Someone to Trust

How could someone who earned $650 million over 17 years be broke? That’s the question that actor Johnny Depp recently put to a team of forensic accountants and his new business manager, according to a *Vanity Fair* article (“How Did Johnny Depp Find Himself in a Financial Crisis?,” August 2017). The team determined that Depp’s business managers of 17 years were guilty of mismanagement, breach of fiduciary duty, and disbursing funds without Depp’s knowledge, and they filed a lawsuit seeking $25 million.

The business managers, who never had been sued before, fired back with a lawsuit of their own. A partial list of why Depp went broke, according to them, was that Depp owned:

- 14 residences, including a chateau in France;
- a 156-foot yacht, which was expensive to maintain;
- 12 storage facilities filled with memorabilia, such as collectible guitars and art;
- $30,000 worth of exotic wines flown to him monthly; and
- he employed 40 full-time employees, costing $300,000 per month.

As an example of his extravagant lifestyle, Depp spent $5 million for a memo-

Will Contests

Everyone who makes a will hopes and expects that its terms will be followed faithfully. However, sometimes wills are contested. Which features are likely to lead to contests?

*Disinheritance of close family members.* A will leaving nothing or only nominal gifts to close family members, such as a spouse of many years or children, is ripe for a contest action, especially if the beneficiaries are distant relatives, social friends, or charities. Juries are prone in close cases to invalidate a will that disinherits the surviving spouse and children.

Will contests based on property passing outside of the traditional family are likely to increase with various societal changes. Many older individuals have sig-
technology has made trust planning accessible and affordable to a much wider segment of the population than was true in the past.

**Trusts versus ordinary investment accounts**

A trust has an independent legal existence. That makes it more durable than an ordinary investment account, because the trustee continues to perform its duties upon the disability, or even the death, of the trust's creator.

In general, a trust cannot be used to shield assets from one's creditors. On the other hand, all states allow trusts to be used to protect a beneficiary who is not the trust creator from creditors' claims. Perhaps the most common example is to use a trust to protect a child's or grandchild's inheritance in the event of a future divorce.

**Living trusts**

Living trusts are so named to distinguish them from testamentary trusts, which are created with a will and take effect after death. A living trust goes into operation during life. Usually, such trusts are revocable and created for the benefit of the grantor. Living trusts are popular for four key reasons:

- **Sound asset management.** The trustee will provide professional supervision of the portfolio, consistent with the grantor's vision.
- **Protection in the event of incapacity.** Trust management continues, even if the grantor becomes unavailable for any reason, such as medical reverses.
- **Probate avoidance.** Estate settlement is necessarily a public process, and it can be a lengthy one. Living trusts normally avoid probate completely, creating a zone of financial privacy.
- **Financial privacy.** The terms of a will become public during the probate process, while the terms of a trust normally are not publicized.

One recent case of the living trust in action was the estate of actor James Gandolfini. There was some negative publicity immediately after his death about the terms of his will, which had been made public. It turned out that the outcry was misplaced, as the bulk of his fortune was controlled by trusts that he had established during life.

**Who should be my trustee?**

Experience counts. Look for a trustee who has managed many kinds of trusts in all sorts of financial markets. Also, you'll want a trustee who can be fair and impartial, one whose judgment will be respected by all the trust beneficiaries.

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**Will contests**

Significant involvement with people outside of the family in retirement communities and senior citizen organizations. The lifestyles of younger people include more divorces, childless marriages, cohabitation, and same-sex relationships. As a result, estate plans of these individuals are more likely to include gifts to non-family members.

**Unequal treatment of children.** A will that treats children unequally, especially if the children receiving disproportionately large amounts have no special needs, is likely to encourage spurned siblings to contest the will. The contestant's appeal to the inherent fairness of all children sharing equally may sway a waver jury.

**Sudden or significant change in disposition plan.** When a testator makes a sudden or significant change to the will's dispositive scheme, the beneficiaries of the old will who lose under the new will may be motivated to contest the new will. These beneficiaries will strive to show that the testator lacked capacity to change the will or that the testator was unduly influenced to make the alterations.

**Elderly or disabled testator.** The age, health, mental condition, or physical capacity of a testator may provide unhappy heirs or beneficiaries of prior wills with a basis to claim lack of testamentary capacity or undue influence. Although the mere fact of advanced age, debilitating illness, or severe handicap does not necessarily diminish capacity, these circumstances can play an important role in supporting a will contest.

**Unusual behavior of testator.** A peculiarly acting testator is apt to give dissatisfied heirs a basis for contesting the will either on the ground that the testator lacked capacity or was suffering from an insane delusion.
Tax-Conscious Bequests

The advent of a higher amount exempt from the federal estate tax ($5.49 million in 2017) has reduced the need for tax-aware estate planning, but it has not eliminated it altogether. Estates of any size will be subject to income taxes, as will their beneficiaries. Planning may permit this burden to be reduced.

