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TRUSTS & ESTATES

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Crafting Structurally and Culturally Balanced Estate Plans

Moving beyond the comfort zone into the stretch zone

In the September 2022 issue of *Trusts & Estates*, we asked readers to pause and deeply consider: *Can your client's family live in the estate plan you create?*[1] Are the quantitative aspects balanced with the qualitative implications? How might the family members start to prepare themselves today to integrate the financial wealth they'll receive in the future?

Now, we invite our community to move beyond our comfort zone into a stretch zone to further explore these questions and some practical implications.

Bottom-Up Approach

Frequently, planners take a top-down approach to constructing an estate and gift plan focused on the wishes of the grantor, saving taxes and protecting assets. Over time, as the plan springs into action and is handed down to beneficiaries who are expected to function in that plan, we see that often, the plan doesn't work from the beneficiary's perspective![2] Advisors creating the plan frequently fail to appreciate that the reality of what they're doing isn't simply drafting documents to create legal structures but also creating the foundational design for a human experience that will likely continue over decades.

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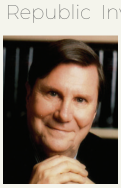

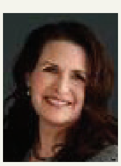

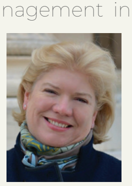

Tragedy or a Comedy?

Consider the metaphor that the drafter of the legal documents (trusts, limited liability companies) is akin to a playwright. The earliest of playwrights, the Greeks, developed the classical understanding of the difference between a dramatic tragedy and comedy.

As Shakespeare understood this difference, a tragedy ends with bodies lying on the stage at the end of the play. A tragedy for our purposes would be a family roiled in conflict, with trusts that undermine the growth and development of the beneficiaries. By contrast, a comedy is a play in which the characters are still standing in the final act. They aren't necessarily singing, nor do they need to be in complete agreement, but they've successfully resolved the play's crisis and are equipped to live on.

How might we develop a play that creates a comedy—where the beneficiaries and all the other members of the Trustscape[3] can work through issues and are equipped to live flourishing lives?

A Gift of Love

One wise team of attorneys, when founding a new law firm, committed to starting every trust they drafted with the words: "This trust is a gift of love; this trust exists to enhance the lives of its beneficiaries."[4] Adding this language to each trust lays the foundation to set the stage and tone to open the door to ongoing qualitative planning. This approach invites creating a play in which the beneficiary might flourish.

These words empower (require!) the trustee to consider the beneficiary and to develop an understanding of what enhancement means to that individual. It's an invitation to step beyond the administrative and investment roles of the trustee to truly engage with the beneficiary in a meaningful and enduring relationship.

Conduct a Feasibility Study

Can your client's family live in the estate plan you create? If you're not so sure, consider borrowing a practice from the business field and conduct a feasibility study.[5]

Before a company launches a new product or service, to make an informed decision and increase the probability of success, it runs a feasibility study. The essence of a feasibility study is to effectively examine if the conditions for success and the intended outcome can be met. Of course, this first requires clarity on the key objectives (purpose) of your estate plan and identifying the conditions for success.

If the estate plan's purpose is to enhance the lives of all beneficiaries and support them in moving towards their potential, what does success look like?

Here are four steps to assessing your plan, followed by a case study in which each step is applied to a family situation. See "Four Steps to Assessing Your Plan," next page.

The aim of the feasibility study is to figure out where you can pivot, adjust and fine tune so that the experience the plan creates is livable—essentially addressing both the quantitative objectives (for example, taxes, creditors and decision making) and the qualitative objectives (managing naturally arising conflict and the evolving needs of the beneficiaries). This is accomplished through building in agility and aligning stakeholders before creating irrevocable structures.[6] This also requires committing to ongoing learning so that family members have the mindset, skills and support to effectively integrate financial capital when it's received over time.

While ideally, the feasibility study is done before irrevocable structures are created to achieve optimal value, the family can still gain insights along the continuum. Meet families where they are by engaging with this practice to proactively ignite their ability to gain insights on the many levers within the system and to act when agility exists.

