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## Tax Avatars

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# TAX AVATARS

Bridget J. Crawford\*

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## I. INTRODUCTION

Anyone who has spent time in cyberspace understands the concept of an alter ego. In online games, chat rooms and on the internet generally, users select one or more avatars to represent themselves. Avatars function as the end-user's alter ego. The avatar may be a three-dimensional character in a multiplayer game or a two-dimensional icon on a bulletin board. This article uses the concept of avatars to explain the tax treatment of real-life alter egos: agents under a power of attorney. Specifically, the article discusses (1) how traditional, standard legal instruments can be used to create legal alter egos; (2) how and why these legal avatars receive

favorable transfer tax treatment; (3) how uniform laws are changing to protect legal avatars; (4) whether new legislation will increase or decrease the use of legal avatars; and (5) how scholars might use the tax treatment of legal avatars to advocate for the favorable tax treatment of relationships that arise by choice.

Part I of this article is an introduction. Part II provides an overview of how powers of attorney create legal alter egos. At its core, executing a power of attorney is like selecting an online avatar. It is a choice to make someone (or something) our representative in the real (or cyber) world. A power of attorney enables one person (called the attorney-in-fact or the agent)<sup>1</sup> to act on behalf of another (the principal). Part III of this article describes the favorable tax treatment that agents—legal alter egos or avatars—receive and seeks to reconcile this preferred treatment with the inconsistent approach of the Internal Revenue Service (the “Service”) to fiduciary duty. Part IV explores the major reforms of the Uniform Durable Power of Attorney Act of 2006 (the “2006 Act”)<sup>2</sup> and Part V anticipates its consequences. Standardizing the principal/agent relationship may have economic consequences that the drafters of the 2006 Act have not anticipated. Part VI of this article considers the implications of the tax treatment of legal avatars. By both inverting a critical paradigm and drawing on the model of a cyberspace avatar, powers of attorney are revealed as a vehicle for choice-based representation. Those who would like the law to recognize varied configurations of choice-based human relationships may find the tax treatment of legal avatars to be a helpful model for their efforts.

## II. CREATING A LEGAL AVATAR: THE POWER OF ATTORNEY

### A. *Creation*

A power of attorney is a legal instrument whereby one person, typically called the principal, designates one or more other persons, typically called the attorney(s)-in-fact or the agent(s), to act on his or her behalf.<sup>3</sup> Every jurisdiction in the United States recognizes some form of the power of attorney.<sup>4</sup> Depending on

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<sup>1</sup> To avoid confusion between the terms “attorney-at-law” and “attorney-in-fact,” this Article follows the choice of the drafters of the Uniform Durable Power of Attorney Act to refer to the person appointed by the principal under a power of attorney as the “agent.” See UNIF. POWER OF ATT’Y ACT § 102(1) (amended 2006), 8B U.L.A. 24 (Supp. 2008).

<sup>2</sup> *Id.*

<sup>3</sup> See BLACK’S LAW DICTIONARY 1191 (7th ed. 1999).

<sup>4</sup> See, e.g., Karen E. Boxx, *The Durable Power of Attorney’s Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 12 (2001).

the jurisdiction, a principal's delegation of authority to an agent may or may not require a formal writing.<sup>5</sup> In those jurisdictions that require a formal writing, counselors to even the wealthiest Americans typically use standard pre-printed forms of powers of attorney because these are most likely to be recognized and accepted by banks and financial institutions.<sup>6</sup>

### *B. Scope*

Powers of attorney generally fall into two categories: those that are presently exercisable<sup>7</sup> and those that are “springing,” or effective only upon the occurrence of a certain event such as the principal's incapacity. Within each classification the power may be time limited or unlimited in duration (“durable”). The powers granted may be broad or narrow in scope.

Lawyers frequently counsel their clients who are in long-term marriages to execute presently exercisable durable powers of attorney granting each other broad powers to act as agent.<sup>8</sup> Such a power allows either spouse to act on the other's behalf, whether as a matter of convenience or necessity. Similarly a parent who has a close emotional and geographic relationship with an adult child may execute a general durable power of attorney in favor of the adult child.

There may be several reasons that a lawyer might counsel a client to execute a springing power instead of a general durable power. A client might view the execution of a power of attorney as diminishing his or her control, or the client may distrust family members or close friends. This client may want to postpone delegating his or her authority until it is absolutely necessary. Similarly a client may wish to designate authority to an individual for a particular transaction only. Consider the following hypothetical:

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<sup>5</sup> See, e.g., CONN. GEN. STAT. § 47-5 (1998) (explaining that in order to use the delegated powers in conveying land the conveyance “shall be . . . [i]n writing”). The applicable South Carolina statute, S.C. CODE ANN. § 62-5-501(C) (1986), requires that a durable power of attorney that includes the power to convey real estate must be executed with all of the same formalities required for the valid execution of a Will.

<sup>6</sup> E-mail from James S. Sligar, Esq., Partner, Milbank, Tweed, Hadley & McCloy LLP, to Bridget J. Crawford, Associate Professor of Law, Pace University School of Law (Aug. 10, 2007, 1:27 PM EST) (on file with author).

<sup>7</sup> See, e.g., 3 AM. JUR. 2D *Agency* § 26 (2002) (describing the function of a presently exercising durable power of attorney); LAWRENCE A. FROLIK & MELISSA C. BROWN, ADVISING THE ELDERLY OR DISABLED CLIENT ¶ 21.03[1] (2d ed. 2003), available at 2001 WL 642769 (2008) (providing an overview of the legal issues related to the durable power of attorney).

<sup>8</sup> See, e.g., 45 SHARON RIVENSON MARK, N.J. PRAC. SERIES *Elder Law—Guardianships & Conservatorships* § 1.4 (2d. ed. 2007).

**Hypothetical 1.** A is scheduled to close on her purchase of a new home, Redacre, on December 1, 2007. Unfortunately, A will be traveling out of town then and the seller is not willing to reschedule. A has several adult children whom she trusts completely, but none of them lives close enough to attend the closing of Redacre on December 1, 2007. On November 30, 2007, A executes a springing power of attorney, effective only on December 1, 2007, and with respect to the purchase of Redacre, in favor of her friend B.

Hypothetical 1 presents a classic case in which a springing, limited (or narrow) power of appointment is appropriate. A has several adult children on whom she can rely as a general matter, but these children are not able to be present for the closing of Redacre. For convenience, A grants B the authority to sign and execute all documents relating to the purchase of Redacre that A herself could and would sign if she were physically present. Because the power is time limited, it is not necessary for A to revoke the power when she returns from her trip; it expires automatically after December 1, 2007.

### *C. Limitations*

Two issues dominate any discussion of powers of attorney. First, not everyone has one. Second, those who do have powers of attorney may not understand them. Powers of attorney are only useful if they exist. Someone who has no close family members or friends may never execute a power of attorney. Furthermore, because the typically granted powers are broad, it is likely that a principal agent or a third party could misunderstand or misinterpret the full extent of the agent's authority. Some agents may even abuse their powers to enrich themselves at the expense of the principal.<sup>9</sup> Historically this toxic combination of uncertainty and power has led banks and other financial institutions to be reluctant to accept powers of attorney.<sup>10</sup> For example, some institutions decline to accept powers because they were executed in another jurisdiction or several years prior to presentment.<sup>11</sup> The

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<sup>9</sup> See David M. English & Kimberly K. Wolff, *Survey Results: Use of Durable Powers*, PROB. & PROP., Jan./Feb. 1996, at 33, 33–35.

<sup>10</sup> See WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES, INCLUDING TAXATION AND FUTURE INTERESTS* 351 (3d ed. 2004).

<sup>11</sup> *Id.* Some states, such as New York, have adopted penalties for institutions that refuse to accept a power of attorney executed in keeping with statutory formalities. See N.Y. GEN. OBLIG. LAW § 5-1504(3) (McKinney 2001) (“The failure of a financial institution to honor a properly executed statutory short form power of attorney shall be deemed unlawful.”).

National Conference of Commissioners on Uniform State Laws cites the “problem of arbitrary refusals of powers of attorney by banks, brokerage houses, and insurance companies” as one of the primary reasons that the laws need to be reformed.<sup>12</sup> Validly executed powers have no practical use if banks and other institutions will not accept them.

### III. TAXING LEGAL AVATARS

#### A. Estate and Gift Tax Generally

##### 1. Overview of Gift Taxation

Current law imposes a tax on completed transfers of property by gift that otherwise are not excludible from the definition of “gift” or in some way eligible for an exemption from the gift tax.<sup>13</sup> This seemingly simple rule derives from several sections of the Internal Revenue Code and the related Treasury Regulations.<sup>14</sup> As an initial matter I.R.C. § 2501 imposes a gift tax on the transfer of property by gift by an individual.<sup>15</sup> To illustrate, consider a second hypothetical:

**Hypothetical 2.** X physically transfers to Y a famous painting owned by X. X also transfers legal title to Y. X receives nothing in return. X and Y are not related in any way.

In Hypothetical 2, X has made a *transfer of property* to Y for gift tax purposes because she transfers the title (and possession of) the painting to Y. Contrast that with another scenario:

**Hypothetical 3.** X invites Y to X’s home to view a famous painting owned by X.

In Hypothetical 3, X does not make a *transfer of property* for gift tax purposes because X does not divest herself of ownership or control over the painting. The painting presumably hangs in X’s home while X and Y gaze at it and the painting remains in X’s home thereafter. Furthermore X does not make a transfer of *property* for gift tax purposes when Y comes to view the painting. X may bestow

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<sup>12</sup> Uniform Law Commissioners: The National Conference of Commissioners on Uniform State Laws, Summary: Uniform Power of Attorney Act (2006), [http://www.nccusl.org/Update/uniformact\\_summaries/uniformacts-s-upoaa.asp](http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-upoaa.asp) (last visited Sept. 30, 2008) [hereinafter Uniform Power of Attorney Act Summary].

<sup>13</sup> See I.R.C. §§ 2501–2505 (2006).

<sup>14</sup> Unless otherwise specified all references to the Internal Revenue Code [hereinafter the “Code” or “I.R.C.”] refer to the Internal Revenue Code of 1986, as amended.

<sup>15</sup> *Id.* § 2501(a).

on Y some psychic or emotional pleasure in inviting Y to view the painting, but such hedonic enjoyment is not *property* for gift tax purposes.

If Hypotheticals 2 and 3 suggest that one can determine with relative ease what is (and is not) a transfer of property for gift tax purposes, it is moderately more difficult to determine what constitutes a transfer of property *by gift* for gift tax purposes. I.R.C. § 2502 provides that the amount of gift tax imposed on a transfer of property by gift is the excess of the tentative tax imposed on “the aggregate sum of the taxable gifts for the taxable year and for each of the preceding calendar periods” over the tentative tax on “the aggregate sum of the taxable gifts for each of the preceding calendar periods.”<sup>16</sup> To illustrate, consider the following hypothetical:

**Hypothetical 4.** Prior to 2006 X never made a taxable gift. In 2006, X makes \$1,000,000 in taxable gifts. X applies to these transfers the credit under I.R.C. § 2505, so X owes no gift tax with respect to this \$1,000,000 of gifts. In 2007 X transfers \$50,000 to Y. X makes no other taxable transfers.

To calculate the gift tax owed with respect to X’s transfers in 2007, one first computes the tentative tax imposed with respect to X’s gifts in 2006. One then subtracts this amount, or \$345,800, from \$366,300, which is the tentative tax on the aggregate sum of X’s gifts in 2007 and 2006 (\$1,000,000 plus \$50,000, or \$1,050,000).<sup>17</sup> Therefore, with respect to the transfer in 2007, X owes \$366,300 minus \$345,800 in gift tax, or \$20,500.

Note that the calculation of gift tax hinges in large part on the definition of “taxable gifts.”<sup>18</sup> But the Code does not define the term “gift.” The closest one comes is in the valuation rule of I.R.C. § 2512.<sup>19</sup> That section provides that where a gift is made in property, its value at the date of the gift is the amount of the gift.<sup>20</sup> In the case of a transfer for partial consideration, the amount of the gift will be the amount by which the value of property transferred exceeds the value of property received.<sup>21</sup> In common parlance then, a gift occurs when one transfers more than

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<sup>16</sup> *Id.* § 2502(a). This rule has the effect of making each gift incrementally more “expensive” in a tax sense. *See id.* § 2502(a)(1) (computation of tax); *id.* § 2502(a)(2) (rate schedule).

<sup>17</sup> *Id.* §§ 2502(a), 2001(c)(1) (rate schedule). The tentative tax on \$1,050,000 is \$345,800 plus 41% of the excess of such amount over \$1,000,000 (or 41% of 50,000), \$366,300.

<sup>18</sup> *Id.* §§ 2501–2502.

<sup>19</sup> *See id.* § 2512(a).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* § 2512(b).

one receives in return, or when—and to the extent that—one “gives” more than one “gets.” To illustrate, consider this variation on Hypothetical 2.

