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Functions of a Trust Protector during Biostasis and at the Time of Cryogenic Revival

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This article was adapted from a lecture given by John Dedon, J.D. at the 1st Annual Colloquium on the Law of Transhuman Persons, December 10, 2005, at the Space Coast Office of Terasem Movement, Inc., Melbourne Beach, Florida.

Editor's Note: Attorney John Dedon is a Partner with Odin, Feldman, Pittleman, PC in Fairfax, VA. In this article, he skillfully strolls through the hypothetical needs of Mr. & Mrs. Cryonic, an average American couple who have opted to be cryogenically preserved. Dedon addresses the Cryonic's specific and potential fiduciary needs (during biostasis and upon cryogenic revival) pertaining to trust protectors, asset management, beneficiaries, and possible litigation. These specific needs dictate that there be flexibility within current and future laws involving the rights of persons so preserved, and their families.

A trust and estate lawyer spends most of his or her time trying to save significant amounts of money in estate tax, ensuring that assets are passed down through the generations and protected for their descendants. But what are the functions of a trust protector during biostasis and at the time of cryogenic revival?¹

Mr. and Mrs. Cryonic

We begin with a hypothetical situation in which Mr. and Mrs. Cryonic are establishing a trust.² The primary purpose of the trust is to designate assets to be available upon their revival from a cryogenic state. These assets will be in place and protected during biostasis and also waiting for them when they are revived.³ Within their estate planning, the couple has an option of placing the assets in a trust. If they do not have the resources to do this, the assets can be placed in a trust

upon their death. We can explore this scenario within the framework of these traditional tools.

The couple may opt to create a dynasty trust, which is quite common. A dynasty trust is a trust where assets will pass down through generations, to future children and family members. This tool is already in existence; what do not exist are the rules for what happens if Mr. or Mrs. Cryonic does not come out of biostasis. In this case, where do the assets go? Does the law even allow to create such a trust for or those who have been cryogenically preserved?

As we explore these questions, let's set the scene. Mr. and Mrs. Cryonic are the grantors who have created a trust in which they are the primary beneficiaries. There may be other beneficiaries as well, but it is primarily for their use. In this situation, we will need a trustee who will be the person or entity that manages these

assets. Who should serve as trust protector in this situation and what exactly is their role during biostasis and upon cryogenic revival?

The Trustee

First, let's explore who the trustee is. The trustee could be an individual, such as a family member. Ideally, *"In a nutshell, the trust protector does what the grantors ... would do if they were alive."* However, as no one knows how long the trust will last, it is preferable to use an institutional trustee. An institutional trustee will provide permanence.

In choosing an institution, find one that will always have a successor, even if it is merged with another institution. An institutional trustee can provide professional management because this is something the institution does for a living. You also want the fiduciary duty that a corporate trustee can provide. A corporate trustee is going to be licensed and regulated and accustomed to handling these situations on a daily basis. In the case of a dynasty trust, it would be unusual for anyone but an institutional corporate trustee to serve as manager of the trust.

The Trust Protector

What is the role of the trust protector? In a nutshell, the trust protector does what the grantors (Mr. and Mrs. Cryonic) would do if they were alive.

The trust protector oversees the trust. In this role, we need someone who is flexible and can adapt to changes in the law and related facts and amend the trust as necessary. It would not be ideal for the trust protector to be an institution because an institution would not have this flexibility. It is unlikely that family or beneficiaries could serve as trust protectors because the trust may persist for decades or centuries, longer than their life spans.

We've eliminated family and institutions; the logical entity for this role is a law or accounting

firm. These entities have the licensing requirements and expertise, but are also flexible and relatively free of restrictions and regulations. They are able to move in and make appropriate changes. It is worth noting that a lawyer or CPA, as trust protector, has the same fiduciary duty of impartiality and loyalty to Mr. and Mrs. Cryonic and their beneficiaries as the institutional trustee does.

Functions of the Trust Protector

What are some of the specific things that the trust protector does? The trust protector might be asked to change the situs of the trust.⁴ Currently, the law allows one to create a dynasty trust that continues in perpetuity for beneficiaries. The trust protector needs to make sure this is possible. For example, South Dakota, Delaware, and Alaska are states that are friendly to dynasty trusts. If the state's laws should change, the trust protector could initiate a move to a more amicable environment.

The trust protector would also be trusted to change the trustee if they became unfriendly to what the grantor intends for their trust. If the trustee's philosophy unexpectedly changes or they are merged with another institution, the trust protector can find a new trustee.

If a trust instrument so dictates, the trust protector may also be the party to make distributions while Mr. and Mrs. Cryonic are in biostasis. If some of the trust is to be used to support children or grandchildren while the grantors are in biostasis, the trust protector would administer this.

