

Estate Planning and Trust Management in a Brave New World: It's All in the Family...What's a Family?

Estate Planning Council of St. Louis

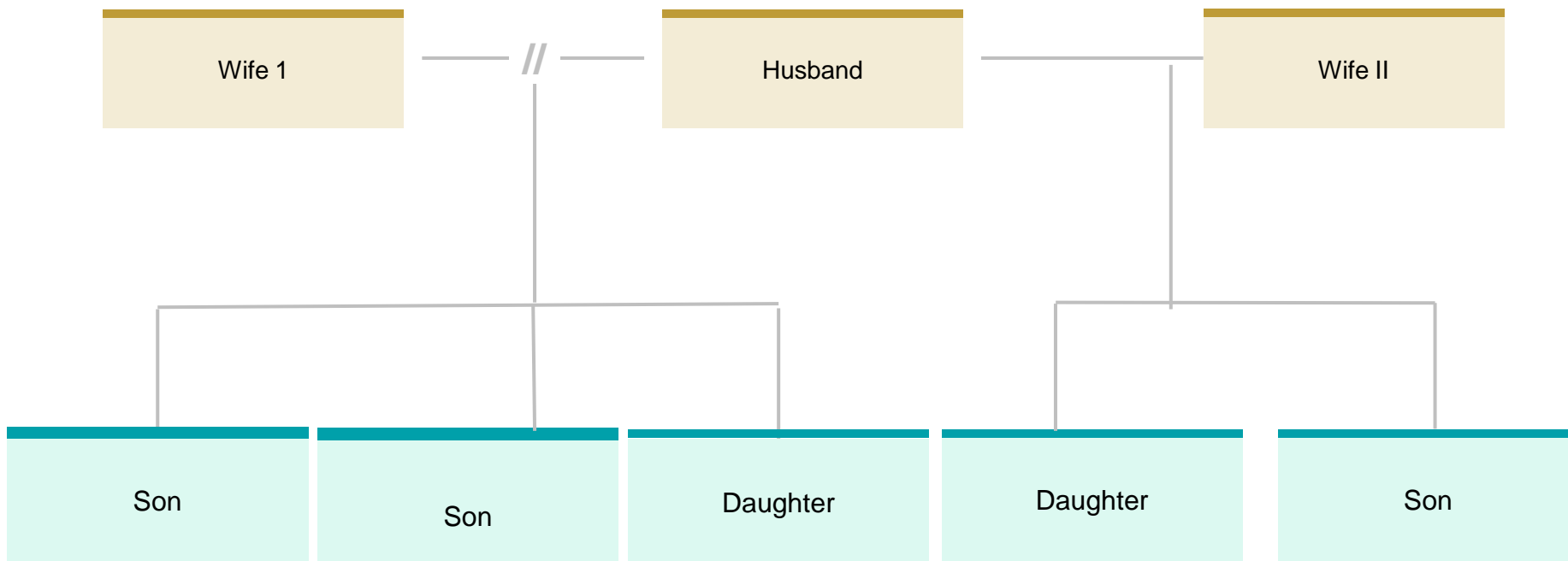
March 18, 2019

PRESENTED BY:

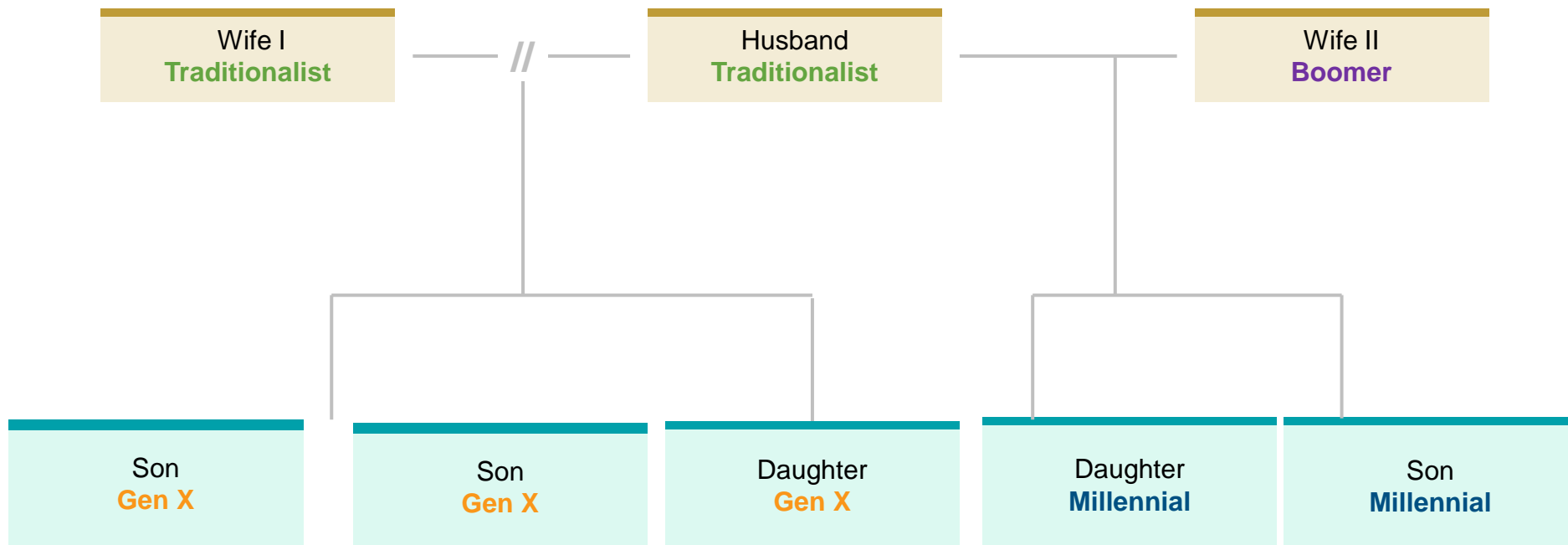
R. Hugh Magill

Executive Vice President and Chief Fiduciary Officer

Blended, Multi-Generational Family



Blended, Multi-Generational Family

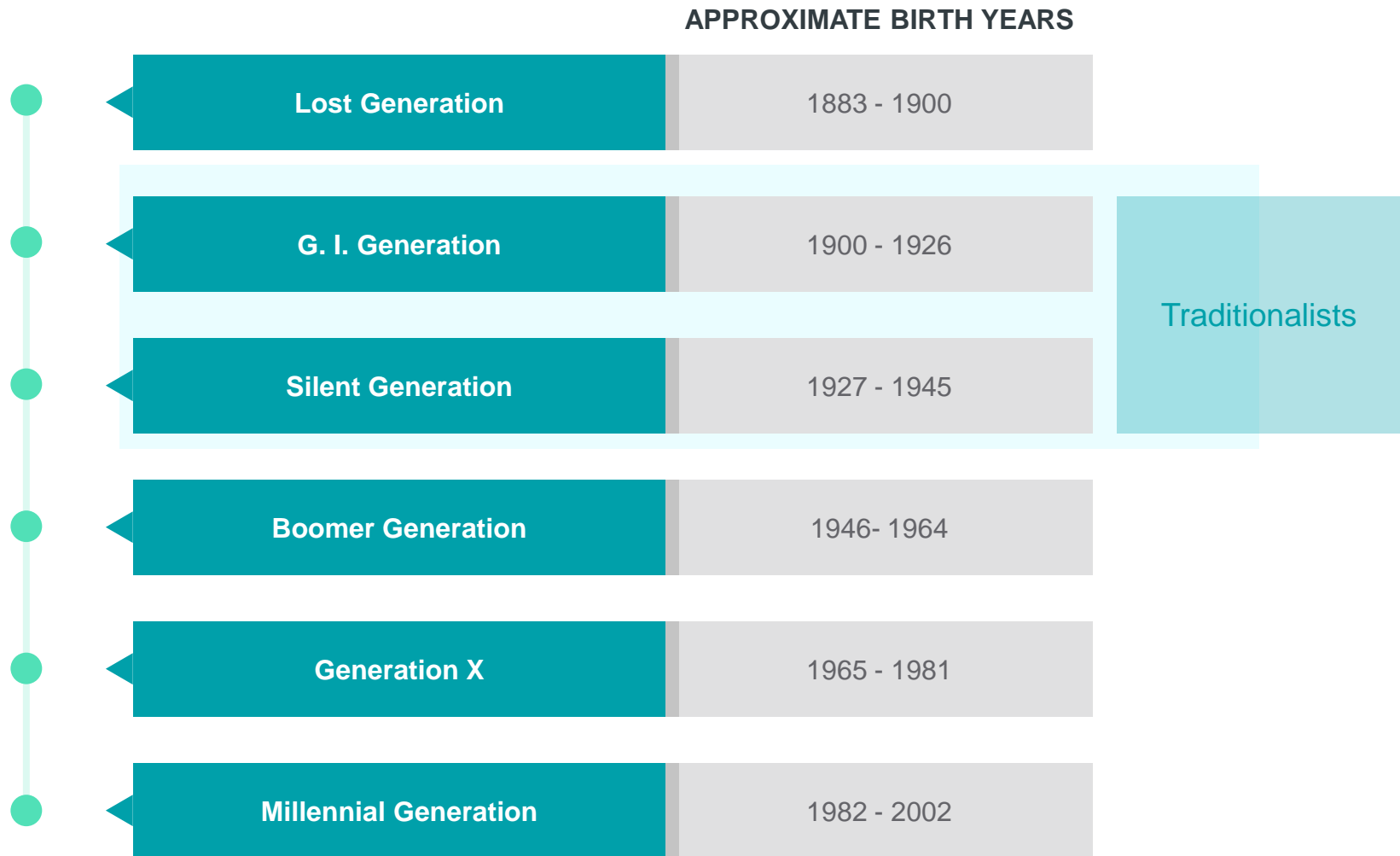




Generalizations About Generations



Generational Assignments And Attributes



Traditionalists - The Adaptive Generation

Defining Question:
Where Were You on D-Day?

Technology Question:
When Did Your Family Get a Radio?

Grew Up During Depression,
Many in Multi-Generational
Households

Parental Model – Breadwinner &
Bread Baker

Children Obey Adults

Personal Responsibility and Self-
Sacrifice Undergird Modesty



Character Traits:

- Dutiful
- Frugal
- Committed (Marriage, Employment)
- Respectful (Authority, Institutions, Government)
- Accelerated Adulthood
- Strong Work Ethic
- Delayed Gratification
- Decision Making: Command and Control
- 89% Religiously Affiliated
- 6% Have Tattoos

Boomers - The Idealistic Generation

Defining Question:

Where Were You When President Kennedy Was Shot?

Technology Question:

When Did Your Family Get Its First Television?

Grew Up in Two-Generation Households (for first time)

Parental Model – Breadwinner & Bread Server

Children Accommodated Adults

Competence and Expertise Before Self-Esteem



Character Traits:

- Optimistic – Hard Work & Loyalty Lead to Personal Gratification
- Competitive (We Choose Sides)
- Rejected then Embraced Authority
- Adulthood Leads to the American Dream
- Live to Work
- Decision Making: Consensus
- 83% Religiously Affiliated
- 15% Have Tattoos

Gen X - The Reactive Generation

Defining Question:

How Old Were You When Your Parents Got Divorced?

Technology Question:

When Did Your Family Get Its First Computer?

More Likely to Grow Up in a Divorced Household

Parental Model – Breadwinner & Breadwinner (Latch-Key Kids)

Children Teach Adults

Self-Reliance and Validation Lead to Self-Esteem (and Entitlement)



Character Traits:

- Skeptical (Marriage, Corporations, Government)
- Private
- Suspicious of Authority
- Adulthood Will be Less Prosperous than Parents'
- Work/Life Balance is Very Important
- Decision Making: Pragmatic, Independent, Impatient
- 77% Religiously Affiliated
- 32% Have Tattoos

Millennials - The Civic Generation

Defining Question:
Where Were You on 9/11?

Technology Question:
How Old Were You When You
Got Your First iPhone?

