For Trusted Advisors

Creating a flexible estate plan through powers of appointment.

By Eva Stark, JD, LL.M.

When establishing an estate plan, it is impossible to anticipate all future changes in family dynamics, personal finances or applicable tax laws. For these reasons, it is often beneficial to incorporate flexibility in an estate plan so that an existing document may easily be adapted to changing circumstances. One widely used estate planning tool that can add significant flexibility is the power of appointment.

A power of appointment gives a person (i.e., the "powerholder") the ability to direct how the assets subject to the power of appointment will pass. A power of appointment may be made effective during the powerholder's lifetime (i.e., a lifetime power of appointment), or more typically, at the powerholder's death (i.e., a testamentary power of appointment).

Powers of appointment generally fall into two distinct categories: "limited" (also known as "special") and "general" powers of appointment. A limited or special power of appointment permits the powerholder to appoint assets to any person or entity EXCEPT the powerholder, his estate, his creditors, or the creditors of his estate. If the powerholder may appoint assets to a person or entity that falls under these four exceptions, a general power of appointment exists. Both limited and general powers of appointment may be drafted narrowly or broadly to achieve specific estate planning objectives, provided that the four exceptions above are respected.

Whether a power of appointment is considered general or limited is critical as each type has drastically different tax and nontax consequences. Limited powers of appointment typically do not cause estate inclusion and generally do not affect the basis of property subject to the power of appointment (they can, however, have tax consequences under certain circumstances). General powers of appointment, in contrast, will cause assets subject to the power of appointment to be included in the powerholder's taxable estate. Estate inclusion will generally occur even if the power of appointment is never exercised—its mere existence is enough. General powers of appointment also can trigger a basis adjustment to the amount equal to value which is includible in the powerholder's taxable estate.

Non-tax considerations also are important when creating powers of appointment. For example, a general power of appointment over a trust, especially if it is effective during the powerholder's lifetime, could allow the powerholder's creditors to reach trust assets, an often-unintended result. In contrast, a special power of appointment generally will not result in loss of creditor protection.

Due to these major differences, special powers of appointment are often used to allow changes in distribution schemes while general powers of appointment are often used to achieve certain tax objectives.

Common Uses for Powers of Appointment

CHANGING INADVISABLE DISTRIBUTION SCHEMES THROUGH SPECIAL POWERS OF APPOINTMENT

Suppose that Bob died and his estate plan left all of Bob's assets in trust

for his wife Mary for her lifetime. Bob's trust provides that at Mary's death, assets are to be divided into equal shares among Bob's three children, and each child's share is to be distributed outright once the child attains age 40. Suppose that all three of the children have attained age 40. The first child is an extraordinarily successful businessperson who does not need her inheritance and any inheritance would only exacerbate her own income tax and estate tax burden. The second child is a stay-at-home parent who is financially savvy and responsible. The third child suffers from a gambling addiction and faces substantial creditor problems.

It could be advisable for the family to channel the trust assets only to the second and third child and to prevent an outright distribution to the third child, but the trust holding Bob's assets became irrevocable at Bob's death.

If the trust grants Mary a limited power of appointment at her death, she could easily utilize that power to appoint assets only to the second and third child and direct that the third child's share be kept in trust for his lifetime for enhanced creditor protection of his inheritance.

TAX PLANNING THROUGH GENERAL POWERS OF APPOINTMENT

Suppose that George died in 2015 and left all his assets in trust for his son, Junior. At his death, George owned land valued at approximately $5 million and no other assets. George's executor allocated his generation-skipping transfer (GST) tax exemption to the trust, and all assets in the trust pass estate and GST tax free (the exemption in 2015 was $5.24 million). In 2020, Junior dies unexpectedly. The land is valued at $9 million at Junior's death. Under the terms of the trust, Junior's trust share passes to his only child, Jane. Jane faces a medical emergency and needs a substantial amount of funds immediately. The Trustee chooses to liquidate the land and distribute funds to Jane's medical providers. Assuming a 20% capital gains rate plus a 3.8% Medicare surtax (and no state income tax), the sale could produce a tax bill of $952,000. However, if Junior would have had a general power of appointment over the trust property, the value of the land ($9 million) would be includible in his taxable estate. Because this value is less than Junior's federal estate tax exemption amount ($11.58 million in 2020), no estate taxes would be triggered (assuming no applicable state-level estate taxes). For income tax purposes, the inclusion of the land into his taxable estate would also trigger a basis step-up in the value of the property to $9 million. As a result, upon liquidation, no capital gains would be produced. All income taxes on the sale would be avoided at no additional estate tax cost.