**Hypothetical 5.** X transfers to Y title to the famous painting owned by X. The painting has a fair market value of \$5,000.<sup>22</sup> Y pays X only \$4,000 cash.

In this case X makes a taxable gift to Y of \$1,000, or the amount by which the fair market value of the painting (\$5,000) exceeds the consideration received (\$4,000).<sup>23</sup> Note that the determination of whether the transfer is a “gift” for gift tax purposes depends on a comparison of values—whether X “gave” more than X “got,” not whether X intended to make a gift to Y.<sup>24</sup>

Apart from a difference between the value of what a taxpayer transfers and the value the taxpayer receives in return, for a transfer to be subject to gift taxation, the transfer must be *complete*. Completion occurs when “the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another.”<sup>25</sup> The following hypothetical presents a typical case of an incomplete gift.

**Hypothetical 6.** X transfers title to the painting to Y (whether for no consideration or for less than fair market value),<sup>26</sup> subject at all times to X’s right to take the painting back (and the requirement that X then refund Y’s money).

Because X retains the right to revoke the transfer, it is not *complete* for gift tax purposes, and no gift tax will be imposed.<sup>27</sup> Similarly, if X loans Y a car so that Y can go to the grocery store, then X has transferred to Y the value of the use of the car for a specific period of time,<sup>28</sup> but X has not make a completed transfer of

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<sup>22</sup> See *id.* § 2512(a).

<sup>23</sup> Assuming that Y is an individual, not a charity, the income tax consequences of this transaction are governed by Treas. Reg. §§ 1.1001-1(e), 1.1015-4 (as amended in 1996). The transferor’s gain is the excess of amount realized over adjusted basis, provided that no loss can be recognized in a part sale/part gift transaction. Treas. Reg. § 1.1001-1(e) (as amended in 1996).

<sup>24</sup> This definition for gift tax purposes contrasts to the definition of a gift for income tax purposes. The income tax definition depends in large part on the transferor’s intent. See, e.g., *Comm’r v. Duberstein*, 363 U.S. 278, 286 (1960).

<sup>25</sup> Treas. Reg. § 25.2511-2(b) (as amended in 1999); see also Rev. Rul. 69-347, 1969-1 C.B. 227 (explaining that a gift pursuant to a prenuptial agreement is complete as of date of the parties’ marriage).

<sup>26</sup> See I.R.C. § 2512(a).

<sup>27</sup> Treas. Reg. § 25.2511-2(b).

<sup>28</sup> See, e.g., *Dickman v. Comm’r*, 465 U.S. 330, 338 (1984) (noting that an interest-



the entire car to Y. X cedes some amount of dominion and control over the car for the period that Y drove the car to the grocery store, but X does not make an irrevocable transfer of the car itself.

There are four major exceptions to the imposition of gift taxes under Chapter 12 of the Code. First, as illustrated in Hypothetical 4, under I.R.C. § 2505, with respect to gifts made after December 31, 2001, each citizen or resident of the United States has a credit against the gift tax equal to the amount needed to “shelter” the first \$1,000,000 in taxable transfers from taxation.<sup>29</sup> Second, a taxpayer may exclude from the calculation of his or her taxable gifts those transfers that qualify for the annual exclusion under I.R.C. § 2503(b).<sup>30</sup> Third, the taxpayer may exclude from the calculation of taxable gifts any payments on behalf of any person made directly to an educational institution as tuition, or directly to a medical care provider for any person’s medical expenses.<sup>31</sup> Fourth, a taxpayer may subtract from the amount of his or her taxable gifts the deductions permitted by Subchapter C of Chapter 12 of the Code.<sup>32</sup> Those deductions include transfers to or for the use of charity and transfers to a spouse.<sup>33</sup>

## 2. *The Special Case of Transfers Subject to Withdrawal Rights*

A transfer subject to gift tax may be direct or indirect. For example, in some contexts the right to withdraw property is the equivalent of an outright transfer for gift tax purposes. Consider this variation on Hypothetical 2:

**Hypothetical 7.** X wants to give a painting to Y, but X is not able to attend to the details of the transfer before X leaves on a long vacation. Without receiving any consideration from Y, X places the painting in a secure local storage facility. X also places in the storage facility a binding legal instrument transferring the painting to Y. X hands Y the key to the storage facility so that Y may pick up the painting at Y’s convenience.

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free loan between parents and son is a taxable gift of the “rental value” of use of the money, i.e., the foregone interest).

<sup>29</sup> See I.R.C. § 2505(a)(1).

<sup>30</sup> Under I.R.C. § 2503(a), “taxable gifts” are “the total amount of gifts made during the calendar year,” other than certain transfers such as annual exclusion gifts made pursuant to I.R.C. § 2503(b), less the deductions permitted by subchapter C of Chapter 12 of the Internal Revenue Code (I.R.C. §§ 2522–2524).

<sup>31</sup> *Id.* § 2503(e).

<sup>32</sup> *Id.* § 2503(b). Subchapter C is found at I.R.C. §§ 2522–2524.

<sup>33</sup> *Id.* § 2522 (charity); *id.* § 2523(a) (spouse). The recipient must be the donor’s spouse at the time of the gift. Treas. Reg. § 25.2523(a)-1(a) (as amended in 1995).

Unlike the facts of Hypothetical 2, in Hypothetical 7, X does not physically transfer the painting to Y. She places it in a storage facility and gives Y the key. Therefore Y can take possession of the painting at any time. Under the case of *Crummey v. Commissioner of Internal Revenue*, the transfers in Hypotheticals 2 and Hypothetical 7 are treated the same for gift tax purposes.<sup>34</sup> Y's rights with respect to the painting in the storage facility are sufficient to cause X to be treated for gift tax purposes as if she had transferred the painting directly to Y.

In the estate planning context, taxpayers frequently use the rule of *Crummey* to make tax-free transfers in trust for the benefit of family members or others.<sup>35</sup> In the typical "*Crummey*" trust, named after the taxpayer in whose case the court validated the technique, one or more beneficiaries with a present interest in the trust have the right to withdraw a pro rata share of property transferred to the trust.<sup>36</sup> As in Hypothetical 7, where Y's ability to take possession of the painting in storage is treated for gift tax purposes the same as if X physically had transferred the painting to Y, a taxpayer's contribution to a *Crummey* trust is treated for gift tax purposes like an outright transfer to a beneficiary, as long as the beneficiary has certain withdrawal rights.<sup>37</sup> Because such a transfer is treated as a present interest,<sup>38</sup> the property subject to that withdrawal right qualifies for the gift tax annual exclusion under I.R.C. § 2503.<sup>39</sup>

If drafted properly, a beneficiary's withdrawal rights may qualify transfers to a trust for the gift tax annual exclusion, but these rights can have other unintended tax consequences. Generally speaking, a beneficiary's withdrawal right is treated as a general power of appointment.<sup>40</sup> In other words, in Hypothetical 7, for estate tax purposes, Y's unrestricted right to take the painting out of storage is treated the same as actual ownership by Y. Therefore under I.R.C. § 2041, the property subject to a beneficiary's withdrawal right will be included in his or her gross estate for federal estate tax purposes.<sup>41</sup> Similarly, to the extent that a beneficiary's

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<sup>34</sup> 397 F.2d 82, 88 (9th Cir. 1968).

<sup>35</sup> For more information on *Crummey* trusts, see JONATHAN G. BLATTMACHR, THE COMPLETE GUIDE TO WEALTH PRESERVATION AND ESTATE PLANNING 406-09 (1999).

<sup>36</sup> *Crummey*, 397 F.2d 82, 87-88.

<sup>37</sup> *Cristofani v. Comm'r*, 97 T.C. 74, 79-84 (1991), *acq. in result*, 1992-1 CB 1, *action on dec.*, 1992-09 (Mar. 23, 1992). In an Action on Decision, the Service announced that it "[would] deny exclusions for powers held by individuals who either have no property interests in the trust except for *Crummey* powers, or hold only contingent remainder interests." *Id.*

<sup>38</sup> Gifts of future interests do not qualify for the gift tax annual exclusion. I.R.C. § 2503(b)(1) (2006).

<sup>39</sup> *Id.* § 2503.

<sup>40</sup> RICHARD B, STEPHENS ET AL., FEDERAL ESTATE AND GIFT TAXATION ¶ 9.04[3][f] n.118 (8th ed. 2002).

<sup>41</sup> I.R.C. § 2041.

power lapses, that lapse is considered a release of the power under I.R.C. § 2514(e),<sup>42</sup> to the extent that the property subject to the power exceeds the greater of \$5,000 or 5% of the aggregate trust property subject to the power.<sup>43</sup> The release of a power may cause the beneficiary to be deemed to have made a gift to the trust in the amount subject to the power of withdrawal.<sup>44</sup> Similar rules, discussed in the next section, apply for estate tax purposes.

### 3. Overview of Estate Taxation

Estate tax is imposed on the transfer of a decedent's "taxable estate."<sup>45</sup> I.R.C. § 2051 defines the taxable estate as the decedent's "gross estate" minus certain deductions.<sup>46</sup> The gross estate is the value of all of the decedent's property, "real or personal, tangible or intangible, wherever situated."<sup>47</sup> This section highlights three specific rules regarding estate tax inclusion.

First, the value of property in which the decedent had an interest is explicitly included in the decedent's gross estate.<sup>48</sup> Therefore in Hypothetical 3, where X invites Y to X's home to view a famous painting owned by X, if X dies during the viewing, for example, the value of the painting will be included in X's gross estate.<sup>49</sup> This is because X is the owner of the painting at the time of her death. X did not transfer any interest in the painting by inviting Y to view it.<sup>50</sup>

Second, property subject to the decedent's power to "alter, amend, revoke, or terminate" is included in a decedent's gross estate.<sup>51</sup> Therefore, in Hypothetical 6, where X transfers title to the painting to Y, subject to X's right to revoke the transfer, this right of revocation causes the value of the painting to be includible in X's gross estate.<sup>52</sup>

Third, a decedent's gross estate includes property subject to any general power of appointment held by the decedent.<sup>53</sup> Under I.R.C. § 2041(a), a general power of appointment is one that the power holder may exercise in favor of himself or herself, the power holder's estate, the power holder's creditors, or the

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<sup>42</sup> *Id.* § 2514(e).

<sup>43</sup> *Id.*

<sup>44</sup> *See Crummey*, 397 F.2d 82, 87-88; Rev. Rul. 85-88, 1985-2 C.B. 201.

<sup>45</sup> I.R.C. § 2001(a).

<sup>46</sup> *Id.* § 2051.

<sup>47</sup> *Id.* § 2031(a).

<sup>48</sup> *Id.* § 2033.

<sup>49</sup> *Id.*

<sup>50</sup> *See supra* Part III.A.1.

<sup>51</sup> I.R.C. § 2038(a)(1).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* § 2041(a)(2).

creditors of the power holder's estate, subject to certain limitations.<sup>54</sup> For estate tax purposes, it is irrelevant whether the decedent or another person creates the power of appointment. What matters is whether the decedent has the ability to direct the disposition of the appointive property so as to cause it to be treated for estate tax purposes as if it were owned outright by the decedent. Consider the following example.

**Hypothetical 8.** X creates a trust for Y. The trust instrument provides in pertinent part that:

The Trustee shall manage, invest and reinvest the trust property, collect the income therefrom, and pay over or apply the net income and principal thereof, to such extent, including the whole thereof, and in such manner or manners and at such time or times, as the Trustee, in the exercise of sole and absolute discretion, may deem advisable, to or for the benefit of Y. Any net income not so paid over or applied shall be accumulated and added to principal at least annually and thereafter shall be held, administered and disposed of as a part thereof. Upon the death of Y, the principal of the trust estate, and any net income then remaining in the hands of the Trustee, shall be transferred, conveyed and paid over to such person or persons (including Y, Y's estate, the creditors of Y or creditors of Y's estate), or corporation or corporations to such extent, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust, as Y may appoint by last will and testament.

In Hypothetical 8, Y has a testamentary power of appointment insofar as Y may appoint the trust property in his or her Will.<sup>55</sup> Y's power is a general power because Y may appoint the trust property to anyone, including Y, Y's estate, Y's creditors or the creditors of Y's estate. For estate tax purposes Y is treated as if Y owned the property outright.<sup>56</sup>

I.R.C. § 2041(b)(1) contains several exceptions to the definition of a power of appointment.<sup>57</sup> Under that section a power is not a general power of appointment if it is exercisable only in conjunction with the creator of the power or a person having a "substantial interest in the property . . . which is adverse to exercise of the power in favor of the decedent. . . ."<sup>58</sup> Although the definition of a "substantial" interest is somewhat vague—one that has a "value in relation to the total value of

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<sup>54</sup> See *id.* § 2041(b)(1)(A), (C).

<sup>55</sup> See *id.* § 2041(b)(1)(A).

<sup>56</sup> See *id.* § 2041(a)(3).

<sup>57</sup> *Id.* § 2041(b)(1).

