

Of Trusts, Grammar, and Gender

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Deborah Gordon, *Engendering Trust*, 213 **Wisc. L. Rev.** 213 (2019), available at [SSRN](#).

In her new piece, *Engendering Trust*, [Deborah Gordon](#) takes on the relationship between women, wealth, inheritance, and the trust form. This intricate relationship is a long-standing one—a vintage marriage, so to speak—defined by gendered asymmetries, assumptions, and characterizations that are all grounded in historical norms. The landscape that gives life to this relationship between women and the trust form is replete with overt female archetypes, such as evil stepmothers, acquisitive mistresses, and vulnerable widows, and the linguistic coin of the realm is a highly gendered grammar that reveals these and other idioms of financial authority, avarice, and inexperience.

Based on a study of 540 cases involving trust law disputes, Gordon seeks to unearth how courts speak about and incorporate gender in their writing and “where cases show trust law clinging to its gendered past, both in language and effect.” (P. 223.) More specifically, she looks at three “key trust characteristics” in the opinions order to parse the role of gender and its effects. First, Gordon looks at trustee identity and finds that not only do men create marital trusts more frequently than women, but men also name someone other than the surviving spouse as trustee more often than women do. Women, by this measure, have still not gained full access to the world of trusteeship, a world in which—in years gone by—“[a]lmost every well-to-do-man was a trustee.” Pursuing this line of inquiry, it would also be interesting to know who courts choose as trustees in cases requiring the court to appoint one.

The second factor that Gordon studies is trust privacy, that is to say the ability of trust settlors to obscure information from other parties, even beneficiaries. Financial privacy has long been a feature of trusts and has, historically, been so strong that trust documents have been kept secret from beneficiaries themselves. Even now, in [South Dakota](#), trust companies [market the fact](#) that state law does not require trustees to notify beneficiaries of their trust interests either as minors or once they reach the age of eighteen. Gordon contends that settlor privacy comes at a price: a lack of transparency that may have gendered results in that the trust’s opacity allows “the private mechanisms of dominance to continue unchecked and unexposed.” Left to flourish in the secretive microclimate of the family trust, gender-based inequalities within the family may tend to persist. Or, returning to the roster of female stereotypes, trust privacy might help reinforce stereotypes about unwitting wives and scheming mistresses. One wealth manager based in the [Cayman Islands](#)—a jurisdiction in which [privacy is paramount](#)—has [observed](#): “Each client will have at least one trust—maybe four—...and they’re all designed to do different things. Right down to a wife’s structure and a girlfriend’s structure.” Privacy hides family secrets as well as family forms of discrimination and financial manipulation.

Lastly, Gordon looks into trust duration and the possible gendered implications of allowing dynasty trusts through the elimination of the [rule against perpetuities](#). In a new world of trust competition, in which jurisdictions [compete for perpetual trust business](#), Gordon suggests that women might be at a disadvantage. Perpetual trusts, she remarks, have the potential to enshrine the wishes, desires, and biases of the original trust settlor for generations. This possibility is already on the minds of wealth managers, and one family office advisor warns of the perils of wealth structures that are “[Monuments to the Founder](#).” As the family office advisor states: “A key characteristic of the Monument to the Founder

is an unwillingness to have to deal with the ‘messiness’ of divergent voices and opinions.” These founders, at least historically, have been “patriarchs” (in telling industry terminology) and their perpetual trusts serve to preserve their patrimonies over multiple lifespans, protecting principal from spouses seeking distributions at divorce and from other such unwanted creditors. From this perspective—women, as spouses, daughters, or “mistresses”—are ancillary to the heroic, male project of legacy creation and preservation.

As Gordon demonstrates through these analyses, the trust form is a gendered wealth transfer vehicle, drenched in the realities of historical practice, industry standards, and cultural narratives. The grammar of the trust continues to be a masculine one and the discourses that circulate in trust law promote a version of femininity grounded in sexualized forms of either vulnerability or avariciousness. Implicit in this inquiry is how these gendered discourses interrelate with gendered economies. The gendering of inheritance practices, and the tools of inheritance like the trust, compound the negative outcomes of gendered labor and income earnings, which lead to [gendered wealth gaps](#).

Ultimately, Gordon tells us that a necessary response is to disrupt these discourses and reimagine the relationship between gender and the trust. Trust law, and those who trade in it, need to reimagine its grammar and reform its embedded assumptions in order to adapt to social change in gender presentation, [marriage rules](#), and [family formation](#). Consequently, Gordon asks us to think about disrupting the myriad of ways in which gender disadvantages women in trust law. This might mean reviewing and revising the ways in which women are portrayed in judicial domains, being attentive to the ways that estate planning practices characterize and authorize women, and generally working to close the gender gaps that the trust form creates.

While working in these ways to “engender” economic and identity justice, however, another front to explore would be the “de-gendering” of the trust. From this perspective, instantiating gender justice would mean creating equity by promoting trust laws and trust grammar that are non-binary and troubling gender itself.

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