

The Future of Estate Planning

Four thought leaders provide their insights into the future of the modern estate-planning practice. Austin Bramwell predicts that despite dire warnings, the private wealth and trusts and estates practice will continue to grow and flourish. Craig R. Hersch posits that well-qualified boutique firms are positioned to lead the estate-planning legal practice into the future, as they can provide the “family feel” conducive to building relationships. Avi Z. Kestenbaum

anticipates growth in three areas: estate litigation; sophisticated business and tax planning; and elder law/mental health planning. Joshua S. Rubenstein shares three observations that lead him to conclude that estate-planning services will need to be provided in full service national and international law firms.

— Dawn S. Markowitz
Legal editor, Trusts & Estates



The private wealth practice will continue to be a growth area

By **Austin Bramwell**

Austin Bramwell is a partner in the New York City office of Milbank LLP

have a simple prediction to beat all the others: The future of estate planning will be like the past. When I began my career in 2005, the trusts and estates practice seemed doomed. Republicans were poised to repeal the estate tax altogether, while doyens of the bar were warning that do-it-yourself document assembly and artificial intelligence, while crude at the time, would soon eclipse attorneys, much like automobiles eclipsed horses. In the late 1990s, journalist David Margolick memorably described trusts and estates departments as “gilded graveyards” inhabited by oddballs, geniuses and others who didn’t fit in.¹ A decade later, some feared that those departments couldn’t even house the walking career dead.

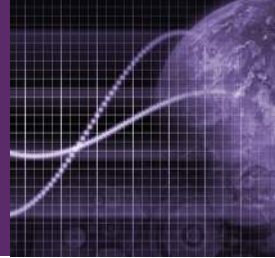
Yet despite the dire warnings, private wealth practice has, if anything, been a growth area. Outstanding trusts and estates departments have not only survived at large New York firms but also have expanded. The number of talented law school graduates hoping to enter the field increases every year. Some firms based outside of New York City even see trusts and estates as central to their business model and have aggressively recruited top talent in the area. The annual Heckerling Institute on Estate Planning conference has grown to mammoth

proportions and shows no signs of stopping.

To determine whether these trends will continue, it’s useful to review why the mid-2000s’ warnings proved incorrect. First, the United States, for all of its flaws, continues to provide the greatest financial returns to talent and ambition. The correlation between an individual’s IQ and their wealth is higher in the United States than in any other country, and it’s not even close.² It would take a lot even for today’s ruling class to stop those blessed with both intelligence and a hyperactive thymos from making large fortunes in America. Once made, those fortunes must be passed on, invariably with the aid of well-compensated advisors.

Second, the U.S. tax system is perfectly designed to support an abnormally large wealth management industry. The estate, gift and generation-skipping transfer taxes alone (even putting aside income and other taxes) have, from an industry standpoint, the optimum mix of severity, moderate leakiness and uncertainty. The taxes are *severe* in that it can take an alarming large fraction (40%, if not effectively 50% in some states) of an affected family’s wealth. Even for those who have no practical worry of ever paying gift or estate tax, the high rate haunts them like an incubus and motivates them to seek and pay for expert advice.

The taxes are *moderately leaky* in that the well-advised, if patient and willing to incur some expense, can reduce, if not virtually eliminate, their family’s wealth transfer-tax burden. Note that the U.S. system has the optimum amount of leakiness. After all, if the taxes are trivially easy



to avoid, then taxpayers will plan on their own and not pay top dollar for advice. If instead, the taxes are impossible to avoid, then hiring advisors is fruitless. Fortunately for trusts and estates professionals, U.S. gift and estate taxes fall between the two extremes. Planning to blunt their impact isn't exactly easy but neither is it impossible. Sound advice, therefore, remains scarce and expensive.