<sup>58</sup> *Id.* § 2041(b)(1) (C)(iii).

the property subject to the power [that] is not insignificant”<sup>59</sup>—the meaning of “adverse” is clear. Examples of adverse interest holders include a taker in default of the exercise of a power and a co-holder of a power where the co-holder may appoint the trust property after the decedent’s death in favor of the co-holder, the co-holder’s estate, the co-holder’s creditors, or the creditors of the co-holder’s estate.<sup>60</sup> The gift tax rules are similar.<sup>61</sup>

After totaling all of the amounts that are included in a decedent’s gross estate, to determine the value of the taxable estate, one must deduct all of the permitted items.<sup>62</sup> The most common deductions from the taxable estate include the value of property passing from a decedent to his or her surviving spouse<sup>63</sup> and contributions to or for the use of public, charitable and religious organizations.<sup>64</sup>

### *B. Why a Power of Attorney Does Not Give Rise to Wealth Transfer Taxation*

If gift tax is imposed on completed transfers by gift,<sup>65</sup> and estate tax is imposed on the value of a decedent’s gross estate,<sup>66</sup> one must query whether the execution of a power of attorney could give rise to a taxable gift or cause property subject to the power to be included in the agent’s gross estate. If X creates a presently exercisable general durable power of attorney in favor of Y, has X made a taxable transfer to Y? If the transfer of property subject to a power holder’s right to withdraw is treated the same for gift tax purposes as an outright transfer of property, then why does the principal not make a taxable gift to the agent upon execution of the power of attorney?

On the question of whether a power of attorney gives rise to a transfer, it would appear that the answer is no. After X executes a power of attorney, X is still the sole legal owner of her bank accounts, real estate and other property. As a technical matter, it is true that under the power of attorney Y has the legal ability to sell, exchange, consume or otherwise dispose of the property subject to the power. But Y *as agent* merely has certain authorities over that property. X has not *transferred* any property to Y.

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<sup>59</sup> Treas. Reg. § 20.2041-3(c)(2) (as amended in 1997).

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* § 25.2514-3(b)(1), (2).

<sup>62</sup> *See* I.R.C. §§ 2051–2057.

<sup>63</sup> *Id.* § 2056(a) (noting that this amount may be deducted to the extent that such interest is included in the value of the gross estate).

<sup>64</sup> *Id.* § 2055(a)(1)-(4).

<sup>65</sup> *Id.* § 2001(a).

<sup>66</sup> *See supra* Part III.A.3.

Consider, however, the complex situation that can arise when under applicable state law or the express terms of the power of attorney itself, the agent has the ability to appoint the principal's property to the agent himself, his creditors, the agent's estate or the creditors of the agent's estate. This would seem to be the precise type of power over property that the gift and estate tax rules should make subject to the wealth transfer tax. On the one hand it could be argued that a mentally competent principal's ability to revoke the power of attorney should prevent the mere execution of a power of appointment from being treated as a completed transfer. Therefore the execution of the power would not give rise to a gift tax. If, however, the agent has the power to appoint the trust property by making gifts to himself, for example, then once the agent has done so, it would appear that the transfer to the agent (by the agent himself) becomes complete. Assuming the principal has no right to reverse a transfer if made within the scope of the agent's authority, then the principal's right of revocation alone does not prevent a taxable transfer in this case.

If a principal's ability to revoke the power, standing alone, may not be sufficient to prevent the imposition of a transfer tax on the creation of a power of appointment,<sup>67</sup> then two further intertwined explanations should round out the analysis. First, the agent is limited by his or her fiduciary duties to the principal to expend the property subject to the power only for the benefit of the principal.<sup>68</sup> For example, when X grants Y a presently exercisable general durable power of appointment with respect to X's bank account containing \$1,000,000, then Y has the ability to withdraw the \$1,000,000 from the account, but only for the benefit of X or if consistent with X's intent. Y may not go out and buy himself a bright red Ferrari, for example, without a specific indication that X intends Y to have that ability. Additionally an agent must "obey all reasonable instructions and directions from the principal regarding the manner of performing his or her services under the power of attorney."<sup>69</sup> At least one commentator has speculated that an agent's fiduciary duty could be construed to include the requirement to seek the principal's advance consent before exercising any power.<sup>70</sup> If this were true, then an agent under a power of attorney resembles a holder of a power of appointment who may not exercise his or her authority without the consent of another person. Under I.R.C. §§ 2041(b)(1)(C) and 2514(c)(3) an attorney-in-fact would fall explicitly outside the definition of a power of appointment.<sup>71</sup> Therefore, if one construes an agent's duties to require at least the implicit consent of the principal, if not her

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<sup>67</sup> Peter B. Tiernan, *Power of Attorney Can Inadvertently Swell Agent's Taxable Estate*, 72 PRAC. TAX STRATEGIES 4, 5 (2004).

<sup>68</sup> See RESTATEMENT (FIRST) OF AGENCY § 13 cmt. a (1933).

<sup>69</sup> Tiernan, *supra* note 67, at 6; *see also* 3 AM. JUR. 2D *Agency* § 218 (2002) (explaining that the agent has a duty of reasonable care with regards to safekeeping the principal's property).

<sup>70</sup> Tiernan, *supra* note 67, at 6.

<sup>71</sup> *See* I.R.C. §§ 2041(b)(1)(C), 2514(c)(3).

explicit consent, then the agent should not possess a power of appointment that would cause the property subject to the power to be subject to any wealth transfer taxes.

Construing an agent's authorities under a power of attorney to require the principal's implied or express consent interprets fiduciary duty in a tax-sensitive way. The Service, however, has not been consistently receptive to the argument that fiduciary duty functions as a meaningful limitation for wealth-transfer tax purposes. In several important cases, the Service has rejected fiduciary duty as either ineffective or illusory.

### *C. The Impact of Fiduciary Duty in Other Transfer Tax Contexts*

The argument that fiduciary duty, however construed, limits an agent's actions under a power of attorney is particularly curious in light of the Service's position that fiduciary duty is not a meaningful constraint in some other gift and estate tax contexts. This section describes the development of the Service's position that fiduciary duty can be ignored for wealth-transfer tax purposes and suggests why that position should not apply to contracts for intimacy in the form of powers of attorney.

#### *1. Background*

In *United States v. Byrum*, the taxpayer transferred his stock in three closely held corporations to an irrevocable trust for the benefit of his descendants with a third-party bank acting as corporate trustee.<sup>72</sup> The corporate trustee had broad control over the trust property except that Mr. Byrum retained the right to vote any non-publicly traded shares held by the trust, to veto the sale, transfer, investment or reinvestment of trust assets and to remove the corporate trustee and appoint a successor trustee in its place.<sup>73</sup> Upon Mr. Byrum's death the Service sought to include in his gross estate under I.R.C. § 2036(a)(2) the value of the stock transferred to the trust.<sup>74</sup> The Service reasoned that the decedent retained the right to designate the beneficial enjoyment of the property.<sup>75</sup> The court rejected this argument, however, finding that whatever powers Mr. Byrum retained, they were not granted to him under the trust instrument itself.<sup>76</sup> Rather, to the extent that Mr. Byrum had any powers with respect to distributions of corporate income, they

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<sup>72</sup> 408 U.S. 125, 126 (1972), *reh'g denied*, 409 U.S. 898 (1972).

<sup>73</sup> *Id.* at 126-27.

<sup>74</sup> *Id.* at 131-32.

<sup>75</sup> *Id.* at 132.

<sup>76</sup> *Id.* at 132-33.

arose out of his position as a majority shareholder (because, as such, he could control the Board of Directors).<sup>77</sup> According to the court, Mr. Byrum was bound by his fiduciary duty as a majority shareholder “not to misuse his power by promoting his personal interests at the expense of corporate interests.”<sup>78</sup> Furthermore, the court noted that the Directors themselves had “a fiduciary duty to promote the interests of the corporation. However great Byrum’s influence may have been with the corporate directors, their legal responsibilities were to all stockholders.”<sup>79</sup> Therefore for estate tax purposes, two levels of fiduciary constraints effectively limited Mr. Byrum’s control over the transferred property.

In deciding *Byrum*, the court cited several cases in support of its holding. Two of these cases provide particular insight into the court’s construction of the limitations that fiduciary duty imposes on the exercise of any rights a taxpayer may retain. For example, the *Byrum* court cited *Reinecke v. Northern Trust Co.*<sup>80</sup> for the proposition that “a settlor’s retention of broad powers of management does not necessarily subject an *inter vivos* trust to the federal estate tax.”<sup>81</sup> In *Reinecke*, the representative of the decedent’s estate brought suit for recovery of estate tax paid with respect to certain trusts, created by the decedent during his lifetime.<sup>82</sup> In the case of five of those trusts, the decedent retained the right to “supervise the reinvestment of trust funds, to require the trustee to execute proxies, to his nominee, to vote any shares of stock held by the trustee, to control all leases executed by the trustee, and to appoint successor trustees.”<sup>83</sup> The *Reinecke* court held that these powers were not sufficient to cause estate tax inclusion of the assets of any of the five trusts, reasoning that in no way had “the reserved powers of management of the trusts saved to [the] decedent any control over the economic benefits or enjoyment of the property.”<sup>84</sup>

In *Estate of King v. Commissioner*,<sup>85</sup> also cited by the *Byrum* court, the decedent created three trusts, one for each of his three children.<sup>86</sup> Each child had the right to receive income from his or her respective trust; upon the death of the child, the trust principal was to be paid out to the children’s children.<sup>87</sup> The decedent as grantor expressly prohibited the trustee from making any management or investment decisions except as directed by the grantor himself.<sup>88</sup> The Service

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<sup>77</sup> *Id.* at 136-37.

<sup>78</sup> *Id.* at 137.

<sup>79</sup> *Id.* at 138.

<sup>80</sup> 278 U.S. 339 (1929).

<sup>81</sup> *Byrum*, 408 U.S. at 133.

<sup>82</sup> *See Reinecke*, 278 U.S. 339, 343-344.

<sup>83</sup> *Id.* at 344.

<sup>84</sup> *Id.* at 346.

<sup>85</sup> *Estate of King v. Comm’r*, 37 T.C. 973 (1962).

<sup>86</sup> *See id.* at 974.

<sup>87</sup> *Id.* at 974.

<sup>88</sup> *Id.* at 975-76.



argued that the decedent's retained right to direct the trustee with respect to management and investment of trust assets caused the inclusion of the trust property in the grantor's gross estate under I.R.C. § 2036(a)(2).<sup>89</sup> The estate countered that the decedent's powers were "exercisable only in a fiduciary capacity, subject to the scrutiny of a court of equity; that . . . the grantor was under a duty to act impartially as between successive beneficiaries; [and] that, therefore, he did not retain any right to designate the persons who should possess or enjoy the property or the income therefrom."<sup>90</sup> Finding in favor of the taxpayer, the tax court stated that the grantor's retained power had the legal effect of making the grantor a trustee, but in doing so "he had subjected himself to those obligations of fidelity and diligence that attach to the office of trustee. . . . His discretion, however broad, did not relieve him from obedience to the great principles of equity which are the life of every trust."<sup>91</sup> Therefore, for estate tax purposes, the fiduciary obligations imposed on a trustee acted as effective constraints on the rights retained by the grantor.

In the years following *Byrum*, courts continued to find that fiduciary duty operated as a meaningful limitation on taxpayers' retained rights. In *Lewis G. Hutchens Non-Marital Trust v. Comm'r*,<sup>92</sup> the Service asserted a gift tax deficiency against the decedent's estate, on the grounds that the decedent had undervalued certain transfers to his children of stock in the family business.<sup>93</sup> The decedent and his wife were majority shareholders of the business, who, the Service reasoned, had the ability to control the dividends paid with respect to the stock; by failing to declare dividends, the value of the stock increased.<sup>94</sup> According to the Service, that increase in value constituted an additional taxable gift to the decedent's children.<sup>95</sup> The Tax Court disagreed.<sup>96</sup> In finding for the taxpayer the court held that the decedent's and his wife's fiduciary duties as majority shareholders prohibited them from promoting their personal interests over the corporation's.<sup>97</sup> Furthermore the court found the decision not to declare dividends was in the interest of the

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<sup>89</sup> *Id.* at 978.

<sup>90</sup> *Id.* at 979.

<sup>91</sup> *Id.* (quoting *Carrier v. Carrier*, 123 N.E. 135 (N.Y. 1919)) (internal quotations omitted). The court in *King* relied on *Carrier v. Carrier*, 123 N.E. 135 (N.Y. 1919), in reaching its decision. *Id.*

<sup>92</sup> 66 T.C.M. (CCH) 1599 (1993).

<sup>93</sup> *See id.* at 1617–18.

<sup>94</sup> *See id.* at 1602–07, 1618–20.

<sup>95</sup> *See id.* at 1625.

