

## Law Review Articles You Should've Read (but Probably Didn't) in 2009

By Bridget J. Crawford

Bridget J. Crawford is a professor of law and the associate dean for research and faculty development at Pace University School of Law.

In this article, Prof. Crawford reviews 10 noteworthy law review articles published in 2009.

### A. Introduction

When a quarterback calls a play for the next down, he likely is not thinking about tomorrow's game. Estate and gift tax professionals need to do precisely the type of simultaneous planning that a quarterback does not. Practitioners and academics alike must keep current with the latest developments in the tax treatment of limited partnerships, defined value clauses, and asset protection trusts, to name a few subjects — all while pondering the future of the estate tax. In a climate of legal change and uncertainty, tax-oriented trusts and estates scholarship is more important than ever.

In many fields lawyers and judges bemoan the absence of relevant law review articles.<sup>1</sup> Cynics complain that law professors write only for each other, without regard to law as it is practiced on the ground.<sup>2</sup> Admittedly, over the last 30 years, a declining percentage of all law review scholarship is of the traditional, doctrinal variety.<sup>3</sup> But estate and gift taxation is one area in which

<sup>1</sup>Adam Liptak, "When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant," *The New York Times*, Mar. 19, 2007, at A8. See also Harry T. Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession," 91 *Mich. L. Rev.* 34 (1992); Staff of *Cardozo Law Review*, "Trends in Federal Judicial Citations and Law Review Articles" (Mar. 8, 2007), available at [http://graphics8.nytimes.com/packages/pdf/national/20070319\\_federal\\_citations.pdf](http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf).

<sup>2</sup>See, e.g., Richard A. Posner, "Legal Scholarship Today," 115 *Harv. L. Rev.* 1314 (2002). ("Traditional doctrinal scholarship is disvalued at the leading law schools. They want their faculties to engage in 'cutting edge' research and thus orient their scholarship, and seek their primary readership, among other scholars, not even limited to law professors, though they are the principal audience.")

<sup>3</sup>See, e.g., Robert W. Gordon, "Lawyers, Scholars, and the Middle Ground," 91 *Mich. L. Rev.* 2075, 2099-2101 (1993); Michael J. Saks et al., "Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart," 30 *Suffolk U. L. Rev.* 353, 369-371 (1996).

law professors' writing should be of interest to tax practitioners and vice versa. Seismic changes in the law of trusts and estates have originated in both the field and the academy.<sup>4</sup> To encourage dialogue, this article identifies 10 noteworthy law review articles of 2009 and summarizes their principal arguments.

### B. Eligible Scholarship

The main challenge in selecting a defined number of noteworthy articles is that there are so many good ones. To narrow the field, however arbitrarily, I considered only those law review articles that met the following criteria:

1. the author is a full-time law professor, or, in the case of a coauthored piece, the first listed author is a full-time law professor;
2. the article was published in 2009; and
3. the article appeared in a student-edited law journal or student-edited law review affiliated with an American Bar Association accredited law school.<sup>5</sup>

Those criteria excluded several excellent articles and publications. The *Real Property, Probate and Trust Law Journal* and the *ACTEC Journal*, to provide just two examples, regularly feature outstanding work. The journals are published with the assistance of law students, but articles are selected by faculty and professional peer reviewers. For that reason, they were excluded from consideration. Thus, a disclaimer is imperative: What

<sup>4</sup>A quiet revolution in American trust law is upon us. Traditional rules that had remained static for decades have been revised substantially or, in some cases, reversed. . . . Some of the new trust law has been produced top-down by the American Law Institute and the Uniform Law Commission, through the Restatements and Uniform Acts. . . . Other major changes to the trust law canon have been bottom-up, driven by local lawyers and bankers in response to the increasingly national scope of the competition for trust business. . . . These dual modes of law reform, which operate either in tandem or in opposition depending on the issue, have produced a thoroughly revised and increasingly statutory trust law. Max M. Schanzenbach and Robert H. Sitkoff, "The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis," *ACTEC J.* (forthcoming 2010) (citations omitted).

<sup>5</sup>In a quest for neutrality, I excluded from consideration any article written by me (either alone or with a coauthor), anyone with whom I have ever coauthored, or anyone who has ever coauthored with anyone with whom I have coauthored. Whatever gains I have made in impartiality are counterweighed by the inevitable annoyance on the part of several close friends who published darn good articles — with or without me — in 2009.

follows is not a list of the 10 *best* estate- and gift-tax-related articles of 2009 (although many likely would appear on such a list). Rather, this is a list of 10 *noteworthy* law review articles that a broad audience of tax professionals likely will find relevant and thought-provoking.

### C. The Chosen Ones

The 10 selected articles (arranged alphabetically, by the author's last name) follow.

