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Fourteen Tips for More Flexible Trusts

The Tax Cuts and Jobs Act dramatically changed trust planning. Though many of those were sunset provisions, it's still possible a new administration may yet again change the rules.

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If you were creating a trust 100 years ago, what would have been on your mind?

World War I had just ended. Automobiles were becoming more common. There were no commercial airplanes. Babe Ruth was a pitcher for Boston. Women didn't

have the right to vote. Divorce was very rare. Adopted children didn't have a right to inherit from grandparents. Children born outside of marriage were scorned and had no inheritance rights.

Consider the rapid pace of changes in social norms, technology and the law over just the past decade, let alone the past century, in terms of topics such as same-sex marriage, gender identity, assisted reproductive technologies, digital assets and cryptocurrencies. And, of course, the tax landscape is always changing.

The process in which we do estate planning hasn't changed at near this pace. Too often, the manner in which practitioners endeavor to help families plan is mired in our past ways of doing things rather than thinking ahead and planning for the next 100 years. With the trend toward longer lasting (even perpetual) trusts, most trusts are being designed to contemplate that they'll still exist in hundreds of years, if not longer, if the assets aren't fully depleted sooner.

With this in mind, we're in the chorus of those singing about the need to draft trusts for flexibility. Let's consider these 14 recommendations for creating trusts that can bend like Gumby and change with the times.

This gallery is adapted from the authors' original article in the .

A composite image showing a close-up of a dark baseball glove and a green plastic toy figure (resembling Gumby) standing next to it. The toy has a smiling face and is holding its hands up to its head.

Fourteen Tips for More Flexible Trusts

1.

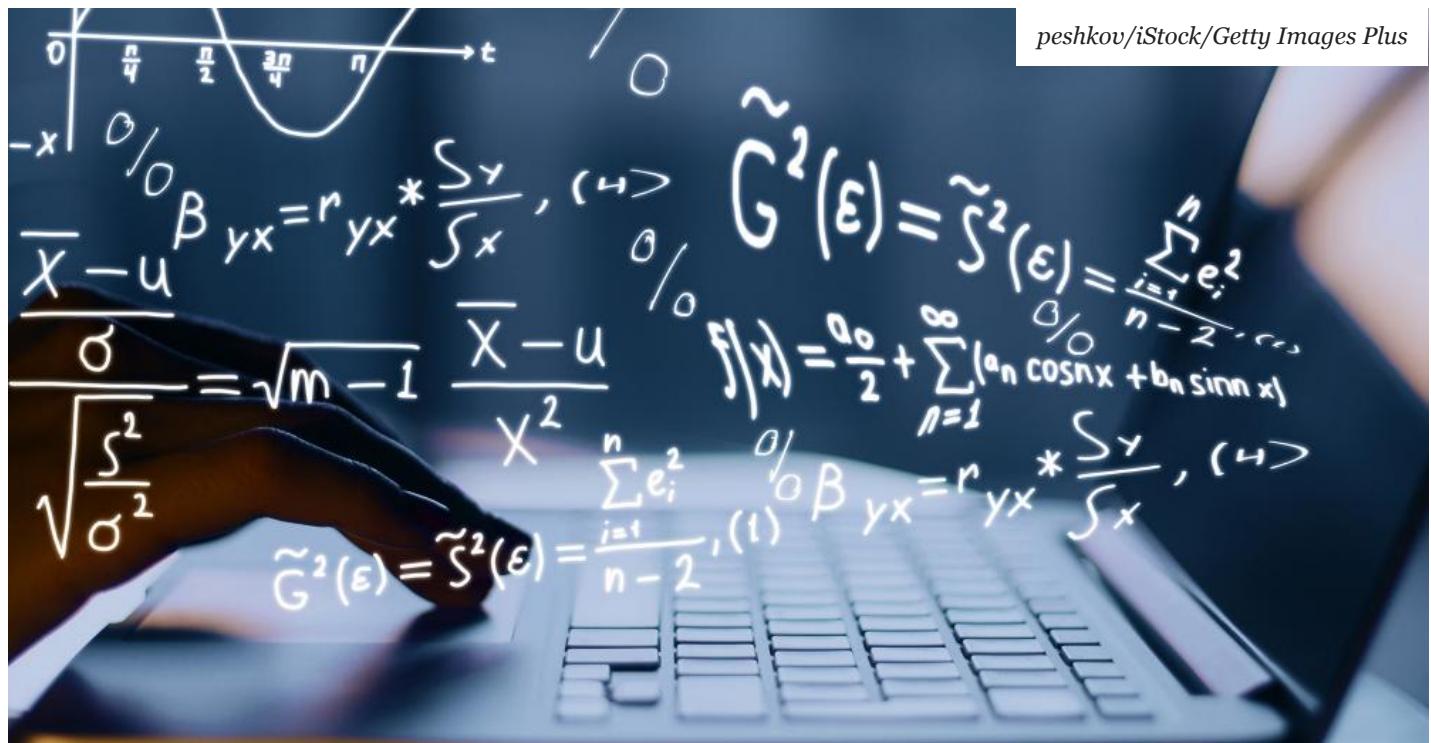
A close-up photograph of a person's hand holding another person's hand. The person whose hand is being held appears to be elderly or ill, wearing a hospital gown and having an IV drip attached to their arm. The lighting is dramatic, with strong shadows.

