

# No Complacency in Trust and Estate Planning

By Julio Castro

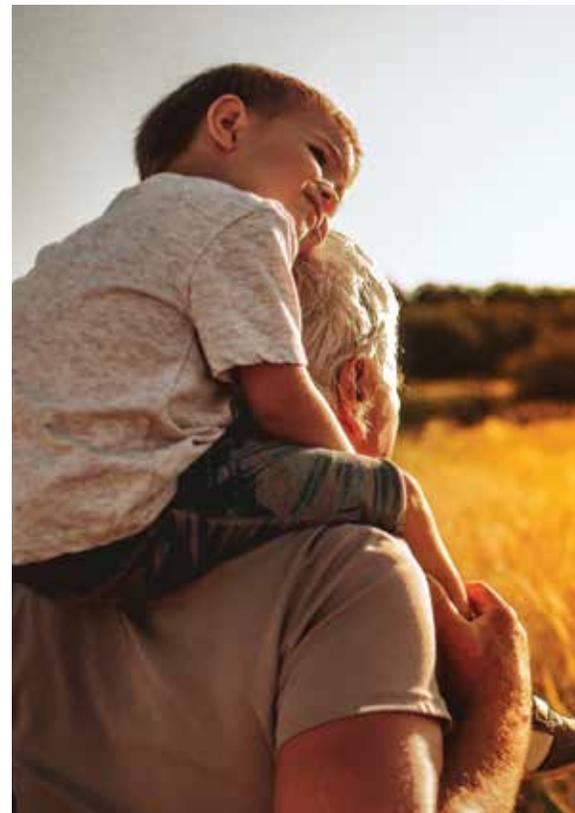
Behind the headline changes afforded by the Tax Cuts and Jobs Act of 2017 are the financial, emotional and physical realities confronted by many families. Comprehensive estate planning is at least as important as it has ever been.

Consider, for example, whether documents ancillary to the last will and testament and revocable trusts reflect the current laws surrounding incapacity. As discussed in previous editions of *Independent Thinking* on special purpose trusts at Evercore, many families struggle with physical or mental illness and, increasingly, addiction. All families need to plan for the consequences of aging. Documents such as durable powers of attorney should be analyzed to ensure that representatives are empowered to address the continuation of family gifting plans and the adjustment of beneficiary designations, and have the ability to modify other planning documents.

Additionally, healthcare documents that empower representatives to make medical decisions, including the removal of life support, should be reviewed to

*All families need to plan for the consequences of aging.*

ensure that the appropriate privacy waivers, prevalent in the wake of the HIPAA Privacy Act, are contained within the documents. The absence of such provisions could render a healthcare document ineffective at a time when it is desperately needed. It's worth noting that many jurisdictions have introduced the opportunity to provide representatives with access to medical records in advance of incapacity. Given the deluge of data and the emotion present at the time of potentially life-changing family medical decision-making, it makes sense to provide for advance access.



It is also important to review primary plan documents to confirm that the individuals named to act as guardians, executors, trustees, trust protectors, and investment advisors are still suitable choices for the roles. Relocation to another state, marriage, divorce, incapacity and, obviously, death can all impact ongoing viability of nominated fiduciaries. Keep in mind that new, more flexible trust arrangements can enable individual trustees to remove or replace legacy corporate trustees at will; trusts don't have to be as rigid as they once were. Indeed, many families choose to appoint both a family member or friend and a professional advisor as co-trustees.

While reviewing those documents, reconsider the timing of distributions

to beneficiaries. After all, a son's poor relationship choices, substance abuse or money management habits may call into question the prudence of distributions that vest on his 40th birthday. Furthermore, powers of appointment provided to children and grandchildren may need to be reviewed to ensure that the designated individuals are appropriate. For example, if a child is unmarried at the time of the parents' plan execution, the plan may not allow for the child to appoint unused funds to his or her own children.

The impact of creditor protection for beneficiaries is always worthy of review. State laws and trends vary widely. Age-old distribution standards contained in wills and revocable trusts may need to be revisited to

*Family circumstances and objectives are subject to change, as are tax laws.*

ensure that the existing provisions don't increase the likelihood of a creditor's success.

Changing nominees, distributions, and protections afforded to beneficiaries is no longer a privilege confined to the revocable trust landscape. State laws governing modification of irrevocable trusts, along with the concept of trust decanting, provide tools that can be used within an irrevocable trust context. As a case in point, an education trust funded 10 years ago with assets that significantly increased over the interim 10-year bull market could potentially be revised now to provide for longer-term support than originally anticipated.

Titling of assets is also part of good planning. The protections afforded joint tenants by the entirety titling versus individual titling, surrounding homestead protection, safety gained within a limited liability structure, and the sanctity of retirement plans are examples of the titling issues that should regularly be reviewed.

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