMEN'S RTS. L. REP. 97, 105 (1997); Veena K. Murthy, Note, *Undue Influence and Gender Stereotypes: Legal Doctrine or Indoctrination?*, 4 CARDOZO WOMEN'S L.J. 105, 106–07 (1997); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576–77 (1997); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 281–82 (1999); Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 246 (2010); *see also* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996); Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 959, 1005 (2006).

agreement, surviving an abusive relationship, caring for elderly parents, outliving their husbands, and inheriting property."[56]

Apart from the QTIP, less has been written about how gender impacts trusts and trustees.[57] One notable exception is Allison Tait's forthcoming article taking a comprehensive look at trusts in the context of marriage and arguing that the wealth preservation theory of trust law fundamentally conflicts with the marital partnership theory that undergirds matrimonial (primarily divorce) law.[58] The trust deserves more attention though, because it is the modern vehicle for property transmission[59] and involves complex and ongoing relationships that often rest on power differentials, information asymmetries, and incompatible or at least discordant beneficial interests.[60] More specifically, in contrast to other types of gifts at death, trusts exist over time and some for very long periods.[61] During that period, control and information are separate and distinct from beneficial enjoyment, which makes the trust quite different from other property ownership structures and thus a particularly interesting lens through which to examine how the law "may promote or reinforce . . . social patterns of dominance and submission."[62] Finally, trusts are very often private so monitoring them, including ascertaining who is involved and what the trusts say, is difficult.[63] The balance of this Article explores how these particular characteristics matter from the perspective of gender.

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56. CARLA SPIVACK, ROBBING WOMEN: HOW PROPERTY LAW CHEATS WOMEN AND WHAT YOU CAN DO ABOUT IT 5 (forthcoming).

57. Crawford & Infanti, *supra* note 17, at 334 ("Apart from the QTIP trust, feminist scholars have not devoted substantial scholarly attention to the operation of trust.").

58. Tait, *Trusting Marriage*, *supra* note 6, at 5-6.

59. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984); Schanzenbach & Sitkoff, *supra* note 21, at 314.

60. *See* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 68–69 (2005); *see also* Andrew S. Gold & Paul B. Miller, *Introduction to* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 1, 11–12 (Andrew S. Gold & Paul B. Miller eds., 2014). I have described these challenges in far greater detail in earlier articles. *See, e.g.*, Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L. REV. 497, 498–511 (2015).

61. Bernard Rudden, *John P. Dawson's Gifts and Promises*, 44 MOD. L. REV. 610, 610 (1981) (book review) ("[T]he normal private trust is essentially a gift, projected on the plane of time and so subjected to a management regime."); *see also* Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 217–18 (2011).

62. Dan L. Burk, *Do Patents Have Gender?*, 19 AM. U. J. GENDER SOC. POL'Y & L. 881, 885 (2011).

63. Carla Spivack, *Democracy and Trusts*, 42 ACTEC L.J. 311, 329–31 (2017).

II. SURVEYING TRUST CASES

This Part discusses a five-year survey of trust cases that I culled to explore where and how issues of gender currently appear in trust law.[64] This universe of approximately 540 cases provides examples of how trust law, and the courts interpreting it, are alert to historical gender inequities and seek to disrupt and reverse that legacy. There are as many moments, though, where cases show trust law clinging to its gendered past, both in language and effect. Before focusing on the three key trust characteristics of divided ownership, privacy, and duration, this section discusses how gender appears in the trust cases more generally.

As an initial matter, the concern described in Part I—that women tend to suffer disproportionately when inheritance law collides with marriage—finds support in recent cases. For example, courts have interpreted established trust doctrines (like distribution standards)[65] and newer ones (like decanting rules)[66] to do an end-run around the rights of

64. More specifically, I ran a search for state cases decided between July 1, 2013, and July 30, 2018, that referenced the West Key number for "trusts" (390), yielding 864 cases. I pruned to those designated in the West system as "estate planning and probate" (as opposed to insurance, litigation, government, etc.) which gave me 542 cases. I then further narrowed depending on what trust characteristic I was exploring. For example, there were 82 cases with co-settlors and 29 cases with someone other than an individual (a court or group of investors) establishing the trust, so those cases were less useful when I was examining the question of which gender was settling trusts and which was named trustee. Likewise, there were cases that involved constructive or resulting trusts, but not intended trusts (59), duplicate cases that I only counted once (26), and cases that involved more than one trust (44). For the latter, I counted the case more than once if it contained multiple trusts with different settlors *and* I could discern each trust's terms, so I was not just replicating my data but adding something new; therefore, of the 44 cases, 24 were counted once, 18 were counted twice, 1 was counted three times, and 1 was designated as co-settled. Finally, as described *infra* in Section III.A, there was a significant cohort of cases (46) that discussed some aspect of a trust but lacked essential information about one or more of the parties to it.

65. *See, e.g.*, *Pfannenstiehl v. Pfannenstiehl*, 55 N.E.3d 933, 940–42 (Mass. 2016) (finding husband's share in multi-million-dollar trust with an "ascertainable standard" of distribution to be "too remote," "speculative," and "'subject to the condition precedent of the trustee having first exercised his discretion' in determining the needs of an unknown number of beneficiaries" to subject the trust to equitable distribution).