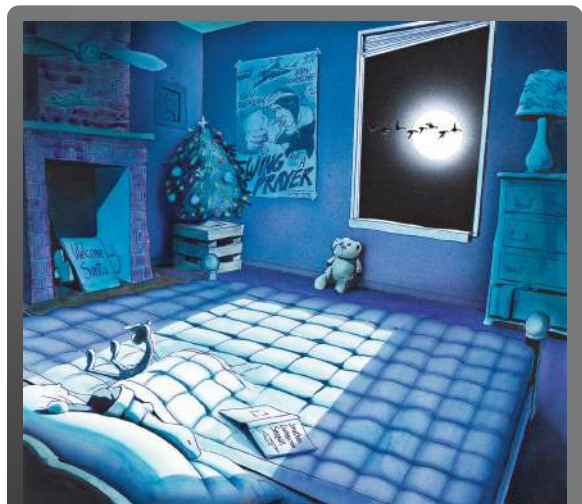
Finally, U.S. wealth transfer taxes are *uncertain*. Expiring rules, failed reforms and short-term alarms have been hallmarks of estate planning throughout my career. The country remains evenly divided politically, powerful factions have veto power over policy and brinkmanship is built into the Congressional budgeting process. Consequently, neither party can achieve its tax policy aims. The taxation of wealthy Americans, therefore, will continue to reflect poor policy choices made decades ago and ugly political compromises made today.

For trusts and estates professionals, it's a melancholy reflection that they earn their living by taking a small piece of the deadweight costs imposed by a flawed system. But given the system we have, someone must do the work. We can console ourselves that good advice can eliminate needless additional costs. For many, that's not enough. Most trusts and estates attorneys, in my experience, develop active sympathy for the unique anxieties that come with extraordinary wealth.

In summary, the basic features of the American political and institutional landscape, which make trusts and estates practice both intellectually and personally rewarding, not to mention remunerative, will likely continue. Perhaps some firms will still shed trusts and estates departments that act as mere services for other practices. But that can be said of any practice area. Many of the most prominent firms will continue to offer trusts and estates services, private wealth attorneys will remain legion at mid-market firms and small firms and solo practitioners will continue to need to offer estate planning as a core service. In short, there will be plenty of good jobs for those interested in the field.

A final word on technology. For years I've been warned that machines will eventually replace lawyers. It's been decades now, and we're still

waiting for the victory of machines over humans to actually take place. Moreover, the supposed conflict between machines and humans is illusory. Take legal research. Thirty years ago, it might have seemed that research engines such as Checkpoint or Westlaw would force the legal industry to contract, as clients would no longer pay for young associates to pore over moldering library tomes in search of authority. Yet firms found that they needed more associates, not fewer. The reason is that, as useful as machines are, humans *with machines* are better. As the best chess players are neither humans nor machines but rather humans *using* machines, an experienced attorney, using technology, will always be better than technology alone. Likewise, advances in artificial intelligence won't obviate the need for lawyers. On the contrary, they likely only increase the demand for legal talent, as the best lawyers distinguish themselves by being better able to exploit new technologies.



SPOTLIGHT

Night Night

"Fly," Opus whispered to himself just before falling asleep. "I'll be flying by Christmas morning." by Berkeley Breathed sold for \$2,125 at Swann Auction Galleries Illustration Art auction on Dec. 15, 2022 in New York City. The illustration at hand is for *A Wish for Wings that Work: An Opus Christmas Story*. Breathed is an American cartoonist, children's book author, director and screenwriter.

Endnotes

1. David Margolick, *Undue Influence: The Epic Battle for the Johnson & Johnson Fortune*.
2. U.S. households at all income levels have more disposable income than households in other countries (excepting small nations such as Luxembourg). See Pew Research Center, “Middle Class Fortunes in Western Europe,” at p. 55 (April 2017); see also “Commission on the Measurement of Economic Performance and Social Progress,” <https://ec.europa.eu/eurostat/documents/8131721/8131772/Stiglitz-Sen-Fitoussi-Commission-report.pdf>. Further, the United States has the highest share of adults in upper income households. See Pew Research Center, “Middle Class Fortunes in Western Europe,” at p. 59 (April 2017). Meanwhile, across countries, an increase in one IQ point translates into approximately a 1% increase in wages, see generally Garrett Jones, *Hive Mind: How Your Nation’s IQ Matters So Much More Than Your Own*. Thus, the returns to IQ in the United States are greater than in any other country.