Grew Up in Diverse Households

Parental Model – Breadwinner &
Breadwinner

Adults Accommodate and Consult
Children

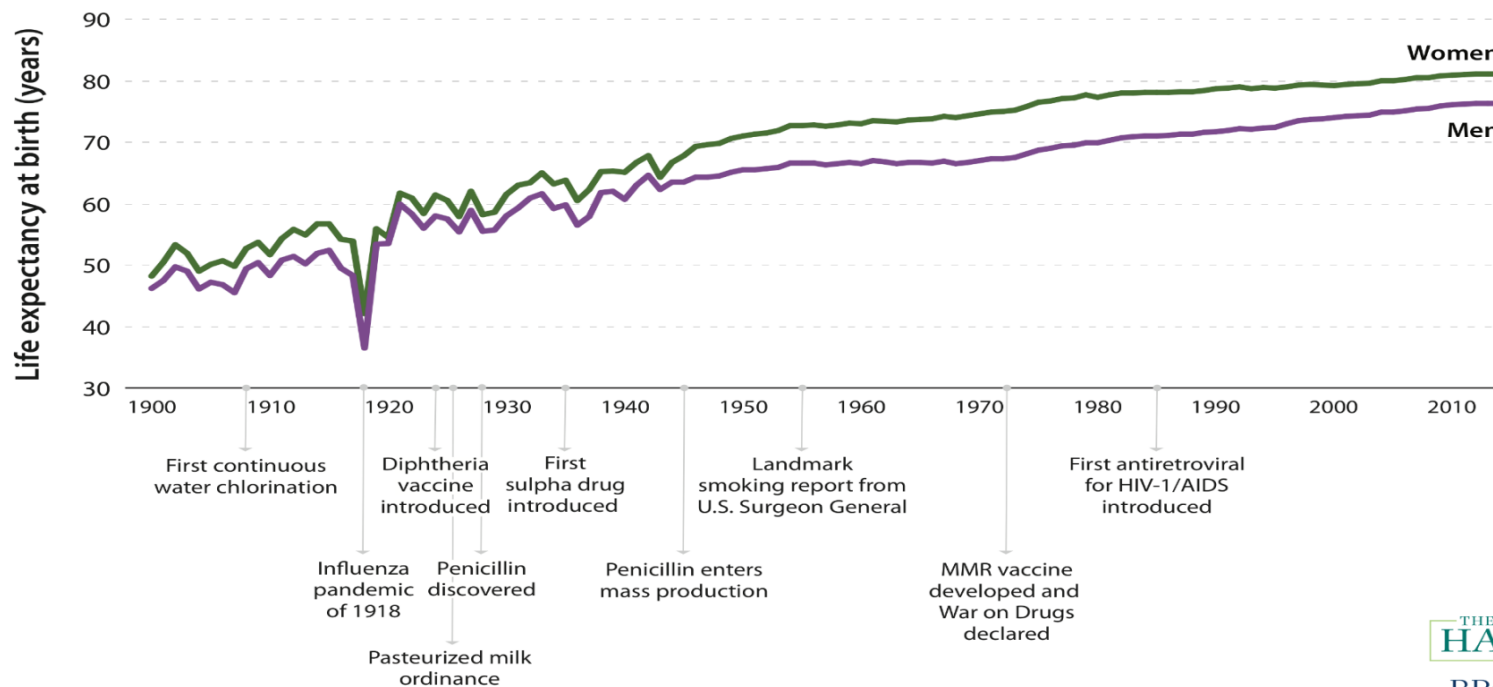
Self-Esteem Precedes
Competence



Character Traits:

- Optimistic
- Collaborative, Tolerant
- Technologically Savvy, Multi-tasking
- Socially Responsible, Multi-Cultural
- Delayed Adulthood
- Work to Live...But Seek Responsibility and Recognition
- Decision Making: Net-Educated, Networked
- Largest and Most Racially Diverse U.S. Generation
- 65% Religiously Affiliated
- 38% Have Tattoos

U.S. Life Expectancy 1900 - 2015



Source: Arias 2015; Costa 2015.

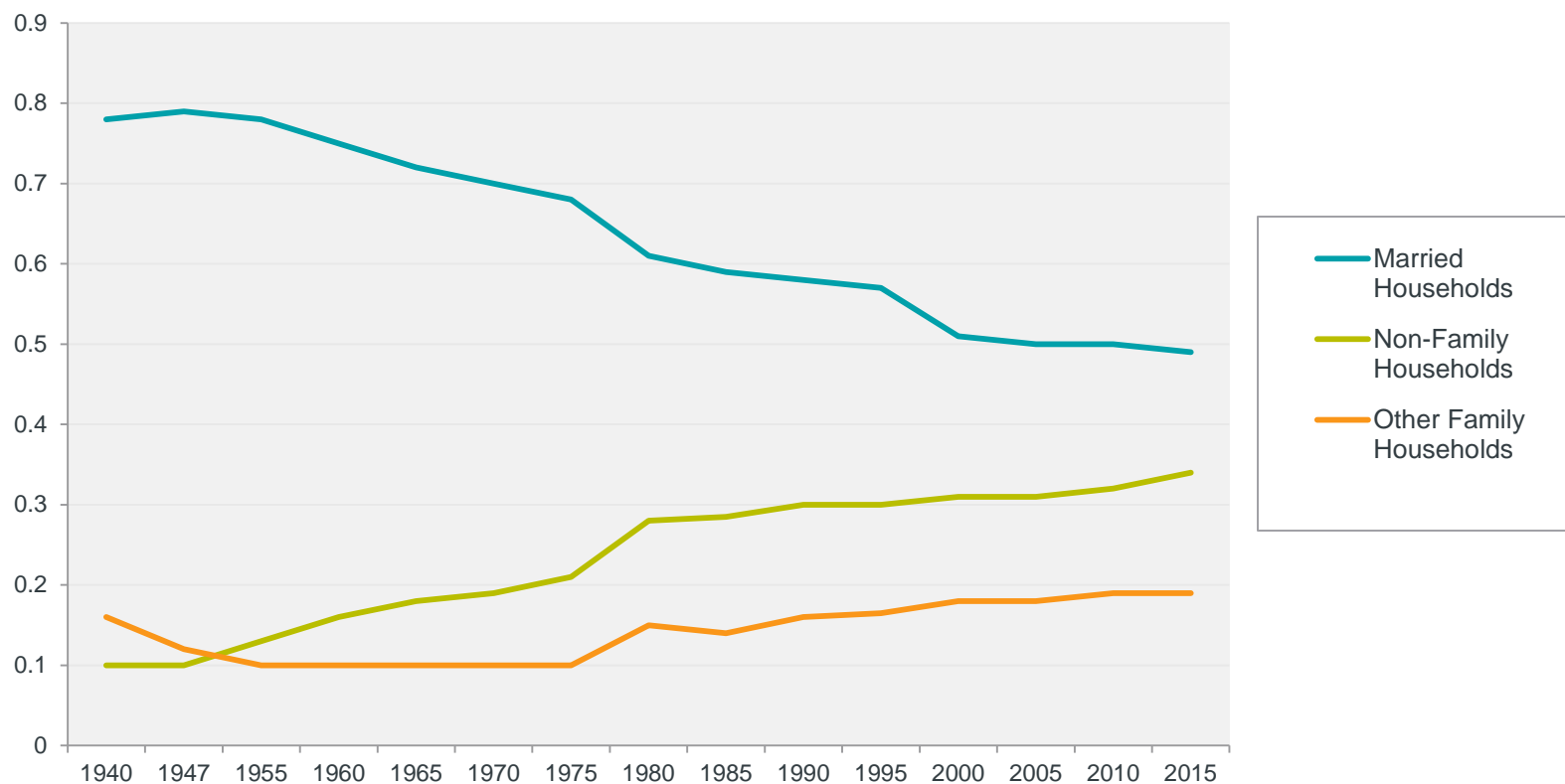
THE
HAMILTON
PROJECT
BROOKINGS



Family Demographics

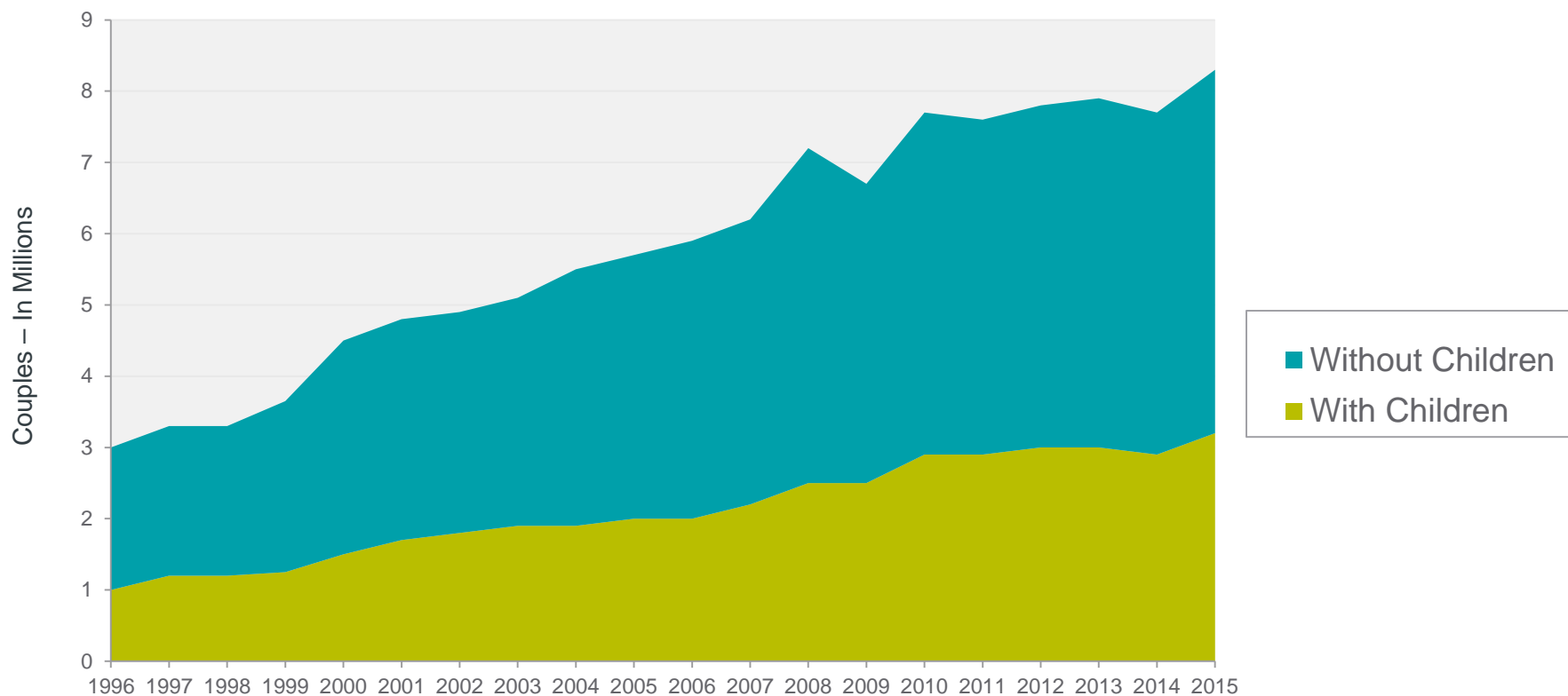


Trends In The Prevalence Of Households By Type



Source: U. S. Census Bureau, Decennial Census, 1960, and Current Population Survey, Annual Social and Economic Supplements, 1968 to 2015