66. *See, e.g.*, *Ferri v. Powell-Ferri*, 165 A.3d 1137, 1145 (Conn. 2017); *Powell-Ferri v. Ferri*, 165 A.3d 1124, 1126 (Conn. 2017); *Ferri v. Powell–Ferri*, 165 A.3d 1124, 543 (Conn. 2017) (trio of related cases together holding (1) that ex-wife had standing to challenge trustees' decanting of assets from ex-husband's trust while dissolution action pending, (2) trustees had authority to decant assets of trust where husband had unlimited right of withdrawal to trust where husband had no such right, and (3) trial court's decision not to treat trust as marital asset did not abuse discretion).

a female and less propertied spouse.[67] Even in cases where wives achieve some form of victory, the facts show husbands more in control of finances and creative use of the trust structure.[68]

The other general observations relate to the rhetorical and emotional patterns that emerge. First, family relationships appear as gendered in notable ways. While trusts can be established for any "lawful" purpose,[69] a common objective of trusts involves keeping property out of the control of certain people. For example, a trust may: provide lifetime support for a surviving spouse but transfer the *res* to descendants on the spouse's death; provide continuing support for family members, who might otherwise lose or squander the property from their own carelessness or inexperience or other vulnerability; or preserve and maintain a legacy (such as a business, home, or charity) so it continues to flourish after the property owner's death.[70] Because

67. *See also In re Trust Under Deed of David P. Kulig*, 175 A.3d 222, 224 (Pa. 2017) (refusing to include revocable inter vivos trust in husband's estate for purposes of discerning wife's pretermitted share); *Collins v. Collins*, 173 A.3d 345, 348 (Vt. 2017) (allowing husband's father to change beneficiary of revocable trust from husband to grandson and rejecting wife's argument that father lacked testamentary capacity to amend trust); *Pratt v. Ferguson*, 206 Cal. Rptr. 3d 895, 897, 901 (Ct. App. 2016) (allowing ex-husband to access wife's beneficial interest in trust, notwithstanding "shutdown" provision, because of policy in favor of child support); *In re Estate of McKenna*, 500 S.W.3d 850, 857 (Mo. Ct. App. 2016) (holding that husband's incorrect belief that prenuptial agreement was enforceable was nevertheless reasonable and showed he had no fraudulent intent to defeat his wife's right of election when he made transfers for the benefit of his descendants). *But see In re Sarkar*, 84 N.E.3d 666, 669, 677–78 (Ind. Ct. App. 2017) (remanding to trial court for "fact-sensitive" inquiry to see if husband, who attempted to disinherit wife of 56 years because she "has more assets than I have and will not need my money or property to support herself," was attempting to defeat right of election); *In re Estate of Thompson*, 434 S.W.3d 877, 883 (Ark. 2014) (affirming finding that trust assets could be included in husband's estate for purposes of determining wife's elective share, which was "expressly linked to the finding of fraud on [wife's] marital rights and was not a broad ruling that invalidated the Trust entirely or directed that the Trust assets be included in the Estate for all purposes").

68. *See, e.g.*, *Dahl v. Dahl*, 345 P.3d 566, 582–83 (Utah 2015) (finding wife had enforceable interest in trust to which she contributed marital property because "Utah law does not allow spouses to place marital assets in revocable trusts and then shield those assets from equitable property division in the event of a divorce"); *Ward v. Fogel*, 768 S.E.2d 292, 299–300 (N.C. Ct. App. 2014) (tolling statute of limitations on wife's claims that husband settled trusts with business interests during marriage because even though wife was a grantor of one trust and a beneficiary of the other, husband admitted that wife "was excluded from the drafting of the trusts and was uninvolved with the couple's financial affairs").

69. UNIF. TRUST CODE § 404 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2003); RESTATEMENT (THIRD) TRUSTS § 29 (AM. LAW INST. 2001); *see* Deborah S. Gordon, *Forfeiting Trust*, 57 WM. & MARY L. REV. 455, 474–76 (2015) (describing purposes for revocable trusts).

70. *See* Gordon, *supra* note 69.

this structure might exacerbate interpersonal tensions among the parties, it was not surprising to see that so many of the litigated cases involved blended families,[71] sibling disputes,[72] and unconventional relationships.[73] Far more startling, though, was the contrast between how many trust disputes involved stepmother beneficiaries (fifty-eight) and how many appeared to involve stepfather beneficiaries (five).[74]

Second, from a rhetorical perspective, it is not surprising that case after case discussed lengthy and contentious litigations.[75] What is unsettling, though, are the overtly gendered examples and narratives that courts use, repeat, and perpetuate in those cases, including narratives of masculinity that are implicitly equated with power. For example, *Babbitt v. Superior Court*[76] involved a claim by a stepdaughter against her stepmother who was both co-settlor and co-trustee of a revocable trust.[77] To explain the concept that co-settlors are entitled to dispose of revocable trust assets without incurring liability to contingent beneficiaries, the court relied on the following hypothetical from an earlier case:

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71. *E.g.*, *EGW v. First Fed. Savings Bank of Sheridan*, 413 P.3d 106, 107 (Wyo. 2018); *Schwartz v. Tedrick*, 61 N.E.3d 797, 799 (Ohio Ct. App. 2016); *In re Gerald L. Pollack Trust*, 867 N.W.2d 884, 889 (Mich. Ct. App. 2015); *Fintak v. Fintak*, 120 So. 3d 177, 179 (Fla. Dist. Ct. App. 2013); *see also Zook v. JPMorgan Chase Bank Nat'l Ass'n*, 85 N.E.3d 1197, 1204 (Ohio Ct. App. 2017) (quoting trial judge's explanation for his finding that stepchildren's failure to inquire into trust activities was objectively unreasonable as: "I find it hard to believe that kids, when they have a stepmom—or not even a stepmom, but a third wife, and their father dies, lay people—I mean, this is starting more fights in the law than anything in the entire world, except for drugs and sex . . . .").

72. *E.g.*, *In re Ricard Family Trust*, 886 N.W.2d 326, 328 (S.D. 2016); *Schroeder v. Sullivan*, 104 N.E.3d 460, 463 (Ill. App. Ct. 2018); *Heiskell v. Morris*, 182 So.3d 714, 716 (Fla. Dist. Ct. App. 2015).

73. *E.g.*, *Doolittle v. Exch. Bank*, 193 Cal. Rptr. 3d 818, 820 (Ct. App. 2015) (involving an aging mother who leaves property to her "gardener" with whom she has relationship and daughters disapprove); *In re Estate of Moore*, 193 Cal. Rptr. 3d 179, 183 (Ct. App. 2015) (involving aging father who leaves property to younger girlfriend).

74. Indeed, it was difficult to discern if some of these cases even involved stepfathers, which is telling in itself because it shows that courts (and litigants) find it more salient to characterize women by how they relate to family.

75. *Pollack Trust*, 867 N.W.2d at 889 ("[E]xtremely contentious . . . ."); *Glassie v. Doucette*, 157 A.3d 1092, 1094 (R.I. 2017) ("[B]ut one chapter in what is a complicated, multistate continuing saga over the decedent's estate, arising in the context of a legacy of wealth . . . ."); *Acorn v. Moncecchi*, 386 P.3d 739, 744 (Wyo. 2016) ("[P]arents' attempt to impose harmony along with the assets they conveyed to the next generation was unsuccessful."); *Fintak*, 120 So.3d at 179 ("[A] particularly contentious case involving the dangerous amalgam of family and money.").

76. 201 Cal. Rptr. 3d 353 (Ct. App. 2016).

77. *Id.* at 355.

> [I]f the settlor of a revocable trust learned he had a terminal disease, and was going to die within six months, he might decide that his last wish was to take his mistress on a deluxe, six-month cruise around the world—dissipating most of the assets held in his trust. The trustee, whose duties are owed to the settlor at that point, would have no basis to deny that last wish.[78]

While the *Babbitt* court acknowledged that the hypothetical was "colorful,"[79] it nevertheless chose to reinvigorate this narrative—a fantasy of taking a mistress on a cruise around the world—as an example of an action that no one, neither beneficiary nor trustee, would have the power to challenge.

Another example of a property owner's power to express *his* wishes appears in *EGW v. First Federal Savings Bank of Sheridan*,[80] a decision rejecting a public policy challenge to a no-contest clause.[81] Describing the Wyoming attitude toward donative freedom, the *EGW* court quoted, and thus reinvigorated, the following:

> No right of the citizen is more valued than the power to dispose of *his* property by will. No right is more solemnly assured to *him* by the law. Nor does it depend in any sense upon the judicious exercise of that right. It rarely happens that a *man* bequeaths his estate to the entire satisfaction of either *his* family or friends. The law wisely secures equality of distribution *where a man dies intestate*, but the very object of a will is to produce inequality . . . . In this country a *man's* prejudices form a part of *his* liberty. *He* has a right to them. *He* may be unjust to *his* children or relatives. *He* is entitled to the control of *his* property while living, and by will to direct its use after *his* death, subject only to such restrictions as are imposed by law.[82]

In the words of Robert Cover, law is "part and parcel of a complex normative world" which includes "not only a corpus juris, but also a language and a mythos."[83] As narrative theorists recognize,

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78. *Id.* at 362 (quoting *In re Estate of Giraldin*, 290 P.3d 199, 207 (Cal. 2012)).

79. *Id.* at 361–62.

80. 413 P.3d 106 (Wyo. 2018).

81. *Id.* at 114.

82. *Id.* at 110 (emphasis added) (quotations omitted) (quoting *In re Goist's Estate*, 18 N.W.2d 513, 521 (Neb. 1945)).

83. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

rhetorical choices in judicial decision-making wield tremendous power.[84] This rhetoric that equates legitimacy and individuality with masculinity and power is not isolated, and it contrasts starkly with language that depicts women in these cases as suspect and worthy of distrust. Courts recount stories of "repugnant" and "manipulative" female confidantes who take advantage of vulnerable and aged male spouses.[85] While aggressive and manipulative males do exist in the cases, they often are characterized as protectors.[86]

Courts also curiously refer to specific details about women that they do not about men; for example, although age and source of wealth are sometimes relevant in these cases, courts mention women's (but not men's) ages[87] and sources of their wealth[88] when those factors have no

84. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 30–31 (2002); Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 266 (2009) [hereinafter Berger, *Judicial Decision Making*]; Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L. J. 275, 278, 282 (2011); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 55 (2008); *see also* JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 169 (1985); Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES 14, 14 (Paul Gewirtz & Peter Brooks eds., 1996).

85. *In re Estate of Folcher*, 135 A.3d 128, 129, 133 (N.J. 2016) (describing "repugnant" conduct of wife toward "vulnerable" and "fragile" husband); *Schwartz v. Tedrick*, 61 N.E.3d 797, 802–04 (Ohio Ct. App. 2016) (describing widow as "hostile," "evasive," full of "outward distain," threatening); *In re Estate of Couture*, 89 A.3d 541, 544 (N.H. 2014) (affirming constructive trust because "decedent's wife, through fraud, deceit, and misrepresentation, induced the decedent to marry her after she gave birth to a daughter whom she claimed was his."); *Lintz v. Lintz*, 167 Cal. Rptr. 3d 50, 59 (Ct. App. 2014) ("The probate court described decedent as 'helpless[] and susceptible[] to [defendant's] wishes and influence beyond the susceptibility which is normal incident of [*sic*] a marital relationship.' . . . [D]ecedent was . . . unable to exercise his free will over her when it came to his money."); *see also Fintak v. Fintak*, 120 So.3d 177, 181 (Fla. Dist. Ct. App. 2013) (describing dueling stories told by settlor's sons and wife).

86. *E.g.*, *Hasty v. Castleberry*, 749 S.E.2d 676, 679 (Ga. 2013) (describing how brother trustee "overreached his narrowly-tailored power . . . for purposes related to [his mother's] welfare" when he used $1,000,000 of a marital trust for mother to benefit the university where brother trustee served on board instead of for beneficiaries, including sister); *Peck v. Peck*, 133 So.3d 587, 588 (Fla. Dist. Ct. App. 2014) (describing efforts of father, who helped daughter settle irrevocable trust, and brother, who served as trustee, to 'protect' settlor from "unwisely dissipat[ing] the assets").

87. *Matter of Sarkar*, 84 N.E.3d 666, 668 (Ind. Ct. App. 2017) ("Eighty-six-year-old Dipa Sarkar, the surviving spouse . . . ."). When the male's age is mentioned, it serves as a touchstone to the female's. *See Bank of Am. v. Judevine*, 26 N.E.3d 555, 558 (Ill. App. Ct. 2015) ("Herbert W. Kochs, the settlor of the Trust, met his third wife, Phyllis Anderson Picker, in 1955 when he was 52 years old and the chairman and chief executive officer of the Diversey Company corporation, a chemical company

bearing on the issue in dispute. Likewise, while status or role in a relationship is admittedly an issue in some trust disputes, women are more commonly defined by how they relate to men[89] while men are simply defined as "patriarchs" or called by name.[90] Of course, there are cases that contain far more balanced narratives,[91] but they are the exception.

In sum, a significant number of cases from my survey seem to perpetuate differences between the genders as a general matter. The next section explores how the specific characteristics unique to trusts appear.

III. DIVIDED OWNERSHIP, DURATION, AND PRIVACY

The central defining feature of the trust is that that those with a beneficial interest in the property are not its legal owners. Who is being chosen to control trusts and by whom, including what is being said about those who occupy the fiduciary role, is therefore a crucial aspect

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founded by the settlor and traded on the American Stock Exchange until 1978, when it was acquired for about $55 million. Ms. Picker, by contrast, was 23 years old and working in New York as a showgirl.").

88. *Duncan v. Rawls*, 812 S.E.2d 647, 648 (Ga. Ct. App. 2018) ("Ms. Olga Casteleiro de Goizueta, heir to her husband's fortune . . . .").

89. *Kincaid v. Johnson, True & Guarnieri, LLP*, 538 S.W.3d 901, 906 (Ky. Ct. App. 2017) (calling senior generation of advisory committee, made up of Settlor's daughters, the "Kincaid daughters" but calling junior generation, made up of Settlor's grandsons, "the Kincaid brothers"); *see also Cresto v. Cresto*, 358 P.3d 831, 835 (Kan. 2015) ("paramour"); *Glinskaya v. Zelman*, 9 N.Y.S.3d 350 (N.Y. App. Div. 2015) ("[L]ong-time domestic relationship" where they "cohabited . . . over many years" and survivor "performed certain services for [decedent], at least in part because of a promise he made that he would bequeath her his estate."); *Blechman v. Estate of Blechman*, 160 So.3d 152, 155 (Fla. Dist. Ct. App. 2015) (describing woman as "estranged wife of sixty years" and "[d]ecedent's girlfriend since 2003"). *But see Matter of Albert G. Aaron Living Trust*, 181 A.3d 703, 711–12 (Md. 2017) (rejecting argument that term "wife" is interchangeable); *Estate of Meyer v. Presley*, 469 S.W.3d 857, 860 (Mo. Ct. App. 2015) (describing trust created for male with whom settlor had "intimate relationship").