KatarzynaBialasiewicz/iStock/Getty Images Plus

2. 1. Continue Sophisticated Planning

For many wealthy clients, there may be little need in today's environment for estate tax planning. But, given the frequent changes, estate planners consider continuing to

integrate estate and generation-skipping transfer tax planning into new instruments. While it's impossible to anticipate future changes, having more flexibility should the exemption be reduced or the estate grow is advisable. The most flexible estate plan incorporates almost all of the possible trusts that should be created at the first spouse's passing.



3. 2. Consider a Single Fund QTIP

Instead of always using a marital deduction formula, consider the single fund QTIP trust with permission for disclaimer and Clayton elections as the estate tax formula of choice, essentially delaying the decision on the funding amounts for each trust (state exempt trust, federal exemption trust, marital trust and portability considerations) until the first spouse passes away.

You can make decisions on portability, the use of a CST and deferral of state inheritance tax at a later date.

A photograph showing two men in business attire, one in a blue suit and bow tie, the other in a grey suit, shaking hands. The man in the grey suit has his left hand on his hip. The background is bright and slightly blurred.

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4. 3. Avoid Gendered Pronouns

At the turn of this century, same-sex spouses were unthinkable by many, and yet now they're legal in the United States and many other countries. In the future, what will be permissible? Plural marriage? Other arrangements? To keep documents flexible in tone, avoid terminology like "husband" and "wife" or any other gendered nomenclature in drafting. Consider using just "spouse." Evolving social trends is another important reason to include trust protector and decanting provisions in the trust instrument as well as a change of situs mechanism. If the old language doesn't suffice, amending or decanting into a new instrument (and perhaps moving to a state with more favorable law before doing so) can provide the flexibility to modernize the trust as necessary.



5. 4. Use Broad POAs

Consider broader powers of appointment (POAs), for example, to anyone other than creditors, the estate, self or creditors of the estate. But, as with so many suggestions for flexibility, planning must be tailored or granular to that particular client. Some client circumstances will be best served by a very broad special POA, while others require more limited POAs. But, the incorporation of POAs into documents has and will continue to grow in importance as a tool to add flexibility to plans. However, the growing use of powers demands that estate planners encourage clients to come back for periodic reviews (annually being ideal) to go over and fine tune the implications of powers and other concerns.



6. 5. Consider Trust Protectors

Some practitioners remain uncomfortable enabling trust protectors to amend trusts. Those fears should have long since passed, and permitting a trust protector to make changes to trusts has become the norm. Also, different people/positions may be provided for in addition to a trust protector to enhance flexibility, such as a power to loan trust assets to the grantor or to add a charitable beneficiary. Note that it isn't necessary to name a trust protector in the instrument if there isn't an obvious candidate, and you don't want to involve a third party in the trust initially. But at a minimum, the trust could permit someone to be appointed who can make amendments to the trust.