Unmarried Couples of the Opposite Sex

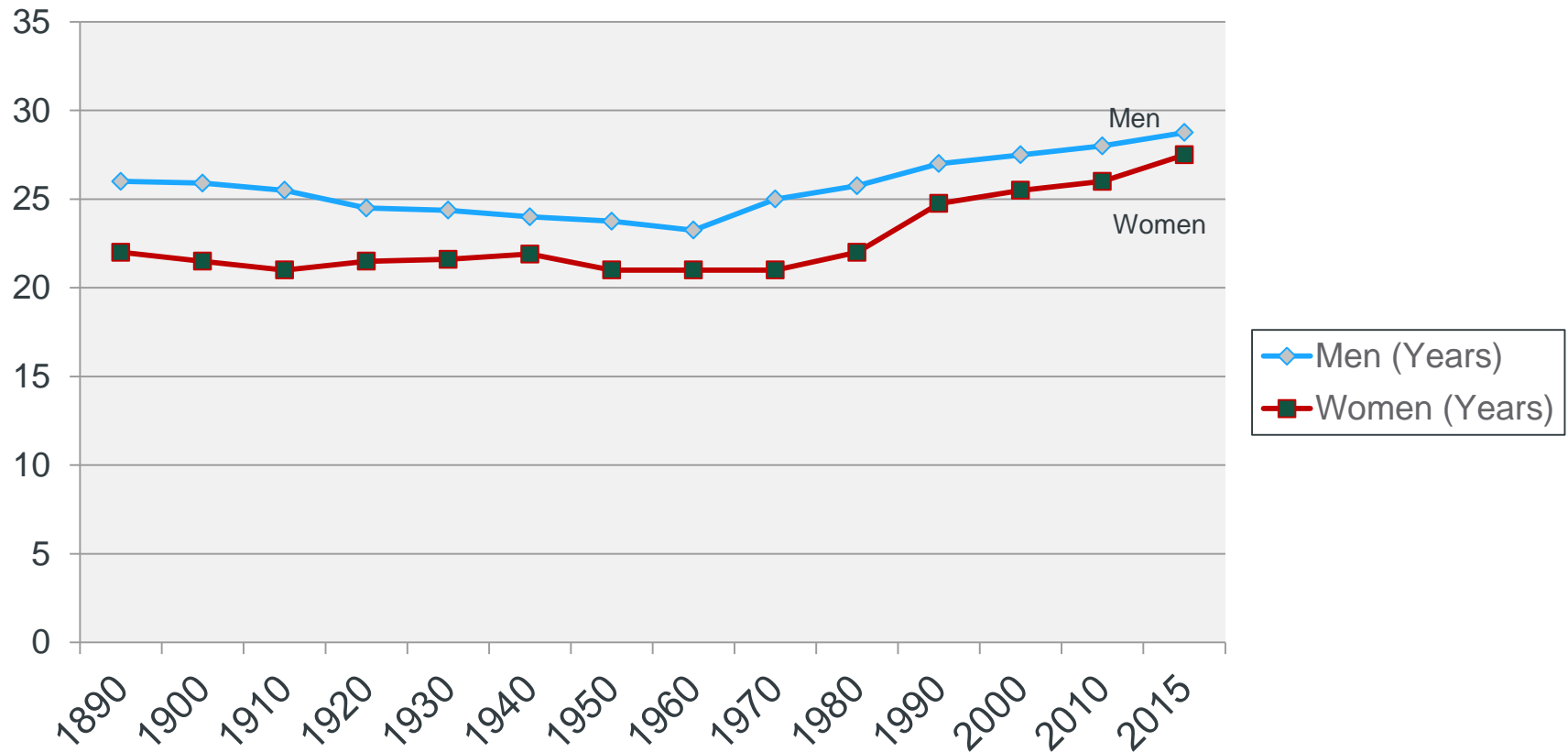


Source: U.S. Census Bureau, Current Population Survey, Annual Social And Economic Supplements 1996-2015.

NOTE: Prior to 2007, unmarried partners were counted only if one of the partners was the householder.

Median Age at First Marriage: 1890 to Present

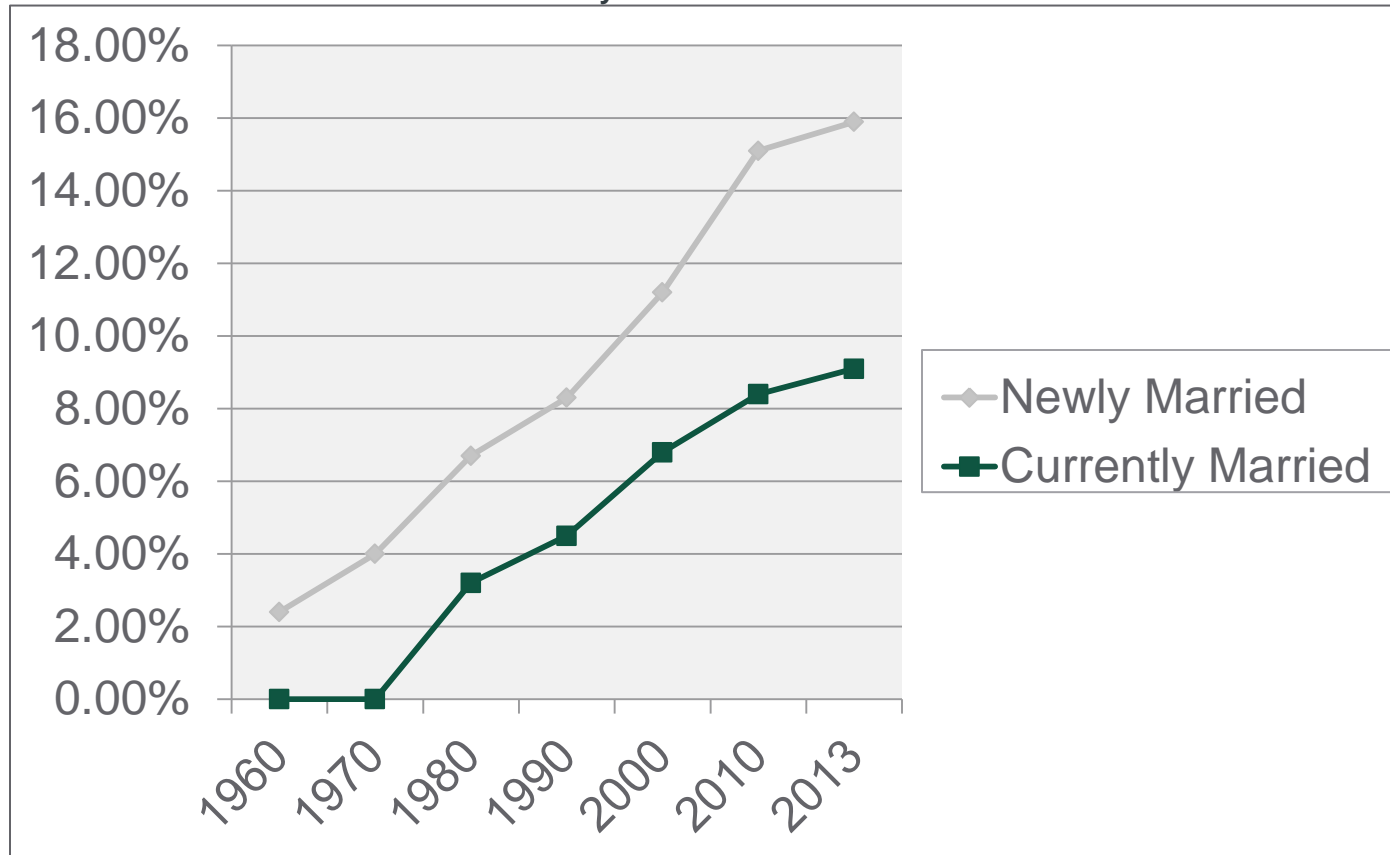
Age in Years



Source: U. S. Census Bureau, Decennial Censuses, 1890 to 1940, and Current Population Survey, Annual Social and Economic Supplements, 1947 to 2015.

Inter-marriage Rates

Percent of Marriages Involving Spouses of a different race/ethnicity from each other



Source: Pew Research Center analysis of 2008-2013 American Community Survey and 1980-2000 census data (IPUMS).

Changing Marital Paradigm

Old Marital Paradigm: Marriage = Cornerstone**



New Marital Paradigm: Marriage = Capstone**



*40% of children are born outside marriage. National Vital Statistics Report 2012 Martin, J.A., Hamilton, D.E. Osterman, M.J.K., Curtin, S.C. & Mathews, T.J. (2013)

***"Knot Yet: The Benefits and Costs of Delayed Marriage in America" © 2013 The National Marriage Project at The University of Virginia

Changing Views of Marriage

The Freedom to marry has long been recognized as one of the vital rights essential to the orderly pursuit of happiness by free men. Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival... ¹

Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations. The centrality of marriage to the human condition makes it unsurprising that the institution as existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together ²

Marriage as a family form is not more important or valuable than other forms of family, so the law should not give it more value. ³

I suspect marriage as we have known it is not coming back. ⁴

1. Loving v. Virginia, 388 U.S. 1, 12 (1967)

2. Obergefell v. Hodges, 576 U.S. _____ (2015)

3. Nancy Polikoff, Beyond (Straight and Gay) Marriage (2008)

4. Isabell V. Sawhill, “Restoring Marriage will be Difficult,” Brookings Institution (2012)

Federal Aspects of Marital Status*

- Taxation
- Inheritance and Property Rights
- Rules of Intestate Succession
- Spousal Privilege in the Law of Evidence
- Hospital Access
- Medical Decision-making Authority
- Adoption Rights
- The Rights and Benefits of Survivors
- Birth and Death Certificates
- Professional Ethics Rules
- Campaign Finance Restrictions
- Workers Compensation Benefits
- Health Insurance
- Child Custody, Support, and Visitation Rules

* Obergefell v. Hodges, 576 U.S. _____, 17 (2015)



