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The Virtual Clone Trustee

Coming soon to a trust near you

Imagine your client has an identical twin who acts just like him, likes and dislikes all the same things, shares his precise values and goals and reacts and makes decisions in the exact way your client does. Imagine further, this isn't just your client's twin, but your client's clone, and unlike your client, the clone can live forever. Wouldn't this immortal being be the perfect candidate to serve as trustee of your client's trusts? Although our clients don't have clones, much less immortal ones, with the speed at which technology is evolving, the concept of a virtual perpetual clone trustee is probably closer to reality than most realize.

As estate planners, our principal goal is to fulfill our clients' wishes. For those clients who want to have control or influence beyond the grave, it's not currently possible to ensure that the estate-planning documents we draft today will accurately carry out their wishes tomorrow. Although trustee selection and guiding trust provisions are the best means to ensure lasting control, after our clients are deceased, we can't really know with certainty if their wishes are being fulfilled, because we can't yet accurately predict what they would have decided in specific future situations.

Enter the virtual clone trustee (VCT)—a virtual clone of your client, designed to serve as trustee and advisor over his assets and legacy. **The VCT would provide specific guidance in future situations, allowing our**

clients' exact intentions to be fulfilled in perpetuity. If this were possible, the VCT would not only allow our clients to accomplish their wishes long after they are deceased, but also let them finally achieve one of man's greatest quests since the dawn of time—eternal life.

Eternal Vehicles

Eternal life, a goal pursued by man since he first walked the earth, is perhaps his most audacious and foolish ambition. From the "Tree of Life" in the biblical Garden of Eden to modern day's cryonics—with mummification, Ponce de Leon's search for the Fountain of Youth and many other historical examples in between—among the most daunting physiological boundaries man has yet to conquer is the achievement of perpetual existence. There are many possible reasons for this quest, including fear of death, unfinished goals and the continued enjoyment of friends and family. And, of course, centrally relevant to the world of estate planning is the desire to continue to support (and, perhaps, direct and control) loved ones and charitable causes.

In furtherance of this quest for longevity, we often recommend that our clients create perpetual or dynasty trusts. In addition to minimizing taxes and maximizing creditor protection, another attraction of dynasty trusts is allowing the grantor to set incentives and goals for many future generations according to his wishes. Indeed, this is one of the fundamental purposes of a trust—vesting legal control of assets in a fiduciary to carry out the grantor's purpose for the economic benefit of the beneficiaries.

Dynasty Trust Challenges

The Restatement (Third) of Property provides that the grantor's intention is the controlling consideration in determining the meaning of a trust and that this intention is given effect to the maximum extent allowed

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by law.¹ “In construing trust provisions, the cardinal rule is to try to give effect to the grantor’s intent.”² The grantor’s intentions aren’t only relevant to the day-to-day administration of a trust, but also are critical in major actions, such as the ability to modify, reform or decant an otherwise irrevocable trust.³ **Discerning and fulfilling the grantor’s intentions aren’t based on an initial assessment performed immediately after a trust is created. Instead, they’re an ongoing endeavor that must be constantly considered and evaluated in light of changing circumstances.**⁴

The traditional rule against perpetuities (RAP), which dictates that a trust must terminate no longer than 21 years after the death of lives in being at the trust creation, provides a practical outer limit of how long into the future the grantor’s intent must be followed. Because trusts subject to the traditional RAP may only survive a certain number of years, it’s likely that the trustee can discern the grantor’s intent, because the trustee or the trustee’s direct predecessor often knew the grantor personally. In fact, the RAP is designed to limit the grantor’s ability to restrict the transfer of property to no more than one generation after the life of anyone possibly known to the grantor (according to the rule, lives in being plus 21 years).

Today, however, many states have abolished or drastically extended their RAP for tax savings, creditor protection and other reasons. In those states, trusts can last for many generations, leaving some trustees with neither a direct nor indirect connection to the grantor. Nevertheless, even decades after the grantor’s death, his intent remains paramount in the trust’s administration. **The challenge of dynasty trusts is ensuring that the grantor’s intent will continue to be fulfilled generations after the grantor has passed away.**

Selecting Trustees

Clients must be confident that the trustee they select will administer the trust according to their wishes. Without faith in their trustees, most clients wouldn’t agree to irrevocably transfer assets to a trust while they’re still alive. That’s why many clients who create inter vivos trusts

will ask their estate-planning attorney whether they, as grantors, can serve as trustee of their own trusts. Though the grantor can’t act as his own trustee, he will often select someone who knows him well, shares his values and with whom he has a relationship built on trust. For this reason, clients will most often choose a spouse, sibling, child, parent, close friend or advisor—in other words—the next best thing to selecting themselves.