1. Gerry W. Beyer and Jonathan P. Wilkerson, "Max's Taxes: A Tax-Based Analysis of Pet Trusts," 43 *U. Rich. L. Rev.* 1219 (2009). Prof. Beyer, the editor of the popular *Wills, Trusts & Estates Prof Blog*,<sup>6</sup> together with a student coauthor, published an accessible analysis of the federal and state gift, estate, and income tax consequences of the creation of trusts for animals. Beyer and Wilkerson take seriously the wishes of clients to benefit their companion animals, and offer a considered approach to tax concerns. Animal law is an increasingly popular field with students, so one should expect to see substantial future scholarship in this area.

2. Paul L. Caron and James R. Repetti, "The Estate Tax Non-Gap: Why Repeal a 'Voluntary' Tax?" 20 *Stan. L. & Pol'y Rev.* 153 (2009). These two well-published law professors take on the canard that the estate tax is a "voluntary" tax (that is, easy to avoid): "When one correctly computes the effective estate rate, one finds a robust tax that takes a sizeable bite out of even the largest estates."<sup>7</sup> Profs. Caron and Repetti explain that while inadequacies in available data make for inexact calculations of the estate tax gap, studies claiming a large gap "have ignored the personal liability imposed on executors for unpaid estate taxes and the comparatively high estate tax audit rate."<sup>8</sup> According to Caron and Repetti, the estate tax is "far more efficient than commonly thought."<sup>9</sup>

3. Joseph M. Dodge, "Replacing the Estate Tax With a Reimagined Accessions Tax," 60 *Hastings L.J.* 997 (2009). Prof. Dodge urges Congress to rethink the entire estate tax system and replace it with a tax on accessions to individual wealth. He argues both theoretically and practically for an accessions tax, positing that a tax on transferees is more consistent than a tax on transferors with a commitment to equity and to limiting large concentrations of wealth.<sup>10</sup> Dodge devotes substantial attention to the definition of an accessions tax base and the mechanical workings of his proposed system.<sup>11</sup> This formidable piece of scholarship is a welcome addition to ongoing tax policy debates.

<sup>6</sup>Wills, Trusts & Estates Prof Blog, available at [http://lawprofessors.typepad.com/trusts\\_estates\\_prof/](http://lawprofessors.typepad.com/trusts_estates_prof/).

<sup>7</sup>Paul L. Caron and James R. Repetti, "The Estate Tax Non-Gap: Why Repeal a 'Voluntary' Tax?" 20 *Stan. L. & Pol'y Rev.* 153, 153 (2009).

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>Joseph M. Dodge, "Replacing the Estate Tax With a Reimagined Accessions Tax," 60 *Hastings L.J.* 997, 1001-1002 (2009).

<sup>11</sup>*Id.* at 1018-1061.

4. Wendy C. Gerzog, "Families for Tax Purposes: What About the Steps?" 42 *U. Mich. J.L. Reform* 805 (2009). Regular *Tax Notes* contributor Wendy Gerzog explores tax rules that treat stepchildren and stepparents differently from blood or adoptive relatives. She argues that fairness dictates that "steps should be treated as family members for all tax purposes where they act like their biological or adoptive counterparts, regardless of whether such treatment decreases or increases their tax burden."<sup>12</sup>

5. David Horton, "Unconscionability in the Law of Trusts," 84 *Notre Dame L. Rev.* 1675 (2009). Prof. Horton argues for the adoption of an unconscionability defense to the enforcement of some trust terms. He reasons that that donative intent should not receive deference if an instrument is, as he calls it, "procedurally suspect," meaning "one created without attorney involvement and laden with complex terms."<sup>13</sup> Horton is especially critical of exculpatory trustee provisions, no-contest clauses, and mandatory arbitration clauses.<sup>14</sup> He suggests that application of the unconscionability doctrine would allow courts to "make sure the [particular] clause accurately reflects the settlor's informed preferences."<sup>15</sup>

6. Charles P. Kindregan Jr., "Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology," 17 *Am. U. J. Gender Soc. Pol'y & L.* 601 (2009). As reproductive technologies advance, scholarly attention to it does, too. Prof. Kindregan demonstrates how the American Bar Association's Model Act Governing Reproductive Technology would resolve cases that otherwise have given rise to a muddled legal definition of motherhood.<sup>16</sup> Kindregan applies the model act to traditional surrogacy, gestational surrogacy, genetic marker tests, same-sex couples, and predeceased mothers.<sup>17</sup> He endorses a state-by-state adoption of the model act.<sup>18</sup>

7. Kristine S. Knaplund, "The Right of Privacy and America's Aging Population," 86 *Denv. U. L. Rev.* 439 (2009). Prof. Knaplund highlights a dichotomous legal approach to the rights of elderly individuals who marry. Different baselines apply, depending on whether they reside in an assisted living facility or in their own residence: "In many cases, especially if the elderly person has some cognitive impairment, institutions assume that the person is incapable of consenting to physical contact, thus reversing traditional rape law."<sup>19</sup> She compares this approach with "the virtual absence of any oversight of elderly in their own homes, and the almost conclusive

<sup>12</sup>Wendy C. Gerzog, "Families for Tax Purposes: What About the Steps?" 42 *U. Mich. J.L. Reform* 805, 806 (2009).