Changes in Family Structures



Prototypical 1950's American Family

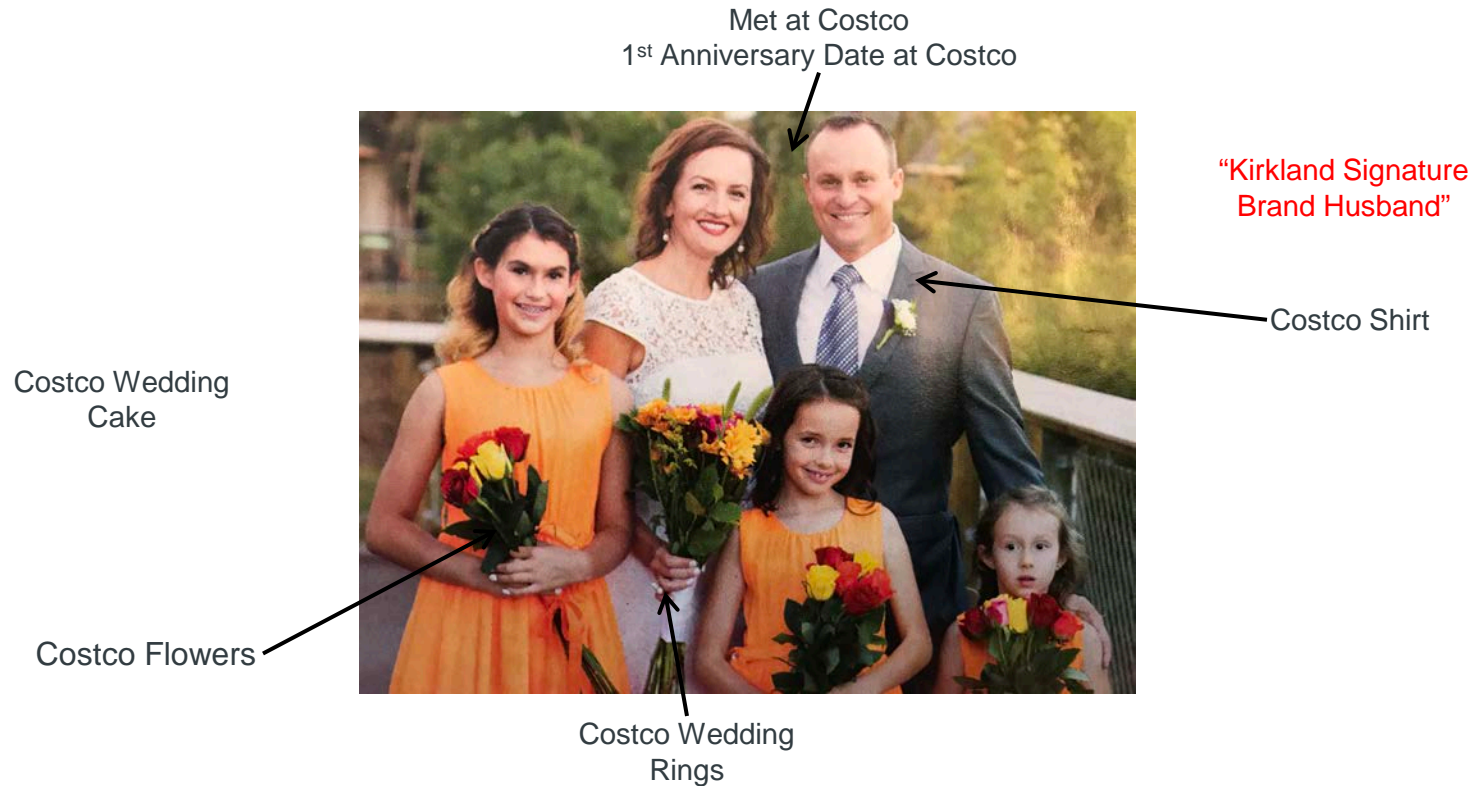


Costco Love



Costco Love

Love in Bulk



The 50 Most Common Family Types in America

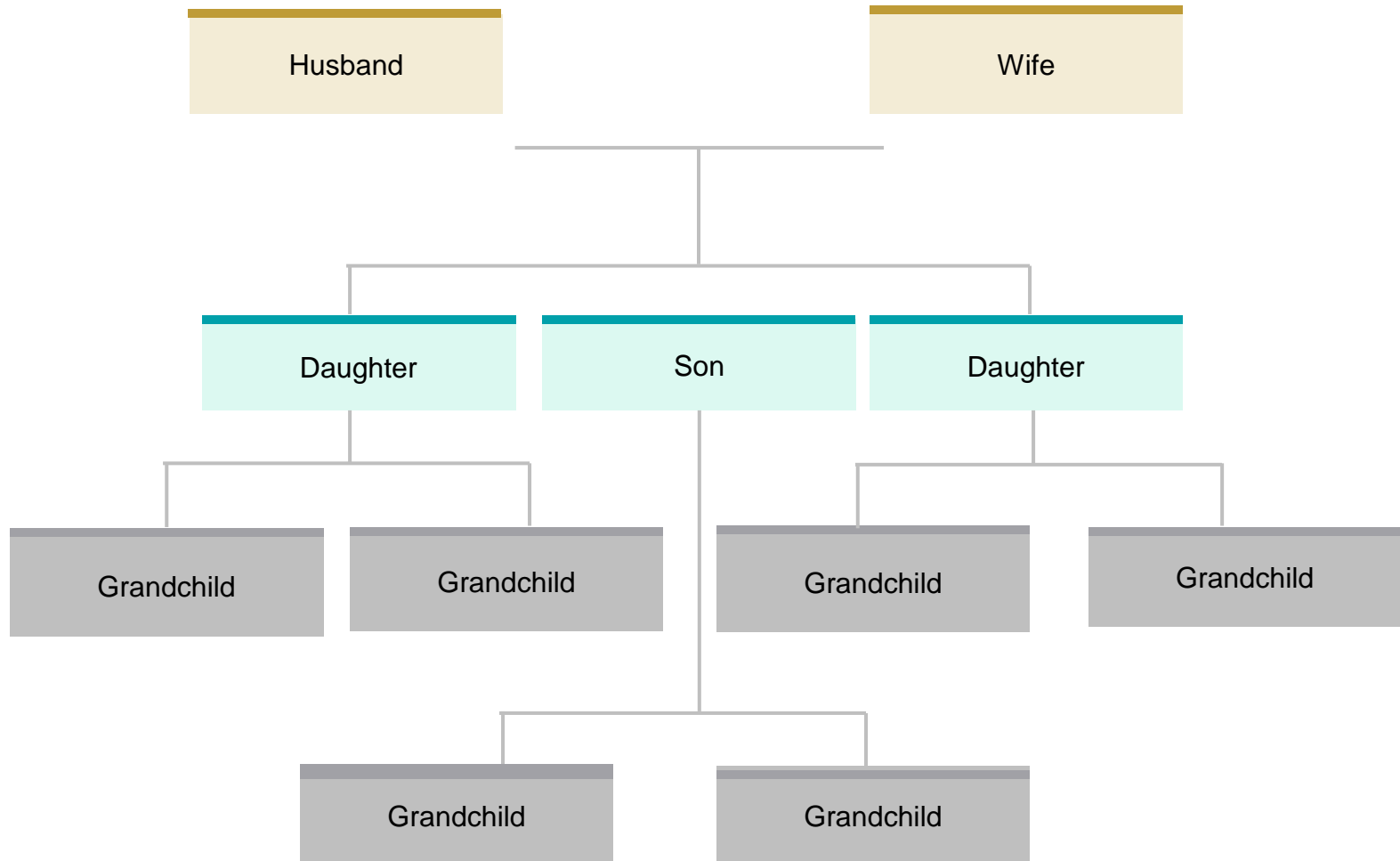


- Larger Circles: Adults
- Smaller Circles: Children/Grandchildren
- Dark Green Circles: Those in Household Nucleus
- Light Green Circles: Family Members Outside the Nucleus
- Grey Circles: Non-Relatives

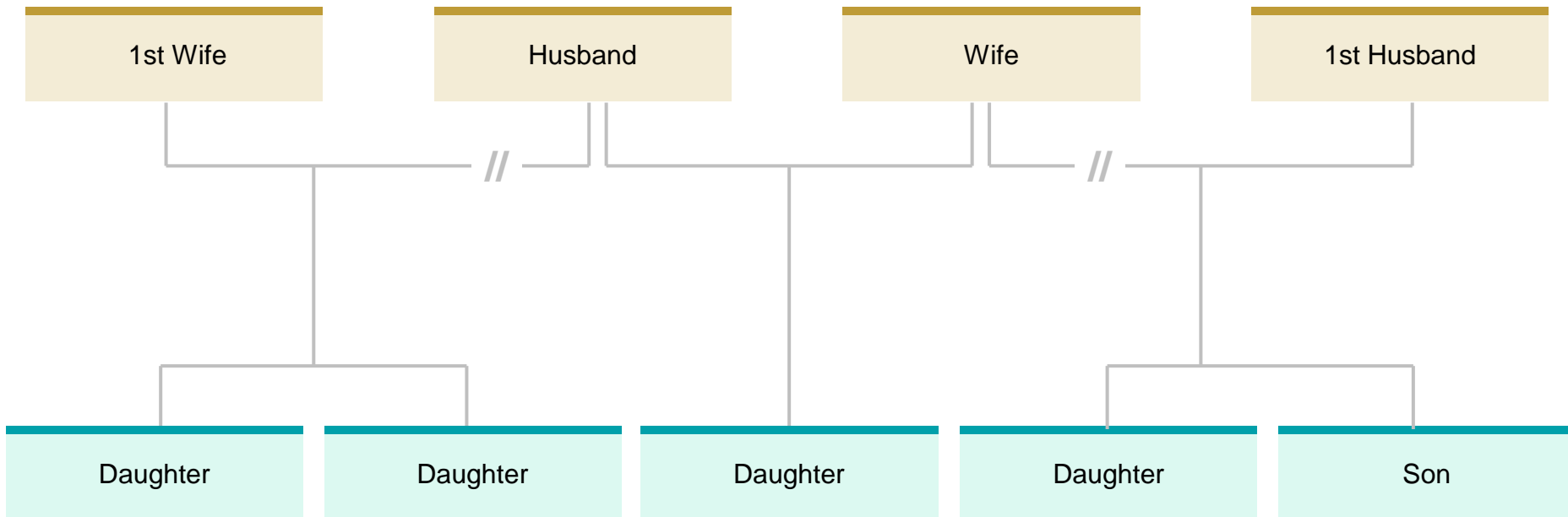
“The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” Troxel v. Troxel, 530 U.S. 57, 63 (2000)

“Most Common Family Types in America,” Nathan Yau, Flowingdata, July, 2016. American Community Survey 2010-2014, United States Census Bureau.

Traditionalist Family



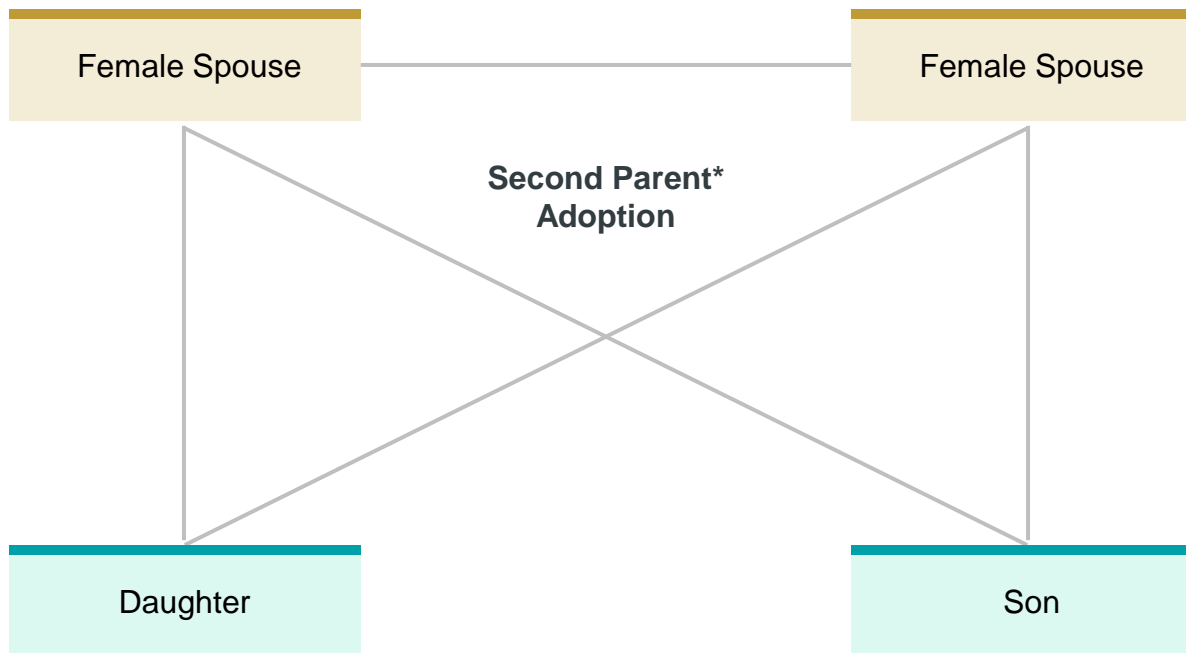
Boomer Family – Blended*



*One out of six American children live in a blended family. Pew Research Center: 10 Demographic Trends That Are Shaping the U. S. and the World

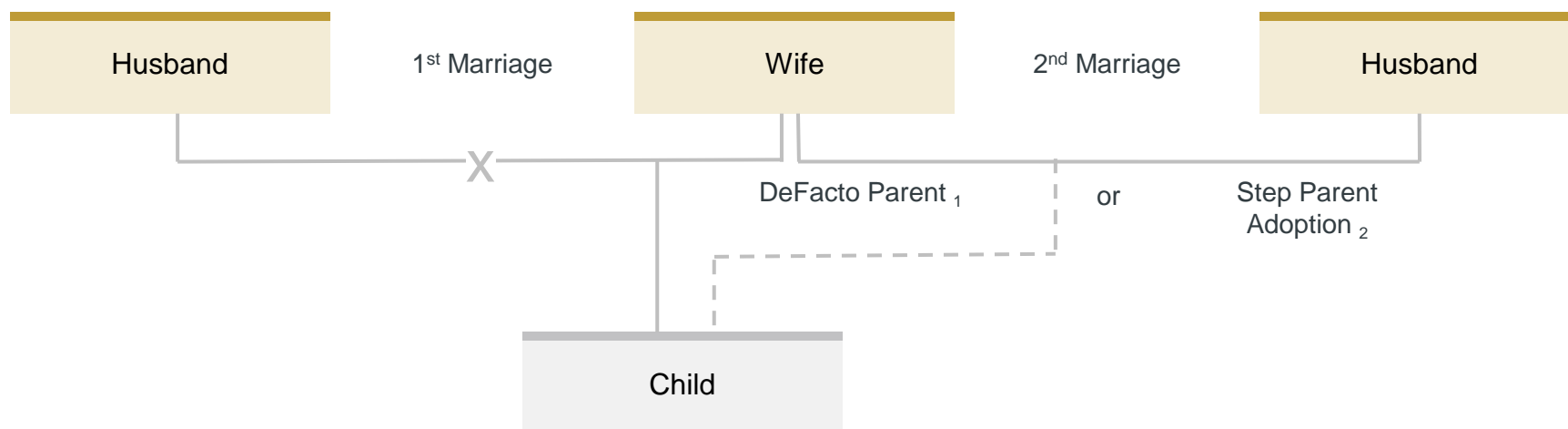
40% of American Adults have at least one step-relative in their family

Gen X / Millennial Family



* "The phrase 'second-parent adoption' refers to an independent adoption whereby a child born to [or legally adopted by] one partner is adopted by his or her non-biological or non-legal second parent, with the consent of the legal parent, and without changing the latter's rights and responsibilities." Sharon S. v. Superior Court, 73 P. 3d, 554, 558 (Cal. 2003)