90. *Pizarro v. Reynoso*, 215 Cal. Rptr. 3d 701, 703 (Ct. App. 2017); *Cassibry v. Cassibry*, 217 So.3d 698, 699–70 (Miss. Ct. App. 2017); *see also Heiskell v. Morris*, 182 So.3d 714, 716 (Fla. Dist. Ct. App. 2015) ("Who owns the family homestead is the question in this internecine quarrel among six adult siblings whose father, lawyer John Morris, Jr., and mother transferred sizable property holdings contemporaneously with the creation of a family trust agreement in the early 1980s.").

91. *Rafalko v. Georgiadis*, 777 S.E.2d 870, 880–81 (Va. 2015) (majority and dissent dispute whether female friend of settlor, named as trustee, gets to decide whether sons who challenged and later withdrew challenge to trust violated no-contest clause); *Pizaro*, 215 Cal. Rptr. 3d at 703 (describing how granddaughter trustee "was the most reliable and credible of the family members" in an "acrimonious family squabble").

of trust law, both substantively and because this choice has the potential to create cognitive schema that impact who we think is worthy of wielding power more generally.[92] And, if trust and power are impacted by gender, as the cases seem to suggest, then the longer that structure lasts and the more the law fails to call attention to it, the more it persists.

A. Trustee Identity

It is a fundamental rule of trust law that a trust "will not fail for want of a trustee,"[93] and yet the trustee is the central figure in nearly every trust, serving as the primary ongoing link between the dead and the living. Often referred to by fiduciary law scholars as the "prototypical" or "archetypal" fiduciary,[94] the trustee wields significant power over the trust and its beneficiaries.[95] The trustee's decision-making and relationship with those beneficiaries determine whether a trust functions smoothly or is beset by conflict. The identity[96] of whomever is appointed to serve in this role is thus a critical decision to any property owner who is considering using a trust vehicle.[97]

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92. *See* J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ASS'N LEGAL WRITING DIRECTORS 155, 168–70 (2010); *see generally* Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1107 (2004) (describing how schema, or "knowledge structures," influence thought).

93. RESTATEMENT (SECOND) OF TRUSTS § 2, cmt. i (AM. LAW INST. 1959); 1 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, THE LAW OF TRUSTS § 33 (4th ed. 1989 & Supp. 2002); *see also*, *Whitehead v. Whitehead*, 142 Ala. 163, 165 (Ala. 1904); *Leaphart v. Harmon*, 195 S.E. 628, 629 (S.C. 1938) ("This universal rule requires no citations.").

94. Karen E. Boxx, *Distinguishing Trustees and Protecting Beneficiaries*, 27 CARDOZO L. REV. 2753, 2754 (2006); Austin W. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 540–41 (1949); *see also* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 912 (characterizing trustee as "a powerful prototype" of the fiduciary).

95. *See supra* notes 6–10 and accompanying text.

96. "Identity" is defined as "the characteristics determining who or what a person or thing is." ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/identity [https://perma.cc/B3HU-YMT8] (definition 1.1). While identity is admittedly multifaceted, *see generally* Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605 (2004), the identity characteristic I focus on here is gender.

97. ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES 87 (5th ed. 2013) ("Identifying a trustee who can monitor investments, file tax forms *and* make sensitive decisions about how much to spend for a beneficiary's 'comfortable support' can be difficult.").

Certainly, the history is clear. Fiduciary identity was once overtly patriarchal, and "'[a]lmost every well-to-do-man was a trustee.'"[98] Today, we know that legislatures may no longer exclude or even prioritize fiduciaries by gender,[99] that planners have made purposeful efforts to abandon the gendered "-trix" drafting protocols,[100] and that all U.S. jurisdictions have abandoned the Prudent "Man" rule.[101]

When we look at cases from the last five years, however, some interesting patterns emerge. After winnowing out cases that did not reveal gender identities, the cases provided approximately 170 trusts settled by males and 134 trusts settled by females. Looking solely at trusts created to benefit a surviving spouse (and totaling all trusts regardless of the gender of other more remote beneficiaries), men created such "marital" trusts a total of eighty-six times, naming the female surviving spouse as sole trustee in twenty instances, someone *other than* the surviving spouse (one or more professionals, friends, or relatives) in more than half (forty-four) cases, and the surviving spouse with a co-trustee eighteen times. Women, on the other hand, created such "marital" trusts only thirty times, naming the surviving spouse as sole trustee in more than half (sixteen), naming one or more others eleven times, and naming the surviving spouse as co-trustee only three times. Not only do these numbers indicate that more men are creating marital trusts, but also that they are more regularly reposing trust in people other than the surviving spouse to control her access to the *res*.