Take charitable bequests, for example. Past practice generally has been to provide for charity from the principal of an estate, according to law professor Christopher Hoyt [“Tax Savings with Income-Based Charitable Bequests,” Probate & Property, September/October 2017]. The better approach from a tax perspective would be to direct the executor to make a payment to charity from the estate’s income. Instead of a will clause providing $50,000 to a selected charity, the will could direct the first $50,000 of income collected by the estate to be used for that purpose. That would garner an income tax deduction for the estate, leaving more money for the other heirs.

Income in respect of a decedent

Most assets acquired from an estate receive a basis step-up to their fair market value at death. With a basis step-up, there will be little or no tax due upon the capital gain if the asset is sold soon. Some assets do not receive any basis step-up, however, such as Series EE savings bonds and employee stock options. Because these would have been subject to income tax in the hands of the decedent, they are “income in respect of a decedent” (IRD) and remain subject to the income tax, as well as the estate tax. The most prevalent source of IRD is an interest in an inherited retirement plan account.

One approach to limiting the income tax exposure with IRD is to use it to fund charitable bequests. The IRD may be paid directly to a charity, so that it never will need to be recognized by the estate. If the IRD will be distributed to the estate, the will should instruct the executor to pay charitable bequests to the extent possible from the IRD, which will generate an offsetting charitable deduction.

With retirement accounts, the beneficiary designation form is key, as the assets may pass outside of probate. A charity may be named as the beneficiary of some or all of the retirement account. To the extent that assets pass directly to the charity, the estate will not have to recognize IRD.

What about a forgotten retirement account for which no beneficiary was named? The asset will pass to the probate estate by default. It may be possible for the executor simply to distribute the retirement account directly to a charity. Alternatively, instructions to the executor to pay charitable bequests from IRD when it is available may cure the tax problem.

Charitable giving grows

According to the annual report of Giving USA, total charitable gifts rose by 2.7% in 2016, reaching $390.05 billion. Giving by individuals was up 3.9%, by foundations 3.5%, and by corporations 3.5%.

Charitable bequests were estimated to have declined by 9.0%, perhaps attributable to the elimination of federal estate taxes for the vast majority of estates. However, bequests only account for 8% of all contributions, while individuals provide 72% of the total charitable support.

Total charitable giving was roughly 1.7% of the country’s gross domestic product through the 1980s. By this measure, giving grew in the 1990s, reaching 2.2% of GDP in 2001. It fell to 1.9% of GDP during the great recession, but has since climbed back to 2.1% of GDP.
Someone to trust . . . continued

rial service for his idol, journalist Hunter S. Thompson. A 153-foot cannon was built at Thompson’s home to blast his ashes into the sky.

The business managers seek damages of $560,000 and a statement by a court declaring that “Depp caused his own financial waste.” The trial is expected in January.

Adding guidance to an inheritance

Although Johnny Depp may be an extreme example of financial management failure, it is stories such as these that cause some wealthy parents to wonder about the financial capacity of their own heirs. Even responsible adults have been known to have moments of weakness when faced with a large inheritance.

That’s why so many are turning to trust-based inheritances. When the trust is administered by a professional trustee, such as us, the beneficiaries get financial management according to the terms of the trust, along with investment management of the trust assets. There’s no guarantee that a trust will last for a lifetime, but it does improve the odds for lifetime financial security.

By the way, Depp paid 10% of his income to his business managers and his lawyer, some $65 million over 17 years. Our fee for trusteeship is well below that percentage. Ask us for details.

Other trust advantages

Trusts to grow on. Trusts can provide professional management for assets set aside for young beneficiaries. The management can continue, if desired, even after a beneficiary reaches age 18 or 21.

Continuing help for a disabled individual. With proper planning (qualified legal guidance is a must), a trust can provide extra support and some of life’s comforts without disqualifying a disabled person from receiving government assistance.

Marital bequest to a noncitizen spouse. Anything that a married person leaves directly to his or her spouse will qualify for the estate-tax marital deduction—unless that spouse is not a U.S. citizen. In that event, a special marital trust is required to preserve the marital deduction.

Gaining the marital deduction without disinheriting children. Individuals with children from a prior marriage may qualify assets for the marital deduction by means of a trust that pays lifetime income to the surviving spouse, then passes its assets to the children.

Collectors Corner

Wucai Dragon and Phoenix Bowl With Qianlong Seal. Wucai, or “five-color ware,” refers to Chinese porcelain decorated mostly with red, green, and yellow enamels within outlines in blackish cobalt, with underglaze blue plus the white of the porcelain—all in all constituting five colors. This bowl shows a green dragon and a red one and a pair of phoenix below a band of the Eight Auspicious Emblems of Buddhism. In Chinese culture the dragon and the phoenix are associated with good fortune. The dragons here pursue “flaming pearls,” which are associated with spiritual energy. The bowl’s seal indicates that it comes from the period of the Qianlong emperor, who reigned 1736–1795. This piece sold at auction at Sotheby’s for $21,250, almost three times the pre-sale estimate.

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