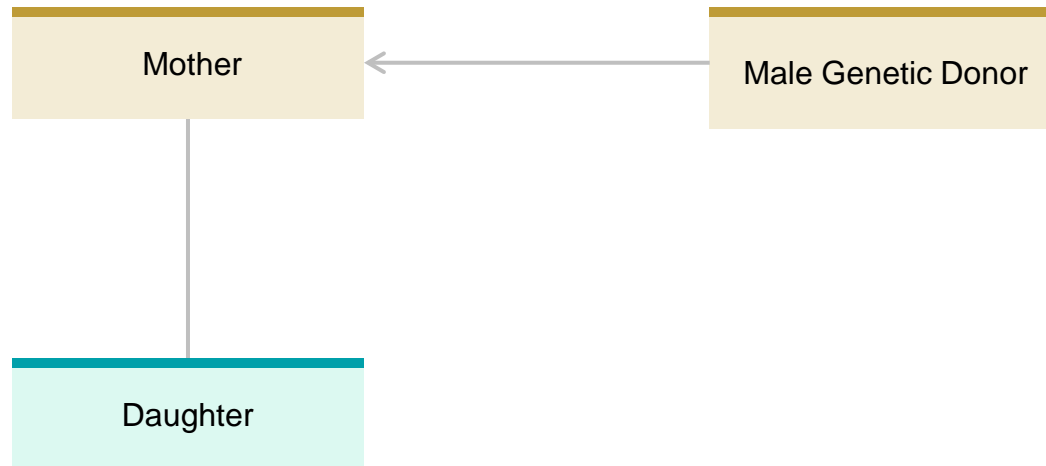
3 Parent Family



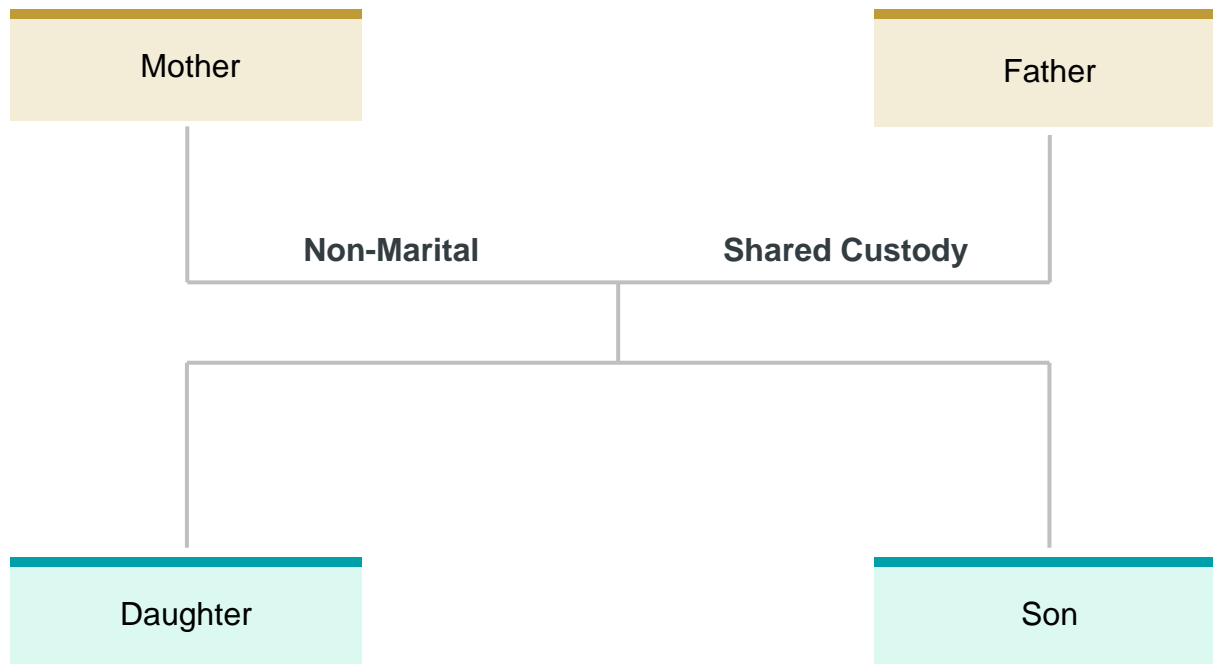
1. A De Facto parent is “one who is not a child’s legal parent, but has been found by a court to have assumed on a daily basis, the role of parent, fulfilling both the child’s physical and psychological needs for care and affection, and has assumed that role for a substantial period of time.” California Rules of Court 5.502 (10) (2015)

2. See *Between A.A. and B.B. and C.C.*, 2007 ONCA 2 (Can.) and *LaChapelle v. Mitten*, 607 N. W. 2d 151 (Minn. Ct. App. 2000) and Gelman, “What About Susan? Three’s Company, Not a Crowd: The Importance of Allowing Third Parent Adoptions When Both Legal Parents Consent,” 30 Wisconsin Journal of Law, Gender and Society 57(2015).

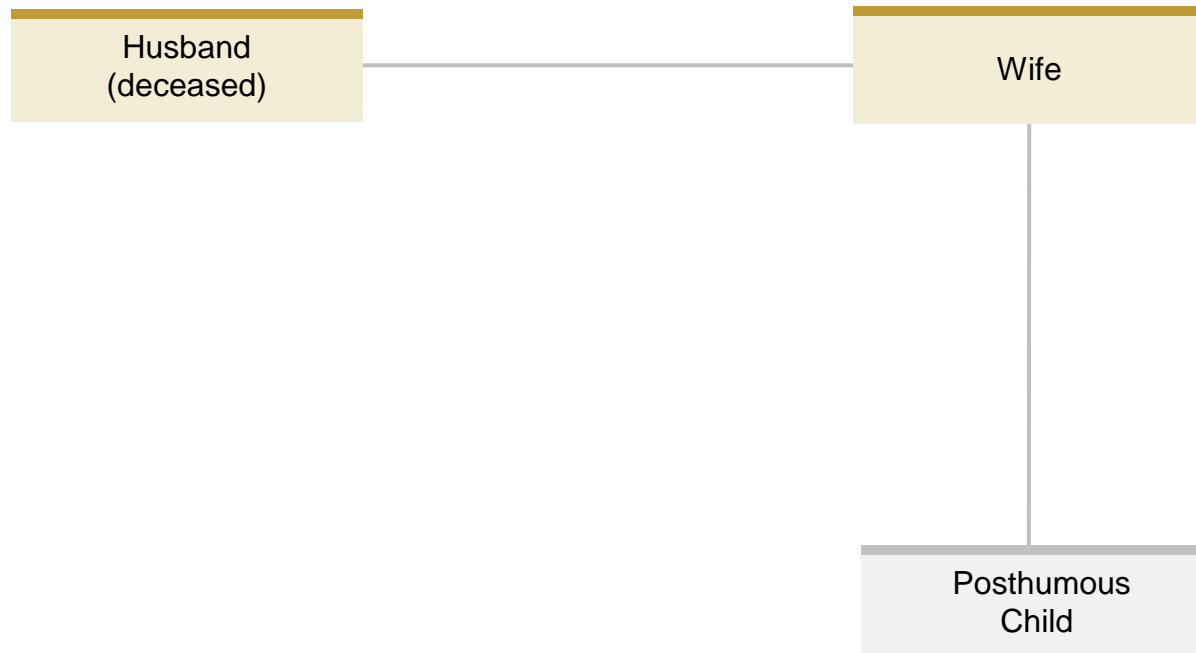
Single Parenthood



Co-Parenting Arrangement

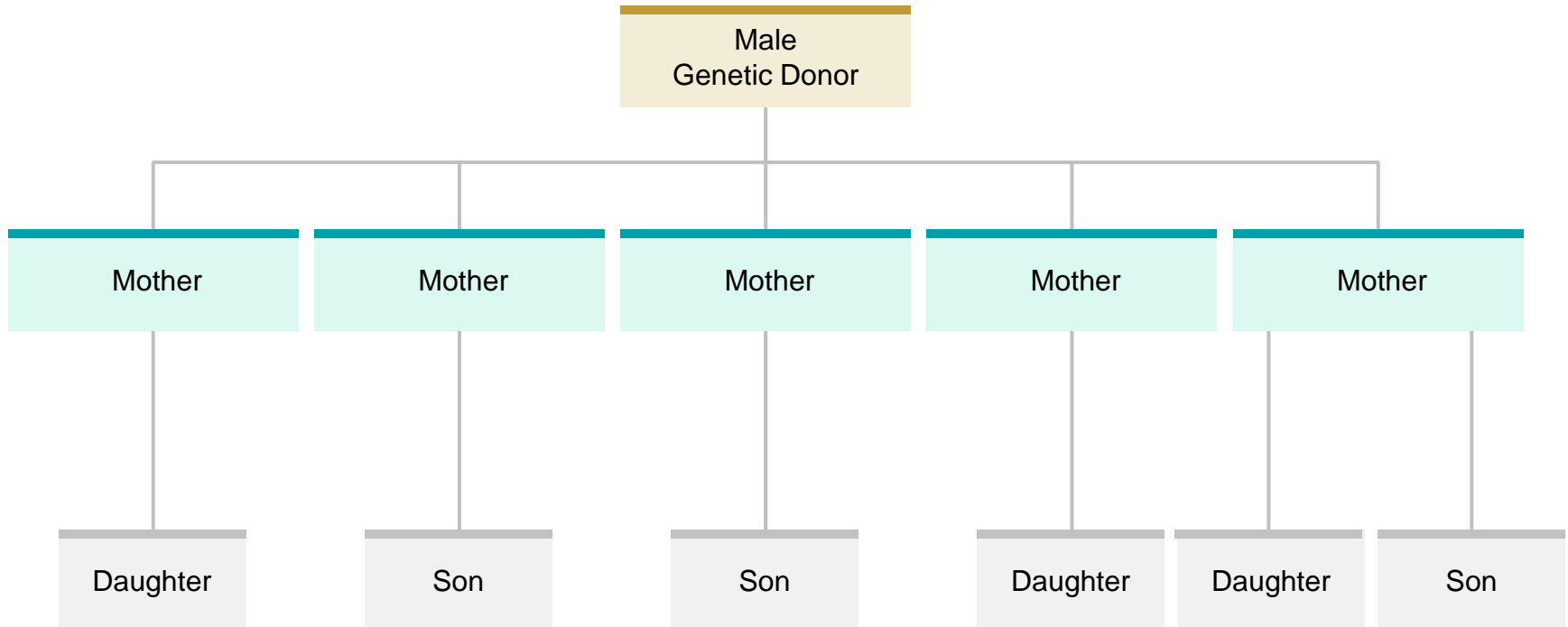


Gen X / Millennial Family



Parentage, inheritance rights, intestate succession and eligibility for Social Security survivorship benefits have been addressed, respectively, by the Uniform Parentage Act §§ 204 and 707, the Restatement (Third) of Property: Wills and Other Donative Transfers § 14.8, The Uniform Probate Code § 2 - 104 and 2-120, (2012), and the U.S. Supreme Court in *Astrue v. Capato* 566 U. S. 132 (2012).

A.R.T. Children – “Dibling” Relationships



The Washington Post

A Lack of Regulation has Created Enormous Genetic Families. Now They are Searching for One Other.



Ariana Eunjung Cha, September 12, 2018

Artificial Reproductive Technology: Reproductive Variables (2019)

Father	Mother	Pregnancy	Conception
<ul style="list-style-type: none">→ His sperm→ Donor sperm→ Fresh→ Frozen	<ul style="list-style-type: none">→ Her egg→ Donor Egg→ Hybrid Egg*→ Fresh→ Frozen	<ul style="list-style-type: none">→ Mother's womb→ Surrogate's womb	<ul style="list-style-type: none">→ In Utero→ Ex Utero→ Inter Vivos→ Posthumous

*Via Spindle Nuclear Transfer Technique

Artificial Reproductive Technology

I

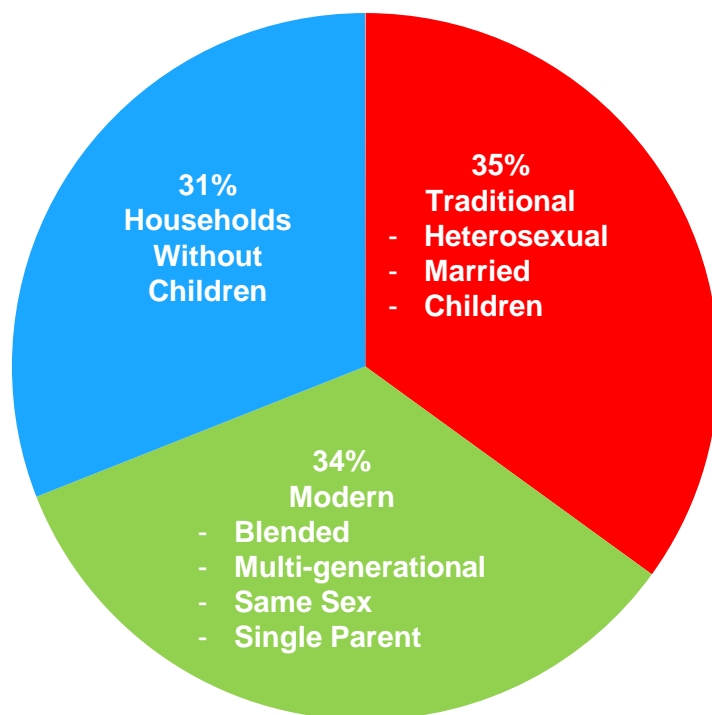
U. S. Statistics*

- 231,936 ART cycles in the U. S. in 2015
 - 60,778 live births
 - 72,913 infants
- 45,779 ART banking cycles in the U. S. in 2015
(preserving fresh non-donor eggs or embryos for futures use)
- 1,000,000 embryos in storage in 2015
- 1.5% of infants born in U.S. annually conceived via ART