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Other times, when clients don’t have a person who fits this description or prefer a trustee with professional training and experience and an objective perspective, they’ll name a corporate trustee. The corporate trustee will try to get to know the grantor during his life and to understand his goals and objectives. And more and more, clients want the best of both worlds and split the various responsibilities of trustee among a team—for example, a corporate trustee to make trust investments and handle administrative duties and a family member or close friend to direct trust distributions.

Letters of Wishes

Even with the right trustee, clients will often want to provide standards and guidance for the trustee to follow to ensure their wishes are fulfilled. **Recognizing that circumstances change over the life of a trust, many drafting attorneys prefer to keep trust instruments flexible, with distributions completely at the trustee’s discretion, or somewhat flexible, but subject to ascertainable distribution standards, such as health, education, maintenance and support.** Typically, as long



as the grantor is confident in the trustee, many advisors feel it's best to use broad standards of discretion and to allow the trustee to make distributions as the situation dictates, rather than lock in specific distributions standards that can't be modified even when circumstances would otherwise warrant modification. However, to provide clients with a level of comfort that their specific wishes will be carried out in the future and to give the trustees real guidance as to those wishes, many attorneys will advise their clients to provide the trustee with a separate, non-binding memorandum of understanding or letter of wishes that explains the

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clients' intentions and provides specific and detailed distribution guidelines. Additionally, when a corporate trustee agrees to be named as trustee, he will often encourage the grantor to prepare a wealth transfer policy statement or a personal mission statement to better guide the trust administration.

An alternative for clients who aren't satisfied with trusts that have non-binding guidelines or mission statements are trusts that require mandatory distributions upon reaching certain ages or upon the occurrence of specific conditions. One extreme example of this is the so-called "incentive trust," which has binding terms and strict guidelines to encourage the beneficiaries' positive behaviors and discourage undesirable behaviors. For example, distributions may only be permitted upon beneficiaries achieving certain benchmarks, such as college graduation, employment or marriage within a particular faith; distributions might be withheld or limited in response to unwanted behaviors, such as substance abuse or financial irresponsibility.⁵ However, such rigid distribution requirements don't allow trustees to respond to changing circumstances that the grantor would have considered relevant. Therefore, these types of trusts often fail to be a panacea

and, instead, may inadvertently subvert the grantor's actual mission and wishes.

For example, tying trust distributions to college credits earned may encourage beneficiaries to become professional students who avoid working and supporting themselves, while punishing beneficiaries who don't have the physical or mental capability to attend college, but who are, nonetheless, successful entrepreneurs.⁶ Due to unforeseen changes in circumstance, there are many potential pitfalls that can arise with inflexible distribution standards in trust instruments.

Appointing a spouse, best friend or sibling to serve as trustee and documenting the grantor's wishes through a letter of wishes or through the trust provisions themselves may provide the grantor with some comfort that the trust will be administered according to his wishes at least for so long as that trustee is alive or the letter of wishes or trust provision deals with a specific issue. The difficulty is ascertaining exactly what the grantor intended after the grantor's death or when unanticipated circumstances arise. However, the combination of increasingly flexible trust law with advances in psychology and technology may soon converge to immortalize the grantor's psychological profile, so the trustee will know the decision that the grantor would have wanted in unanticipated future circumstances.

Psychological Predictions of Behavior

Professional psychologists have long used statistical methods to better understand specific human behavior and help patients. For example, the Rorschach inkblot test, named after Swiss psychologist Hermann Rorschach, involves having an individual describe his perceptions of a series of amorphous inkblots. Because the Rorschach slides have no inherent meaning, an individual's interpretations of the pictures are representative of the dominant traits in his personality. By prompting an individual to ascribe his own thoughts, biases and predilections to otherwise meaningless images, the Rorschach test prompts the brain to paint a picture of itself and a personality on a blank canvas. Other well-known personality assessments include the Myers-Briggs Type Indicator and the NEO Five-Factor.

The legal and business communities have appropriated these and other scientific methodologies used by psychologists to understand and predict individual



behavior. For example, almost 90 percent of Fortune 100 companies employ the Myers-Briggs Personality Test to determine whom to hire and which employees will work well together.⁷ Companies also use jobEQ or similar services in pre-employment testing to predict how effective a prospective employee would be and to reduce turnover.⁸ And courts use the Rorschach test to determine propensity for future violent behavior in sentencing decisions and custody disputes.⁹

Technological Behavior Predictions

Our increased use of technology is also being used to predict our behavior. Just a decade ago, using “cutting-edge” computer technology meant performing basic web searches and sending emails. Today, our virtual footprint is growing at an exponential rate and our very existence is dependent on the latest technology. The majority of our communications, both professional and personal, are performed electronically, through email, text or social media, such as Facebook and Twitter. We shop, store files, conduct business, network and even obtain continuing legal education credit online. Our iPhone or Blackberry is just one of the new technological devices that travel with us everywhere.