Trusts created by settlors who did not have a surviving spouse also reveal some interesting results. Of the small number of trusts (totaling fifteen) created by male settlors for a charity or distant relatives, one had a male family member as trustee, nine had an unrelated individual male as trustee, and five had an entity trustee. In other words, there were no female trustees named in this category. Female settlors had the same number of such trusts, totaling fifteen, the same number of corporate sole trustees (five), but the remaining trustees were far more diverse.[102] For "family" type trusts without surviving spouses, settlors of both genders tended to name family members whose gender matched

98. Langbein, *supra* note 9, at 640 (quoting Frederic W. Maitland, *Trust and Corporation*, *in* SELECTED ESSAYS 141, 175 (H.D. Hazeltine et al. eds., 1936)).

99. *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

100. Sneddon, *supra* note 50, at 1581–82.

101. *See supra* note 21.

102. More specifically: three had female family members as trustee(s); two had family members of both genders serving as trustee; two had unrelated males; one had an unrelated female; one had a corporate and male family member as co-trustees; and one had individuals of both genders with a corporation.

those of the beneficiaries, with a slight preference for male individual professionals and male family members.[103]

There is no compelling way to prove from this sample that trustees on a whole are overwhelmingly male, white-haired or otherwise.[104] But along with the above patterns, the cases reveal anecdotal preferences for males, both family and professional, and support the idea that where women serve as trustee, their powers are more circumscribed.[105] In *Karras v. Karras*,[106] for example, the settlor's children from an earlier marriage claimed that their stepmother converted certain accounts that belonged to their father's trust, and the stepmother claimed that she had the power, as co-settlor, to act alone and without supervision from the stepchildren who were named as co-trustees. The court decided the case in favor of the surviving spouse on the conversion claim but rejected the wife's position that she had the power to act independently, observing how:

> Notably, the trust provided a different outcome if [wife] had predeceased [husband]. In that circumstance, he would have "serve[d] as sole trustee." Thus, a fair reading of the trust as a whole is that [husband and wife] intended for her to have the assistance of co-trustees (of which she was one) who must act in concert if [husband] predeceased her, but that [husband] was to make his own decisions as "sole trustee" if [wife] predeceased him.[107]

Similarly, *Calhoon v. Oakes*[108] involved a settlor who named his son as trustee and beneficiary and his wife as "income beneficiary and trustee for income purpose only."[109] Finding that the settlor's son's request for

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103. Data on file with author.

104. *See supra* notes 6–10.

105. *See, e.g.*, *Jimenez v. Corr*, 764 S.E.2d 115, 117 (Va. 2014) (son and son-in-law co-Trustees of trust owning family corporation); *In re Rolf H. Brennemann Testamentary Trust*, 849 N.W.2d 458, 460 (Neb. 2014) ("The will . . . provided that if any of [the children] were unable to serve, or ceased to serve, the oldest son of that person would then serve as trustee."); *Warner v. Warner*, 319 P.3d 711, 715 (Utah Ct. App. 2014) (authorizing male sibling to "take lead responsibility"). *But see Cockerham v. Cockerham*, 201 So.3d 253, 255 (La. Ct. App. 2013) (naming three sons to serve as joint trustees, but granddaughter as arbitrator in event of disagreement).

106. 76 N.E.3d 706 (Ohio Ct. App. 2016).

107. *Id*. at 721.

108. *Calhoon v. Oakes*, 423 P.3d 664 (Okla. Civ. App. 2016).

109. *Id.* at 665; *see also In re Shadek*, 118 A.3d 182, 193 (Del. Ch. 2016) (rejecting settlor's daughter's attempt to modify trust because settlor "plainly intended for the Trust to benefit from the expertise and judgment of individuals whom he trusted and who were not beneficiaries").

an accounting and a declaration about limits on the wife's authority did not violate the trust's no-contest clause, the court explained how the husband had "carefully" restricted the wife's power.[110]

In sum, although the cases reveal no explicit disapproval of female trustees, they offer a window into the private planning that is taking place and, at the very least, suggest a pattern of male dominance that is worthy of attention by settlors, trustees, and estate planning professionals.

B. Trust Privacy

Trust privacy has two aspects to it: disclosure rules, which allow beneficiaries access to information and are therefore intertwined with who is serving as trustee and how freely the trustee wields power; and the role of courts, as the public face of otherwise private legal interactions. Although there is no space in this Article to discuss specific advances in disclosure rules and how they might relate to trustee identity, it is worth considering the gendered implications of trust privacy more generally.[111] As already noted, gathering empirical evidence about trusts is "tricky."[112] Although there is data available from filings by institutions that are part of the Federal Reserve System or from income tax returns for trusts that are required to file them, neither source reports individual account information, specific trust terms, or details about the identity of individual trustees, settlors, and beneficiaries.[113] And while we are starting to see some empirical research that focuses on more granular trust planning, including a unique survey of "service providers" in the trust field,[114] most of the information we have about trust provisions, trust planning goals, trust

110. *Calhoon*, 423 P.3d at 669.

111. *See* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 725–27 (2006) [hereinafter Foster, *Elusive Quest*]; Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 559–65 (2008); *see also* Spivack, *supra* note 54, at 272.

112. *See* Wright & Sterner, *supra* note 52, at 354–55 ("[T]rying to discover what people would want in their estate plans, just as more and more of those who can get what they want are using private non-probate mechanisms, is a very tricky endeavor.").