Overall, the trust protector acts on behalf of Mr. and Mrs. Cryonic, perhaps even to the degree that they have the ability to rewrite the trust. The trust protector has great authority, so it is necessary to include restrictions on what he or she can do. For example, the trust protector may pay out distributions, but only within a limited

subset of people. Distributions may be given to children or lineal descendants, but not to other beneficiaries. Some distributions may be given to charities, but only those with a defined purpose.

When designing a trust like this, what happens if it becomes apparent that Mr. and Mrs. Cryonic will not be revived? What happens to the assets in this situation? This contingency must be built into the trust. What happens if the beneficiary that is named does not exist when it comes time to distribute the assets? The trust protector will have the authority and flexibility to make this decision (perhaps giving the assets to a charity or other entity).

In summary, the trust protector for Mr. and Mrs. Cryonic's dynasty trust would have many of the roles of a traditional trust protector. But they would also have other more sophisticated roles requested of them. The trust protector must also monitor the changing technology surrounding biostasis and revival. He or she must keep apprised of the current applications of nanotechnology and nanotechnology laws.

Due to the uncertainty of what we're talking about, it is more important than ever for the trust protector to have a very active supervisory role in monitoring whether the trust is going in the direction the grantors intended it to go. This is not the type of role that a typical institution would want or is equipped to do. It is a role that is more appropriate for a law or accounting firm.

Biostasis and Alcor

Let's assume that Alcor is the likely candidate for the preservation of Mr. and Mrs. Cryonic.⁵ Should the trust protector not only supervise and monitor the current laws, but Alcor as well? The trust protector must ask if Alcor is financially sound. Are they still offering the expected degree of care? Are there any new competitors to Alcor? Would these competitors be better able than Alcor to care for Mr. and Mrs. Cryonic? Do Mr. and Mrs. Cryonic have the resources that would allow them to be moved from Alcor to

another caregiver? The trust protector will have to make these types of decisions.

Biostasis and Litigation

There may be a situation where trust funds must be used in order to assist Alcor in caring for Mr. and Mrs. Cryonic. For example, Alcor describes a situation where they needed a court order to get a hospital to release a body to their care. If a hospital is reluctant, the trust protector will be able to use trust funds to pay for legal assistance to persuade the hospital to comply as quickly as possible to assure that Mr. and Mrs. Cryonic have the best chances of revival. In this situation, the trust protector might also be called on to navigate state regulations during such a move.

A situation might arise where the trust could be involved in litigation with Alcor. Perhaps we want to move Mr. and Mrs. Cryonic to a different caregiver and Alcor resists. Flexibility must be built into the trust to allow the funds to be used in this situation. It is impossible to know what all of the specific contingencies will be, thus we must allow for them when designing the trust and considering the role of the trust protector.

Ultimately, the trust protector should be authorized to use funds within the trust to retain whatever assistance is necessary to see that Mr. and Mrs. Cryonic are given the best chance for biostasis and revival to be successful.

This leads us to ask - what exactly does "revived" mean during the transition from biostasis to revival? I believe it means that the person is functional and able to live an independent life. This "revival" might take weeks or months to occur. Who will make the decisions as to what degree of autonomy is returned to Mr. and Mrs. Cryonic as they come out of biostasis? Again, it will be the trust protector. He or she must work with Alcor and with the trustee to ensure a smooth transition.

Terminating the Trust

Once the full revival is complete and independence is attained, we may no longer need the trust. When Mr. and Mrs. Cryonic are back in society and are productive, the trust may be terminated, or at the very least, they should have the option to terminate it. They may very well decide that they need some time to go by before they are entirely comfortable terminating it. They may still wish to continue to benefit from having the institutional trustee manage the assets for a time. At what point do they get full control? The trust protector can play a role in this decision as well.

Permanence

When choosing the institutional trustee, we mentioned the importance of permanence. This is also a factor in choosing a trust protector. How do you know that the accounting or law firm will be around forever? Safeguards must be built in to account for the possibility that they may not.

You may have an attorney or CPA that you're working with currently, but in reality, you are hiring a law firm. You are providing that if and when that attorney is no longer around, the law firm will be. It would be wise to have a trust protector with similar or the same institutional knowledge as the institutional trustee.

Timing

When does the trust protector get involved? Does the trust protector get involved upon the first or the second death of Mr. and Mrs. Cryonic?⁶ Do they get involved before either death? There is a strong argument for involving them while Mr. and Mrs. Cryonic are still living because who knows more about what their intent is and the cryogenic process than Mr. and Mrs. Cryonic?

By working with the couple now to do more than simply have a role in setting up the trust,

the trust protector will be able to get a sense of what their intent is. He or she will be able to work with Mr. and Mrs. Cryonic to define that monitoring role mentioned earlier.

By working with them now, the trust protector will be able to institutionalize that role within the law firm and preserve it. This will ensure that we are as close as we can be to the intent of Mr. and Mrs. Cryonic when some of these things need to be acted upon in future years.

