

Trusts and Estates A Practice Focus

How to Take It With You

Cryonic preservation trusts help create new possibilities for clients.



BY JOHN P. DEDON

In traditional estate planning, death was always the end for the client, and the money went to the heirs. But a new use of estate planning, combined with advancing technology, means that, perhaps now, some dying clients really can take their wealth with them.

In estate planning, a “dynasty trust” typically has meant a trust created in perpetuity for future generations. These dynasty trusts are finding a new use as the cryonic movement—the increased use of cryonic preservation—becomes more mainstream.

Cryonic preservation is the process of maintaining an individual classified as legally dead at an extremely low temperature to preserve his or her body so that it remains biologically viable for possible treatment by future medicine. The hoped-for result is that the person can ultimately be revived and return to life.

If revival from a successful cryonic preservation seems far-fetched to some, it is probable to others. Recent articles in *The Wall Street Journal*, on Jan. 21, and ABC News Internet Ventures, on Jan. 25, have described individuals who plan on being cryogenically preserved. A growing number of successful individuals plan on joining the roughly 140 human bodies or heads currently cryogenically preserved.

Scientists, doctors, and futurists can determine the likelihood of cryonic revival. For lawyers called on to draft legal documents that satisfy the needs of cryogenically preserved clients, the task is to create the appropriate tools that will allow these clients to preserve their resources for revival.

One such tool is a trust to hold assets during preservation and upon revival. As an attorney who has drafted several of these “cryonic preservation trusts,” I found the task involves many novel challenges. This article identifies some of those challenges and provides ways to mitigate the legal risks, thus helping cryogenically preserved clients to accomplish their legal objectives.

MR. CRYONIC

First let’s set the context. Mr. Cryonic plans to have his body

preserved upon death at one of the two facilities doing cryonic preservation: Alcor Life Extension Foundation in Scottsdale, Ariz., (the current home of Ted Williams’ frozen head) or the Cryonics Institute, located outside of Detroit.

The preservation will be paid for by Mr. Cryonic’s funds, or often by a life insurance policy secured for this purpose. The cost of preservation, reportedly \$150,000 or less depending on whether the entire body or merely the head is preserved, is not a problem. Rather, Mr. Cryonic is concerned about whether his assets will be available upon his revival.

The tool of choice to hold the assets is a cryonic preservation trust, which is modeled after a traditional dynasty trust.

Dynasty trusts can be created under the laws of approximately 20 states. When practitioners think of dynasty trusts, Delaware, South Dakota, and Alaska often come to mind as favorable jurisdictions, for reasons of both tax and asset-protection laws. The premise of a dynasty trust is that assets are contributed now with gift and generation-skipping tax exemptions allocated so that the assets grow in perpetuity for future generations, free of the estate tax. The assets can also be protected from creditors.

Dynasty trusts are powerful tools to pass wealth from one generation to the next. They serve as family banks that future generations can draw on for primary support or to complement their lifestyles.

THE UNKNOWN FUTURE

This traditional estate-planning tool is the appropriate model to build a cryonic preservation trust. Similar to clients seeking traditional dynasty trusts, Mr. Cryonic wants to provide assets, ideally free of tax and protected from creditors, for beneficiaries far into the future. The obvious distinction is that Mr. Cryonic is the primary beneficiary.

In the typical dynasty trust, the grantor makes lifetime gifts or the assets flow into the trust upon the grantor’s death. The duration of the trust and its future beneficiaries are uncertain. Most

often, grandchildren and great-grandchildren will reap the dynasty trust benefits. In contrast, Mr. Cryonic does not know whether he will be revived in 10 years, 100 years, or ever.

Does this uncertainty preclude the creation of a dynasty trust for Mr. Cryonic? Although some financial institutions have shied away from serving as trustees of these cryonic preservation trusts, no legal precedent forbids their use.

Are cryonic preservation trusts more likely to be challenged than other dynasty trusts? It is easy to envision Mr. Cryonic's descendants, eyeing an ever growing pot of assets tied up for his possible revival, seeking to penetrate the trust for what they believe is their rightful share. Although Mr. Cryonic, of course, may disinherit his children or leave fewer than all of his assets to them, his assets, absent the cryonic trust, would typically be left to descendants or charities, rather than being held indefinitely for growth pending his revival. Perhaps this distinction will lay the ground for a challenge.

But these and other legal hurdles can be addressed. In drafting cryonic preservation trusts, the following provisions may be helpful.

First, if property is included in the trust, consider allowing the descendants a limited use of the property. For example, if a beach house or mountain retreat is part of the trust, consider permitting descendants to use the property under specifically defined limitations.