113. Schanzenbach & Sitkoff, *supra* note 21, at 315, 321 (describing public data).

114. *See* Adam S. Hofri-Winogradow, *Contract, Trust, and Corporation: From Contrast to Convergence*, 102 IOWA L. REV. 1691, 1692 (2017); Adam Hofri-Winogradow, *The Demand for Fiduciary Services: Evidence from the Market in Private Donative Trusts*, 68 HASTINGS L.J. 931 (2017); *see also* Pennell, *supra* note 7, at 5 n.13 (describing ACTEC survey).

successes, and trust party identity is anecdotal.[115] We can examine what practitioners say about how they plan and we can look at form books and trust codes, but the actual provisions and proscriptions of trusts are not available to the public unless the trust is testamentary. The only other major source of information about trusts, then, is case law, which describes trusts that have necessarily failed in some major respect so that they end up in court.[116]

Case law nonetheless reflects what the law does and says publicly about trusts. It therefore provides an opportunity to examine, as I've tried to do above, how gender manifests and matters, and it also provides an opportunity to give a public face to this private domain. As problematic as it may be to see relics of archaic language and myth in current case law, it is equally distressing to see the many cases that are devoid of identity information about the parties altogether. One way to respond to embedded power differentials is to unearth "culturally embedded stories and symbols," because doing so allows the audience to break down some of the schema that affect how we think and perceive the world.[117]

A recent federal case hinging on disclosure obligations illustrates how a court might take this type of "engendered" approach to trust law. *Osborn v. Griffin*[118] involved an epic family battle among the twelve children born into a "patriarchal family."[119] The dispute spanned nearly thirty years, resulted in damages of over half a billion dollars, and raised nearly every topic covered in a first-year civil procedure course, including jurisdiction, choice-of-law, estoppel, and laches.[120] Essentially, the two eldest sons schemed to gain control of a family company that originally was to be divided equally among all the settlor's children. The sons were not named as fiduciaries but took on the role after their father's stroke and manipulated him for twelve years prior to his death. Their lies and self-dealing eventually caught up with

115. *See, e.g.*, ROY WILLIAMS & VIC PREISSER, PREPARING HEIRS: FIVE STEPS TO A SUCCESSFUL TRANSITION OF FAMILY WEALTH AND VALUES (2014); HARTLEY GOLDSTONE & KATHY WISEMAN, TRUSTWORTHY: NEW ANGLES ON TRUSTS FROM BENEFICIARIES AND TRUSTEE (2012); JAMES E. HUGHES, JR., FAMILY WEALTH: KEEPING IT IN THE FAMILY (2004).

116. It is primarily trusts with restrictive or poor drafting that end up in litigation because a well drafted trust document will have provisions, such as broad removal and replacement powers vested in the beneficiaries or carefully designed disclosure provisions, that help with non-judicial resolution of disputes.

117. Berger, *Judicial Decision Making*, *supra* note 83, at 259, 263–69.

118. 865 F.3d 417 (6th Cir. 2017).

119. *Id.* at 428.

120. *Osborn* thus takes an arguably feminist approach to the probate exception. *See* Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1721–30, 1743–44, 1746–47 (1991).

them, allowing the daughters to recover millions of dollars in wrongfully diverted assets, compounded significantly by prejudgment interest. One interesting aspect of this case is how the court highlighted and used the family dynamics that led to the daughters' delay in discovering the sons' conduct: "Before this court is an extraordinary case, spanning decades, in which defendants repeatedly and fragrantly violated the fiduciary duties they owed to their sisters, *who reposed great trust in their brothers*."[121] In other words, the *Osborn* court explicitly acknowledged the family's patriarchal structure as giving rise to the circumstances that enabled and fostered the trustees' manipulation.

The *Osborn* opinion is engendered because it recognizes how the sisters' delay, which might have barred their cause of action, resulted, in part, from the way the trust inherited and mirrored a male-dominated family. The court's application of trust doctrine did not ignore the identity relationships grounded in power differentials but instead used those dynamics as the lens through which to view and interpret the trustees' conduct. Adopting an "engendered" approach by making public and express the power dynamics implicit in the characterization of objective reality helps legal actors to further "what happens already in the best practices of justice," which is a "commitment . . . to give equality meaning for people once thought to be 'different' from those in charge."[122] Ignoring what is actually happening in these cases allows the private mechanisms of dominance to continue unchecked and unexposed.

C. Trust Duration

The final defining characteristic of a trust is that it lasts over time. The limits, if any, on trust duration have stimulated much controversy. Starting (again) with history and origin, there is a strong argument that the increasingly popular perpetual (or dynasty) trust[123] is liberated in that it abandons a rule with a history of gender bias. Much like dower or the forced share, the rule against perpetuities was seen by some as an incursion on property owners' donative freedom.[124] Fellows recounts how Barton Leach, in discussing why perpetuities should be abolished, analogized the rule to "'an elderly female clothed in the dress of a

121. *Osborn*, 865 F.3d at 457 (quoting *Osborn v. Griffin*, 2016 WL 4014987 *2 (E.D. Ky. 2016)) (emphasis added).