Simply granting all beneficiaries a general power of appointment at death is generally not advisable, because, as previously noted, the mere existence of the power of appointment will cause estate inclusion for the powerholder. A more precise method is to create a formula general power of appointment that may limit the power of appointment only to an amount equal to: (i) the powerholder's unused estate tax exemption (federal or state), (ii) appreciated property in the trust, and/or (iii) an amount that produces greater income tax savings than the added estate tax cost.

Alternatively, an independent third party might also be given the discretion to grant beneficiaries a general power of appointment at death to the extent that tax savings are produced.

Powers of appointment can add substantial flexibility and result in substantial tax savings if drafted properly. Clients who think they might benefit from such planning should discuss powers of appointment with their estate planning or tax attorney. Creating powers of appointment requires very precise planning and drafting as well as consideration of both tax and non-tax consequences.

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Coronavirus Aid, Relief, and Economic Security ("CARES") Act Establishes $2.2 Trillion Financial Backstop to U.S. Economy in Time of Crisis

On March 27, 2020, the U.S. Congress passed, and the President signed into law, a massive and unprecedented economic rescue package to provide a capital infusion to individuals and businesses alike. This legislation follows on the heels of two recent bills aimed at providing emergency medical funding support as well as paid sick leave for many employees. As the saying goes, desperate times call for desperate measures, and the sudden and immediate shutdown of large swaths of the US (and global) economy as a result of the COVID-19 pandemic has resulted in a surge of unemployed workers as well as businesses facing existential concerns. The government mandated closures have triggered a needed government response that has been crafted to include direct cash payments to many, as well as government secured business loans that may be forgiven to the extent proceeds cover payroll costs and certain fixed business expenses. And to demonstrate the true thoroughness of the legislation, Congress saw fit to mercifully grant a temporary exception from excise taxes on alcohol to producers of hand sanitizer.

Key Stimulus Provisions of CARES Act

- Expedited Small Business Administration (SBA) loans, for businesses with fewer than 500 employees, up to $10 million with loan principal forgivable up to the total cost of eight weeks' worth of payroll, rent, mortgage interest and utilities of the business;
- Payments of $1,200 per individual ($2,400 for married couples), plus $500 per child, for individuals with income below certain thresholds ($75,000 single/$150,000 married);
- Penalty-free access of up to $100,000 from IRAs and qualified retirement plans for partipants impacted by the coronavirus, plus increased loan capacity to such level;
- Waiver of required minimum distributions from IRAs and qualified plans for 2020;

- Deferral for payment of the employer portion of the FICA taxes payable in 2020;
- The ability to carry net operating losses incurred in 2018-2020 back to prior tax years in order to generate potential tax refunds this year and next; and
- Various other short-term tax rules changes, including additional incentives for charitable gifts.

Small Business Paycheck Protection Loan Program (PPP)

Perhaps the most significant and desperately needed program to be established under the law involves the ability for businesses with fewer than 500 employees to borrow up to $10 million through SBA loans under the Paycheck Protection Program (PPP). Not only is an immediate infusion of capital being made available to possibly hundreds of thousands of small businesses across the country, but also a portion of the amount borrowed may be forgiven as an effective grant based on the costs of payroll and certain business expenses.

Which Business Are Eligible for PPP Loans?

- In addition to small businesses normally eligible for loans under the SBA's 7(a) program, the CARES Act broadly expands the scope of eligibility to "**any business concern, non-profit organization, veteran's organization or Tribal business concern**." Such concerns must **generally have no more than 500 total employees**; however, the SBA may apply a larger standard for specific industries. Non-profits are specifically defined as 501(c)(3) organizations, so not all non-profit organizations are eligible.
- Notably, **for accommodation and food service businesses** (which includes most hotels, restaurants and bars under the NAICS 72 classification), the 500 employee rule is based on a per location basis. The applicable classification, however, excludes civic and social organizations, amusement and recreation parks, theaters, and other recreation or entertainment facilities. While employee figures generally include affiliates under applicable SBA rules, such affiliation rules are waived for hotel and food service industries, as well as franchises.
- The 500 employee threshold includes all employees, including individuals employed on a full-time, part-time or "other basis."
- **Sole proprietorships and independent contractors** are eligible for loans as well.
- Note that businesses that received an economic injury disaster loan (EIDL) after January 31, 2020, are still eligible for a PPP loan so long as the EIDL is used for separate purposes.

