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 draft-
ing 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 per-
mitting descendants to use the property under specifically
defined limitations.

For the trust’s liquid assets, consider allowing descendants
discretionary income and principal distributions. These distri-
butions 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 undermines legal challenges by disgruntled descend-
dants claiming the trust should fail for lack of a beneficiary.

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

Mr. Cryonic also could consider permitting one or more chari-
ties 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 pro-
vision 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 chal-
enges, 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 healthi-
er revival. Thus, the trust should be drafted to allow for distribu-
tions to the cryonic service provider to take advantage of techno-
logical 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 function-
ally 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 deci-
sions 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 exam-
ple, 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 pro-
tector 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 pro-
tector’s role is similar to that of a trust protector in a tradition-
aldynasty 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 flexi-
ble, 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 cry-
onic 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 protection, 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.

John P. Dedon is a partner in the Fairfax, Va., firm of Odin, Feldman & Pittleman. He concentrates in estate planning, tax, and wealth preservation. He may be contacted at john.dedon@ofplaw.com.