Case Study: The Lopez Family

Pablo and Anna Lopez, in their early 60s, are leaders in their community, dedicated to both running a large operating company and maintaining a connected family with their four adult children and six (and growing) grandchildren. Pablo's father started the company over 50 years ago with a dual purpose of providing reliable employment opportunities in their community and building financial security for their family. An engineer, Pablo was intrigued when systems didn't work well and, over the years, implemented multiple innovations that were industry game changers, increasing worker safety and company profitability. An intuitive, caring "people person," Anna was the connector for building a strong corporate culture and developing practices to support a healthy workforce, company and community, well before environment, social and governance was a thing.

Following are four steps to assess Pablo and Anna's plan.

The hypothetical family understood the value of constructive conflict, but they also understood the need for one united "voice of the family."

Purpose

The process started with a conversation with Pablo and Anna, as trust creators and heads of their family, to understand their purpose at a deeper level.

Defining the macro factors of what they desired to achieve with their estate plan, they identified what they want to stand for (essentially what they sought to promote in their plan) and what they stand against (or what they want to avoid or prevent with their plan). Ultimately, they chose three key themes as success criteria based on promotion and prevention:

Promotion. Do:

- Support the growth and development of each family member moving toward their potential and contributing to society (including thoughtfully supporting entrepreneurship, socially responsible jobs and working artists as culture carriers).

Four Steps to Assessing Your Plan

Is it feasible?

PURPOSE	ASSUMPTIONS	"WHAT IF"	DIAGNOSE
What's the purpose of the estate plan—usually expressed as a number of key objectives (Yours? Your client's?) What are all the criteria for successfully achieving these objectives (quantitative and qualitative)? How does the plan account for future beneficiaries? Where do multi-generational objectives: • align? • diverge? • conflict?	What are the major assumptions in the plan? What are the risks if the assumptions don't hold up? What can you do to gain greater confidence in the quality of the assumptions behind the plan? What do you know about the interests, hopes, expectations of the family members the plan impacts?	How might you give your plan a test drive? • Run a small-scale trial • Conduct a short-term test • Test some aspect of the plan by walking through alternative scenarios with your client and considering all the implications, both for today and for future generations	Re-examine your criteria for success and rate your plan's ability to meet them from 1-5 (5 being highest) Update plan as needed to bolster success factors

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- Continue to grow the company in a sustainable way to provide positive impact for employees, community and owners.
- Maintain strong family harmony in current and future generations.

Prevention. Don't:

- Undermine growth and development of family members (by interfering with opportunities to struggle/build resilience), being overly protective and overly enabling and fostering risk aversion for fear of failing to live up to legends of elders.
- Lack an emotional connection to the company and fail to focus on making the world a better place for others.
- Use financial capital as power and/or cause unresolved conflict.

Assumptions

After outlining the many assumptions underlying the plan, both parents and siblings were the most concerned about the siblings' ability to work cohesively as owners. (To streamline our case study, we'll focus on this single factor.) They understood the value of constructive conflict and the importance of all voices being heard, but they also understood the need for the family to routinely work out their differences and then present one united "voice of the family" to the business. Without this, the purpose of the company would be difficult to achieve.

Run "What If"

Considering the importance of the siblings' ability to work effectively together as owners, the family invested in testing their assumption by purchasing a small company for the siblings to run. With a budget funded by their parents, the siblings interviewed and

hired a family business consultant to work with them for the next two years to build their understanding of what it took to be an informed and responsible owner, build capacity to make shared decisions and advise business management with one voice. (None of the siblings worked day-to-day in the new business. Their focus was on their role as owners.[7])

Diagnose and Adjust

After two years of meeting together for two days each quarter and making decisions together as owners, it was clear to all four siblings and the consultant that, while three of the siblings had built capacity to work cohesively as owners, the fourth sibling (let's call him Roberto) determined that he didn't have the interest or disposition to be an owner with his siblings.

Grappling with this realization, they reflected on their shared commitment to their family's three core purposes:

1. Support the growth and potential of each sibling
2. Sustain the company
3. Maintain family harmony

The family worked with their advisors to create a fair and transparent gift and estate plan that passed the business ownership to three siblings, while providing for Roberto with separate assets. They also had a candid conversation about what they could do to protect against the risk that Roberto would feel excluded from the family because he hadn't opted in as a business owner.

Armed with this intelligence, they were able to pivot and adjust. They crafted guidelines to ensure the whole family had other ways of engaging, including connection points around holidays, vacation travel and volunteer work. They also set healthy boundaries around limiting business discussions at family gatherings. And they built in an escape hatch for future owners in the grandchildren's generation.