- Employers who obtain a PPP loan will not be eligible for the employee retention credit due to COVID related closure; however, such credits are limited to $5,000 per employee per calendar quarter, and are further limited to employment taxes payable during such period. As a result, it is likely that the Paycheck Protection Program will be much more attractive in most cases.

How Do Business Owners Apply for the Loans?

- PPP loans can be obtained through commercial banks, credit unions and other lending institutions, with the SBA providing a 100% guarantee for the loan to the lender. In order to expedite the processing of such loans, many of the requirements for traditional SBA 7(a) loans are being waived (including posting collateral, offering a personal guarantee, or demonstrating an inability to obtain loans through other channels, etc.).
- Loans should start to become available in early April, and the SBA indicated it is hiring 1000 people to assist with the expected massive volume of applications. Under the law, borrowers will have until June 30, 2020, to apply for a loan.
- For independent contractors, sole proprietors, and self-employed individuals, lenders are being instructed to verify eligibility through certain documents, including payroll tax filings, Forms 1099-MISC, and income and expenses from the sole proprietorship.
- Note that recently obtained SBA loans (after January 31, 2020) but prior to the enactment of the CARES Act, may be refinanced as a covered loan under PPP loan program.

How Much Can Be Obtained Through a PPP Loan?

- The **maximum amount that can be borrowed** is 2.5 times the borrower's average monthly payroll costs, **up to a maximum of $10 million**. Average monthly payroll costs are based on an employer's total 1-year payroll costs (as described below) prior to the date the loan is made.
    - *Example: A business applies for an SBA PPP loan on May 1, 2020. For the period of May 1, 2019, until April 30, 2020, the total payroll costs of the business were $2 million, for an average monthly cost of $166,667. The maximum loan available would therefore be **$416,667**.*
- For "seasonal employers" (to be determined by the SBA), the average monthly payroll is based on the 12-week period beginning on February 15, 2019 (or at the election of the borrower, the average based on March 1 to June 30, 2019).
- For new employers who may not have been in business prior to June 30, 2019, the average monthly payroll cost may be determined based on the period from January 1, 2020, through February 29, 2020.

What Are the Loan Repayment and Forgiveness Terms?

- The basic terms of the loan require a maximum 4% interest rate and 10-year maximum duration. Loan repayment on interest and principal is deferred for a minimum period of 6 months, and up to 1 year. All loans made under this program are furthermore free of any pre-payment penalties that may otherwise apply.
- The primary and obviously most attractive feature of these small business loans is the ability to not only obtain desperately needed capital in a time when revenues may have dried up, but also to have some or all of the principal repayment obligation forgiven. The **amount that may be forgiven** is based on expenditures **incurred during the eight-week period** beginning on the date of origination of the loan as to:
    - Payroll costs;
    - Interest payments on mortgages (incurred before February 15, 2020) on real or personal property of the business (not including any prepayments);
    - Rent payments under a leasing agreement (in force before February 15, 2020); and
    - Utility payments of the business including electricity, gas, water, transportation, telephone or internet access for which service began prior to February 15, 2020.
- Note that the total amount forgiven cannot exceed the amount borrowed. More importantly, however, the amount of forgiveness is based on the extent employees are maintained on the payroll of the business. Since the purpose of the program is to enable businesses to continue paying employees where it is otherwise unprofitable or impossible to do so, the amount forgiven is reduced proportionally based on any work force reduction during the first 8 weeks after obtaining the loan.

  To make such determination, the average monthly number of full time employees during the forgiveness period is compared to the average monthly full time employees of the business during the period of February 15, 2019, to June 30, 2019, or (alternately at the election of the lender), the average employees employed during January 1, 2020-February 29, 2020.