Boutique firms are poised to lead the way

By **Craig R. Hersch**

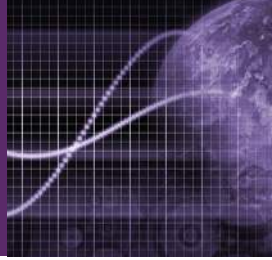
Craig R. Hersch is founder of The Freedom Practice and senior partner at the Sheppard Law Firm in Fort Myers, Fla.

Estate planning is so much more than transfer-tax planning. Most of my clients, even the wealthiest of them, are concerned about protecting the inheritances they leave for their loved ones from divorce, creditors or simply poor economic choices. Do they have the right trustee named? Is there something beyond the standard language to distribute income and principal for health, education, maintenance and support that they should consider? How do they balance the economic and emotional interests of blended families? What charitable options are available, and from which assets should these distributions be made? All this not to mention beneficiary income tax planning, which affects nearly every estate. Wise counsel will always prevail, adding value to the attorney/client relationship.

As a long-time shareholder in a boutique firm, my admittedly biased opinion is that qualified boutique firms are positioned well to lead the estate-planning legal practice into the future. Boutique

firms managed correctly can provide the “family feel” conducive to building relationships. They’re not constrained with competing departments for technology, hiring, marketing and other resources that an estate-planning department in a larger firm may face. The danger that many boutique firms fall into is not spending adequate time and resources for continuing education, training and development of partners, associates and staff. Further, boutique firms must realize that as a relationship practice, budgeting time and money for client events, activities with centers of influence and the development of relevant material for the firm’s website, social media presence and other digital media is paramount to success.

Another area for concern, discussed in more detail in Avi Z. Kestenbaum’s article in this issue, “The Estate Planner’s Dilemma: When to Give Non-Legal Advice,” p. 62, is the extent to which attorneys should get involved in conflict within the family. For example, a client came in to discuss how to leave his estate to a daughter who married “a tall island guy, all six foot-two of him.” He went on to discuss his concern that any amounts his daughter inherited would end up with his son-in-law’s “relatives who reside in a third world country,” as he continually provided financial assistance to his family. During the discussion, I pointed out that to me, the traits his son-in-law exhibited were admirable, including his concern and loyalty for loved ones. “That’s a trait I hope my son-in-law will have towards my daughter and his family.” My client’s wife mouthed “thank you” to me after I offered this opinion. From that point forward the meeting pivoted to one of happiness and fruitful discussion. I could have kept my feelings to myself. Instead, I offered my own views that provided a perspective that my client may have found useful. That’s the beauty of an estate-planning practice, one that I cherish and have loved for more than 33 years. I hope that my colleagues won’t shy away from offering their views to their clients as our collective wisdom is where almost all of our client value resides. It’s not about the documents—even though our documents are important. Our clients don’t understand our documents, and quite frankly, can’t easily distinguish between well drawn and terrible drafts. Clients seek our wisdom and the application of that wisdom into their estate plans.



AD PAGE



It's not all about saving estate taxes

By **Avi Z. Kestenbaum**

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Some question whether there's still a need for estate-planning attorneys given the higher exemption amounts. But let's not forget there are still millions of individuals who must deal with gift and estate tax concerns, even with the higher exemptions, with a greater concentration of these individuals in certain geographical areas, for example California, Florida, Illinois, New Jersey, New York, Pennsylvania and Texas (that is, the states with the most millionaires). The total U.S. population is over 330 million, and many foreigners also need to contend with U.S. gift and estate tax issues. Let's also not forget that 17 states still have a state estate tax or inheritance tax.