122. Minow, *supra* note 14, at 16–17.

123. Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2100 (2003).

124. Fellows, *supra* note 7, at 148–49.

bygone period who obtrudes her personality into current affairs with bursts of indecorous energy.'" [125] And other images associated with the rule slot women into their traditional roles of wife and child-bearer: the unborn widow; the fertile octogenarian.[126] It is not hard to see why this intent-defeating rule has been viewed with skepticism.[127] We *might* then think of perpetual trusts as a welcome farewell to a biased rule. Moreover, there is nothing overtly gendered in perpetual trusts.[128] They are equally available to female and male property owners and hold the property of female and male beneficiaries.

A perpetual trust, however, subjects its beneficiaries to outdated proscriptions over long periods of time, while depriving them of the ability to exert control over the trust property.[129] Researchers in the social sciences have documented how women especially have relied on "kin-keeping" as a means of legacy building.[130] This kin-keeping is accomplished through gifts, testamentary or *inter vivos*, of cherished property.[131] Perpetual trusts diminish the likelihood that any such individualized gift giving will occur.[132]

Even the garden variety perpetual trust, though, *perpetuates* control in the creator, potentially forever. Accordingly as ideas, society, and the law progresses, the trust is bound to its origins.[133] In *McFadden*, for example, the court construed a 1930 testamentary trust created by a man who was not "'inclined to relinquish control sooner than he had to do so'" to determine who among three candidates was the measuring life for the purposes of satisfying the perpetuities period.[134] The trust provided that each son would receive two shares but

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125. *Id*. at 149 & n.49 (quoting W. Barton Leach, *Perpetuities in Perspective, Ending the Rules Reign of Terror*, 65 HARV. L. REV. 721, 725, 727 (1952)).

126. *See* WRIGHT, *supra* note 31, at 631; *see also* Fellows, *supra* note 7, at 149.

127. SITKOFF & DUKEMINIER, *supra* note 31 (listing jurisdictions that have abolished RAP and allow perpetual trusts).

128. *See* Dodge, *supra* note 44, at 1748–49 ("Autonomy feminists should be especially skeptical of the institution of the trust and other forms of dead hand control.").

129. *See In re Estate of McFadden*, 100 A.3d 645 (Pa. Super. 2014).

130. Finch & Hayes, *supra* note 24, at 125–27.

131. *Id*.

132. There also has been significant scholarship on how perpetual trusts serve as asset protection vehicles, with some forms explicitly designed to avoid surviving spouses. Tait, *supra* note 22, at 167.

133. *See* Spivack, *supra* note 63, at 332; *see also* Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2481 n. 65 (2006).

134. *McFadden*, 100 A.3d at 654 (quoting Brief for Appellants at *45, *In re Estate of McFadden*, 100 A.3d 645 (Pa. Super. 2014) (No. 2872 EDA 2012), 2014 WL 4953124).

each daughter only one, a structure that continued through the trust's existence so that "whenever a descendant of mine shall die leaving male and female children, the income shall be divided in such a way that the males shall receive twice as much income as the females."[135] The trust provided other benefits to male descendants, including loans.[136] The trust also restricted severely how the wife could use and receive property, including where she could live and for how long.[137] The only reason this trust, which the "[d]ecedent intended to perpetuate . . . for as long as possible" and which was "at best baroque and at worst byzantine," came to an end was because the perpetuities rules required it to do so. [138]

Many respected family advisors agree that a goal of trust planning should be to transition property to the beneficial owners, teaching them how to exercise autonomy over their wealth and planning.[139] Perpetual trusts do the opposite, yielding family member autonomy to settlor design and trustee discretion. So, if power exists in male settlors and trustees, it remains perpetually situated there when a trust lasts in perpetuity. And while this observation about duration is by no means unique to trust law, and necessarily will diminish as new trust creators choose to incorporate more inclusive trust terms from the outset, it is another lens through which to view how purportedly "objective" rules operate when they are applied to people who do not sit in a position of power.[140] It therefore reinforces the necessity and even urgency of taking a deliberately engendered approach to trusts and to the law more generally.

CONCLUSION

Trusts are legal structures that operate largely without public oversight, driven by individual property-owner proclivities, governed by often-varying state rules, and immune from all but the most obvious policy controls. As with many areas of the law, it is not simply what we say about trusts that matters, but how we say it. Legal actors, courts

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135. *Id.* at 648.

136. *Id.* at 654.

137. Brief for Appellants at *13–14, *In re Estate of McFadden*, 100 A.3d 645 (Pa. Super. 2014) (No. 2872 EDA 2012), 2014 WL 4953124).

138. *McFadden*, 100 A.3d at 657.

139. *See supra* note 8 and accompanying text; *see also* WILLIAMS & PREISSER, *supra* note 115, at 31-33.

140. Katharine T. Bartlett, *Objectivity: A Feminist Revisit*, 66 ALA. L. REV. 375, 378–84 (2014) (giving liberal, nonsubordination, and positional feminists' views on objectivity); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1294–87 (1991).

foremost among them, engender justice by recognizing and disrupting embedded power dynamics that might seem neutral but often serve to perpetuate myths about women.