For the trust's liquid assets, consider allowing descendants discretionary income and principal distributions. These distributions could be for ascertainable standards such as "health, maintenance, support, and education," as determined by the trustee. Alternatively, all the income could be paid out each year to beneficiaries.

Obviously, as the list of descendants grows, distributions of income and principal may be capped at a certain percent or amount to ensure the bulk of the assets are available for Mr. Cryonic upon his revival. But allowing use of the property or distributions undercuts legal challenges by disgruntled descendants claiming the trust should fail for lack of a beneficiary.

In addition, the inclusion of an *in terrorem* clause, which disinherits the challenging beneficiary from the pool of eligible beneficiaries, also may discourage challenges.

Mr. Cryonic also could consider permitting one or more charities the use of property or discretionary distributions during the trust term. This serves the dual purpose of naming eligible trust beneficiaries and satisfying a public good.

It could become apparent at some point that Mr. Cryonic will not be revived. For example, the storage site could be destroyed by fire or another act of God. In this event there should be a provision for the dissolution of the trust to named beneficiaries, such as descendants or charities.

A FULL TRUST

Assuming the trust has been drafted to withstand legal challenges, what other trust provisions are important?

Although the trust's primary purpose is to provide assets for Mr. Cryonic's revival, trust funds can also be used to enhance the level of cryonic preservation to lead to a quicker and healthier revival. Thus, the trust should be drafted to allow for distribu-

tions to the cryonic service provider to take advantage of technological and scientific advances. Again, there should be a cap on such distributions so that the funds are not fully depleted before Mr. Cryonic's revival.

Funds also can be dedicated to facilitating the revival of Mr. Cryonic as he emerges from preservation and becomes functionally living and independent.

During cryonic preservation, trust funds also should be available if litigation is necessary to protect Mr. Cryonic against the cryonic facility. (Such a suit might be necessary, for example, if the facility's level of care has become less than state-of-the-art.) On the other hand, trust funds for lobbying or litigation may too be necessary to support the cryonic facility if, for example, the state where the facility is located enacts laws contrary to cryonic preservation.

Using funds from the trust to hire experts could be necessary to monitor whether the facilities have maintained state-of-the-art science, whether they are providing the proper level of care for Mr. Cryonic, and whether they are financially sound.

Much thought must go into drafting a trust with provisions for various contingencies during Mr. Cryonic's preservation. This leads to another important question: Who will make these decisions before revival?

WHO DECIDES?

As with any trust, there must be a trustee to carry out the trust provisions and invest the trust assets. To provide the permanence and institutional management necessary to guard the assets and invest the funds for an extended period, a large institutional trustee is the only choice.

But the very reasons for selecting an institutional trustee—a strong institutional fiduciary with permanence and financial and property management skills—cut against the other tasks necessary during the cryonic preservation period. For example, a large institutional trustee is not equipped for (nor does it want) the responsibility of monitoring the cryonic facility, checking state laws, and hiring experts. Thus, a trust protector also is needed.

If resources are available, it is prudent to not only create the trust but also to fund it during Mr. Cryonic's lifetime, at least in part, so that Mr. Cryonic can see how the trustee and trust protector work together. It also expedites the education of both the trustee and the trust protector because they benefit from Mr. Cryonic's guidance while he is alive.

In addition to the specific cryonic issues noted, the trust protector's role is similar to that of a trust protector in a traditional dynasty trust. In short, the trust protector serves as a fiduciary of the trust, providing flexibility to accommodate legal or factual changes. The trust protector is allowed to amend the trust under specific circumstances.

For the very reasons that the trust protector needs to be flexible, an institutional trust protector is usually impractical. Institutional trustees, such as banks, with strict regulations and fiduciary duties, often do not have the ability or the inclination to change trust provisions or address the unique needs of a cryonic beneficiary described above.

The logical choice for a trust protector is a law firm. Its typi-

cal function would be to change the site of the trust if one state or another became more friendly to cryonic preservation. The trust protector also would be allowed to remove or add a trustee.

If Mr. Cryonic is married, there may be a separate but identical trust created for Mrs. Cryonic. Alternatively, they could create one trust together that would be for both beneficiaries and that would end upon the first of their revivals. Of course, either spouse may want the comfort of knowing that the trust would continue until they are both revived, which would require separate trusts.

The challenges are many in drafting a cryonic preservation trust. To draft a dynasty trust, the model for a cryonic preservation trust, counsel must consider a myriad of complex asset pro-

tection, asset management, and tax issues. When you add the issues pertaining to cryonic preservation, the challenge becomes even more daunting.

Nevertheless, the drafter and the client can be confident that a cryonic preservation trust can be created to address the client's needs. Just as cryonic science will advance, so too will the legal profession strive forward in meeting the needs of the cryogenically preserved client.

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