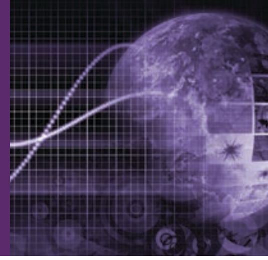

By **Marvin E. Blum, Gary V. Post and Thomas Rogerson**

A FAST Solution to Legacy Planning

The "family advancement sustainability trust"

In their recent article entitled, "Innovate or Die," Timothy J. Belber, Ian McDermott, and John A. Warnick assess the current estate-planning landscape and perceptively find the profession to be at a turning point.[1] While tactical, tax-driven planning (along with asset protection planning) was the driving force for estate planning throughout the 1980s, 1990s and early 2000s, the authors point out that there are forces at work disrupting the traditional paradigm of tax-centered estate planning. The passage of the American Taxpayer Relief Act of 2012 and its increased exemptions, higher income tax rates and portability may have triggered a renewed emphasis on technical estate-planning practices, but a number of societal changes are placing a new demand on estate planners. There's a chasm developing between what constitutes a traditional estate plan and what clients need and expect. Belber, McDermott and Warnick make it clear that estate planners must address these new developments or run the risk of becoming obsolete.

For those seeking to stay ahead of the changing landscape, the first step is an understanding of the ways in which traditional estate planning falls short of meeting a client's needs. The problem with traditional planning is that it's far too narrow in its scope. Historically, an expertly crafted estate plan would transfer wealth from one generation to the next in a tax-efficient manner, protecting the client's assets and ensuring an effective system was in place to administer those assets for heirs. While this process remains the foundation of estate planning, it's become only the first part of a two-part race. More and more, clients are beginning to understand that even the most well-crafted estate plan will be useless if it fails to address their qualitative goals and/or if their heirs are unprepared to receive the inheritance. The innovative, adaptive estate-planning attorney will break from the confines of the traditional model to include "expanded planning" as the second part of the estate-planning process.

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Two-Stage Process

Stage 1: This stage is twofold: (1) begin the process of teaching and enhancing family communication skills, and (2) work with family members and spouses at the first generation (G1) and second generation (G2) levels (and third generation (G3) if practical) to clarify and commit to family beliefs, shared values and goals. The ultimate objective of this first stage is to create a collective family mission statement outlining the family's core values, beliefs and goals. This process can yield three useful results for moving to the next level of expanded planning.

1. Start the ongoing process of garnering participation and buy-in from G1, G2 and G3 (if practical), building cohesion and connection and giving the family members a cause behind which they can unite.

2. Identify relationship issues that can be addressed and resolved while the matriarch and patriarch are alive and participating. Relationship issues can spring from obvious situations such as a family business, a second marriage or access, use and management of a family ranch or vacation home. Further, the process

can identify subtle, yet important, conflicts among family members that can emerge as a disruptive influence on family harmony if not identified and resolved while G1 is still living.

3. The family mission will be the springboard from which will emerge the estate plan for the family. The mission will drive the estate plan, and the estate plan will in turn be structured to support the mission.

Stage 2: Build and implement the family estate plan. Planning under the expanded model will differ from the traditional system in two primary ways. First, the plan will be purpose-driven and tailored to the family in that its purpose will be to advance the values, beliefs and goals set forth in the family mission statement. Second, the plan will be beneficiary-focused and oriented toward ensuring a family's wealth exists for more than one generation.