<sup>96</sup> *Id.*

<sup>97</sup> *See id.* at 1619 (citing *United States v. Byrum*, 408 U.S. 125, 137–38 (1972), *reh'g denied*, 409 U.S. 898 (1972)).

corporation because it allowed the company to retain working capital for other needs.<sup>98</sup>

In *Daniels v. Commissioner of Internal Revenue*,<sup>99</sup> which was decided in 1994, the taxpayers moved for summary judgment in response to the Service's assertion of an alleged gift tax deficiency.<sup>100</sup> As in *Hutchens*, the Service argued that the failure to declare and pay corporate dividends constituted a taxable gift by the taxpayers to their children, who were owners of the corporation's common stock.<sup>101</sup> The Tax Court granted the taxpayers' motion for summary judgment, finding that the failure to declare and pay dividends did not constitute a gift to the other stockholders.<sup>102</sup> The court referred specifically to both *Byrum* and *Hutchens*.<sup>103</sup> Just as the *Byrum* and the *Hutchens* courts did, the *Daniels* court recognized the vitality of fiduciary limitations imposed on the taxpayers as members of the corporation's board of directors.<sup>104</sup> Furthermore, the *Daniels* court added, the taxpayers had valid business reasons for the nonpayment of dividends, so their actions were in the best interests of the corporation.<sup>105</sup>

## 2. *The Continuing Vitality of Fiduciary Duty*

In 1976 Congress responded to *Byrum* by passing an addition to I.R.C. § 2036<sup>106</sup> that became I.R.C. § 2036(b) in 1978.<sup>107</sup> Under that section, a transferor's estate includes the value of any shares of stock in a "controlled corporation" with respect to which the transferor retained the right to vote those shares.<sup>108</sup> The retained right to vote the shares is deemed to be a retained right to enjoy the property and therefore a trigger for estate tax inclusion.<sup>109</sup> Under I.R.C. § 2036(b)(2), a controlled corporation is any corporation with respect to which, during "the 3-year period ending on the date of the decedent's death, the decedent [or certain members of the decedent's] family owned . . . , or had the right . . . to

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<sup>98</sup> See *id.* at 1618–20.

<sup>99</sup> 68 T.C.M. (CCH) 1310 (1994).

<sup>100</sup> See *id.* at 1310.

<sup>101</sup> See *id.* at 1313; see also *Hutchens*, 66 T.C.M. (CCH) at 1618–20.

<sup>102</sup> See *Daniels*, 68 T.C.M. (CCH) at 1320.

<sup>103</sup> See *id.* at 1319.

<sup>104</sup> *Id.*

<sup>105</sup> See *id.* at 1320.

<sup>106</sup> Tax Reform Act of 1976, Pub. L. No. 94-455, §. 2009(a), 90 Stat. 1520. The proposed legislation added one sentence to I.R.C. § 2036. *Id.*

<sup>107</sup> Revenue Act of 1978, Pub. L. No. 95-600, § 702(i), 92 Stat. 2763, 2931, reprinted in 1978-3 C.B. (Vo. 1) 1, 165. This new section 2036(b) was effective with respect to transfers made after June 22, 1976, the effective date of the 1976 legislation's rule. *Id.* § 702(i)(3).

<sup>108</sup> I.R.C. § 2036(b) (2006).

<sup>109</sup> *Id.* § 2036(b)(1).

vote. . . at least 20 percent of the total combined voting power of all classes of [the corporation's] stock.”<sup>110</sup> Scholars and practitioners typically refer to this as the “anti-*Byrum*” rule.<sup>111</sup>

At least one scholar has suggested that the language of I.R.C. § 2036(b) “does not impact the Supreme Court’s analysis of fiduciary duty as set forth in *Byrum*.”<sup>112</sup> Although literally true, the House Committee explained that, “[T]he voting rights are so significant with respect to corporate stock that the retention of voting rights by a donor should be treated as the retention of the enjoyment of the stock” for estate tax purposes.<sup>113</sup> The committee added that such treatment “is necessary to prevent the avoidance of the estate and gift taxes” and that “the capacity in which the decedent exercised the voting rights is immaterial.”<sup>114</sup>

In one of the most significant fiduciary duty cases since *Byrum*, the United States Tax Court ruled in *Estate of Strangi v. Commissioner of Internal Revenue*<sup>115</sup> that the value of property transferred by a decedent during his lifetime to a family limited partnership was includible in the decedent’s gross estate under I.R.C. § 2036(a).<sup>116</sup> In 1993 Mr. Strangi was diagnosed with a terminal illness.<sup>117</sup> Shortly thereafter, his son-in-law, acting as attorney-in-fact, assumed management of Mr. Strangi’s affairs.<sup>118</sup> Approximately two months before Mr. Strangi’s death, his attorney-in-fact transferred more than \$9 million of Mr. Strangi’s property, consisting mostly of cash and marketable securities, as well as Mr. Strangi’s personal residence, to a family limited partnership in return for a 99% limited partnership interest.<sup>119</sup> The general partner of the partnership was a corporation

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<sup>110</sup> *Id.* § 2036(b)(2). The family members whose ownership will be attributed to the transferor/decedent for purposes of I.R.C. § 2036 (b) are the decedent’s spouse, children, grandchildren, parents and certain partnerships, estates, trusts and corporations owned by any of the foregoing. *Id.* § 318(a)(1)-(3).

<sup>111</sup> Brant J. Hellwig, *Revisiting Byrum*, 23 VA. TAX REV. 275, 326 (2003).

<sup>112</sup> Elaine Hightower Gagliardi, *Economic Substance in the Context of the Federal Estate and Gift Tax: The Internal Revenue Service Has It Wrong*, 64 MONT. L. REV. 389, 409 n.86 (2003).

<sup>113</sup> H.R. REP. NO. 94-1380, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3356, 3419.

<sup>114</sup> *Id.*

<sup>115</sup> 115 T.C. 478 (2000), *aff’d in part, rev’d in part*, 293 F.3d 279 (5th Cir. 2002), and *remanded in part*, to *Estate of Strangi v. Comm’r.*, 85 T.C.M. (CCH) 1330 (2003) (“*Strangi III*”), *aff’d*, 417 F.3d 468, 2005-2 U.S. Tax Cas.

<sup>116</sup> *Id.* at 487–88. For a complete analysis of the *Strangi* case, see Mitchell M. Gans & Jonathan G. Blattmachr, *Strangi: A Critical Analysis and Planning Suggestions*, 100 TAX NOTES 1153 (2003).

<sup>117</sup> *Strangi*, 115 T.C. at 480.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 480–81.

whose stock was owned 47% by Mr. Strangi and 53% by Mr. Strangi's four children.<sup>120</sup> Mr. Strangi's attorney-in-fact was employed as the corporation's president.<sup>121</sup> The assets transferred to the partnership represented approximately 98% of Mr. Strangi's total wealth.<sup>122</sup> Prior to Mr. Strangi's death, the family limited partnership paid for a variety of Mr. Strangi's personal expenses, which included his home health care.<sup>123</sup>

The Service asserted a deficiency against Mr. Strangi's estate, alleging estate tax inclusion of the value of the limited partnership interests under I.R.C. 2036(a)(1) because Mr. Strangi retained the right to enjoyment of the property.<sup>124</sup> The Service also asserted estate tax inclusion under I.R.C. § 2036(s)(2) on the grounds that Mr. Strangi retained the right to designate enjoyment of the transferred property.<sup>125</sup> The tax court ruled in favor of the Service on both claims.<sup>126</sup>

The tax court first reasoned that the limited partnership interests were included in Mr. Strangi's gross estate because he impliedly retained "economic benefit" from the partnership.<sup>127</sup> The court cited the fact that Mr. Strangi transferred 98% of his wealth to the limited partnership, that he remained in his personal residence after transferring it to the partnership, and that distributions from the partnership had been made for Mr. Strangi's personal expenses.<sup>128</sup>

The tax court next reasoned that Mr. Strangi, in his capacity as a member of the Board of Directors of the corporate general partner, effectively retained the right to designate the enjoyment of the partnership property because he could join with the other directors to direct or withhold distributions from the partnership.<sup>129</sup> In other words, because of the managerial authority granted to the corporate general partner, the Tax Court found that the "decedent can act together with other [corporate] shareholders essentially to revoke the [limited partnership arrangement] and thereby to bring about or accelerate present enjoyment of the partnership assets."<sup>130</sup>

In response to the estate's assertion that a corporate shareholder's fiduciary duty would prevent him from joining with the other directors to revoke the partnership agreement, the tax court distinguished the *Strangi* facts from *Byrum*.<sup>131</sup>

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<sup>120</sup> *Id.* at 481.

<sup>121</sup> *Id.*

<sup>122</sup> *See id.*

<sup>123</sup> *Id.* at 482.

<sup>124</sup> *See id.* at 483, 487.

<sup>125</sup> *See id.*

<sup>126</sup> *See* Estate of Strangi v. Comm'r., 85 T.C.M. (CCH) 1331, 1335-45 (2003).

<sup>127</sup> *Id.* at 1337-38.

<sup>128</sup> *Id.* at 1338.

<sup>129</sup> *Id.* at 1340-41.

<sup>130</sup> *Id.* at 1341.

<sup>131</sup> *Id.* at 1342.

The tax court noted that in *Byrum*, an “independent trustee . . . alone had the ability to determine distributions from the disputed trust, notwithstanding any prior action by corporate owners or directors.”<sup>132</sup> Furthermore, the court stated that the “dual roles” played by Mr. Strangi’s attorney-in-fact, as corporate manager and attorney-in-fact for one of the shareholders, compromised any fiduciary duty.<sup>133</sup> Unlike in *Byrum*, the alleged fiduciary duties in the *Strangi* case were substantively limited, insofar as the fiduciary did not owe duties to “a significant number of unrelated parties” and the asserted duties had no origin in “operating businesses that would lend meaning to the standard of acting in the best interests of the entity.”<sup>134</sup> The court stated that “[t]he rights to designate [the transferred property] traceable to decedent through [the corporate general partner] cannot be characterized as limited in any meaningful way by duties owed essentially to himself. . . . Intrafamily fiduciary duties within an investment vehicle are not equivalent in nature to the obligations created” in *Byrum*.<sup>135</sup>

It is important to note that in *Strangi*, the tax court, affirmed by the Court of Appeals for the Fifth Circuit, acknowledged that fiduciary duty may have some meaning for estate tax purposes.<sup>136</sup> But in *Strangi*, the tax court cited two facts as precluding the finding that fiduciary duty was a meaningful limitation in that case. First, any such duty would have run to Mr. Strangi himself as limited partner.<sup>137</sup> Second, the limited partnership was an investment vehicle, not an operating business.<sup>138</sup> The court left open the possibility that, with different facts before it, fiduciary duties might constitute meaningful limitations for estate tax purposes.<sup>139</sup>

The power of attorney presents the ideal scenario for the estate and gift tax recognition of fiduciary duties. Such contracts for intimacy arise for largely non-tax motives, such as planning for one’s subsequent incapacity<sup>140</sup> and delegating legal authority to another to engage in a particular transaction, as in Hypothetical 1 discussed in Part II B. Therefore, like in *Byrum* and unlike in *Strangi*, the duties of an agent to a principal have legal and tax significance. The Uniform Power of Attorney Act, passed by the National Conference of Commissioners on Uniform State Laws on July 13, 2006 (the “2006 Act”)<sup>141</sup> and discussed in the next part, is consistent with this construction of the agent as the principal’s fiduciary.<sup>142</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 1343.

<sup>136</sup> *See id.* at 1342–43.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *See id.* at 1343.

<sup>140</sup> *See supra* Part II.B.

<sup>141</sup> *See* UNIF. POWER OF ATT’Y ACT (amended 2006), 8B U.L.A. 24 (Supp. 2008); *see*

## IV. PROTECTING LEGAL AVATARS

A. *Overview of the Uniform Durable Power of Attorney Act*

The 2006 Act provides default rules applicable to powers of attorney and recommends the use of a simple statutory form of power.<sup>143</sup> The 2006 Act improves on prior versions of uniform statutes concerning durable powers of attorney, namely portions of the Uniform Probate Code of 1969<sup>144</sup> and the Uniform Durable Power of Attorney Act of 1979, as amended through 1987.<sup>145</sup> As of the late 1980s,<sup>146</sup> some version of a uniform act had been adopted in a majority of states, albeit with significant variations between and among them.<sup>147</sup>

In its survey of a national group of probate and elder law attorneys, the National Conference of Commissioners found six main divergences among state laws: “1) the authority of multiple agents; 2) the authority of a later-appointed fiduciary or guardian; 3) the impact of dissolution or annulment of the principal’s marriage to the agent; 4) activation of contingent powers; 5) the authority to make gifts; and 6) standards for agent conduct and liability.”<sup>148</sup> The survey revealed that practitioners had substantial consensus about what constituted “best practices” with respect to powers of attorney, such as whether the grant of a power should include gift-giving authority (not unless the power expressly stated), what standard of care an agent owes to the principal (a fiduciary duty), and what safeguards are necessary to prevent abuse of the power of attorney (many).<sup>149</sup>

The 2006 Act regularizes the power of attorney in many ways. The presumption of a power of attorney’s durability is one of the most important

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*also* Press Release, National Conference of Commissioners on Uniform State Laws, New Act Updates the Rules on Powers of Attorney (July 13, 2006), *available at* <http://www.nccusl.org/Update/DesktopModules/NewsDisplay.aspx?ItemID=159>.