Our every click is a virtual breadcrumb that we drop in a cyberspace trail. Not surprisingly, new industries have exploded to gather, harvest and market this big data by using predictive analytics to ascertain future probabilities and trends. Both government and the private sector draw on these techniques for their benefit.

State and federal agencies use this information to prevent crime and provide for the public safety. Police enforcement agencies use software to predict which individuals on parole and probation are most likely to murder or be murdered based on many variables, including the type of crime and the age of the perpetrator at the time the crime was committed.¹⁰ The federal government is planning on using the software to mine through social media posts to predict everything from future terrorist attacks to foreign uprisings.¹¹ The U.S. Department of Homeland Security field-tested a program at a 70 percent success rate that employs technology to screen individuals to determine whether they’re a security risk based on physical factors including eye movement, body language, facial expression and heart rate.¹² MIT has tested software

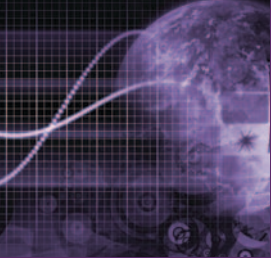
on miniature cars that predicts what actions human drivers will take to avoid collisions.¹³

On the private sector side, many companies have created predictive analytics departments to understand consumer habits and increase marketing efficiency.¹⁴ As early as 2004, Walmart was able to use predictive technology to anticipate an increase in demand for specific products in the days before Hurricane Frances.¹⁵ Today, Amazon’s Silk browser for the Kindle Fire tablet is capable of monitoring consumer behavior to predict which website a user is most likely to visit next and can preload the website even before the user keys in the

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address.¹⁶ Amazon has also recently patented software that predicts the next web destination an individual is headed by analyzing recent movements.¹⁷ Target employs its individual customer data to identify when its customers are pregnant based on changes in their purchase histories. LinkedIn can predict when a company is in trouble based on the frequency of log-ins and employee updates.¹⁸

In addition to the government and private sector using technology to predict the behavior of others, there are also various companies that help individuals create a virtual self or avatar to mimic their own behavior. One example is *virtualeternity.com*, which allows the user to create an “intelligent” avatar or a virtual clone that looks and talks just like the user. The user can even train it to think like him through personality tests. The more time the user spends with his virtual clone, feeding it data and information about him, the more it will act and respond like him. Another example is *3Dchat.com*, which allows an individual to create a



virtual self for dating and socializing. Soon enough, it's likely new technology will no longer require the user to spend time inputting data and training his virtual clone, but instead he will give his virtual clone permission to follow him electronically and gather all the virtual breadcrumbs that he leaves behind.

Combining Predictions

These developments in computing and information technology will undoubtedly broaden the use of traditional psychological personality assessments. By combining new technologies and traditional psycho-

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metric testing, psychology can be used to generate information vital to creating the VCT. Data mined from analysis of our daily responses to real life and online situations is certain to revolutionize the ability to determine an individual's personality well beyond the currently established methods of personality diagnosis. In fact, as psychology develops to explore and harness this new frontier of data, we'll be able to rely on its analysis to articulate an individual's exact decisions in future situations.

The VCT

Due to ever-advancing predictive analytics and their impact on traditional psychological personality assessments, we envision a time when, in essence, each individual will have a virtual self.¹⁹ While this may sound farfetched to estate-planning professionals, to those in Silicon Valley, this is the future.²⁰

We're simply adapting the virtual-self concept to trusts—the ultimate perpetual legal vehicles designed to carry out an individual's intent.²¹ Individuals may not be able to exist in perpetuity, but through a trust with a VCT, their wishes and desires might just live forever.

For many of our clients, the VCT will be the dream trustee. The VCT will know with a high degree of certainty the decisions the grantor would have made long after the grantor is deceased. It will exist in perpetuity and will serve as the trustee or as an advisor to the trustee.

We've informally surveyed a number of trust companies and many attorneys, and none were aware of projects to develop technology for the purpose of guiding trust administration or predicting the grantor's intent. However, just as our personal use of technology has dramatically expanded in the past few years, so too will the ways we use technology to help our clients meet their goals.

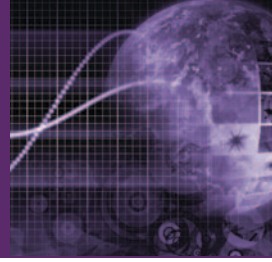
Possibilities and Legal Ramifications

As the VCT is still a novel concept, it raises many practical questions, and we're not suggesting precisely how the VCT will work. For example, will the trust instrument name the VCT as the trustee or as an advisor with whom the trustee must consult? Will the VCT direct the trustee as to distributions or just serve as an advisor to the trustee regarding only those difficult situations when the grantor's guidance is of particular importance? And, for trust instruments that predate the existence of the VCT, if a trustee or beneficiary has a question concerning the grantor's intent, will a court of law seek the advice of the grantor's VCT?