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Tools to Implement Plan

With these parameters of the expanded planning model in place, the question remaining is what tools will be used to implement and operate the plan on an ongoing basis. For this, it's helpful to look to successful multi-generational families as models. No two families are the same, but through the use of concepts such as family retreats, educational development and organized governance, families who've managed to skirt the old "shirtsleeves-to-shirtsleeves" adage provide a template of best practices to incorporate into a client's expanded planning. For some estate planners, the idea of expanded planning may seem too abstract. Often, the concepts may be easy to discuss with the client but ultimately become too difficult to implement, which is why it's necessary for planners to have a practical tool available to help achieve the objectives of expanded planning. One such tool is a family advancement sustainability trust (FAST), a new type of trust that essentially serves as the legs of expanded planning, providing both the money to fund planning strategies and the leadership to place those strategies into motion.[2] It isn't enough for G1 to implement best practices and just hope that the family will continue them. To beat the odds and overcome the "shirtsleeves" adage, G1 needs to put a structure in place. For example, when G1 is gone, G2 (or their spouses) may resist paying for their portion of the family retreats out of their pocket. Once G1 creates a FAST and funds it, the FAST can provide the funds to pay for the retreat, and one of the FAST's decision-making bodies is charged with the responsibility of making sure the retreat actually happens.

The FAST

To appreciate how a FAST facilitates expanded planning, it's first necessary to understand the technical nuts and bolts of what a FAST is. At its core, the FAST is created to support the institution of the family, investing in family members rather than simply distributing assets to heirs. Structurally, a FAST is a standard dynasty trust, but with a spin—it's a directed trust created in Delaware or a state with similar directed trust laws. With a directed trust, decision-making authority isn't concentrated solely in the trustee, but instead can be split among one or more advisors to the trust. Specifically, decisions regarding administrative matters, trust investments and trust distributions may be assigned to separate co-trustees, advisors or trust protectors. Thus, the significance of the directed trust is that it allows family members and trusted advisors of the family to directly participate in the governance of the trust.

Accordingly, a FAST contains four decision-making bodies, described in detail below. Individuals may serve on more than one committee, and non-family committee members receive compensation for serving on a committee. The grantor(s) would likely desire to be a member of each committee.

Four Decision-Making Bodies

1. **Administrative trustee.** Typically, a corporate trustee serves as the administrative trustee. The

administrative trustee has no control over investment or distribution decisions but rather deals strictly with generic trust-related tasks such as recordkeeping and maintaining custody of the trust's assets.

2. **Investment committee.** The investment committee is commonly comprised of three members: two family members and one professional advisor. The professional advisor could be a peer, such as a family investment advisor or some other type of fiduciary, or could be a hired investment advisor. The investment committee is charged with making all decisions relating to the investment of trust assets.

3. **Distribution committee.** The distribution committee is comprised of several members, for example: two family members, a professional consultant who has experience working with families on legacy planning, an individual who's a like-minded peer to the grantor and one other advisor (family attorney or accountant) with professional expertise who also brings a knowledge of or familiarity with the family. A key aspect of the FAST is that the responsibilities of the distribution committee are much broader than in typical trusts. Whereas in other trusts, a distribution committee makes decisions regarding the disbursement of trust assets, in a FAST, the distribution committee is charged with spending trust assets to preserve and strengthen the family institution.

4. **Trust protector committee.** The trust protector committee may be comprised of three professional members such as the family's attorney, CPA, financial advisor and/or a trusted fiduciary. Although it wouldn't be advisable to have a family member serve on the trust protector committee, family members could serve as consultants to the committee. The trust protectors are individuals charged with playing the role of the grantor once the grantor is no longer able to do so. Some typical trust protector duties include removing or appointing trustees, committee members or other advisors and amending the governing instrument of the trust to efficiently administer the trust or to achieve favorable tax status for the trust.

As noted above, a key component of the FAST is that it allows family members and trusted advisors of the family to directly participate in the governance of the trust. A way to be sure these fiduciaries are accountable to carry out the tasks that have been assigned to them is to include a peer review process in the FAST to be administered by the trust protector committee. Within the context of trusts, peer review is a tool used solely as a positive review process of trust operations. Essentially, peer review is a way for an objective person or committee to perform a check-up on how well the trust is continuing to meet the patriarch's and matriarch's original objectives. As such, it's a healthy way to assure the patriarch and matriarch that the long-term stability and effectiveness of the trust will continue to be monitored. A peer review system requires careful thought and drafting. The trust agreement should include a requirement that the review occur periodically. The reviewers should be objective and unbiased and should receive reasonable compensation for their efforts and expenses. Although peer reviewers have no enforcement authority, their reports act as checks on the committees and can provide clients with the assurance of knowing that as younger generations become committee members, they won't be without continued guidance.