While it's hard to quantify the tremendous value of what they learned and the benefits of their actions to tailor the plan to the capacity of their family, it's clear that this family would have been at high risk of contentious disputes—which could undermine the estate plan, and importantly, the family's three core purposes.

It's important to note that the work is ongoing. Leveraging research,[8] the family and advisors continued to work on understanding and building the five pillars of competent, committed and sustainable ownership: (1) shared values and goals; (2) ownership competences; (3) psychological glue; (4) informal family governance; and (5) formal family governance.

Their investment of time, energy and financial cost allowed the family to "go upstream" to experiment and learn. A qualitative plan needs to include the right amount of challenge for current and future beneficiaries along with support to navigate these challenges. (This is different from simply removing the challenges for the family members.) See "Actions for Positive Impact," p. 20.

Only when a plan has expanded to provide guidance for the qualitative needs of the family can that family flourish over generations.

Qualitative Planning

We hope you now understand that no family can live within the experience the plan creates unless it evolves beyond the purely quantitative objectives that deal with economic, material and technical aspects. Only when a plan has expanded to provide guidance for the qualitative needs of the family can that family flourish over generations. This involves a significant investment of time and energy from the family and the planner into understanding the deepest human objectives the family seeks to achieve and build a platform to support the family in achieving these objectives. A qualitative estate plan is more than just the legal documents. A family with just a deed is like a group of actors without a play. That family needs its scripts, rehearsals, direction and a willingness to explore and evolve through improvisation. This is a much more expansive engagement than simply

Actions for Positive Impact*

Nine practical ideas

Reflect on Past Plans and Learnings

As advisors to families, step back and reflect on the plans you had a hand in creating over the years.

As those plans later sprang into action, what was the outcome?

What are the factors and indicators when a plan:

- Is working?
- Isn't working?

Go Deeper in the "Why" Questions

Many advisors have perfected the art of the "how" (saving taxes, restricting control and protecting assets), but far fewer go deep enough into the "why" and timeless questions. Admittedly, having these meaningful qualitative conversations requires a huge commitment to learning and growing[1] and an investment of time and resources!

Knowing answers to our "why" questions leads to purpose; purpose leads to action. It drives us forward.

Provide Guidance and Clear Intent, With Built-in Agility

Include a preamble[2] (Grantor's Letter of Wishes)

After experiencing an estate attorney being called out of retirement to attempt to articulate grantor's intent in a family meeting, it's hard to overstate the value of a preamble to the family.

Trustees also frequently cite having a Grantor's Letter of Wishes as the one thing that makes a big difference.

Develop a Highly Functioning Distributive Methodology

Read *TrustWorthy* (Hartley Goldstone and Kathy Wiseman, Trustscape LLC 2012) and tap into the wisdom of appreciative inquiry[3] (bright spots).

As you read the 25 stories of showcasing positive beneficiary/trustee relationships, ask:

- What are the conditions that gave rise to this positive outcome?
- How might we tailor the plans we create to include these conditions?

Include the Voices of All Key Stakeholders

Including family from the beginning decreases the risk of conflict.

Given the ever-evolving river of life, allow space for the rising generation to bring their own voice.

Balance the polarities of control and freedom — allowing members to experience the benefits of each while learning to manage the downside that results from overemphasizing either one over the other.

Craft the Plan to Support Well-Being

Drawing on learnings from the field of positive psychology, draft the plan to support flourishing.[4]

How might the trust experience amplify the core attributes of well-being:[5]

- Positive emotions
- Engagement
- Positive relationships
- Meaning
- Accomplishment
- Health
- Mindset
- Environment
- Economic security

Use a Dual Lens: Prevention and Promotion

Recognize that the trust documents you're creating will significantly impact the lives of each beneficiary.[6] Imagine what life for each beneficiary will be like under these trust terms. Seek to move beyond the standard of "do no harm" to *also* enhance lives of beneficiaries.

Leave Room for Flexibility

Build an agency clause that allows flexibility for the trustee to hire (and pay) a holistic team (including learning specialists, coaches, health and wellness professionals, psychologists) and encourages the trustee to exercise this right when the need arises.

Create a Generative Trust

A generative trust starts with a clear purpose. Attorney John A. Warnick recommends reflecting on the two "golden questions of trust creation":[7]

- Why am I creating this trust?
- How would I want to be treated if someone were creating a trust for me?

*Endnotes appear in sidebar, next page.

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drafting a will or trust. And much more rewarding for the family and planner.

