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The Use of Trusts

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Trusts have been around for six centuries. In that timespan, their uses have evolved as circumstances have changed. Trusts were first used to distinguish between legal ownership and beneficial ownership. Trusts evolved out of this environment to find equitable solutions to difficult problems. Today the basic concept of a trust remains the same. It allows one person to have legal ownership while another person has beneficial ownership.

The use of trusts has evolved dramatically over the years and varies depending on the nature of the jurisdiction in which they are used. For example, jurisdictions that have complex tax systems have developed trusts in order to provide for tax and estate planning. However, in jurisdictions where tax is not a motivating factor, the use of trusts is a key ingredient in asset preservation.

Trusts are not a static environment. As circumstances change, the use of trusts in different jurisdictions continues to evolve and new and inventive uses can be applied.

It has not been long since Leona Helmsley, heir to the hotel chain, decided that she needed to ensure her pets were cared for following her death and wanted to provide a fund for their care. What better way to do that than through the use of a trust. But how can you have a trust where the only beneficiary is a pet and, even more thoughtworthy, how can you ensure that the trustee use the proceeds of that trust for the benefit of the pets? It's not as if the pet can initiate a lawsuit against the trustee for failure to take care of them. Nowadays, some jurisdictions in the U.S. specifically allow for this and a Purpose Trust may be the best vehicle. If you are contemplating this route for a client, there are many items to deal with including identifying the trustee, an intermediary (think Enforcer or Protector), a residual beneficiary and a possible limit on discretion.

As medical science advances, people are beginning to think that their lifespans can be extended or that cures for illnesses present in today's world will be available at some point in the future. In these circumstances, the concept of cryogenics is starting to be seriously considered throughout the world. Cryogenics espouses the concept that your brain tissue can be frozen and preserved until such time as a cure for the illness or disease that killed you is available, at which point you will be unfrozen and essentially recreated. I have had discussions with wealthy clients who look at the concept of cryogenics as a realistic option in the next 50-100 years. They want to know that should they be cryogenically frozen and, when the time comes, re-enter into the world, their money is available to them.

Here we have the most innovative new concepts of the use of a trust as the idea is to create a trust to hold the funds of the cryogenically frozen until the point in time when they may return. But is this a trust at all? Do we have to do anything to ensure that the law of trusts can meet these requirements where, in essence, one of the key requirements of a trust - being the certainty of objects - may not exist? There are a lot of



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other complicating factors including the involvement of subsequent generations, the assurance that the trust funds are maintained and the use of third party trustees to ensure that subsequent generations do not use the money in the trust for their own benefit rather than for the ultimate benefactor. Even more challenging is trying to design a trust for a person that may never live again and how to ensure that ultimately that person's wishes are honoured while the potential outcomes are all contemplated.

In this backdrop, jurisdictions have constantly been evolving to provide for such possibilities. Whether it is pet trusts or purpose trusts, a trust may be the tool that we are looking for to hold those unique assets or evaluate those unique purposes that have not been contemplated in the past.

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