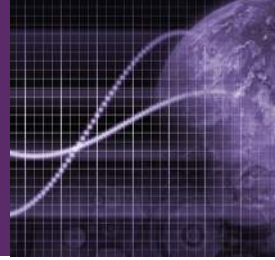
That being said, it's interesting to note that the word "tax" doesn't appear in the job title "estate-planning attorney," and there's a good reason for this. Estate-planning attorneys counsel the "estate," which includes: (1) the assets; and (2) the family. On the asset side, it isn't all about estate taxes and in fact, for many attorneys like me, this is only one of the types of taxes on which we advise. There are all sorts of income taxes to advise on—federal, state, local and foreign—and we must also determine how these various income taxes interplay with each other and with the estate taxes. Other types and forms of taxes to counsel our clients on include real property transfer taxes and partnership and corporate-related taxes. Continuing on the asset side, in addition to focusing on taxes, we may also advise on business planning and structuring, succession planning, partnership and corporate agreements, as well as general guidance regarding our clients' holdings and investments. We advise on how to protect and preserve these assets through various legal structures.

On the family side, we play all sorts of important roles. We're close confidantes and consiglieres to our clients and may help them deal with many deep and sensitive personal issues with spouses, children and partners and plan and strategize accordingly. We may also assist them with special needs and disabilities planning, elder law and charitable giving. These roles also include making sure the assets pass to the correct parties in the appropriate manner and helping avoid family and partner disputes and conflicts. Additionally, if there are disputes, trusts and estates litigators are needed to help resolve them. So as long as people own any assets and have families, there will always be a tremendous need for estate-planning attorneys!

Potential growth areas. I think growth will depend on the type of work and the services provided. Certain types of services (for example, complex tax and business planning and structuring) are more effectively performed at larger or mid-size firms with large trusts and estates departments or in boutique smaller firms in which most of the attorneys focus on trusts and estates matters. Those firms are more likely to have a team of individuals working together, who have the many years of training it takes to acquire the necessary skills and expertise to handle complex issues. For example, sophisticated tax and complex business planning involve a myriad of issues that can arise that require vast amounts of knowledge and specialists.

Other areas, such as elder law and Medicaid planning, may not require the same amount of sophistication and experience or require several attorneys brainstorming with each other on potential solutions. I think areas like Medicaid planning and elder law will most likely remain with smaller firms. Price point is also an important factor because larger firms typically bill at higher hourly rates. Generally, only very wealthy clients are willing to pay these rates. Medicaid planning, which is a big part of elder law planning, is generally performed for clients who aren't very affluent. Estate litigation also will continue to flourish at firms of all sizes, similar to other types of litigation.

Having practiced at firms of different sizes, I believe that often, even very affluent clients



don't want to pay the same billable rates as large corporations because the fees come directly out of their own pockets. Furthermore, trusts and estates often isn't a large firm practice area because these firms generally make money on leverage and placing as many professionals as reasonable and necessary on matters. Most trusts and estates matters don't require more than one or two professionals working on them at once. So it isn't such a lucrative area of the law for many large firms, especially ones that operate in big cities. Additionally, trusts and estates is a complex and sensitive area in which there's statistically a high risk for malpractice. I heard this and saw the data directly from my firm's malpractice insurance carrier. Therefore, the risks for many large firms of malpractice claims and the negative press of families fighting with each other and perhaps later with their attorneys might not be worth the benefit of having this practice area. These are among the reasons that many very large firms have either jettisoned or significantly shrunk their trusts and estates departments in recent years, especially in big cities.

While I'm a little biased based on my firm's practice, trusts and estates is also a deeply personal area of law and should be as devoid as possible of making the client feel like a commodity or needing to deal with too much red tape and corporate formalities. Therefore, to handle a complex client matter, the practice should be large enough to be experienced and proficient but small enough to offer a personal touch and make the client feel important. To be clear, certain clients will always choose the breadth and prestige of the large law firm even if they could receive similar and sometimes superior representation at smaller firms, and other clients will always choose smaller firms to save on fees and red tape.