As a family's trusted advisor, consider whether the purpose of your advice is to help that family flourish, and in turn, through their flourishing, to create a flourishing society. We invite you to step further into the world of qualitative estate planning, where your empathy for the experience of the members living within the plan can shape a better world.

Find Bright Spots

To combat a key villain of decision making, narrow framing, and to spark inspiration, decision professors, researchers, brothers and authors Chip Heath and Dan Heath suggest widening your options, including finding others who have solved your problem.

For the question we're grappling with, "Can your client's family live in the estate plan you create?" consider:

- Where are the examples of success (or closest thing to success) you've seen to date in your life?
- What can we learn from others who have made progress in similar situations?

If you can answer that, you've got a "bright spot."[9]

Endnotes

1. James E. Hughes Jr., Stacy L. Allred and Mary K. Duke, "Can Your Client's Family Live in the Estate Plan You Create?" *Trusts & Estates* (September 2022).
2. This is evidenced with the increased estate litigation, as mentioned in our earlier article. *See ibid.*
3. "Trustscape" describes a subsystem within the larger family system. Members of the trustscape are those connected by a trust agreement— trust creators, trustees, beneficiaries, trust protectors, committees and their advisors. Hartley Goldstone developed the idea of the trustscape.
4. This commitment, made by trusts and estates attorneys Don Kozusko and John Lahey, was endorsed by James (Jay) E. Hughes Jr.
5. In scanning to see if others have adopted the idea of feasibility studies with estate planning, we came across the work of Nancy G. Henderson, who discusses feasibility studies and the steps involved in determining whether it's reasonable or practical to plan to preserve a particular property. *See www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/posts/the-importance-of-feasibility-studies-in-estate-planning.*
6. While ideally, the feasibility study is conducted before irrevocable documents are created, we recognize the need to meet families where they are and have found value at exploring a feasibility study with families knee deep in living with the estate plans, mining experiential learning and further understanding the levers of the system to adjust to increase the probability of a better outcome.
7. To further explore the simple question "what characterizes good owners?" (which, turns out, isn't so simple after all), *see* foundational research, sponsored by the 2086 Society and the Family Firm Institute, conducted by Claudia Binz Astrachan, Matthias Waldkirch, Anneleen Michiels, Torsten Peiper and Fabian Bernhardt, "Professionalizing the Business Family—The Five Pillars of Committed and Sustainable Ownership."
8. *Ibid.*
9. For more depth on the idea of "bright spots" *see* Chip Heath and Dan Heath, *Switch: How to Change Things When Change Is Hard,* (Crown Business 2010), Chapter 2.

Endnotes "Actions for Positive Impact,"

1. *See* Edgar H. Schein and Peter A. Schein, *Humble Inquiry: The Gentle Art of Asking Instead of Telling* (2021).
2. The idea of creating preambles is explored in Hartley Goldstone, James E. Hughes Jr. and Keith Whitaker, *Family Trusts: A Guide for Beneficiaries, Trustees, Trust Protectors, and Trust Creators* (Bloomberg 2015), Chapter 10.
3. Learn more about "appreciative inquiry" at "Appreciative Inquiry Commons," *http://appreciativeinquiry.case.edu.*
4. Richard S. Franklin and Claudia E. Tordini, Franklin Karibjanian & Law PLLC and Appanage LLC, "Well-Being Supported by Family Wealth—A Foundation to Flourish." *See also* Richard S. Franklin and Claudia E. Tordini, "A Framework for Family Wealth and Well-Being," *Wealth of Wisdom, Top Practices for Wealthy Families and Their Advisors* (Wiley 2022), Chapter 4. American College of Trust and Estate Counsel fellow Raymond C. Odem has also done significant work in this area.
5. Martin E.P. Seligman, professor and director of the University of Pennsylvania Positive Psychology Center, created the PERMA Theory of Well-Being Model (the Model). Other researchers have added to the Model, for example, Michelle McQuaid, who added an "H" to designate "health" (PERMAH). Recently, Prof. Scott Donaldson expanded the Model to include mindset, environment and economic security.
6. James E. Hughes Jr., *A Reflection on the Often-Unexpected Consequences of the Perpetual Trust.*
7. John A. Warnick, "Expressing Purpose in Your Trusts," in Tom McCollough and Keith Whitaker, *Wealth of Wisdom: Top Practices for Wealthy Families and Their Advisors* (Wiley 2022), Chapter 18.

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