Consider protections in all trusts along with express decanting powers, special limited POAs or broader trust protector provisions. Give thought as to who should hold these powers, the status of the position that's granted each power and the impact on the overall plan.



7. 6. Consider Power to Substitute Assets

Consider including the power to substitute assets. This power becomes especially important as the estate tax exemption increases and income tax planning becomes more relevant for step-up in basis purposes. In many settings, a grantor of a grantor trust may want to substitute high basis assets for low basis assets, and the substitution power is one way this can be achieved (a purchase agreement is another). These benefits are also why the view that non-grantor trusts are the new default planning tool can be inadvisable. For ultra-high-net worth clients, it may be preferable that certain of their assets be held in grantor trusts for basis step-up purposes via the swap power and other assets be distributed to non-grantor trusts that don't need the possible benefits of the swap power.



8. 7. Name Charitable Beneficiaries

Consider granting someone the power to add charitable beneficiaries in a grantor irrevocable trust, characterized as a grantor trust. It may reduce amounts going to beneficiaries, thereby providing a disincentive for beneficiaries to challenge trustee actions. Use caution in deciding how this power or similar or related powers are used.

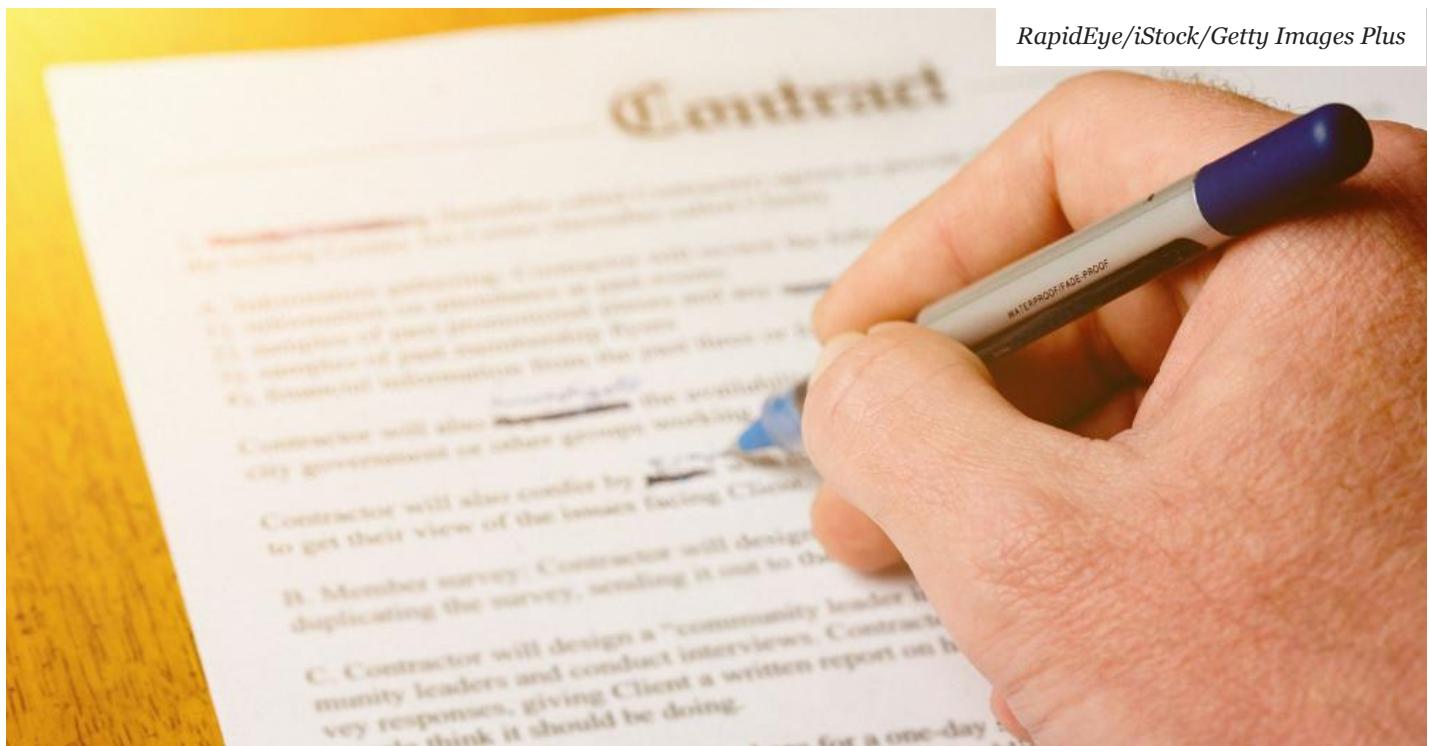
Given the post-Act increase in the standard deduction, it can be advantageous for many clients to structure non-grantor trusts with charitable beneficiaries so that they can use the Internal Revenue Code Section 642(c) deductions to claim a 100 percent deduction of donations, whereas the same settlors might have realized no deduction had the donations been made personally because of the doubled standard deduction. This must be distinguished from giving a power to add charitable beneficiaries, which would characterize the trust involved as grantor for income tax purposes, thereby defeating the hoped-for income tax benefits.