*Centers for Disease Control ART National Data 2015

Composition of American Families*

American Families



- Traditional
- Modern
- Households Without Children

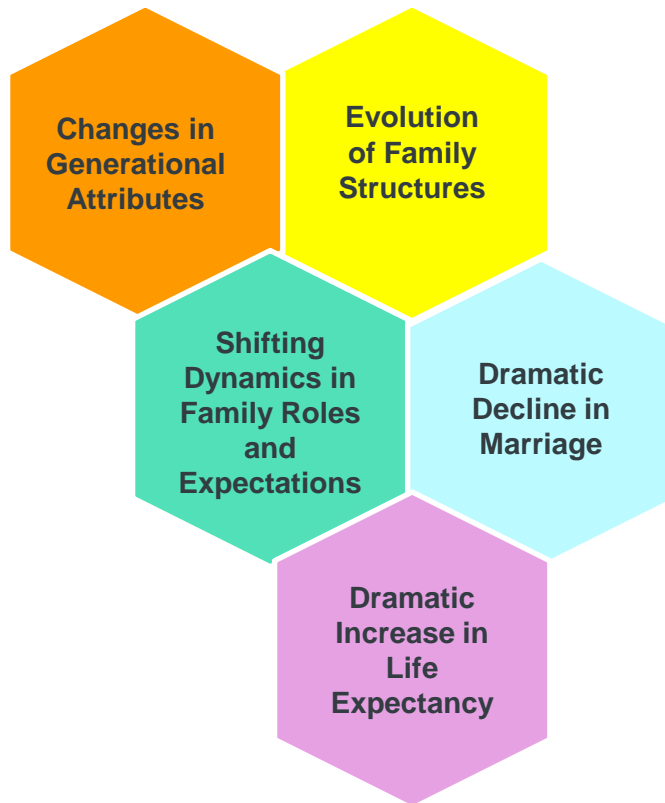
*United States Census Bureau "America's Families and Living Arrangements" (2013)



Estate Planning & Trust Management For A Brave New World



Demographic Changes: Strategic Issues



How and to Whom
will Financial
Wealth be
Allocated?

How will Trusts Evolve
for Modern Families?

Are There Limits to
Longevity?

How will Modern
Families Collaborate
and Make Decisions?



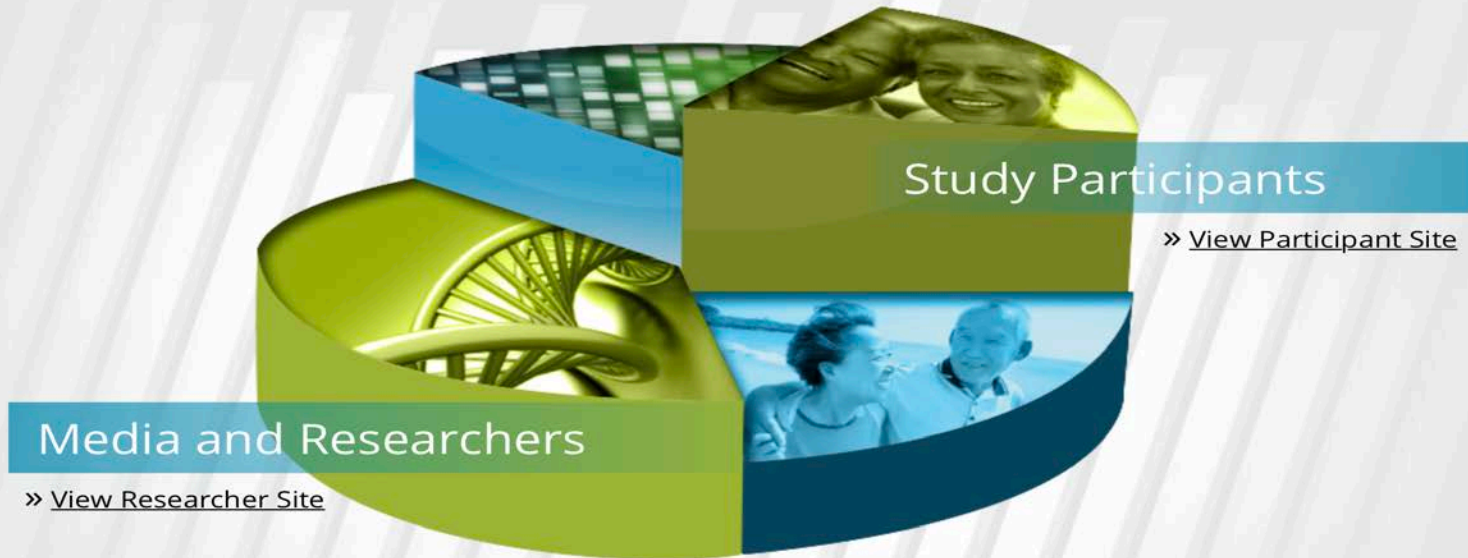
How and to Whom Will Financial Wealth be Allocated?



The Health & Retirement Study



A public resource for data on aging
in America since 1990



The Health and Retirement Study is a longitudinal project sponsored by the National Institute on Aging (NIA U01AG009740) and the Social Security Administration. The study director is Dr. David R. Weir of the Survey Research Center at the University of Michigan's Institute for Social Research.

The Health & Retirement Study*

- Bi-annual survey of 20,000 Americans aged 50 and older
- Objectives:
 - ◆ Explain the antecedents and consequences of retirement
 - ◆ Examine the relationships among health, income, and wealth over time
 - ◆ Examine life cycle patterns of wealth accumulation and consumption
 - ◆ Monitor work disability
 - ◆ Examine how the mix and distribution of economic, family, and program resources affect key outcomes, including retirement, “dissaving,” health declines, and institutionalization

*National Institute on Aging and University of Michigan Institute for Social Research

Health & Retirement Study Themes*

I

Intestacy:

- 42% of all Health & Retirement Study (HRS) respondents have no will
- 38% of deceased HRS respondents died intestate
- 49% of HRS respondents with stepchildren have no will
- 59% of HRS “no-contact” parents have no will (parent who has had no contact with at least one genetic child for at least one year)
- 62% of divorced HRS respondents have no will

*Drawn from Health & Retirement Study data and National Bureau of Economic Research Working Paper “Unequal Bequests,” M. Francesconi, R. Pollack, D. Tabasso. Working Paper 21692 (2015).

Estate Planning – Essential Questions

To Whom/To Which

How Much

- Is Enough
- Is Too Much

When

- To Give
- To Discuss

In What Form

- Outright or in Trust
- Trust Design and Attributes

Who Will Serve as our Surrogate

- For Health Care and Financial Decisions
- For Managing Our Assets
- To Care for Our Families

Wealth Allocation - Equal v. Unequal Bequests

“Almost All Economic Models Predict Unequal Bequests.” ¹

Altruist Model:

Parents Equalize Marginal Utilities Across Children (“Balancing the Scales”)

Exchange Model:

Bequests are Made in Return for Services (“Compensation for Care”)

Evolutionary Model:

Parents Transfer Wealth to Their Genetic (Rather than Social) Children to Maximize the Probability of Survival of Their Genes. (“Paying for Posterity”)

Litigation Minimization Model:

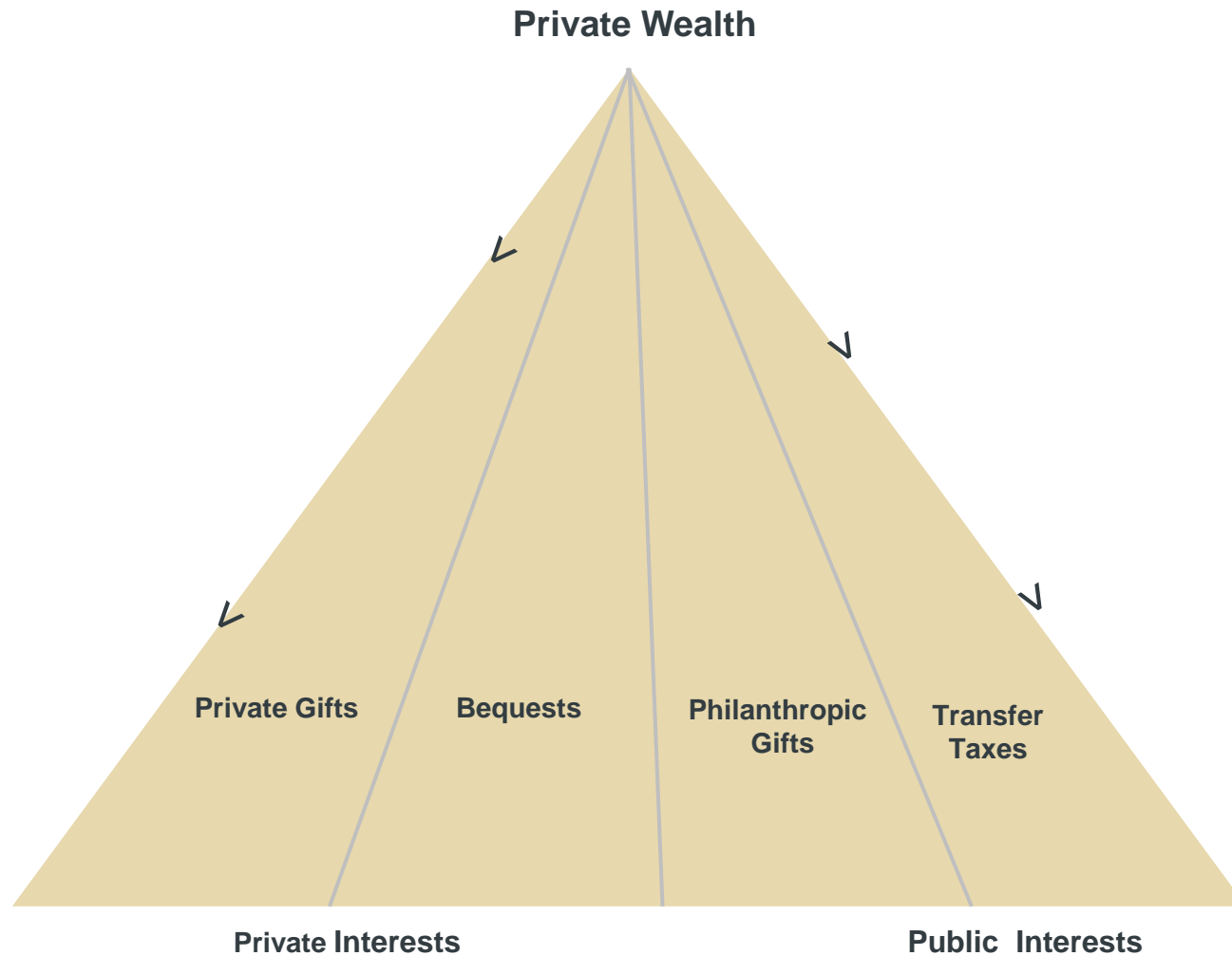
“Unequal Division of Estates Among Genetic Children Typically Generates Unease Among Trust and Estate Lawyers Because They View Unequal Bequests as Invitations to Litigation” ¹

Maternal Model:

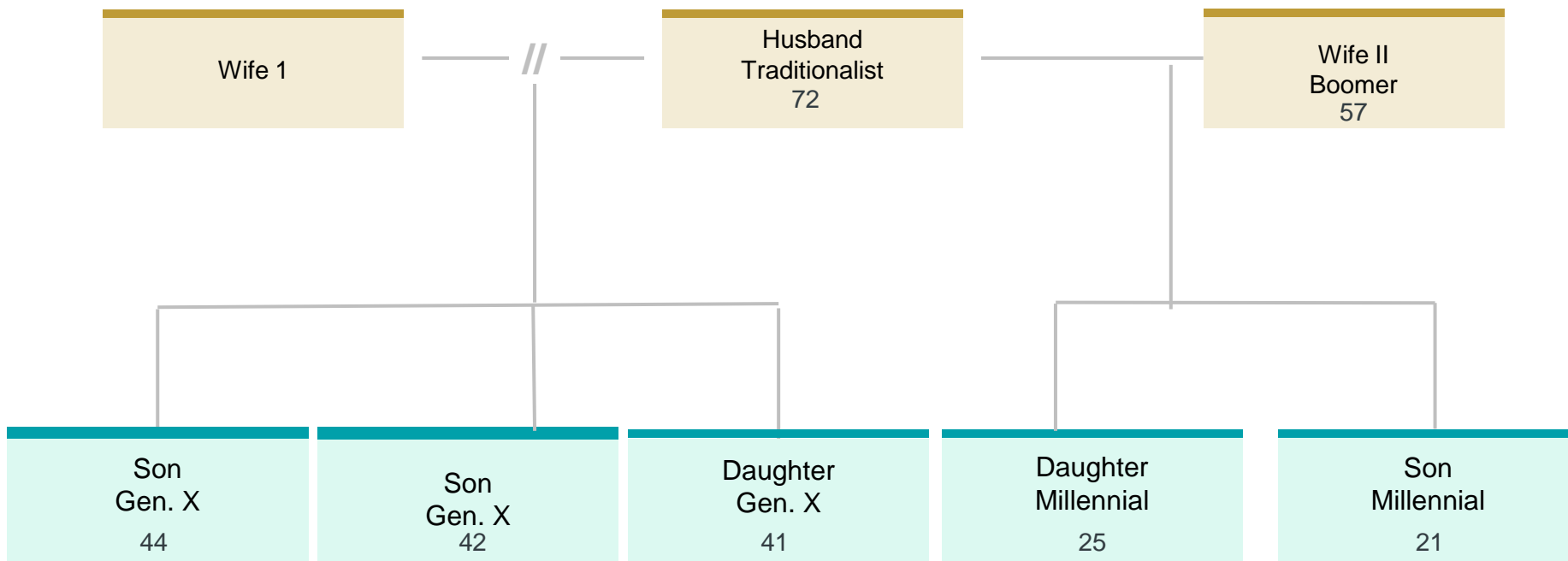
“The Vast Majority of Mothers (More than 92 Percent) Intend to Leave Equal Bequests” ²

1. Unequal Bequests, Francesconi, Pollak and Jabasso, National Bureau of Economic Research Work Paper 21692 October, 2015
2. Light, Audrey, and Kathleen McGarry, “Why Parents Play Favorites: Explanations for Unequal Bequests.” 94 American Economic Review, 5 1669.

Gratuitous Transfers: Freedom of Disposition



Blended, Multi-Generational Family



Entertainment for Stepchildren



NTAC:3NS-20

NTAC:3NS-20

Blended, Multi-Generational Estate Plan

Husband
Traditionalist

Wife II
Boomer

Lifetime Wealth Transfer

Testamentary Wealth Transfer

Split Annual Exclusion
Gifts - \$30,000 x5

Rolling GRAT's
Remainders in
Equal Shares to
Children's Trusts

QPRT for
Vacation
Compound

Unused Exemption
Grandchildren's Trust

Marital Trust

Endowment for
Vacation
Compound

Son
Gen X

Son
Gen X

Daughter
Gen X

Daughter
Millennial

Son
Millennial

Wealth Transfer Planning for Contemporary Families

PRIOR GENERATIONS

Estate Planning → Mortality → Family Disclosure

CONTEMPORARY FAMILIES

Estate Planning

Family Dialogue → Plan Design and Implementation → Family Disclosure

Spouses/Partners

- Expectations
- Expectancies
- Goals

Parents/Partners and Children

- Family Views
- Expectations
- Hopes/Fears

Spouses/Partners and Children

- Plan
- Rationale
- Role of Advisors
- Concerns

Wealth Transfer Issues for Contemporary Families

Wealth Sufficiency

Generational Expectations About Financial Wealth and Estate Planning

Lifetime v. Testamentary Wealth Allocation

Viability of Life Estate with Remainder Construct

Utility and Shelf Life of Spray Trusts

Rewards and Risks of Shared Assets

Perpetual Trusts: Family Reproduction and Per Stirpital Allocation

Fiduciary Roles: Who Serves Whom and Why

Traditional Estate Planning Paradigm...Recast

**Tax Based
Transfer Tax Centric**



**Goals Based
Tax Efficient**

**Hierarchical
Nuclear Family Oriented**



**Humanistic
Sensitive to Family Structure**

Culturally Homogeneous



Culturally Adaptable

**Predominant Focus on
Financial Wealth**



**Holistic Understanding of
Family Wealth**

Traditional Trust Design and Management...Recast

Immutable Grantor Intent
Beneficiary Accommodation



Grantor Intent  Aspirational
Flexible
Beneficiary Engagement

Hierarchical
Nuclear Family Oriented



Humanistic
Sensitive to Family Structure

Culturally Homogeneous



Culturally Adaptable

Predominant Focus on
Financial Wealth



Holistic Understanding of
Family Wealth



How Will Trusts Evolve for Modern Families?

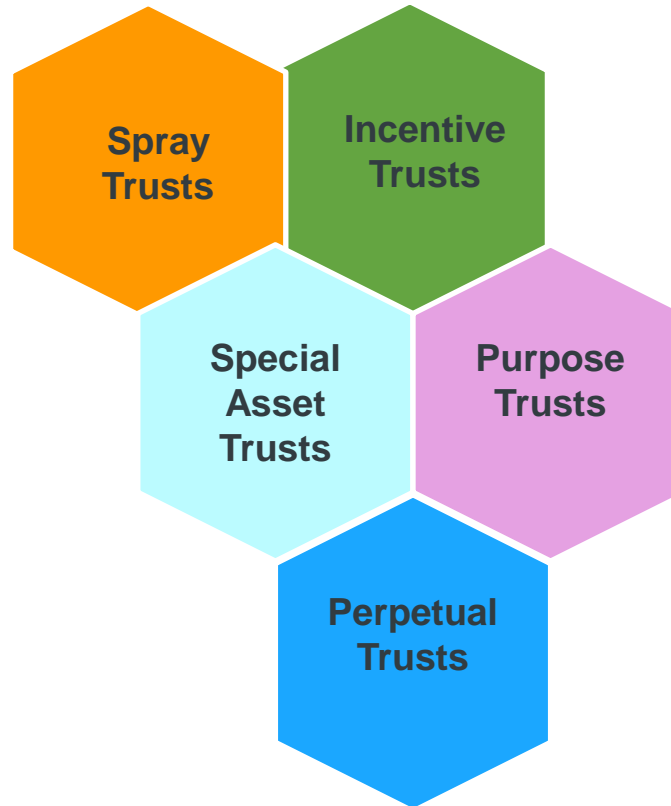


How Will Trusts Navigate the Generational Divide?

GRANTORS

**Traditionalists
Boomers**

- Respectful of Authority
- Control-Oriented Decision Making
- Work-Centered
- Culturally Homogenous
- Digital Learners



BENEFICIARIES

**Gen-Xers
Millennials**

- Suspicious/Tolerant of Authority
- Pragmatic/Networked Decision Making
- Life-Centered
- Culturally Diverse
- Digital Natives

Trusts and Material Purposes

Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to a beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple intended beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.*

*Restatement (Third) of Trusts § 65, Comment d.

Trust Design: Statements of Intent

Tension Between Grantor Intent, Beneficiary Goals, and Fiduciary Duties

Evolution of Standards for Early Termination and Trust Modification

- The Claflin Doctrine: Early termination of a trust may be allowed so long as it does not frustrate a **Material Purpose** of the settlor. Claflin v. Claflin (20 N.E. 454, Mass.1889).
- Restatement (Third) §65: **Material Purposes** are not readily to be inferred
- The Uniform Trust Code requires determination of a trust's **Material Purpose** for:
 - §111: Non-Judicial Settlement Agreements
 - §411: Modification or Termination by Consent
 - §412: Modification of Termination Because of Unanticipated Circumstances

Trust Design: Statements of Intent*

Instructions to the Trustee (and Other Fiduciaries)

Letters of Wishes

- External
- Generally unenforceable (in the U. S.)

Precatory Language

- Internal
- Aspirational

Statement of Intent: Explicit, unambiguous purpose for wealth transfer

- Language within the trust document
- Demonstrates a unique intention that is tied to the grantor's personal history, personal values or personal properties
- Articulates a direct link between unique personal intent and the purpose of the trust
- Expresses grantor's view on modification and termination
- Provides context for the trustee's exercise of discretionary powers

Public Policy Limitations

*Raymond C. Odom, The "Goal Standard" of Estate Planning (2016)

Trust Design: Statements of Intent

Communications to Beneficiaries

Wills and Trusts are a Form of Personal Communication

Ethical Wills

- Memorialize and “Transfer” Family Values

Family Mission Statements

- Formalize Family Vision and Values

Statements of Intent

- Provide Context for Financial Capital Held in Trust
- Articulate Goals for Family Wealth and Beneficiaries’ Well Being
- Inform Future Generations About Family Values and Vision

Formulation of Statements of Intent

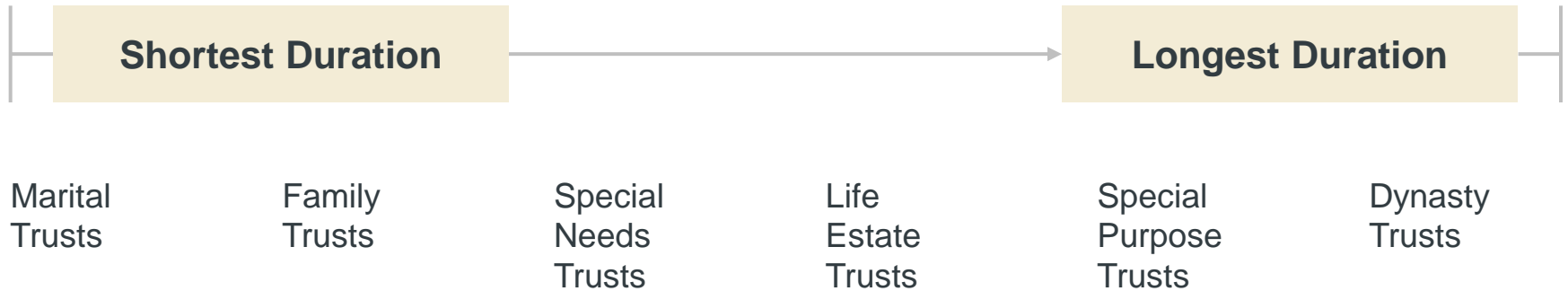
- Client Authorship
- Focus on Heritage and Legacy, Values, and Hopes
- Brevity is Best

Sample Statement of Intent

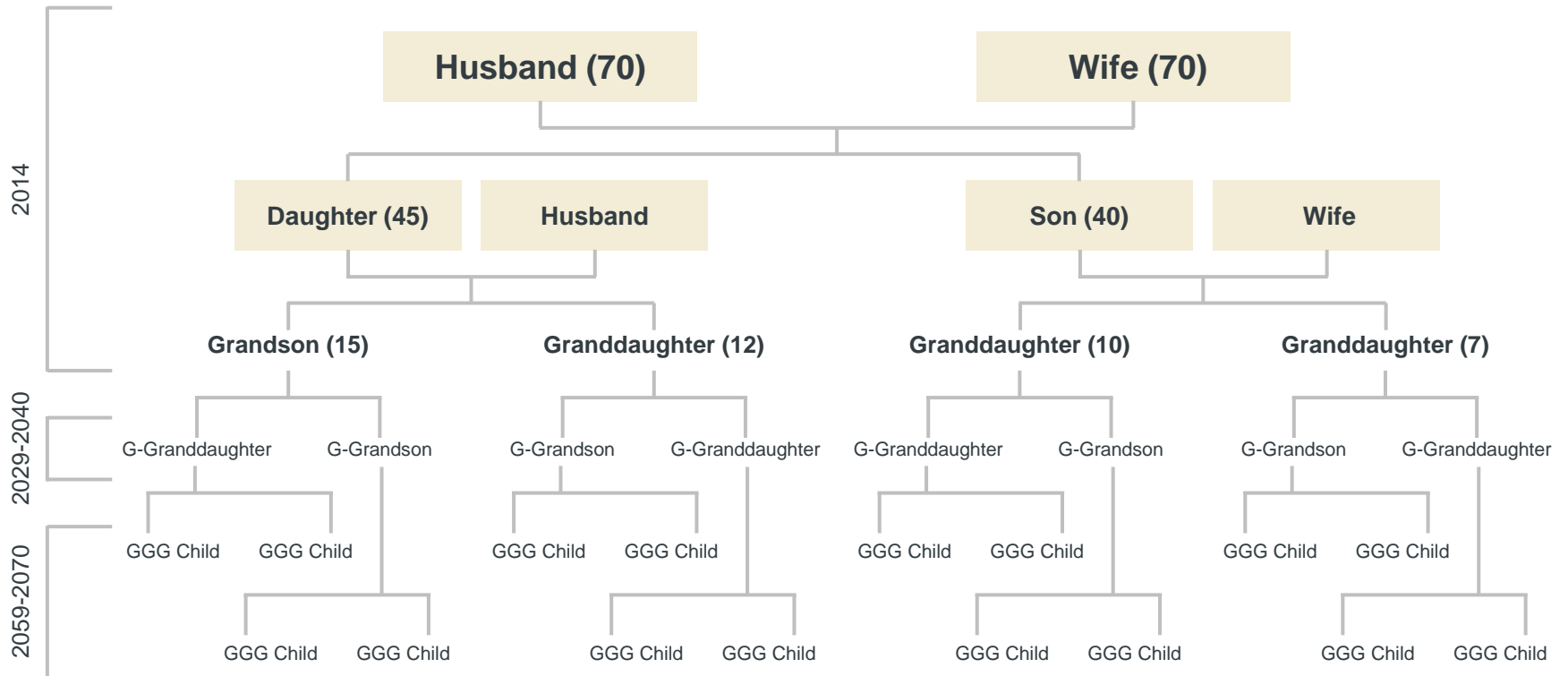
SAMPLE PARAGRAPH

I acquired the wealth transferred into this trust at age 60 through starting a business that grew out of a personal passion. As an immigrant to this country it is essential to me that my descendants also demonstrate a lifelong commitment to economic achievement that is not available in my birth country. Therefore, this trust was created by me to serve as a financial catalyst for the personal, cultural and professional achievement of my descendants. The human need for productive personal fulfillment never retires or ends. I intend that the funds in this trust be strategically distributed throughout the entire lifetime of the designated beneficiaries. Since I have transferred substantial funds to my children outside of this trust, I intend that this trust should not be terminated prematurely to serve any alternative material purpose