The VCT also raises numerous legal questions. Will the VCT's determination be legally binding? Will an individual or corporate trustee have a duty to ensure the VCT is in good "health" and receiving the latest technology updates?


And, fundamental to serving as trustee is the ability to hold title to trust property and act as a fiduciary. Under current law, virtual beings are not recognized as legal entities and, as a result, can neither hold property nor be fiduciaries. However, the law frequently has to catch up with changes in technology, and it may not be long before the law adapts to recognize virtual beings and their ability to own property and possess other legal rights and duties.²²

The VCT also raises complicated tax issues. For example, if a grantor names his VCT as trustee of an inter vivos trust, will the property transferred to the



trust be considered a complete or incomplete gift for gift tax purposes? Additionally, will the use of a VCT be considered a “string” that causes trust property to be included in the grantor’s taxable estate?

Despite the numerous practical, legal and tax challenges that the VCT presents, we’re looking forward to the future of our trusts and estates practice using VCTs. Many of our clients have already expressed a strong interest in this technology when it becomes available. You may be surprised by how your clients react.

Jon Bon Jovi sings “It’s my life, It’s now or never, I ain’t gonna live forever, I just wanna live while I’m alive.” While Bon Jovi is still correct that we won’t live forever, and we should focus on our lifetime decisions and choices, for those who would like a virtual slice of immortality, the VCT offers an interesting alternative. 

Endnotes

1. *Restatement (Third) Of Property: Wills and Other Donative Transfers* Section 10.1 (2003).
2. *Vetric v. Keating*, 877 So.2d 54 (Fla. Dist. Ct. App. 2004).
3. See Uniform Trust Code Sections 410–17 (amended 2005) (dealing with modifications and reformations of a trust); See also N.Y. Estate Powers & Trusts Law Section 10-6.6(h) (McKinney) (regarding decanting assets of a trust).
4. *Restatement (Third) Of Trusts* Section 4 (2003).
5. See generally Nancy G. Henderson, *Managing “Carrot and Stick” Provisions: Selected Fiduciary Issues in Drafting and Administering Trusts With “Incentive” Provisions* (ALI-ABA, 2008).
6. *Ibid.* at p. 7.
7. “CPP Celebrates 60th Anniversary of Myers-Briggs Assessment,” CPP (Oct. 28, 2003), www.cpp.com/press/mbti60.aspx?zoom_highlightsub=89+fortune.
8. “Using jobEQ’s Technology for Pre-employment Testing,” http://jobeq.com/articles/pre-employment_testing.htm.
9. *The Handbook of Forensic Rorschach Assessment* (Carl B. Gacono and F. Barton Evans eds., 2007).
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17. Rebecca Boyle, “Amazon Software Knows Where You Are, Predicts Where You’ll Go Next,” POPSCI (Dec. 14, 2011, 6:16 p.m.), www.popsci.com/technology/article/2011-12/amazon-patents-location-predicting-software-guess-places-youll-go.
18. Murat, “If Facebook Knows When People Break Up and Google Can Predict Flu Outbreaks, Does LinkedIn Know When Companies are in Trouble?,” *Mobile Inc. Blog* (Nov. 5, 2010), www.mobileinc.co.uk/2010/11/if-facebook-knows-when-people-break-up-and-google-can-predict-flu-does-linkedin-know-when-companies-are-in-trouble.
19. The authors note that they don’t speak Klingon nor do they have any special understanding of computers beyond that of the average estate-planning attorney (that is, they have the extension of their firm’s IT department committed to memory).
20. By way of example, just recently, and despite being dead for 15 years, a fully digital virtual image of Tupac Shakur appeared at Coachella and performed “Hail Mary” and “2 of Amerikaz Most Wanted” alongside Dr. Dre and Snoop Dogg. Tupac’s image was created by Digital Domain, a special effects studio, using computer-generated imagery.
21. Although the focus of this article is using virtual clones for purposes of fulfilling the grantor’s intent with trusts, this concept has revolutionary applications beyond the trusts and estates field, such as knowing what our ancestors would have decided in a given family or business situation, or for that matter, what a famous general or leader would have decided in a potentially world-changing event.
22. For example, in vitro fertilization technology allows sperm and egg to be combined to produce children after the donors have died. In *Astrue v. Capato*, 132 S.Ct. 576 (2012), the U.S. Supreme Court held that children conceived through artificial insemination after their father died weren’t entitled to Social Security survivor benefits.