    - *Example: Assume total forgivable loan based on eight weeks of qualifying costs is $100,000, for loan beginning on May 1, 2020. Full time equivalent (FTE) employees as follows:*

January 2020	February 2020	Average Monthly	May 2020	June 2020	Average Monthly
24 FTE	20 FTE	**22 FTE**	18 FTE	14 FTE	**16 FTE**

- *The average proportion of employees retained is **72.73%.** Therefore, the **total amount forgivable is reduced to $72,730**.*

- The <u>amount of loan forgiveness may also be reduced</u> if the **salary or wages of employees** earning less than $100,000 annually **is reduced by more than 25%** during the eight-week period after the loan is obtained. The amount of forgiveness reduction is based on the amount of total wage reduction in excess of such 25% level, as determined by reference to the most recent quarter of earnings prior to the loan.

- While many employees may have already been furloughed or laid off as result of the forced closure of the business, the principal forgiveness reduction will not apply to businesses that re-hire such workers by June 30th. Any reduction in employment or pay occurring between February 15, 2020, and April 26, 2020 (30 days post enactment of the CARES Act), will not be included in any assessment of the forgivable principal amount if corrected.
  - *Example: A restaurant employing 25 individuals lays off the entire workforce as a result of the shutdown on April 1st. A PPP loan is obtained on May 1st. Assuming the entire workforce is rehired (or returns to a total of 25 employees) by June 30th, the average monthly full time employees in May and June will not otherwise trigger a reduction in the forgivable amount of loan principal.*

- Note that borrowers must request forgiveness from their lender by submitting documentation verifying the number of full-time equivalent employees, as well as their payroll costs, mortgage payments, rent payments and utilities payments.

What Items Are Included in "Payroll Costs?"

- Payroll costs are very broadly defined to include salary, wages, commissions, cash tips, as well as payments for leave (including vacation, parental, family, medical or sick leave), payments for group health care benefits (including insurance premiums), and payments for retirement benefits. Note that payroll costs <u>do not include payments made to independent contractors</u> hired by the business (as such individuals are expected to apply for their own loans).

- Payroll costs additionally **include income and net earnings from self-employment** of <u>a sole proprietor or independent contractor</u>.

- In all events, the maximum annual compensation of any employee or self-employed individual considered for purposes of forgivable loans is $100,000 (equating to $1,923 per week maximum, or $15,384 total per employee for eight weeks). Additionally, compensation for these purposes is limited to employees with their <u>principal place of residence inside the United States</u>.

- Payroll costs furthermore exclude any costs for qualified sick and family leave for which a tax credit is allowed under the recent Families First Coronavirus Response Act.

What About Businesses That Don't Necessarily Need the Funds to Operate?

- The law is intended to assist companies that are in need of funds to keep employees on the payroll in light of the sudden economic shutdown. As such, borrowers are required to certify with their loan applications that:
    - The uncertainty of current economic conditions makes necessary the loan request to support ongoing operations;
    - Funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; and
    - No duplicate loan applications are pending or duplicative amounts have been received.
- The lending institutions themselves are being delegated authority to verify the purposes and suitability of the loans. It is likely that additional guidance will be forthcoming from the SBA, but the immediate intention is to make loans available to largest swath of businesses possible. For the time being, it does not appear that immediate and specific financial distress must be demonstrated.
- While loans do not require personal guarantees, they are considered non-recourse to the business owner except to the extent that loan proceeds are used for a purpose not otherwise authorized.

Are Forgiven Amounts of Principal Taxable to the Business?

- While PPP loan principal that is forgiven is considered canceled indebtedness, the CARES Act specifically excludes such debt forgiveness from gross income for federal income tax purposes.
- While forgiven loans are therefore effectively tax-free grants to a business owner to help fund operations, it appears that a **deduction for business expenses funded via the loans should still be available** to offset taxable income as earned, a potentially significant tax benefit for businesses that maintain operations.

Individual Income Tax Items

The economic rescue package contains significant individual income tax provisions aimed at providing direct cash payments to millions of Americans and the ability to access retirement plan balances on a preferential basis as well. The most significant of such items includes the 2020 individual recovery rebate – an "advanced tax credit" that will be direct deposited in many individual's accounts in the coming weeks or otherwise mailed as a check.