<sup>142</sup> *But see* Boxx, *supra* note 4; Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574 (1996).

<sup>143</sup> *See* Uniform Power of Attorney Act Summary, *supra* note 12.

<sup>144</sup> *See* UNIF. PROBATE CODE §§ 5-501–505 (amended 1975), 8 U.L.A. 419–24 (1998).

<sup>145</sup> *See* UNIF. DURABLE POWER OF ATT’Y ACT §§ 1–9 (amended 1987), 8A U.L.A. 246–59 (1998).

<sup>146</sup> The National Conference of Commissioners on Uniform State Laws began its study of professional opinion in 2002. Uniform Power of Attorney Act Summary, *supra* note 12, at 1.

<sup>147</sup> *See* UNIF. POWER OF ATT’Y ACT, *supra* note 1, at 22–23 (prefatory note); *see also* William P. LaPiana, *The New Uniform Power of Attorney Act*, <http://www.abanet.org/rppt/publications/estate/2004/2/UPOAA-LaPiana.pdf> (last visited Sept. 30, 2008).

<sup>148</sup> *See* UNIF. POWER OF ATT’Y ACT 22 (amended 2006), 8B U.L.A. 27 (Supp. 2007) (prefatory note).

<sup>149</sup> *Id.* at 22–23.

changes.<sup>150</sup> Previously the reverse assumption applied; silence meant that the power terminated upon the principal's incapacity. A principal was required to specify if he or she wanted the agent's authority to continue beyond the principal's incapacity or incompetence.<sup>151</sup> Under the 2006 Act, a power is presumed to be presently exercisable "unless the principal provides in the power of attorney that it is to become effective at a future date or upon the occurrence of a future event or contingency."<sup>152</sup> The 2006 Act provides a model statutory form of power of attorney<sup>153</sup> in an effort to regularize the substantive content of these instruments and the procedures for their execution.<sup>154</sup> The 2006 Act attempts to address "the problem of persons that refuse to accept an agent's authority."<sup>155</sup> Specifically section 119 provides that a party who accepts a power of attorney in good faith will be protected from liability as long as he or she has no actual knowledge that the power of attorney has been revoked or terminated.<sup>156</sup> Section 120 provides for the imposition of financial and other penalties against a person who "unreasonably refuses" to accept a power of attorney.<sup>157</sup> A person's refusal is not unreasonable if he or she has actual knowledge of the revocation of the power of attorney<sup>158</sup> or the person has a reasonable belief that the offered power is invalid.<sup>159</sup>

In addition to rules designed to enhance the creation and use of powers of attorney, the 2006 Act specifically addresses the six noted sources of divergence among state laws.<sup>160</sup> With respect to the authority of multiple agents, section 111 of the 2006 Uniform Act provides that "[u]nless the power of attorney otherwise provides, each coagent may exercise its authority independently."<sup>161</sup> A successor agent who survives the death or resignation of his or her co-agents may continue to serve as sole agent.<sup>162</sup> The principal also has the ability to nominate successor agents who will have the same of authorities as the original agent.<sup>163</sup> The powers

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<sup>150</sup> *Id.* § 104.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* § 109(a).

<sup>153</sup> *Id.* §§ 301–302 (Article 3).

<sup>154</sup> The form power of attorney contemplates that the principal will initial the powers that he or she wishes to grant to the agent. *See id.*

<sup>155</sup> *Id.* at 23 (prefatory note).

<sup>156</sup> *Id.* § 119(b)–(c).

<sup>157</sup> *Id.* § 120.

<sup>158</sup> *Id.* § 120(b)(3).

<sup>159</sup> *Id.* § 120(b)(5).

<sup>160</sup> *See supra* note 156, at 125 and accompanying text.

<sup>161</sup> UNIF. POWER OF ATT'Y ACT § 111(a).

<sup>162</sup> *Id.* § 111(b)(2).

<sup>163</sup> *Id.* § 111(a)(2).

<sup>163</sup> *Id.* § 111(b).

granted to an agent either may be enumerated or a principal may incorporate them by reference to the 2006 Act.<sup>164</sup>

The 2006 Act clarifies the circumstances under which an agent's authorities commence and terminate. Under section 109, a power becomes effective immediately upon execution<sup>165</sup> and its durability shall continue unless it expressly provides that the power terminates upon the incapacity of the principal.<sup>166</sup> An agent's authority predictably terminates upon the principal's death,<sup>167</sup> revocation by the principal,<sup>168</sup> or termination pursuant to the terms of the instrument itself.<sup>169</sup> An agent's authority also will terminate if "an action is filed for the [dissolution] or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides."<sup>170</sup> Unless one of those circumstances exists, mere lapse of time does not cause the power to expire. The length of time between the date of the execution of the power and the agent's exercise of his or her authority has no relevance.<sup>171</sup> A power of attorney does not become "stale" by virtue of the passage of time alone.<sup>172</sup>

The principal expressly must grant (or restrict) certain of an agent's powers.<sup>173</sup> For example, in order to avoid negative tax consequences for an agent who is an ancestor, spouse, or a descendent of the principal, or a person whom the principal is legally obligated to support, that agent shall not have the right to transfer to himself or herself any interest in the principal's property, "whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise."<sup>174</sup> Similarly, for an agent to have the ability to create trusts, make gifts or create property rights in others, the principal must expressly authorize the agent to do so.<sup>175</sup> Otherwise the 2006 Act provides that the execution of a power of attorney grants broad authorities to an agent with respect to the principal's real property;<sup>176</sup> tangible personal property;<sup>177</sup> stocks and bonds;<sup>178</sup> commodities and options;<sup>179</sup> banking and

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<sup>164</sup> *See id.* § 202.

<sup>165</sup> *Id.* § 109(a).

<sup>166</sup> *See id.* § 109(c). The purpose of this change is to "reflect[] the view that most principals preferred their powers of attorney to be durable rather than nondurable." *Id.* at 2.

<sup>167</sup> *Id.* § 110(a)(1).

<sup>168</sup> *Id.* § 110(a)(3).

<sup>169</sup> *Id.* § 110(a)(4).

<sup>170</sup> *Id.* § 110(b)(3) (alteration in original).

<sup>171</sup> *Id.* § 110(c).

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* § 201(a)–(c).

<sup>174</sup> *Id.* § 201(b).

<sup>175</sup> *Id.* § 201(a)(1)–(a)(2).

<sup>176</sup> *Id.* § 204.

<sup>177</sup> *Id.* § 205.

<sup>178</sup> *Id.* § 206.

<sup>179</sup> *Id.* § 207.



other financial transactions;<sup>180</sup> operation of an entity or business;<sup>181</sup> insurance and annuities;<sup>182</sup> estates, trusts, and other beneficial interests;<sup>183</sup> claims and litigation;<sup>184</sup> personal and family maintenance;<sup>185</sup> benefits from governmental programs;<sup>186</sup> retirement plans;<sup>187</sup> and taxes.<sup>188</sup> A principal may incorporate all of those powers by reference to grant an agent a wide range of authorities.<sup>189</sup>

For tax purposes, the Service takes the position that gifts made under a power of attorney are revocable by the principal.<sup>190</sup> Whether an agent under a power of attorney has the ability to make gifts of the principal's property has been the source of significant litigation.<sup>191</sup> Some courts have found that a broad grant of authority includes the ability of the agent to make gifts,<sup>192</sup> but other precedent suggests that gift-giving authority must be granted specifically.<sup>193</sup> Therefore the best practice is for a principal to state specifically whether the agent may make gifts of the principal's property.<sup>194</sup>

If an agent has the ability to make gifts, whether as a matter of state law or under the terms of the durable power of attorney, some courts (and the Service) take the view that the agent has no ability to make such gifts to himself or herself.<sup>195</sup> The 2006 Act attempts to "strike[] a balance between the need for

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<sup>180</sup> *Id.* at § 208.

<sup>181</sup> *Id.* at § 209.

<sup>182</sup> *Id.* § 210.

<sup>183</sup> *Id.* at § 211.

<sup>184</sup> *Id.* at § 212.

<sup>185</sup> *Id.* § 213.

<sup>186</sup> *Id.* § 214.

<sup>187</sup> *Id.* § 215.

<sup>188</sup> *Id.* § 216.

<sup>189</sup> *Id.* § 203.

<sup>190</sup> *Estate of Casey v. Comm'r*, 948 F.2d 895, 896 (4th Cir. 1991).

<sup>191</sup> In the absence of a specific grant of a gift-giving authority, courts often turn to state law for a determination of whether silence in a power of attorney includes the ability to make gifts. *See, e.g.*, *Estate of Ridenour v. Comm'r*, 65 T.C.M. (CCH) 1850, 1850-51 (1993) (applying Virginia law to gifts made by attorney-in-fact).

<sup>192</sup> *See id.*

<sup>193</sup> *See, e.g.*, I.R.S. Priv. Ltr. Rul. 950934 (Dec. 4, 1995) (stating that a power of attorney must expressly grant gift-giving authority to agent). *But see Ridenour*, 65 T.C.M. at \*8 (holding that attorney-in-fact had power to grant gifts "in accordance with decedent's personal lifetime gift-giving history" under Virginia law).

<sup>194</sup> *See MYRON KOVE & JAMES M. KOSAKOW*, 1 *HANDLING FEDERAL ESTATE & GIFT TAXES* § 2:160 (6th ed. 2008) ("The power of attorney should be durable so that it survives the principal's incompetency, and should contain a specific power authorizing gifts to family members").

<sup>195</sup> *See, e.g.*, *RESTATEMENT (SECOND) OF AGENCY* § 314 (1958).

flexibility and acceptance of an agent's authority and the need to prevent . . . abuse."<sup>196</sup> Section 217 contains three significant provisions that apply to an agent who has been granted a broad gift-giving authority. First, the agent may make an unlimited number of annual exclusion gifts, so long as the value of each gift does not exceed the per-donee limit established by I.R.C. § 2503(b)(1).<sup>197</sup> Second, those gifts may be made outright or in trust or to a college tuition savings program under I.R.C. § 529.<sup>198</sup> Finally, all gifts by an agent must be "consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors."<sup>199</sup> Therefore the 2006 Act creates boundaries that limit the power of an agent who is generally authorized by a power of attorney to make gifts.<sup>200</sup> In all cases an agent is required to act consistently with the principal's known objectives or best interests.<sup>201</sup> In other parts of the 2006 Act, this standard for decision making is more fully articulated as a fiduciary duty, as discussed in the next section.

#### *B. Agents as Fiduciaries Under the Durable Power of Attorney Act*

Generally speaking, fiduciary duty arises out of the constellation of the "duties of loyalty, prudence, and a host of subsidiary rules that reinforce the duties of loyalty and prudence."<sup>202</sup> In 1927, Justice Benjamin Cardozo, Chief Judge of the New York Court of Appeals, famously described fiduciary duty as a standard "stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."<sup>203</sup> A fiduciary is a person with responsibilities to others and whose behavior is held to the highest standard.

Consider a trustee of a lifetime or a testamentary trust. The trustee's duty of loyalty requires the trustee to administer the trust assets for the benefit of the

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<sup>196</sup> UNIF. POWER OF ATT'Y ACT 2 (amended 2006), 8B U.L.A. 27 (Supp. 2007) (prefatory note).

<sup>197</sup> *Id.* § 217(b)(1). The provision for excluding gifts from taxable income is set forth at I.R.C. § 2503(b)(1) (2000). Originally the exclusion amount was \$10,000 but was adjusted to \$12,000 beginning in the 2006 tax year. *See* Rev. Proc. 2005-70, 2005-2 C.B. 979, 984.

<sup>198</sup> *See* UNIF. POWER OF ATT'Y ACT § 217(a).

<sup>199</sup> *Id.* § 217(a).

<sup>200</sup> *See id.* § 217. Note however that a power of attorney can provide the agent with greater powers. *Id.* § 217(b) (stating that the boundaries of the act apply "[u]nless the power of attorney otherwise provides").

<sup>201</sup> *Id.* § 217(c).

<sup>202</sup> JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 772 (7th ed. 2005) (emphasis omitted).