It's important to consider when to create and how to fund the FAST.

Creation and Funding

It's important to consider when to create and how to fund the FAST. Creating a FAST should ideally occur during the patriarch's and matriarch's lifetimes to allow G1 to mold the trust to reflect the needs and ideals of the family. Moreover, initiating operation of a FAST during the lifetime of G1 helps to guide family members and advisors and establish the direction of the FAST for future generations.

The FAST may be minimally funded during the lifetimes of G1, with additional funds contributed to the trust on their deaths. The amount of funding can be either a fixed amount or a percentage of the estate. It will vary from family to family according to their means and the FAST's agenda. During the patriarch's and matriarch's lifetimes, FAST-related activities such as family retreats and educational programs can be paid for either out of G1's pocket or from the FAST.

Although there are several ways to fund a FAST, two primary funding techniques are the special purpose irrevocable life insurance trust (ILIT) and the 678 trust (also known as a "beneficiary defective irrevocable trust" or "BDIT"). With a special purpose ILIT, a stand-alone ILIT holds a life insurance policy on the patriarch or matriarch that funnels additional funds into the FAST at the death of G1. The other funding technique involves the use of a 678 trust, which is a unique estate-planning tool that allows clients to combine asset protection, estate tax savings and the continued ability to benefit from the assets they've accumulated. On the death(s) of G1 (the primary beneficiaries of the 678 trust), generation-skipping transfer (GST) tax-exempt assets from the 678 trust pour over to the FAST. This pour-over can be achieved by G1 exercising a special power of appointment directing assets into the FAST, which also allows them to periodically adjust the amount of the pour-over. When funding a FAST, it's important to do so in a way that avoids potential GST tax liability.

> The FAST aims to provide practical experience by serving as a mentor to beneficiaries, imparting wisdom instead of simply acting as a gatekeeper to the family wealth.

Strengthen Family Cohesiveness

Whether a family realizes it or not, the patriarch and matriarch often act as the glue that holds the family together. Once they pass away, the dynamics of the family can shift drastically. By establishing a FAST, the family leaders are essentially creating a replacement glue that will assume the responsibility of fostering and nurturing family relations and of maintaining a family identity.

Shared values. Ensuring that the family has a clear understanding of the patriarch's and matriarch's intentions and vision for the family can be crucial to the family's ability to work together as one unit. Creating a family mission statement can be a particularly impactful tool in this regard. According to an article from *The New York Times* entitled "The Stories That Bind Us," it's recommended that families craft a mission statement to preserve the core—similar to the way a large company often uses a mission statement to maintain its core values.[3] With a FAST, the trust agreement lays out the process to determine and preserve the family mission, beliefs, values and goals. Moreover, the drafting of the trust itself can serve as a way to initiate a conversation among the different generations of the family.

Family retreats. Another significant way the FAST promotes family relations is through the planning, coordination and financing of an annual family retreat. While conflicts and busy schedules are a typical part of any family, real problems emerge when there's no positive force pushing the family closer together acting as a balance against the stress. Family retreats can provide an ideal atmosphere for fellowship and the facilitation of meaningful and informative conversations regarding family affairs, all of which help to reinforce the stability and connectedness of the family. The distribution committee assumes responsibility for the planning of the family retreat, preparing activities and creating agendas for formal family meetings.