2020 Individual Recovery Rebates

- Taxpayers with adjusted gross income (AGI) below certain thresholds are eligible for payments of $1,200 per individual ($2,400 for a married couple), plus an additional $500 for any dependents under the age of 17. Eligible recipients must be U.S. citizens or U.S. resident aliens, may not be claimed as a dependent on another tax return, and must have a valid ID number (generally, a Social Security number). AGI thresholds are as follows:
    - **$75,000** individual;
    - **$112,500** head of household;
    - **$150,000** married filing jointly.
- The rebate is phased out by 5% of income above such thresholds, (complete phaseout above $99,000 individual, and $198,000 married), and the phaseouts apply to rebates for children as well.
    - *Example: Married couple with 2 children and combined AGI of $180,000. Total rebate amount is $2,400 (couple), plus $1,000 for the children, or $3,400. AGI exceeds threshold by $30,000. 5% of $30,000 is $1,500 reduction in rebate to $1,900.*
- The determination of AGI is by reference to the taxpayer's 2019 tax return (if filed), otherwise the 2018 tax return. Notably, the rebate is being treated as an "advanced tax credit" reported on the 2020 tax return.
    - For taxpayers who will not be eligible based on ultimately reported 2020 taxable income, but who are eligible for and receive the credit based on 2019 or 2018 income, it is not considered likely at this point that any portion of the tax credit will need to be refunded, or will otherwise increase the taxpayer's tax liability when 2020 taxes are computed.
    - For taxpayers who are not eligible based on 2019 or 2018 income, but are eligible based on 2020 income, it is anticipated that such credit should be available to reduce the taxpayer's tax liability when the 2020 return is filed.

- Taxpayers who are not eligible for the rebate based on 2019 income and have not yet filed their return, but would be eligible based on 2018 income, may consider waiting to file their 2019 return (with current due date extended to July 15, 2020).

- Note as well that the credit is considered "refundable," meaning that a taxpayer does not need taxable income in order to be eligible. As a result, retirees who receive only Social Security and/or tax-free income will be eligible for such payments.

Preferential Access to IRAs and Qualified Retirement Plans

- Individuals who have been adversely impacted by COVID-19 have the ability (during 2020) to take a penalty-free distribution of up to $100,000 from qualified defined contribution retirement plans and IRAs. A 10% penalty normally applies to distributions from such plans for participants who are under age 59½. Of course, for those who continue to be employed, in-service distributions from employer sponsored plans may not be permitted under the plan document. In such instances, a plan loan under expanded terms (as discussed below) may be considered in the alternative.
- To be considered a "coronavirus-related distribution," the participant or account owner must:
    - Be diagnosed with SARS-CoV-2 or COVID-19;
    - Have a spouse or dependent diagnosed with such virus; or
    - Experience adverse financial consequences as a result of quarantine, furlough, being laid off, a reduction in work hours, or an inability to work due to lack of child care, business closing or reduced hours.
- Such **distribution may be included in income over a three-year period**. Conversely, the distribution may be re-contributed over a three-year period, in which case it is treated as an eligible rollover contribution.
    - As a result, an individual may elect to pay income taxes on the distribution over the next three years, or repay over the same period as essentially an interest-free loan.
    - Tax withholding obligations on such distributions will not apply to plan administrators.
    - While it appears possible to effect complete repayment in the third year, it is unclear what the impact of income recognition ratably over the prior two years would be. Additional guidance on this and several other questions will likely be required.

- Lastly, the CARES Act includes a provision permitting participants of qualified plans who have likewise been impacted by COVID-19 (as described above) to take **up to $100,000 in loans** (or up to 100% of the fully vested balance) from such plans, for a period of up to 180 days from March 27, 2020, the date of enactment. This is an increase from the normal loan limit of $50,000 or half of the vested account balance.
    - Additionally, repayment on plan loans for such qualified participants are delayed for one year, with interest accruing on the loans during such period.

RMD Waiver for 2020

As was provided in 2009 during the last recession amid the financial crisis, **required minimum distributions (RMDs)** for qualified plans and IRAs (though not defined benefit plans) **are waived for 2020**. A waiver is helpful for many retirees whose plan balances have been battered by the severe correction in financial markets, where they would otherwise be required to take a taxable distribution at potentially depressed values. Any rebound in markets could then accrue to the participant on a tax-deferred basis.