<sup>203</sup> *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

beneficiaries alone.<sup>204</sup> Without court approval, the trustee may not buy trust assets or sell them to himself, borrow trust funds, loan funds to the trust, profit (except through compensation) from serving as trustee, commingle the trustee's and trust assets, or indirectly engage in any of the foregoing.<sup>205</sup> Similarly the duty of prudence<sup>206</sup> requires a trustee to act in accordance with "the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another."<sup>207</sup>

The 2006 Act imposes most of the traditional duties of a fiduciary (such as trustee) on an agent acting under a power of attorney.<sup>208</sup> Section 114(b) of the 2006 Act enumerates nine specific duties,<sup>209</sup> each of which can be characterized as a duty of loyalty, a duty of prudence, or a derivative thereof. First in the list is the agent's duty to act "loyally for the principal's benefit."<sup>210</sup> The agent must act within the scope of the authority granted to him or her<sup>211</sup> and in a manner that is "in accordance with the principal's reasonable expectations," if known, or if not, then in the principal's "best interest."<sup>212</sup> The agent may not create a conflict of interest that would prevent the agent from acting in the principal's best interest.<sup>213</sup> The agent must cooperate with any person named as the principal's agent for health-care decision making.<sup>214</sup>

The agent's duty of prudence is articulated as the duty to "act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances."<sup>215</sup> Interestingly, although the 2006 Act refers to the behavior of "agents in similar circumstances" as the touchstone against which an agent will be measured, this standard falls somewhat short of the traditional articulation of the

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<sup>204</sup> See *In re Gleeson's Will*, 124 N.E.2d 624, 627 (Ill. App. Ct. 1955) (describing how trustee's lease of trust land to himself constituted a breach of fiduciary duty); *Hartman v. Hartle*, 122 A. 615, 615 (N.J. Ch. 1923) (describing how trustee breached fiduciary duty when he purchased estate property in wife's name).

<sup>205</sup> GEORGE GLEASON BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 543(rev. 2d ed. 1993 & Supp. 2007).

<sup>206</sup> See UNIF. TRUST CODE § 804 (2005).

<sup>207</sup> UNIF. PROB. CODE § 7-302 (1993).

<sup>208</sup> See generally UNIF. POWER OF ATTORNEY ACT § 114 (amended 2006), 8B U.L.A. 27 (Supp. 2007) (detailing the fiduciary duties of an agent notwithstanding the provision in the power of attorney).

<sup>209</sup> *Id.* § 114(a), (b).

<sup>210</sup> *Id.* § 114(b)(1).

<sup>211</sup> *Id.* § 114(a)(3).

<sup>212</sup> *Id.* § 114(a)(1).

<sup>213</sup> *Id.* § 114(b)(2).

<sup>214</sup> *Id.* § 114(b)(5).

<sup>215</sup> *Id.* § 114(b)(3).

duty of prudence—that is, “the standards in dealing with [property] that would be observed by a prudent man dealing with the property of another.”<sup>216</sup> Therefore agents under powers of attorney are compared with other agents, not necessarily the prudent person, although one hopes that the average agent is prudent. If not, the average agent’s behavior remains the measurement under the 2006 Act. An agent is required, as part of the duty of prudence, to “attempt to preserve the principal’s estate plan,” if both known by the agent and “consistent with the principal’s best interest.”<sup>217</sup> The agent must keep complete records of his or her actions.<sup>218</sup>

Even though the 2006 Act embraces the duties of loyalty, prudence and their derivatives, the 2006 Act also specifically permits the agent to engage in limited self-dealing transactions. An agent under a power of attorney may benefit from a transaction with the principal as long as the agent acts with “care, competence, and diligence for the best interests of the principal.”<sup>219</sup> Evaluation of the agent’s “care, competence, and diligence” necessarily will take into account the agent’s individual skills and expertise.<sup>220</sup> To the extent that an agent is permitted to self deal without court approval at all suggests that the duties of an agent under a durable power of attorney are somewhat less rigorous than a trustee’s duties to trust beneficiaries, for example.<sup>221</sup>

From a policy perspective, the somewhat modified fiduciary duty of an agent to a principal under a power of attorney reflects at least in part the uniqueness of the principal-agent relationship. In many cases, the person acting as agent will be a natural object of the principal’s bounty. A family member may be chosen as agent, for example, precisely because the principal has a close relationship with him or her. That close relationship, combined with the competent principal’s ability to revoke the power of attorney, functions as some protection against an agent’s acting in a manner that is inconsistent with the principal’s directions or best interests. In the trustee-beneficiary scenario, trust beneficiaries typically have no ability to remove the trustee.<sup>222</sup> Also the trust’s grantor, not the beneficiaries, selects the initial trustee, who may be a stranger to the beneficiaries. And even if the initial trustee were a person or institution known to the initial trust beneficiaries, as more time passes, it is less likely that a successor trustee and trust beneficiaries have any personal relationship.

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<sup>216</sup> See *supra* note 207.

<sup>217</sup> UNIF. POWER OF ATT’Y ACT § 114(b)(6).

<sup>218</sup> *Id.* § 114(b)(4).

<sup>219</sup> *Id.* § 114(d).

<sup>220</sup> *Id.* § 114(e).

<sup>221</sup> See, e.g., *In re Estate of Hegel*, 668 N.E.2d 474, 478 (Ohio 1996) (stating that courts are not required to approve acts of agent under power of attorney); see also *supra* notes 72–74 and accompanying text (describing fiduciary duties).

<sup>222</sup> But see Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761 (2006) (discussing the use of trust protectors to enforce principals’ intent).

*C. Fiduciary Duties Are Meaningful Limitations for Tax Purposes*

Fiduciary duty is the most commonly asserted explanation for why the creation of a durable power of attorney does not give rise to negative wealth transfer tax consequences.<sup>223</sup> Even under a law such as the 2006 Act, which grants an agent the ability to appoint the principal's property to himself or herself,<sup>224</sup> the agent's power is limited to the annual exclusion amount.<sup>225</sup> The agent is constrained by his or her duty of loyalty to the principal from applying the trust property in a manner that is inconsistent with the best interests of the principal.<sup>226</sup> An agent under a power of attorney has a slightly different fiduciary duty from a trustee. That difference arises out of the unique nature of the principal-agent relationship.

Fiduciary duty in the power of attorney context has an estate and gift tax impact that it does not have in other contexts.<sup>227</sup> At its core, a power of attorney is a contract for intimacy. More people have created these contracts for intimacy than have established a trust.<sup>228</sup> According to one survey of adults age 50 and over, 23% of that population have created one or more lifetime trusts,<sup>229</sup> but 45% have executed a durable power of attorney.<sup>230</sup> Among the age 75 to 79 subgroup, about 30% have created a trust<sup>231</sup> but 60% have executed a durable power of attorney.<sup>232</sup>

Contracts for legal intimacy of the principal-agent variety are popular because they are easy to create without a lawyer. In fact, the power of attorney forms that are available in stationery stores and on the internet<sup>233</sup> are often identical to those

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<sup>223</sup> See *supra* Part III.B.

<sup>224</sup> See *supra* Part III.C.

<sup>225</sup> See *supra* note 207 and accompanying text.

<sup>226</sup> See *supra* Part IV.B.

<sup>227</sup> See *supra* Part III.

<sup>228</sup> AARP Research Group, *Where There is a Will...: Legal Documents Among the 50+ Population: Findings from an AARP Survey* (Apr. 2000), <http://assets.aarp.org/rgcenter/econ/will.pdf>.

<sup>229</sup> *Id.* at 5.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at fig.7.

<sup>232</sup> *Id.* Other commentators estimate that approximately 70 percent of people over the age of seventy have executed powers of attorney. MCGOVERN & KURTZ, *supra* note 10, at 300 (citing Thomas J. Begley, Jr. & Andrew H. Hook, *The Elder Law Durable Power of Attorney*, 29 EST. PLAN. 538 (2002)).

<sup>233</sup> See, e.g., Statutory Durable Power of Attorney Form (listing a variety of powers which may be denied by crossing them out), available at <http://www.texasprobate.com/forms/poa.htm> (last visited July 2, 2008).

used by expensive law firms.<sup>234</sup> Additionally, power of attorney forms, unlike many will and trust forms, require minimal customization. Therefore it is likely that a layperson can prepare and execute a power of attorney form without making legally significant mistakes; problems with will and trust forms, in contrast, give rise to well-known litigation.<sup>235</sup>

Durable powers of attorney are also appealing because they enable a principal to share or delegate power over his or her property without relinquishing full control over it. For those who are reluctant to acknowledge that they have lost the interest, ability, or energy to manage their property, the power of attorney may be a particularly desirable arrangement. Unlike a court-appointed guardianship, a contract for intimacy is a private arrangement that need be known only to the principal, agent, and the person requested to accept the durable power of attorney as evidence of the agent's authority. The contract for intimacy allows for a level of privacy that a guardianship does not.

## V. THE FUTURE OF LEGAL AVATARS

### A. *For Taxpayers with Limited Traditional Family Ties*

The 2006 Act standardizes the contract for legal intimacy that arises between a principal and agent under a durable power of attorney.<sup>236</sup> The 2006 Act clearly defines the agent's duties to the principal. From a business perspective, one can anticipate a shift in the practices of certain banks and trust companies. Just as some institutions now offer professional executor or trustee services, these institutions could expand their fiduciary business to include professional attorney-in-fact services. This potential shift to a commodified, professional fiduciary relationship would have no impact on the very rich (who can pay a bank or trust company to act in this capacity) or the very poor (who will not be able to afford professional fiduciary services at any cost). The United States middle class, however, may benefit from being able to obtain professional fiduciary services at a standardized rate.

Many Americans live more than two hours from their closest family members. These people would be the target market for professional fiduciary services under a power of attorney. Even those who do live close to family members may prefer a professional fiduciary; not everyone has a trusted family member who is willing and able to take care of his or her financial and personal matters. The divorce rate for first marriages hovered at 3.6 per 1,000 of the

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<sup>234</sup> See *supra* note 6.

<sup>235</sup> See, e.g., *In re Estate of Mulkins*, 496 P.2d 605, 607 (Ariz. Ct. App. 1972) (holding that the text of the will form itself was "surplusage," but that the remainder formed a valid holographic will).

<sup>236</sup> See *supra* Part IV.A.

population in 2005.<sup>237</sup> Marriage rates occur at a rate of 7.5 per 1,000 of the total population.<sup>238</sup> Of the 105.5 million households surveyed in the 2000 Census, 68.1% were “family households” (households containing at least one person related to the head of household by birth, marriage or adoption).<sup>239</sup> 31.9% were “non-family households” (not containing at least one person related to the head of the household by birth marriage or adoption).<sup>240</sup> More and more often people live far away from family members; they live alone or with others to whom they are bound together by affective ties, but not genetic or legal ones.

*B. For Taxpayers of Varying Levels of Wealth*

The regularization of the principal-agent relationship by the 2006 Act may lead to its commodification. If so, then those who do not have a family member or close associate willing or able to fulfill that function will be able to engage a professional to do so at presumably competitive prices. Four factors would encourage positive performances by a professional agent at a relatively low cost. First, there are very low barriers to entry. One need not have specialized training or knowledge to act as an agent under a power of attorney. Second, a professional fiduciary will want to maintain a good reputation in the community, or risk losing existing business. Third, a professional fiduciary will want to enhance his, her or its good reputation in the community in order to increase business. If a professional fiduciary abuses his, her or its authority under a power of attorney, the fiduciary will have difficulty maintaining existing business and attracting new business. Fourth, a professional fiduciary has an incentive to act within the scope of its authority because it will be a repeat player who both proffers and receives powers of attorney in the financial marketplace.

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<sup>237</sup> BIRTH, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2005, NAT'L. VITAL STATISTICS REPORT 54 (2) (July 21, 2006), [http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54\\_20.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_20.pdf).

<sup>238</sup> *Id.*

<sup>239</sup> Tavia Simmons and Grace O'Neill, Households and Families: 2000 Census Brief (Sept. 2001), Table 1, <http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf>.

<sup>240</sup> *Id.*

To illustrate, consider two neighborhood banks, Bank X and Bank Y, both of which offer professional services as agents under powers of attorney. Bank X will want to act within the scope of its authority under a power of attorney presented to Bank Y, for example, because Bank X will want Bank Y to act similarly with respect to any power of attorney presented to Bank X. Furthermore, if Bank X imposes significant transaction costs (such as delay) every time Bank Y presents a power of attorney, then Bank Y will impose significant transaction costs every time Bank X presents a power of attorney. Neither would be able to carry out its duties in a timely fashion. Market incentives would encourage the two banks to act appropriately.

As a practical matter, however, professional fiduciaries may not appeal even to taxpayers who can afford them. A professional might do a “better” job as agent than would a friend or family member, but a professional fiduciary might feel less obligated to act in conformity with a principal’s previously expressed wishes or unique needs. Acting as agent will be cost ineffective for the professional fiduciary if too much customized work is required. One hopes that an individual nominated as agent would feel at least some moral duty to act consistently with the principal’s wishes, no matter how idiosyncratic, because of his or her personal connection to the principal. An institutional relationship by its nature is less likely to carry with it such a moral or behavioral obligation.

If a professional fiduciary business does develop in response to the Act, most taxpayers will remain in the same position in which they were before the Act. Wealthy people, who have always had the ability to hire a professional fiduciary, will continue to be able to afford one. They may even benefit from cost reductions due to the regularization of the principal-agent relationship. Of course a person may not need to engage a professional fiduciary, if a willing child, for example, will perform those services.