<sup>13</sup>David Horton, "Unconscionability in the Law of Trusts," 84 *Notre Dame L. Rev.* 1675, 1683 (2009).

<sup>14</sup>*Id.* at 1727-1737.

<sup>15</sup>*Id.* at 1738.

<sup>16</sup>Charles P. Kindregan Jr., "Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology," 17 *Am. U. J. Gender Soc. Pol'y & L.* 601, 604-625 (2009).

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* at 625.

<sup>19</sup>Kristine S. Knaplund, "The Right of Privacy and America's Aging Population," 86 *Denv. U. L. Rev.* 439, 442 (2009).

presumption that a marriage is valid.”<sup>20</sup> Knaplund suggests that the law’s hands-off approach to elderly people residing at home leaves them uniquely vulnerable to exploitation by family members and caregivers.<sup>21</sup> She suggests a more robust role for the judiciary in resolving estate disputes when a person lacking understanding marries another.<sup>22</sup>

**8. Kevin Noble Maillard, “The Color of Testamentary Freedom,”** 62 *SMU L. Rev.* 1783 (2009). Prof. Maillard explores the intersection of history, race, testation, and family law. He uses as a lens for his study the 19th century will of a white man who disinherited his white family in favor of his de facto wife, a slave, and their children. Maillard argues that the doctrine of testamentary freedom is far from a bedrock legal principle. “Testamentary freedom, in all of its aspirational claims,” he says, “means nothing in the face of a legal system rooted in the restrictive and damaging conformity of ‘legitimate’ families.”<sup>23</sup>

**9. Paula A. Monopoli, “Marriage, Property and [In]Equality: Remediating ERISA’s Disparate Impact on Spousal Wealth,”** 119 *Yale L.J. Online* 61 (2009). Prof. Monopoli exposes the unintended gender disparities created by existing ERISA law. She suggests several reforms aimed at reversing, or at least destabilizing, incentives for the accumulation of retirement assets by one spouse, typically the husband. “Congress should amend ERISA to confer an immediate ownership interest in one-half of the assets in each spouse as they are earned and contributed by one spouse, akin to a community property theory of ownership. Each half should then be allocated to a separate account, one in each spouse’s

name.”<sup>24</sup> Monopoli further proposes unlimited tax-free and penalty-free transfers between spouses’ retirement accounts to bring the law of ERISA in line with the law of wealth transfer taxation.<sup>25</sup>

**10. Kent D. Schenkel, “Trust Law and the Title-Split: A Beneficial Perspective,”** 78 *UMKC L. Rev.* 181 (2009). Examining the law of trusts from the beneficiary’s perspective, Prof. Schenkel suggests that beneficiaries improperly exploit the externalization (to a trustee) of the burdens of property ownership.<sup>26</sup> This disadvantages third parties, such as creditors, who have limited rights with respect to property held under a trust instrument that is properly drafted.<sup>27</sup> To the extent that trusts are used broadly throughout the population, Schenkel is concerned with the potential for market distortion<sup>28</sup> and, presumably, the rise of a two-tiered system of property ownership.

#### D. Conclusion

This selection of tax-oriented trusts and estates articles published in 2009 illuminates the relevance of law review scholarship to understanding doctrinal and policy issues relating to wealth transfer taxation. The growth in open-source repositories like the Social Sciences Research Network<sup>29</sup> makes law review literature more readily available than it has been in the past. Fee-based electronic databases remain important for some tax research, but the collective wisdom of America’s law professors is available just a mouse click away, without charge.

<sup>24</sup>Paula A. Monopoli, “Marriage, Property and [In]Equality: Remediating ERISA’s Disparate Impact on Spousal Wealth,” 119 *Yale L.J. Online* 61, 64 (2009).

<sup>25</sup>*Id.* at 65.

<sup>26</sup>Kent D. Schenkel, “Trust Law and the Title-Split: A Beneficial Perspective,” 78 *UMKC L. Rev.* 181, 184 (2009).

<sup>27</sup>*Id.* at 213-214.

<sup>28</sup>*Id.*

<sup>29</sup>Social Sciences Research Network, available at <http://www.ssrn.com>.

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

<sup>21</sup>*Id.* at 446.

<sup>22</sup>*Id.* at 444-445.

<sup>23</sup>Kevin Noble Maillard, “The Color of Testamentary Freedom,” 62 *SMU L. Rev.* 1783, 1816 (2009).