Trust Duration



Trusts - Family Growth



Trust Design: Beneficial Interests

Income

Discretionary Principal

Unitrust or Annuity Interests

Withdrawal Rights

- Staged
- 5 x 5 Powers

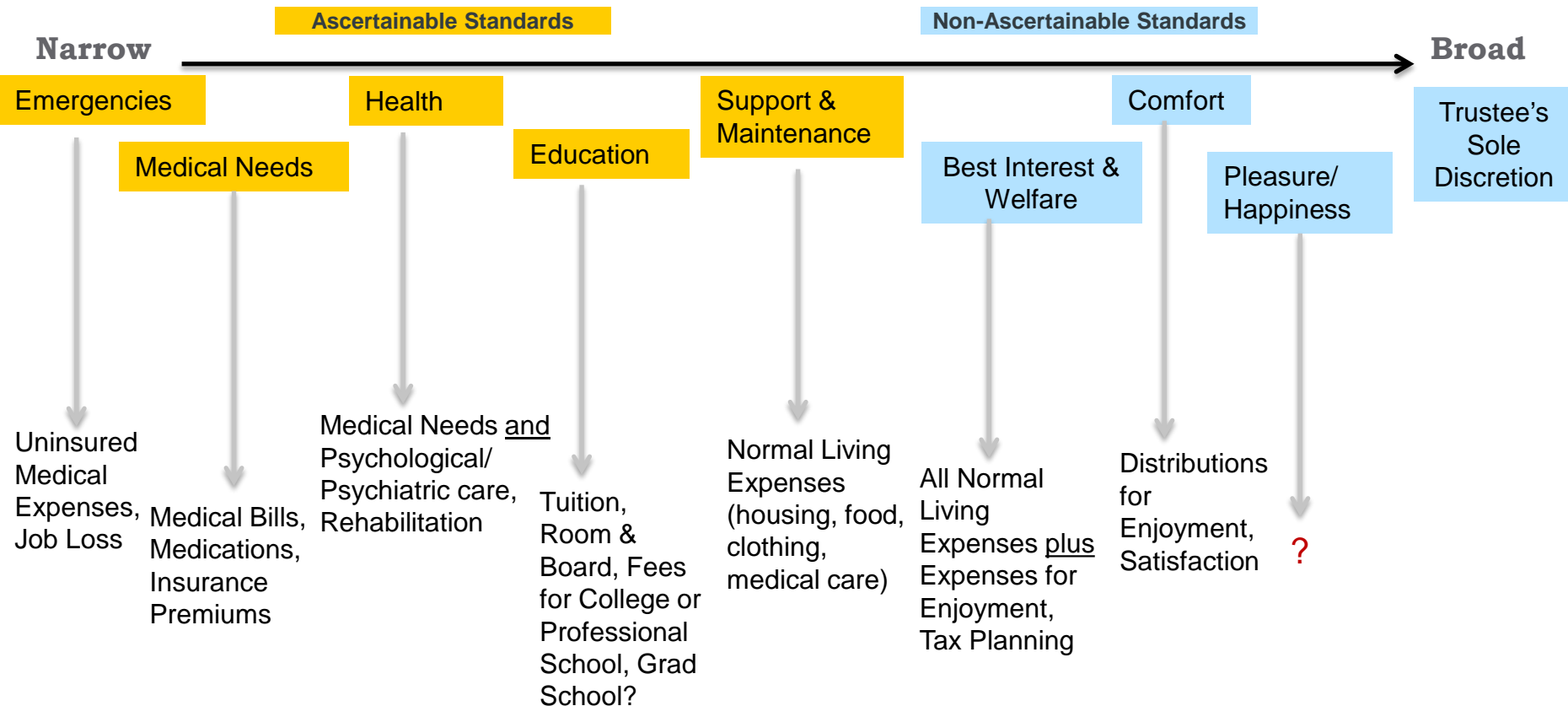
Mandatory Distributions

Use of Trust Assets

Powers of Appointment

- Inter-Vivos
- Testamentary
- Limited
- General

Discretionary Distribution Standards



*The term "emergency" alone may not be ascertainable. See *Budd v. Commissioner*, 49 T.C. 468 (1968).

Spray/Sprinkle Trusts

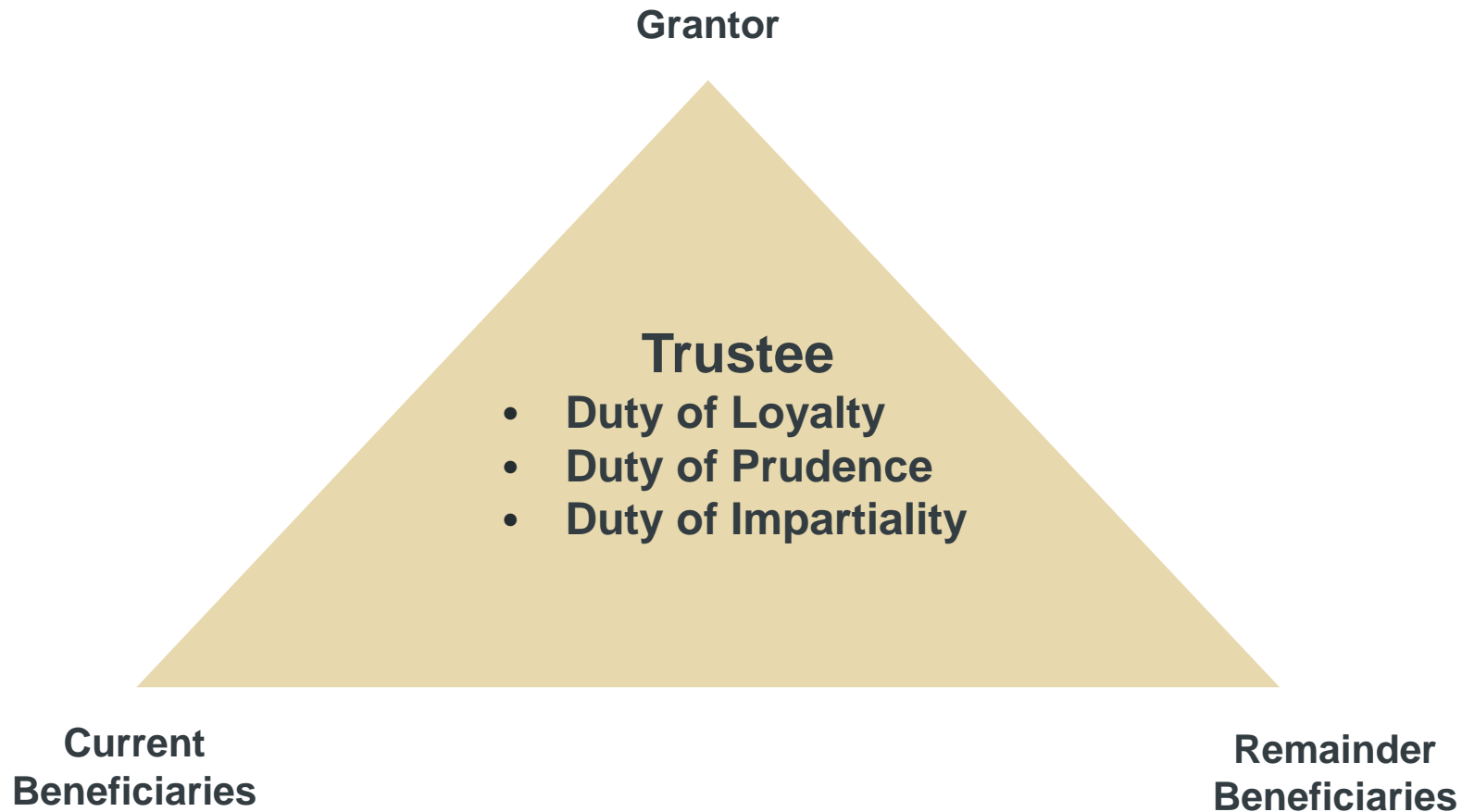
Advantages:

- Permit Equitable (Disproportionate) Distributions
- Achieve Economies of Scale
 - Larger Range of Investment Alternatives
 - Lower Fees
- Well-Suited to Related, Minor Beneficiaries

Disadvantages:

- Potential for Conflicting Fiduciary Duties
 - Duty to Provide Information
 - Duty of Confidentiality
- Challenges with Disproportionate Distributions
- Challenges with Investments
 - Risk Tolerance
 - Tax Brackets
- Ill-Suited to Most Adult Beneficiaries

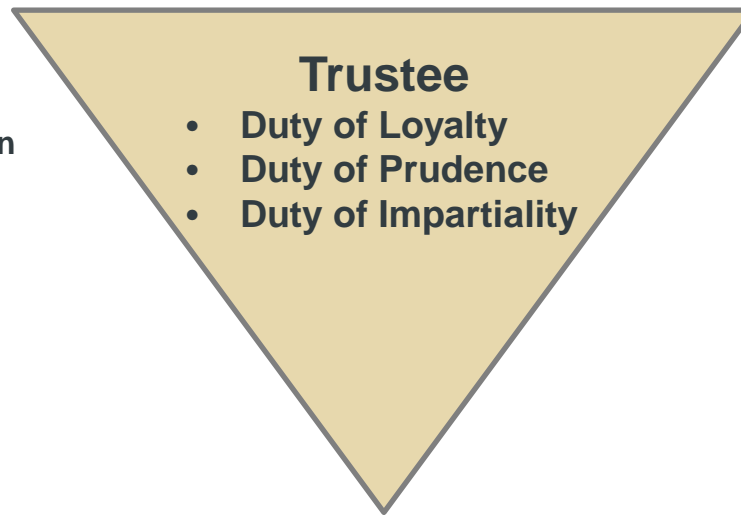
Trust Design: Grantor Intent & Fiduciary Flexibility



Trust Design: Grantor Intent & Fiduciary Flexibility

Trust Design / Grantor Intent

- Allocation of Fiduciary Responsibility
- Beneficial Interests
- Discretionary Powers
- Powers of Appointment
- Trustee/Advisor Succession



Statutory Modification Powers

- Decanting
- Merger
- Unitrust Conversion/Equitable Adjustment
- Virtual Representation/ Non-Judicial Settlements

Explicit Modification Powers

- Amendment
- Decanting
- Situs Change
- Trustee Removal
- Termination

Trust Design: Grantor Intent & Fiduciary Flexibility

Trust Design / Grantor Intent

- Allocation of Fiduciary Responsibility
- Beneficial Interests
- Discretionary Powers
- Powers of Appointment
- Trustee/Advisor Succession

Grantor

Statutory Modification Powers

- Decanting
- Merger
- Unitrust Conversion/Equitable Adjustment
- Virtual Representation/ Non-Judicial Settlements

Trustee

- Duty of Loyalty
- Duty of Prudence
- Duty of Impartiality

Current Beneficiaries

Remainder Beneficiaries

Explicit Modification Powers

- Amendment
- Decanting
- Situs Change
- Trustee Removal
- Termination

Estate Planning and Trust Management for a Brave New World

We are such stuff
As dreams are made on;
And our little life
Is rounded with a sleep

Shakespeare, The Tempest, IV.i.

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