In contrast, moderate-income or low-income taxpayers who historically have not employed professional fiduciaries may still not be able to afford them, regardless of how low the fees become. Even a commodified principal-agent relationship may be too costly for many taxpayers; the Act does nothing to help these taxpayers contract for intimacy. Yet the regularization of these types of contracts suggests the possible recognition of other choice-based human relationships, discussed in the next part.



## VI. TAX AVATARS, ALTER EGOS AND CHOICE-BASED RELATIONSHIPS

A. *How Legal Avatars Benefit the Economy*

Critical scholars who share an anti-subordination agenda have two reasons to engage in a deep analysis of the tax treatment of powers of attorney. First, if the tax and other aspects of powers of attorney are well understood, the value of an agent's services will be able to be measured accurately. Second, a regularized principal-agent relationship should be understood in historical context; it conforms to the cultural practice of outsourcing activities that one is not willing or able to do for oneself (or find a family member to do).

Commodification of the fiduciary relationship under a power of attorney will permit scholars to measure more accurately the economic value of this work.<sup>241</sup> The overwhelming majority of caregivers for the elderly are female.<sup>242</sup> In a study of elderly people's choice of a health care proxy, i.e., someone to make medical decisions in the event of the individual's incapacity, "in selecting a surrogate decision maker, elders tend to look at those they see as caregivers. The spouses of elderly persons are commonly elderly as well and therefore may have physical or cognitive deficits that limit their ability to engage in effective caregiving."<sup>243</sup> Therefore if women are most likely to be caretakers, and caretakers are likely to be the surrogate decision makers, it is not unreasonable to assume that women are more likely than men to serve as agents under a power of attorney.

For feminist legal scholars in particular, making women's caretaking work visible historically has been an important project.<sup>244</sup> For example, Martha Fineman has highlighted the secondary economic effects of women's caretaking activities. Fineman points to women's "derivative dependency": "[T]hose who care for others

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<sup>241</sup> In the international development context, Lourdes Benería has suggested that much of women's work is not accounted for in economic studies because it is unregulated or not generally visible in the marketplace. See LOURDES BENERÍA, GENDER, DEVELOPMENT AND GLOBALIZATION: ECONOMICS AS IF ALL PEOPLE MATTERED 136 (2003) (describing the role of women in the informal sector and the difficulty of gathering systemic information from this informal sector).

<sup>242</sup> For a breakdown of the demographics of formal and informal caregivers, see Jeannette Takamura & Bob Williams, *Informal Caregiving: Compassion in Action* 5–12, <http://aspe.hhs.gov/daltcp/reports/carebro2.pdf> (last visited July 2, 2008).

<sup>243</sup> Nina A. Kohn, *Elder Empowerment As a Strategy for Curbing the Abuse of Durable Powers of Attorney*, 59 RUTGERS L.REV. 1, 9 (2006).

<sup>244</sup> See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 9 (1995) (framing her argument in terms of "burden[ing] those who would caretake with ideological and actual impediments that make their tasks more difficult").

are themselves dependent on resources in order to undertake that care. Caretakers have a need for monetary or material resources. They also need recourse to institutional supports and accommodation, a need for structural arrangements that facilitate caretaking.”<sup>245</sup> In a similar vein, Katharine Silbaugh has emphasized the importance of understanding the economic value of women’s unpaid caretaking and household work.<sup>246</sup> She says, “[h]ome labor as an area of significant concern to women’s working lives does not appear to be temporary. . . . [I]t is critical to push for the equality of treatment of that work with paid work, and not just to seek the equality of treatment of both men and women in the paid labor force.”<sup>247</sup> A crucial step toward gender equality, then, is measuring the economic value of women’s unpaid work. If even a small professional fiduciary service business arises from the regularized principal-agent relationship created under the 2006 Act, then the market itself will set the value for this “caretaking” work.

If it is true that more women than men do the caretaking work of agents under a power of attorney, then the shift to a market in professional fiduciaries mirrors other cultural practices of outsourcing work traditionally performed by women. The influx of women into paid “market” work created a secondary workforce of women engaged in paid child-care and housekeeping. Some scholars have suggested that women’s work outside the home has perpetuated a hierarchy in which “market” (outside-the-home) work is more important than “non-market” (inside-the-home) work, even if both are compensated.<sup>248</sup> Additionally, critics claim that women’s paid employment outside the home reifies a racialized economic stratification of women in which (the typically white) women who work outside the home employ women (typically of color) to work inside the (typically white) women’s homes.<sup>249</sup> Yet in the power of attorney context, the shift of one woman’s responsibilities onto another is not likely to involve outsourcing to a party with a lesser bargaining position. A professional fiduciary, such as a bank or trust company, will be able to charge a market rate for its services and will offer

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<sup>245</sup> Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 20 (1999).

<sup>246</sup> Katharine Silbaugh, *Commodification and Women’s Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997).

<sup>247</sup> *Id.* at 101.

<sup>248</sup> MARY ROMERO, MAID IN THE U.S.A. 98 (1992) (“[e]mployed middle- and upper-middle class women escaped the double day syndrome by hiring poor women of color to perform housework and child care, and this was characterized as progress. Some feminists defined domestic service as progress . . . . However this definition neglects the inescapable fact that when women hire other women at low wages to do housework, both employees and employers remain women”).

<sup>249</sup> Rosa Lopez, *Christopher Darden and Me*, in CRITICAL RACE FEMINISM: A READER (Adrien Katharine Wing ed., 2d ed. 2003); Taunya Lovel Banks, *Toward a Global Critical Feminist Vision: Domestic Work, and the Nanny Tax Debate*, 3 J. Gender, Race & Justice 1, 31 nn. 139–40 (1999).

professional agent services only if they are remunerative. In contrast, at least with childcare and housekeeping, the women to whom the work is “outsourced” often earn minimum wage and have limited economic mobility.<sup>250</sup> In this way, the projected outsourcing of professional agent work avoids some of the traditional critiques of other outsourcing of women’s work.

*B. How Legal Avatars Benefit Diverse Human Relationships*

Another reason that scholars need to understand the tax treatment of powers of attorney is that the Service’s recognition of contractual intimacy in this context may suggest the possibility of formal recognition in the tax law of other relationships that arise by individual choice. Affective family-like relationships have achieved some level of legal recognition in other, more fundamental areas of the law. For example, in response to a decision by the New Jersey Supreme Court in 2006,<sup>251</sup> the New Jersey state legislature passed “An Act Concerning Marriage and Civil Unions” granting to same-sex partners to a civil union “all the rights and benefits that married heterosexual couples enjoy.”<sup>252</sup> But the vast majority of opposite-sex New Jersey couples must marry in order to receive these rights and benefits.<sup>253</sup> As a policy matter, New Jersey law gives its imprimatur to certain relationships through formal labels of “marriage” and “civil union.”<sup>254</sup>

In contrast to the New Jersey rule, the Netherlands has a rule that permits any two people to choose to be treated as “married,” but for the limited purposes of tax reporting and paying:

These partners are permitted to share joint income (e.g., their taxable income from an owner-occupied dwelling, splitting mortgage interest deduction, child care expenses, taxable income from substantial participation, and the personal allowance) between them for their tax return. Of course, the law demands some conditions to be fulfilled . . .

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<sup>250</sup> This may be due to language status, educational status, economic status or a variety of other factors. *See, e.g., id.*

<sup>251</sup> *Lewis v. Harris*, 908 A.2d 196, 206 (N.J. 2006) (holding that same-sex couples have no fundamental or constitutional right to be married under New Jersey law; they do have a right to the “benefits and privileges afforded to married heterosexual couples”).

<sup>252</sup> *See* N.J. STAT. ANN. § 37:1-28 (West Supp. 2008).

<sup>253</sup> *See* Domestic Partnership Act, N.J. STAT. ANN. § 26:8A (West 2007 & Supp. 2008). New Jersey makes an exception for opposite sex couples, where both of the parties are age 62 or older. *See id.* § 26:8A4(b)(5). These couples can register their domestic partnership and receive certain state benefits. *See id.* §26:8A.

<sup>254</sup> *See* N.J. STAT. ANN. § 37:1-1 (West 2007) (prohibiting certain marriages or civil unions).

The most important conditions are having a joint household and having lived together for at least six months. . . . [S]ame-sex (homosexual) couples[,] . . . a parent and an adult child or . . . other siblings or non-siblings who share one household . . . can opt to be partners for tax purposes.<sup>255</sup>

By permitting these types of elective “family” registrations, the Netherlands consciously recognizes and grants privileges to those relationships that have certain qualities of most marriages (a physically shared residence and some economic pooling). Dutch law gives greater latitude, at least in a tax sense, to many types of relationships that arise by choice, not just those relationships that are eligible for official state recognition as “marriage” or a “civil union,” which labels depend on the gender of the parties and the presumed existence of a sexual relation between them.

Like the New Jersey law and unlike the Dutch law, the U.S. federal laws of wealth transfer taxation generally are selective in what types of relationships between taxpayers are eligible for favorable treatment.<sup>256</sup> For example, a taxpayer may make unlimited tax-free transfers to his or her U.S. citizen-spouse.<sup>257</sup> Some death-time transfers to family members receive favorable estate tax treatment compared to transfers of the same property to non-family members.<sup>258</sup> The estate and gift tax treatment of the power of attorney is an important exception to the preferential treatment for married, heterosexual couples and certain family members. The fact that creating a power of attorney triggers no taxable gift by the principal or estate tax inclusion for the agent<sup>259</sup> is true regardless of the presence or absence of a genetic or other legal relationship between the principal and agent.<sup>260</sup> Thus, at least in the power of attorney context, the U.S. federal estate and gift tax laws permit the recognition of all intimate relationships that arise by contract.

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<sup>255</sup> J.L.M. Gribnau & R.H. Happé, *Restricting the Legislative Power to Tax*, 11. 1 ELEC. J. OF COMP. L. 1, 21 (May 2007), <http://www.ejcl.org/111/art111-11.pdf>; see also Henry Ordower, *Comparative Law Observations on Taxation of Same-Sex Couples*, 111 TAX NOTES 229, 230 (Apr. 10, 2006) (stating that “the Netherlands . . . permit[s] same-sex, civil marriages”).

<sup>256</sup> See, e.g., Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach To Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757, 759 (2004) (advocating for abandonment of marital gift and estate tax deductions).

<sup>257</sup> See I.R.C. §§ 2056, 2523 (2006) (setting the estate tax marital deduction and the gift tax marital deduction).

<sup>258</sup> See, e.g., Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1, 18 (2005) (discussing how distribution of certain types of real property to family members may affect the property’s valuation for estate tax purposes).

<sup>259</sup> See *supra* Part III.B.

<sup>260</sup> See *supra* Part III.B.

The law's recognition of contracts can be the source of power and rights for members of disenfranchised groups. Consider, for example, Professor Patricia Williams' description of her apartment search and how it differed from her white male colleague's search:

In my rush to show good faith and trustworthiness, I signed a detailed, lengthily negotiated, finely printed lease firmly establishing me as the ideal arm's-length transactor . . . . [Peter and I] could not reconcile our very different relations to the tonalities of law. Peter, for example, appeared to be extremely self-conscious of his power potential (either real or imagistic) as white or male or lawyer authority figure. He seemed to go some lengths to overcome the wall that image might impose . . . . On the other hand, I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute . . . . [T]o show that I can speak the language of lease is my way of enhancing trust of me in my business affairs.<sup>261</sup>

For Williams, a contract evidences legal personhood and secures rights. Only those in positions of power (the "white or male or lawyer authority figure") eschew the contract. But those whom society has regarded as "unreliable, untrustworthy, hostile" or otherwise outsiders are the ones who can benefit most from the formalized rights and recognition inherent in a contract. Favorable estate and gift tax treatment of contractual intimacy then can read as recognition of the rights (and responsibilities) that the parties to the contract have. For those with relationships that are already favored, because of marital status or otherwise, the commodification of the principal-agent relationship may have no cultural significance. But for members of out-groups, legal recognition and protection for their relationships are crucial steps toward meaningful rights.

If the wealth transfer tax laws give a favorable tax treatment to contracts for intimacy that arise under a power of attorney, then the law has the capacity to recognize elective, non-marital relationships for other tax purposes. The Netherlands example suggests that any two people should be able to "opt in" to being treated as a single taxpaying unit. Such an "opt in" to favorable tax treatment currently exists with respect to powers of attorney.<sup>262</sup> Just as one can enter into a contract for intimacy in the form of a power of attorney, an individual taxpayer should be able to designate another as his or her "partner" for income tax filing

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<sup>261</sup> PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 147 (1991).