Charitable Income Tax Deduction Preferences

- Charitable deduction rules for individual taxpayers have been modified as well, to encourage those able to consider charitable giving during this tumultuous period, as well as to enable donors to benefit from increased generosity. Specifically:
    - The AGI limit to deduct cash contributions to public charities has increased from 60% under current law to 100% for 2020.
    - For taxpayers who do not itemize deductions (where charitable contributions are otherwise claimed), a $300 above the line deduction will be available for cash contributions to most public charities (though not private foundations or donor advised funds). As a result, relatively small charitable gifts will effectively increase the amount of the available standard deduction. This provision is effective in 2020, but continues indefinitely.

Student Loan Relief Provisions

- The CARES Act expands the existing exclusion for up to $5,250 of employer educational assistance (which currently applies to expenses such as tuition, fees and books), to include employer repayments of student loans. Employees may exclude employer student loan repayments made between the date of enactment and Dec. 31, 2020.
- Lastly, certain student loan repayment obligations under the Federal Family Education Loan (FFEL) Program and Ford Federal Direct Loan (Direct Loan) Program have been suspended until September 30, 2020, with no accrual of interest required.

Conclusion

The current situation related to the COVID pandemic has witnessed one of the most rapidly deteriorating economic environments in modern history. In spite of the extremely partisan divisions in Washington, the federal government has been able to enact a series of increasingly bold programs, most recently placing an enormous wager on the long-term prospects of the U.S. economy. Many observers are rightly concerned about the level of debt necessary to finance the multi-trillion dollar CARES package, on top of already high levels. While the near zero interest rate environment will help, the only way to ever ultimately repay the stimulus outlays is for a vibrant U.S. economy to flourish and lead the world as it has for many decades. The short-term infusion of capital to keep American businesses open and workers and their families housed and fed should provide much needed stability during unprecedented times and, hopefully, a swift recovery when the crisis abates. Morning in America cannot arrive soon enough.

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Trustee selection considerations.

By Eva Stark, JD, LL.M.

Many estate plans incorporate a revocable trust, an irrevocable trust, or both. Revocable trusts are typically set up to facilitate asset management during lifetime as well as to avoid probate and maintain privacy after death. Irrevocable trusts are generally created to help reduce estate taxes, protect assets from creditors or for special purposes such as providing for a special-needs child.

When a trust is contemplated or drafted, the issue of trustee selection necessarily arises. Who should serve as trustee? Should a family member (or friend) serve, or should a corporate trustee be selected? What should a grantor consider when selecting a trustee?

THE TRUSTEE'S ROLE. To understand what qualities are important in a trustee, it is important to understand the role of a trustee. The trustee is the person or entity who holds legal title to all trust assets and has a fiduciary duty to hold and manage the assets for the benefit of the trust beneficiaries. The most common roles of the trustee are record keeping, handling accounting matters, filing any required tax returns, tax planning, managing investments, making distributions to beneficiaries, exercising discretion in making distributions, and keeping beneficiaries informed; all as required by the trust instrument and applicable law.

TECHNICAL KNOWLEDGE. In order to carry out the myriad of duties required of a trustee, he, she, or it must have a broad range of technical knowledge and great organizational skills. As a result, corporate trustees generally employ professionals with substantial accounting, tax, trust administration, and legal experience and have sophisticated systems and software in place. In contrast, an individual trustee will often lack the knowledge and skills to carry out all of these duties. He or she will typically need to engage professionals such as accountants, attorneys, and financial advisors or risk breaching his or her fiduciary duties.

If a trust holds an interest in a closely-held family business, it is also important to ensure that the trustee understands the business. It is unlikely that a surviving spouse or a corporate trustee will have the requisite knowledge. A "special business trustee" can be considered to make decisions and take actions with respect to business interests held by the trust. Potential candidates for a special business trustee may be a family member who is actively involved in the business or a senior manager or executive working for the business.

UNDERSTANDING THE NEEDS OF INDIVIDUAL BENEFICIARIES. A family member serving as trustee is likely to have a deeper understanding of beneficiaries' circumstances and needs as well as family values and may be more effective at fulfilling the grantor's intent with respect to trust distributions. A corporate trustee will generally lack such depth of understanding and will likely use a more "one-size-fits-all" approach.