In all events, the flexibility to add or give to charity in irrevocable trusts can provide further flexibility to irrevocable trust plans.

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9. 8. Grantor Trust Status Turnoff

Consider the flexibility of providing a mechanism so that grantor trust status can be turned off. There are a number of ways to accomplish this. The settlor should have the power to renounce a grantor trust power. A spouse acting as trustee could have the power to resign. And, a trust protector should have the power to amend the trust both to add or remove grantor trust powers. Finally, in most states, there should be a provision permitting the trustee to reimburse a grantor for taxes paid.



10. 9. Trust Conversion

Closely related to the power to turn off grantor trust status above is the flexibility to transform a grantor trust into a non-grantor trust and vice versa. But, be cautious of possible adverse income tax implications (for example, converting a grantor trust into a non-grantor trust while the trust holds a note resulting from a note sale transaction). Income tax status planning and allocation of taxation to different parties under trusts will continue to be critical going forward. Third parties, perhaps special power holders (not trustees because fiduciary capacity may inhibit or prevent the exercise of certain powers) need to have the power to convert from grantor to non-grantor trust and back again.



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11. 10. Allow for Change of Situs

It may be beneficial to change trust situs to a more favorable jurisdiction for state income tax and creditor protection purposes. Include both change of situs and trustee designation provisions in the documents, and discuss the benefits to clients at a follow up estate planning meeting.



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12. 11. Provide Creditor Protection

Lawsuits are becoming more plentiful, especially plaintiff actions. People are greedy, lawyers are creative, life is more complicated and people are feeling more entitled. All variables to increase the abundance of lawsuits.

Most clients, certainly those educated on possible options, want to establish trusts for creditor protection purpose. Consider several mechanisms to enhance creditor protection and thereby infuse more flexibility into the trust, such as: (1) beneficiary trustees should be able to renounce their trusteeship, and (2) trusts should provide for the appointment of independent or institutional successor trustee, change in situs and governing law and discretionary distributions only by independent trustees.



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13. 12. Give Each Generation a POA

Make sure each generation has a testamentary POA, broader than just to descendants. Consider adding trust protectors to allow change in the terms of trusts. Clients should meet regularly with an advisor team to address these issues. Further, at some point in that periodic review meeting process, the next generation should be brought in to the extent appropriate so the planning, including use of powers, can be monitored and used as appropriate.



14. 13. Expand the Definition of “Child”

Considering all the forms of assisted reproductive technologies like artificial insemination, in vitro fertilization and surrogacy, genetic manipulation and designer babies are likely to increase. Family definition provisions regarded as state of the art a decade ago are already outdated. Endeavor to use definitions of “child” or “descendant” that are broader.



15. 14. Allow Beneficiaries to Move Abroad

The world is becoming a much smaller place. Will clients' descendants continue to be U.S. citizens? Is their security in place? What kind of food considerations will be more relevant in the future? All things considered, we in the United States are doing quite well, but what will the U.S. be like in 50 years? Consider distribution of funds to allow beneficiaries to move to jurisdictions outside of the U.S. or to allow distributions for security measures for beneficiaries.

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