<sup>262</sup> *See supra* Part III.B.

purposes. That same “partner” could receive lifetime and death-time transfers free of any wealth transfer tax, just as spouses can.<sup>263</sup> Also the tax-designated “partner” could be treated as a “member of the family” of the taxpayer for purposes of eligibility for the special valuation rules under I.R.C. § 2032A among other tax benefits.<sup>264</sup>

These are only two illustrations of the ways that the tax law could recognize tax-designated partners. As with any benefits, a person with a tax-designated partner would be required to accept the negative consequences of that designation. For example, that tax-designated partner would be considered as a “member of the family” of the taxpayer within the meaning of I.R.C. § 318<sup>265</sup> for purposes of determining whether a particular corporation is a “controlled corporation” within the meaning of I.R.C. § 2036(b).<sup>266</sup> A full exploration of all of the possibilities for the tax recognition of contractual intimacy deserves more in-depth study, which is beyond the scope of this article. The next section outlines the theoretical implications for future critical scholarship of tax recognition of contracts for intimacy.

### *C. How Legal Avatars Impact Tax Scholarship*

#### *1. An Overview of Critical Tax Scholarship*

The mid- to late-1990s were the halcyon days of critical tax scholarship. During this period, a small number of law professors attracted significant attention for the application of so-called “outsider” perspectives to the study of the Internal Revenue Code.<sup>267</sup> Their scholarship employed feminist theory, critical race theory, and LGBT perspectives to uncover bias against women, racial minorities, and gays and lesbians.

Some of the best feminist-oriented tax scholarship had the quality of intellectual archaeology. Carolyn Jones’s historical work highlighted women’s

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<sup>263</sup> See *supra* note 258 and accompanying text.

<sup>264</sup> Almost always, the alternate valuation under I.R.C. § 2032A will result in a lower valuation and lower estate tax bill. See, e.g., Dennis I. Belcher, *Estate Planning for Family Business Owners: Section 2032A, Section 6166 and Section 303*, SH092 ALI-ABA PCW 449, 465–69 (2003) (discussing examples of special valuation and noting that it is rarely used outside of the context of farm land).

<sup>265</sup> See I.R.C. § 318(a)(1)(A) (2006) (establishing circumstances under which an individual is considered to own stock for another).

<sup>266</sup> See I.R.C. § 2036(b)(2) (valuing a life estate in stock with reference to whether the stock was owned for an individual by another under I.R.C. § 318).

<sup>267</sup> See, e.g., Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1994) (describing how the contributions of women were valued from a tax perspective in the 1940s).

participation in nineteenth-century tax protests.<sup>268</sup> Although Jones did not specifically contextualize her scholarship, her study of women's tax resistance employed the classic feminist legal method of "emphasiz[ing] women's experience."<sup>269</sup> Similarly Wendy Gerzog read the specialized estate and gift tax marital deduction rules from the perspective of women who survive their spouses.<sup>270</sup> Gerzog suggested that certain tax rules contribute to women's economic dependence and are based on traditional gender stereotypes of women.<sup>271</sup> Her work demonstrated the feminist legal method of exposing "male bias and male norms in rules, standards, and concepts that appear neutral or objective on their face," a classic method of feminist legal theory.<sup>272</sup> Also in a similar vein, Nancy Staudt undertook a study of the tax treatment of unpaid household work and argued that the "the Tax Code provides financial incentives for women to work in the home after bearing children. It is not surprising that the tax laws reflect an image of men as public actors earning a wage in the market, and that the laws assume women do not and should not have such roles."<sup>273</sup> By exposing the "less-than-ideal course of action" that women face,<sup>274</sup> Staudt employed feminist legal methodology to understand better the disparate impact of seemingly facially neutral rules.<sup>275</sup>

At approximately the same time that Jones's, Gerzog's, and Staudt's work appeared, three scholars in particular employed critical race theory as a lens for examining the Internal Revenue Code. Beverly Moran, William Whitford and Dorothy Brown responded explicitly to Professor Jerome Culp's challenge that

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<sup>268</sup> See, e.g., Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1994).

<sup>269</sup> MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 4-6 (2d ed. 2003).

<sup>270</sup> Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L. J. 201 (1995).

<sup>271</sup> *Id.* at 305-06.

<sup>272</sup> CHAMALLAS, *supra* note 269, at 6. For a thorough discussion of "androcentrism" and "the privileging of males experience and the 'otherizing' of female experience," see also SANDRA LIPSITZ BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY 39-79, 183-91 (1993).

<sup>273</sup> Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1571 (1996).

<sup>274</sup> CHAMALLAS, *supra* note 269, at 9.

<sup>275</sup> For other feminist tax scholarship, see, e.g., Mary Louise Fellows, *Wills and Trusts: The Kingdom of the Fathers*, 10 LAW & INEQ. J. 137 (1991) (discussing how women receive less consideration than men under facially-neutral laws) and Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993) (recognizing that tax law reflects longstanding biased social models).

“[e]veryone has to do black scholarship if it is to succeed.”<sup>276</sup> Moran and Whitford in their 1996 article, “A Black Critique of the Internal Revenue Code,”<sup>277</sup> declared the relevance of critical race theory to tax scholarship:

One main thrust of critical race theory is a belief that racial subordination is everywhere, a structural aspect of all parts of American society. If this part of critical race theory has merit, then every important American institution should reflect racial subordination, even such a seemingly neutral institution as the American tax system.<sup>278</sup>

Similarly, Dorothy Brown has focused her research agenda on the purported neutrality of tax laws.<sup>279</sup> In a 1997 speech, Brown proposed a scholarly project “dedicated to forever eradicating the belief that tax law is somehow different, that it has no differing impact based upon race, ethnicity, or any other characteristic.”<sup>280</sup> In one article, Brown exposed “how the convergence of the tax principles, employment discrimination, and differing marital rates result in black couples being more likely to pay a higher marriage penalty and white couples being more likely to receive a marriage bonus.”<sup>281</sup> In another article, Brown demonstrated how members of some racial groups are more likely than members of other racial groups to be eligible for certain tax credits.<sup>282</sup> By combining sociological studies with technical understanding of tax rules, Brown exposed the racialized aspects of tax law.

Writing approximately five years after this highly publicized feminist and critical race scholarship, Anthony Infanti added another critical perspective to the study of tax law. Infanti’s work engages in illustrating that tax is just one of the many areas of law that actively discriminate against lesbian and gay people.<sup>283</sup> He has applied critical theoretical methods to study tax expenditures and tax treaties.<sup>284</sup> According to Infanti, the tax law is “an area where gay and lesbian

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<sup>276</sup> See Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 105 (1991).

<sup>277</sup> Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996).

<sup>278</sup> *Id.* at 751–52 (citations omitted).

<sup>279</sup> Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89 (1997).

<sup>280</sup> *Id.* at 91.

<sup>281</sup> *Id.* at 94.

<sup>282</sup> Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 790 (2007).

<sup>283</sup> Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 768 (2004) (describing the Internal Revenue Code as “another weapon for discrimination and oppression in society’s already well-stocked arsenal”).

<sup>284</sup> Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis*,



issues generally remain shrouded in darkness, forcibly banished to the invisibility of the closet.”<sup>285</sup> His scholarship invites consideration of how tax rules impact individuals whose relationships are not recognized for federal tax purposes.<sup>286</sup>

The reaction of traditional tax scholars to feminist, critical race, and LGBT perspectives has not been positive. Critical tax scholarship has been criticized as inaccurate and unhelpful. Lawrence Zelenak suggests that critical scholarship displays “an overeagerness to accuse the tax laws of hostility to women.”<sup>287</sup> Both Zelenak and Joseph Dodge have dismissed critical scholarship as failing to articulate a positive agenda for legal reform.<sup>288</sup> Their critique is accurate in part, to the extent that critical tax scholarship does not take as its primary task a detailed rewriting of tax rules, nor does it emphasize the ways in which the tax law actually could favor disenfranchised groups.<sup>289</sup> But to suggest that it should develop a positive agenda fundamentally misunderstands the critical project as a whole. Critical tax scholarship uncovers, reveals, and exposes bias in the face of arguments that the tax laws are value neutral.

## 2. *Opportunities for Critical Tax Scholarship*

This article shares the normative assumptions of critical tax scholarship.<sup>290</sup> It accepts the proposition that the tax laws are biased in favor of certain groups.<sup>291</sup> It argues that the tax laws should recognize a wider range of human relationships

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*Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707 (2005).

<sup>285</sup> Anthony C. Infanti, *Tax Protest, "a Homosexual," and Frivolity: a Deconstructionist Meditation*, 24 ST. LOUIS U. PUB. L. REV. 21, 21–22 (2005).

<sup>286</sup> See generally *id.* (discussing the legal implications of same-sex married couples filing either single and joint tax returns).

<sup>287</sup> Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1523 (1998).

<sup>288</sup> *Id.* at 1524 (“The most serious problem [with critical tax scholarship] is the failure to think through proposed solutions with sufficient care.”); Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1729 (1998) (stating that critical tax scholarship is “weak on plausible solutions”).

<sup>289</sup> But see Theodore P. Seto, *The Assumption of Selfishness in the Internal Revenue Code: Reframing the Unintended Tax Advantages of Gay Marriage* (April 2007). Loyola-LA Legal Studies Paper No. 2005-33 (arguing that tax treatment of familial relationships relying on traditional legal definitions may benefit same-sex spouses), <http://ssrn.com/abstract=850645>.

<sup>290</sup> See *supra* Part V.

<sup>291</sup> *Id.*

than they currently do.<sup>292</sup> Where this work departs from critical tax scholarship, however, is in its methodology. Instead of centering the critique on ways in which the existing tax rules are discriminatory (at worst) or misguided (at best), the article focuses on how the current tax law suggests the possibility for broader recognition of alternative family structures and choice-based human relationships. Through a detailed analysis of the estate and gift tax treatment of powers of attorney, one can see how the existing tax structure accommodates and privileges contracts for intimacy. Similar choice-based relationships could receive favorable treatment in other tax contexts.<sup>293</sup> By focusing more on the positive aspects of existing tax rules, critical tax scholars have the opportunity to use the current legal framework to subvert restrictive and discriminatory social structures and to achieve recognition and protection for those who experience discrimination or disadvantage.

Writing about feminism in particular, Janet Halley has warned about the constraining theoretical consequences of a movement's failure to embrace its own power.<sup>294</sup> In particular, Halley suggests that feminism has taken on a tyrannical quality; it wields "actual, real-world and theoretical power."<sup>295</sup> Halley calls power-wielding, moralistic feminism "governance feminism."<sup>296</sup> One of the main theoretical missteps of governance feminism according to Halley is feminism's persistence in believing itself to be powerless:

[A]cknowledging [some feminist work] to be a governance project has a dark side, and it is important to face it. That dark side includes its vanquished, its prisoners of war, the interests that pay the taxes it has levied and owe the rents it has imposed. Feminism with blood on its hands. . . .

. . . .

. . . [W]hen governance feminism/feminist theory pretends it is always the underdog, and when feminists insist that the prodigals must be converged back into feminism *or feminism will die*, it wages power without owning it. . . .

. . . .

. . . When feminist theory refuses to own its will to power, when it insists that prodigals must be converged back into feminism, it commits itself to

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<sup>292</sup> *Id.*

<sup>293</sup> *See supra* Part V.B.

<sup>294</sup> JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 10 (2006) ("[W]e can't make decisions about what to do with legal power . . . without taking into account as many interests, constituencies and uncertainties as we can acknowledge.").

<sup>295</sup> *Id.* at 32.

<sup>296</sup> *See id.* at 20–22.

a theoretical stance that makes it hard for feminists to see around corners of their own construction.<sup>297</sup>

One need not agree with Halley's proposal to "take a break from feminism" to appreciate her claim that feminist theory is constrained by negative perceptions of feminists. Instead of pronouncing itself an "underdog" perspective, feminism needs to acknowledge its power.<sup>298</sup> So, too, should critical tax scholars be willing to move away—at least temporarily—from a critical perspective. Some existing tax rules, such as the wealth transfer tax rules applicable to powers of attorney, work in favor of the larger project of creating a tax system that is free from bias of any kind.

## VII. CONCLUSION

As avatars stand for the internet's end users, agents under a power of attorney act on behalf of the appointing principal. Both an avatar and an agent under a power of attorney are kinds of alter egos. The favorable wealth transfer tax treatment that legal avatars receive suggests their utility as a model for how the tax law could be expanded to recognize other choice-based relationships. In his novel *The Partners*, author and lawyer Louis Auchincloss wrote that "[e]verything today is taxes. . . . What better seat on the grandstand of life can I offer you than that of tax counsel?"<sup>299</sup> Understanding the tax treatment of legal avatars is the foundation for a grandstand for seeing the potential diversity of preference-based relationships that the law could embrace.

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<sup>297</sup> *Id.* at 32–33.

<sup>298</sup> Young women who proclaim a "third wave" of feminism adopt a similar posture, claiming a feminism that embraces power and fluid identities. *See, e.g.*, Lillian S. Robinson, *Subject/Position*, in "BAD GIRLS"/"GOOD GIRLS": WOMEN, SEX, AND POWER IN THE NINETIES 177, 182–83 (Nan Bauer Maglin & Donna Marie Perry eds. 1996).

<sup>299</sup> LOUIS AUCHINCLOSS, *THE PARTNERS* 29 (1974).