Familiarity with the beneficiary's needs can be especially important for special needs trusts, as an example. A special needs trust is a trust typically established for disabled children with the goal of enriching their lives without disqualifying them from government benefits. An individual trustee close to the beneficiary will

be better able to direct resources toward expenditures that most improve the beneficiary's quality of life; however, familiarity with the law for these trusts is paramount.

CONFLICTS OF INTEREST. Although all trustees must act in the beneficiaries' best interests, conflicts of interest can arise for both corporate and individual trustees. An institution may offer a multitude of products and services in addition to fiduciary services (such as investment products, banking services, etc.) which creates an incentive to steer assets in the direction of its own products and services without investigating better or less costly alternatives. Similarly, an individual trustee who is also a beneficiary, for example, may favor distributions to himself or herself or his or her descendants instead of other trust beneficiaries such as a step-parent or sibling. It is important for both individual and corporate trustees to recognize such potential conflicts and manage them accordingly.

RELIABILITY. Corporate trustees will typically be banks or trust companies, many of which have been in business for generations and are likely remain in place for many more. Individual trustees, on the other hand may die, become disabled, or refuse to serve as trustee when the time comes.

COST. Individual trustees typically serve for free but may expend trust resources for professional advice. Corporate trustees on the other hand can charge high fees which may render smaller trusts uneconomical. Individuals considering a corporate trustee should comparison-shop and evaluate the fees and services offered by various institutions. Avoiding a corporate trustee solely because of the potentially high upfront costs may be "penny wise and pound foolish" in the long run. Also, if a costly error does occur, a corporate trustee has the financial ability to reimburse the trust for the mistake; an individual trustee is unlikely to have the wherewithal to do so.

INDIVIDUALS TO BE AVOIDED. It is important to note that depending on the goals of the grantor and the trust's provisions, certain persons should never serve as trustee. For example, the grantor of an irrevocable trust created for estate tax reduction purposes generally should not serve as trustee of his or her trust as it could result in the inclusion of trust assets in the grantor's estate. Similarly, a spouse who is an insured on a policy owned by an irrevocable life insurance trust should also generally not serve as trustee since the life insurance policy could arguably become includible in his or her taxable estate. There are many situations where certain individuals should be avoided. It is important for clients to discuss with their attorney any limitations with respect to whom may be appointed trustee.

THE BEST OF BOTH WORLDS?
Choosing an individual trustee or a corporate trustee is not a binary decision. In many circumstances it may make sense to appoint an individual and a corporate trustee as co-trustees. The individual trustee may make decisions regarding distributions while the corporate trustee may handle other duties such as record keeping, accounting, tax questions or discretionary distributions.

MAINTAINING FLEXIBILITY. When creating a trust, it is important to name successor trustees or have a mechanism for the appointment of successor trustees. Where a corporate trustee is contemplated, grantors might also consider incorporating language for the removal of the corporate trustee, with or without cause, in case the trustee's handling of trust assets becomes unpalatable to trust beneficiaries or if the corporate trustee is acquired by a less favorable company.

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The cash value in a life insurance policy is accessed through withdrawals and policy loans, which accrue interest at the current rate. Loans and withdrawals will decrease the cash surrender value and death benefit.

As a result of the Tax Cuts and Jobs Act of 2017 (TCJA) the estate, gift and generation skipping transfer (GST) tax exemption amounts increased to approximately $11.18 million per person (approximately $22.36 million for a married couple). For asset transfers in excess of the applicable exemption amount and otherwise subject to such taxes, the highest applicable federal tax rate remains at 40 percent. While the exemption amounts are indexed for inflation, current law provides for an automatic sunset of these increased exemption amounts after 2025. As a result, the exemption amounts available in 2026 and beyond could be reduced to a level provided under prior law ($5.49 million/single and $10.98 million/couple in 2017, indexed for inflation) absent further action by Congress. In addition, under different rates, rules and exemption amounts (if any), there may be state and local estate, inheritance or gift taxes that apply in your circumstances. Please consult your own tax or legal advisor for advice pertaining to your specific situation.

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