I anticipate growth in these three practice areas:

Estate litigation. This is a lucrative and growing practice area at many firms, including my own. There are several good reasons for this including:

1. There needs to be assets, usually substantial, to drive the fighting and necessitate paying lawyers to navigate estate disputes. Baby Boomers, the first generation in the United States who across-the-board have savings, are starting to pass away, so there are more and larger estates over which to fight.
2. Families seem to be more willing to air their grievances in a public setting and to pay lawyers to assist with these often bitter and acrimonious family disputes.
3. We're living in a generation of entitlement, where people think they have so much owed or coming to them. Therefore, they're more likely to be litigious to fulfill their needs and wants.
4. People are living longer, which leads to serious questions of mental capacity, especially when changes to documents are made later in life.
5. The family structure is often more complex today than in the past with an increased number of blended families. Also, many people end up married more than once due to the death of a spouse (people are living longer) or the high divorce rate. Therefore, there's more room for disagreements, mischief and mayhem when interests are misaligned.

Sophisticated business and tax planning. This area also seems to be at a continuing premium because navigating the increasingly challenging and multi-jurisdictional tax and business matters that affluent and successful clients routinely face requires counselors with immense amounts of knowledge and wisdom and the ability to handle difficult clients and situations. Few advisors have the depth and breadth to identify and quarterback these multifaceted issues because it takes special training, which many firms don't provide, and years of experience to have the skills and wisdom to guide clients with complicated tax and business issues. Therefore, there will always be a strong need for advisors who can quarterback and lead their clients in the more sophisticated tax and business planning areas, which still have a plethora of clients and businesses that require this higher level of advisement in a business atmosphere that seems to become more complicated each year.

Elder law/mental health. With a growing population of seniors, and in a society where many suffer from mental illnesses and other disabilities,

elder law and mental health/disability planning will continue to rise. Almost every senior will require some level of planning. That will require an abundance of elder law attorneys. Additionally, in many families, there's an individual who suffers from some form of mental illness or disability, and planning for them requires significant knowledge, skills and long-term solutions.

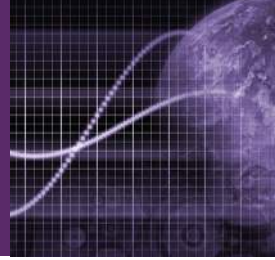
Attracting law students to the field. Many of us pursued a law degree because, without trying to sound too sappy or "holier than thou," we believe in justice and trying to make the world a better place. We also desire to be financially successful and good providers for our families. Trusts and estates is a field that really marries these two principles well. While there are certainly more lucrative areas of the law, such as representing large corporations in litigations and with mergers and acquisitions, we're able to truly help individuals with their most treasured assets: their families and their hard-earned possessions. Our guidance and documents make a real difference with their piece of mind, family harmony and preservation and protection of their valuables. On top of this, many of our clients become our dear friends as we develop close personal bonds with them because they're confiding in and sharing with us their deepest thoughts, feelings and fears and are asking for our help regarding their loved ones and possessions. We're also there for them in their times of need, helping them cope with matters of death, disability and personal and business problems, and in their times of joy, sharing in happy occasions such as family births, weddings, cashing out of old businesses and the launching of new ones.

There also seems to be a dearth of qualified trusts and estates attorneys who can deal with the complete picture of both the client and their businesses, and there will be plenty of opportunities for those willing to work hard and learn the complex tax and business structuring intricacies. Additionally, as the population continues to age, there will continue to be a tremendous need for elder law attorneys, as well as ones who can deal with mental health and disability issues, which seem to be on the rise nationally.

Lack of qualified attorneys? I think there's a

lack of qualified attorneys in two primary areas. The first is sophisticated tax and business counseling, which includes, among other items, tax guidance for closely held businesses, succession planning and partnership agreements and structuring. In my opinion, that's because at the larger firms, corporate and tax attorneys handle much of this planning, and trusts and estates attorneys only handle some of it. Several heads brainstorming together is fine, but there still should be one quarterback who can spot and understand all the issues and guide the client. It's difficult for any one attorney to acquire the skills to lead, especially when sophisticated tax and business counseling overlap with several different legal areas including estate, partnership and corporate. Smaller firms typically can't handle this area as well, either due to the vast amount of knowledge, training and expertise required or the sheer number of brains necessary to collaborate on this.

