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Long-Term Trust-Based Planning Makes Focusing on Intent More Important

by Richard M. Morgan & Loraine M. DiSalvo

What is your true estate planning intent? Let this question sink in for a moment, then think about it again: What is your true estate planning intent? How do you want your loved ones to benefit from the assets you leave behind? Would you like to provide a safety net or a source of support? Is your primary goal to provide for your immediate family, or would you also like to help provide for many future generations after you are gone? Do you want to encourage beneficiaries to become productive citizens and avoid laziness and self-destructive behavior? What kind of legacy do you want to leave? Answering these questions, and ensuring that your estate planning reflects your answers, can be critically important, especially for those who are contemplating long-term trusts or who really want to ensure that they leave a legacy which goes beyond the economic value of their assets.

In the fairly recent past, many people focused primarily on three goals when developing their estate plans: (1) reducing the impact of the wealth transfer taxes - the gift, estate, and generation-skipping transfer ("GST") taxes, (2) ensuring that a surviving spouse was provided for, and (3) ensuring that any remaining assets were divided among other beneficiaries (loved ones and/or charities) in specific shares. The wealth transfer tax exemptions were relatively low, and each state had its own version of an ancient law called the "Rule Against Perpetuities." The low wealth transfer tax exemptions tended to reduce the amount of assets which could easily be passed in trust for multiple generations without negative tax consequences. The Rules Against Perpetuities also generally prevented trusts from benefitting more than a few different generations of beneficiaries, by limiting the period for which trusts could exist. For these reasons, most estate plans tended to use trusts in very limited ways, and the trusts were often designed to last for a fairly short period of time before the assets would be distributed outright to the trusts' beneficiaries. Many people never thought much about their non-economic goals and desires for their families, in part because the short-term nature of the trusts used in their plans meant that their ability to have the trust administration truly reflect their desires would be correspondingly short-lived.

However, in the past couple of decades, a number of legal changes have made long-term trust planning both more possible and more attractive for many people. Many states have changed their laws to either significantly amend or abolish their Rules Against Perpetuities. These states now allow very-long-term trusts, from ones which will last for hundreds of years to those that may be truly perpetual. These long term trusts are often referred to as "dynasty trusts." In addition, the gift, estate, and GST tax exemptions have skyrocketed in the past few years: for example, the estate tax exemption was $625,000 in 1997, it was gradually increased over time, reaching $3,500,000 for 2009, and then recently increased to $5,000,000 for 2011 and 2012. The gift tax exemption and GST tax exemptions are also currently $5,000,000 each - much higher than they have ever been. The combination of these changes to the Rules Against Perpetuities and the wealth transfer tax laws means that people who wish to create very-long-term trusts can now do so much more easily.

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In addition to the changes in the laws regarding trust period limitations and wealth transfer taxes, more and more people are becoming aware that trusts, unlike outright gifts or inheritances, can offer a number of benefits beyond just the economic value of the trust's assets. These benefits can include protecting the trust's assets from a beneficiary's spouse in a divorce, from the beneficiary's creditors, and from predators who could try to take advantage of the beneficiary. The trust can also prevent its assets from being included as part of the beneficiary's own assets for wealth transfer tax purposes and, sometimes, for other purposes as well, such as determining eligibility for Medicaid or other needs-tested benefits. Trusts can also incorporate provisions designed to encourage beneficiaries to engage in certain behaviors the trust's creator views as positive, such as getting a college degree, getting married, having children, or engaging in charitable activities, and discourage behaviors the trust's creator views as negative, such as dropping out of school, refusing to work or be productive, abusing drugs or alcohol, or getting involved in criminal activity. This type of trust is generally referred to as an "incentive trust."

As a result of both fairly recent legal changes and increased awareness of how beneficial trusts can be, more and more people are beginning to use very-long-term trusts as an integral part of their estate plans. Long term trusts create both an opportunity for trust creators to have their values and goals reflected in the way their assets are used and managed for an extended period. They also create a strong need for clear, well-considered statements of the trust creator's goals and desires regarding how the trust should be managed and used. A clear statement of the trust creator's intent is especially important for long-term trusts since the trustee will need to interpret and apply this intent for tens, hundreds, or possibly even thousands of years into the future.

In developing your own estate plan, especially if you intend to use a long-term trust or an incentive trust as part of the plan, you should consider questions such as:

1. Is the trust intended to primarily benefit one person during his or her lifetime, such as a surviving spouse or a child? If so, what benefits, if any, should be provided to others whose lives may be involved with the primary beneficiary's life, such as the primary beneficiary's spouse or children? What about others who may someday depend on the beneficiary, such as elderly parents or in-laws, or a niece or nephew for whom the beneficiary becomes responsible?

2. If the trust has multiple current beneficiaries (ones who can receive benefits now, rather than having to wait until after other beneficiaries' interests have ended), should certain beneficiaries (or groups of beneficiaries) be favored over others, or should all beneficiaries be treated equally?

3. Should one or more of the beneficiaries of a trust be given practical access to and control over some or all the trust's assets? Do you want a beneficiary to be able to serve as his or her own Trustee, or as a Co-Trustee along with another party?

4. Should the Trustee be able to use assets for one or more beneficiaries as needed even if it means that the trust's assets will be used up and there will be nothing left for successor or contingent beneficiaries?

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5. Do you want trust assets to be the beneficiary's primary source of support, or to serve primarily as a "safety net" or source of supplemental funds to help the beneficiary accomplish his or her educational, business, and family goals?

6. Do you want the beneficiaries to have a particular standard of living, even if the trust's assets may end up being depleted to maintain that standard during periods of low investment returns, or should a given beneficiary's standard of living be secondary to the goal of ensuring that the trust's assets last over a long period, even if that means the beneficiary's customary standard of living may not be fully supported by the trust at certain times?

7. Are you concerned about a large trust fund negatively affecting the beneficiary's desire to work or otherwise be productive? What information should a beneficiary be entitled to receive regarding the trust? Do you want to include incentive trust provisions to encourage or discourage certain behaviors?

8. Is it important to you that your assets be used for certain purposes or to accomplish certain goals? Are there purposes for which you do not want your assets used under any circumstances?

9. Do you have charitable goals or a desire to create significant charitable benefits? Do you want your loved ones to be involved in philanthropic activities? How do you want to address your charitable goals or desires?

10. What messages regarding life, family, religion, charity, and other matters of substance do you wish to pass on? What legacy do you wish to leave behind? How do you want those who knew you to remember you? What impression do you want to make on others who never knew you, but who will be part of your legacy?

Your answers to these sorts of questions, and the extent to which those answers affect your estate plan, will be completely personal to you. If, when considering these types of questions, you discover that you really care about the answers, then you should ensure that your estate planning documents take your desires and concerns into account. Estate planning which truly and accurately reflects your intent will generally result in a fairly complex plan with complex documents. These plans may also involve a good deal more time, thought, effort, and cost than the less-intent-focused planning of the past. However, the rewards of true intent-focused estate planning, both to you and your intended beneficiaries, can be worth much more than the time, effort, and costs incurred. A plan which accurately reflects your true intent allows you to be sure that you will leave your truly desired legacy to your loved ones and community.

Do you want to get started on an estate plan which will truly reflect your intent and ensure you leave the legacy you really want to leave? Contact us at (678) 720-0750 or sollila@morgandisalvo.com to set up an estate planning consultation with either Richard Morgan or Loraine DiSalvo. You can discuss your planning intent and find out what benefits a plan which incorporates your intent can offer you and your loved ones. We look forward to helping you with these important matters.