As we explore the functions of a trust protector in this new field, we need to ask all of these questions and identify all of the potential issues. We must try to draft this role with flexibility in mind, notwithstanding the fact that we have an irrevocable trust that the terms (within certain limits) are to be adhered to long into the future.

Compensation

There are a host of ways to compensate the trust protector. He or she could be paid an annual fee which is a percentage of the managed assets. This is often how an institutional trustee is paid. Or, the trust protector could be paid an hourly rate or on a retainer basis.

One creative way to compensate the trust protector would be to build in an additional payment for when Mr. and Mrs. Cryonic are revived. This will create an incentive to monitor Alcor and the related laws and to motivate the trust protector to provide the best circumstances for the couple.

If a lawyer is serving as trust protector, he or she will be concerned about liability. Therefore, the typical liability indemnification provisions that you would see for that institutional trustee may apply for a trust protector.

The uncertainty of the possible situations discussed in this article dictate that the time is upon us to consider the needs, rights, and laws pertaining to cryogenic preservation and securing assets for future use.



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¹ Cryogenic – adj. a. Relating to or producing low temperatures. b. Requiring or suitable for storage at low temperatures. Stedman's The American Heritage Medical Dictionary, second edition. Boston, New York: Houghton Mifflin Company, 2004:195.

² For demonstration purposes, Mr. and Mrs. Cryonic represent an average American couple who are planning to be cryogenically preserved.

³ Biostasis: <biology> The ability of an organism to tolerate changes in its environment without having to adapt to them. Origin: Gr. Stasis = stoppage (09 Oct 1997). [The CancerWEB Project Online Dictionary](#) (March 3, 2006 11:53 A.M. EST)

⁴ Situs - (Latin) "Site"; fixed location; place. Usually a place where a thing has legal ties. Law Dictionary for Nonlawyers, Fourth Edition, Daniel Oran, J.D. (2000)

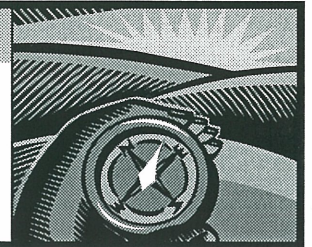
⁵ Alcor Life Extension Foundation – The world leader in life extension through cryonic preservation, since 1972. <http://www.alcor.org/> (March 3, 2006 11:55 A.M. EST)

⁶ The term, "first or second death" refers specifically to the query: At which time is the Trust Protector to get involved regarding an existing trust created by Mr. & Mrs. Cryonic, at the time in which the first spouse dies, or when the second spouse dies? As statutes regarding Trusts/Trust Protectors involving cryogenics have not yet been brought to legislation, this is merely conjecture and speculative; for educational purposes only. Editor's Note, Loraine J. Rhodes.

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 used 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.

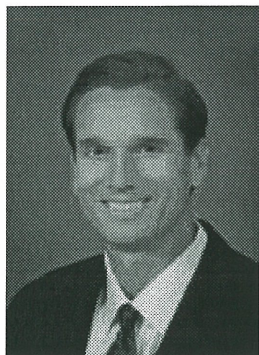
The challenges are many in drafting a cryonic preservation trust. To draft a dynasty trust, the model for a cryonic preservation trust, counsel must consider a myriad of complex asset pro-

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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Techniques including family partnerships, irrevocable trusts, dynasty trusts, cryonic preservation trusts, defective trusts, grantor retained annuity trusts and charitable planning often play a key role in the wealth preservation planning. He also provides solutions for clients wanting to preserve assets for special needs beneficiaries, such as children with handicaps, children with failing or failed marriages, and children requiring incentives to succeed on their own.

Mr. Dedon has been quoted extensively in newspapers throughout the country including the *Washington Post* and *Chicago Tribune* and as a nationally recognized expert on Supporting Organizations, he was quoted in a lead article on the subject in the *Wall Street Journal*. Mr. Dedon has written numerous articles for professional journals and publications on tax issues, and speaks on tax matters and wealth preservation issues for health care providers, certified public accountants, lawyers, financial planners and the public. He is also the author of Dedon on Estate Planning (<http://www.dedononestateplanning.typepad.com/>), a regularly updated discussion of estate planning topics affecting Virginia residents and U.S. citizens. In addition, he also conducts continuing education seminars throughout the country for CPAs and insurance professionals.

In 2007, Mr. Dedon was named among Virginia's "Legal Elite" according to *Virginia Business* magazine. His inclusion on this list means that he is among those lawyers recognized by his peers as the best in Virginia.

To view a video from John Dedon, [click here](#).

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- *Capital Gain, Plainly Explained: With planning, real estate sales don't have to be taxed as ordinary income.* Legal Times, September 2006
- *How to Take It With You: Cryonic preservation trusts help create new possibilities for clients.* Legal Times, February 2006
- *Wealth Preservation for the Technology Entrepreneur*, March 2000

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