The second is guiding clients regarding mental health issues. While attorneys set up all types of trusts, unless they're specially trained, it would be difficult for them to understand the complexities of both the day-to-day and long-term mental health issues clients and their families face and how to draft trusts and structures that can best address these issues in longevity. I think greater practical training and education is required regarding how these issues affect families and the individuals suffering, what types of planning and trust provisions are most effective in dealing with them, who should serve as trustees and how to locate long-term (corporate) trustees, protectors and caregivers who can properly fulfill these roles. I don't think attorneys and corporate trustees have the bandwidth or proper experience to deal with complex and long-term family mental health issues and often prefer and recommend directed trusts or very specific and restrictive trust distribution standards, which would be very difficult to understand, predict and draft at the outset of the planning. Drafting too broadly doesn't work either unless the trustees have the expertise and experience to make serious judgment calls, which trustees generally prefer not to make in this difficult area.



Areas of growth: a move to full-service firms focused on private wealth

By **Joshua S. Rubenstein**

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Under the best of circumstances, making predictions is a challenging task. And yet, that’s exactly what our clients need and want us to do to help them navigate the seemingly constant spate of broad ranging and unpredictable change affecting all aspects of their lives: tax, political, social, safety, health, succession, mental well-being, privacy and structuring changes. In my next life, I would like to be a meteorologist, where one gets paid regardless of the accuracy of one’s predictions.

My first observation is that over recent years, a disproportionately large amount of wealth has ended up in the hands of a disproportionately small number of individuals. With U.S. estate tax exemptions at nearly \$13 million per individual, a couple would need well north of \$30 million before structuring to minimize estate taxes is of any particular moment or necessity (and I’ll predict that the exemptions *won’t* sunset in 2026, but even if they do, the exemptions will still be high). That means that by definition, estate-planning clients will all be ultra-high-net worth (UHNW) families. UHNW families frequently operate in private formation, making integrating their business planning with their personal planning essential. Estate-planning lawyers will therefore increasingly need to partner with transactional lawyers.

My second observation is that UHNW families aren’t geographically constrained and are able to live and operate in more than one state and more than one country, with everyone seamlessly connected on their smart phones. Estate-planning lawyers will therefore increasingly need to partner with lawyers in other states and other countries and be knowledgeable as to conflict-of-law issues and multi-jurisdictional reporting requirements.

My third observation is that along with

constant change comes the increasing likelihood of conflict and controversy. With the proliferation of both lifetime and posthumous trust and estate controversies, increasingly every plan must be drafted—and every estate and trust must be administered—on the assumption that it will be viewed at some point by one or more beneficiaries with a view towards contest, if not in fact be contested. Estate-planning lawyers will therefore increasingly need to partner not only with estate and trust administrators but also with estate and trust litigators.

Forty years ago, all the major white shoe and magic circle law firms used to have substantial trusts and estates departments. But with the M&A and capital markets boom of the 80s, most such firms drastically reduced or even eliminated their trusts and estates departments, forcing trusts and estates lawyers into boutique law firms. Now, with the explosion of reporting and other regulatory requirements that followed the worldwide economic collapse of 2008, increasingly we’re seeing clients choose to keep their wealth in private formation. As a result, you can see the white shoe and magic circle firms increasingly rebuilding their ability to provide trusts and estates services to their UHNW clients. Only with the task of what used to be called a “trusts and estates” lawyer becoming so broad ranging, what used to be known as “trusts and estate departments” are increasingly rebranding as “private client” or “private wealth” departments.

So the old fashioned trusts and estates lawyer is now the legal equivalent of a Marcus Welby, MD, a general practitioner who’s the point of first entry and trusted advisor to the wealthy, who must diagnose their clients’ problems and then refer them to specialists, that is, lawyers who provide corporate, income tax, real estate, intellectual property, capital markets, litigation and international/cross-border services. It will be increasingly difficult to do that as a boutique, and I think we’ll see the pendulum swing back to where providing estate-planning services—which will be needed only by the wealthy few—will need to be provided in full service national and international law firms. 