Family history. In addition to a clear family mission, a family's history can also serve as a unifier for the family. Furthermore, a knowledge of family history has been linked to higher self-esteem and better emotional health in children. Because a family's history is integral to maintaining a family identity, the distribution committee acts as a family historian, ensuring the documentation and dissemination of important aspects of the family's history. In practice, each distribution committee will carry out its role differently. Accordingly, overseeing the preservation of family history could include various tasks, including the safekeeping of family heirlooms, the creation of a written history of the family that's accessible to family members or the incorporation of family history lessons into family meetings or educational curriculum.

Maximize Heirs' Potential

In addition to strengthening the familial bond, expanded planning aims to prepare heirs to reach their maximum potential. Equipping a family to receive and successfully manage an inheritance is no small task, but it can be broken down into three parts: (1) education; (2) mentoring and practical experience; and (3) family philanthropy.

Education. The most effective way to approach the education of future heirs is to establish an education strategy. The strategy should be a dynamic, multi-faceted plan that aims to instill knowledge and wisdom in the next generation. Because creating and implementing this strategy can be an overwhelming task for any one family member, transferring that responsibility to a FAST can reap great rewards. Taking into account the ages, occupations and sophistication levels of the family members, as well as the characteristics of the family assets, the distribution committee determines what types of programs will be beneficial for preparing the family members to manage their inheritance and function as responsible members of society. Generally, an education plan will aim to cover basic topics: an understanding of family virtues, values and history; financial education; the ability to read and understand legal documents; the skills to make competent decisions in coordination with financial advisors; and the desire to participate in family meetings. A more sophisticated education plan would include additional curriculum related to the family business, as well as integrated family wealth management (financial planning, taxes, sustainable spend rates and market cycles). The distribution committee disseminates materials, schedules outside speakers to lead family meetings and ultimately ensures (and funds) the successful implementation of the family's education strategy.

Mentoring and practical experience. Overall, one of the primary benefits of the FAST is the message it sends to the family—specifically, that the family leaders aren't primarily interested in saving taxes or attaching strings to monetary gifts, but rather desire to empower the younger generations of the family. In this regard, the FAST aims to provide practical experience by serving as a mentor to beneficiaries, imparting wisdom instead of simply acting as a gatekeeper to the family wealth. The trust decision makers—the committee members—are in an ideal position to act as mentors to members of the younger generations.[4] For example, the investment committee could provide investment mentoring to the younger generations by meeting with each member annually to explain the investment decisions that have been made with respect to the trust. Some younger family members may need advice on how to be a better investor, while others may need advice on how to read a balance sheet. The mentor should make resources available to the family member that will complement his unique learning needs.

In addition to education and practical experience, family philanthropy is vital to preparing heirs for their inheritance.

The distribution committee grants practical experience to family members by making decisions regarding whether family funds should be gifted or loaned to a family member for entrepreneurial endeavors. Encouraging budding entrepreneurs not only teaches valuable business and money management skills, but also increases family interaction. It's important to note that the FAST itself doesn't gift or loan funds for entrepreneurial endeavors, but rather listens to proposals, advises and makes a recommendation as to whether family assets should be accessible to the applicant. The actual funds to be gifted or loaned should come from one of two places: if G1 is still living, then the funds should be drawn directly from them; if G1 is deceased, then the funds should come from a separate trust or family bank.

Under the structure of a FAST, the process of requesting money provides invaluable real-world experience. The FAST can implement protocols for the borrowing process, requiring the beneficiary to submit a lending request that summarizes the purposes of the loan, the proposed loan terms and how he plans to repay the money. Moreover, the distribution committee can maintain guidelines and limitations for the amounts that should be administered, with increasingly higher standards for those with a history for entrepreneurial failures or poor performance.

Family philanthropy. In addition to education and practical experience, family philanthropy is vital to preparing heirs for their inheritance. Charitable giving shows younger generations the value of helping others, and statistics show that the use of family philanthropy as a teaching tool is a determining factor in whether a family remains united. The FAST prepares the next generation to be leaders in the family's philanthropic activities by demonstrating how to give effectively and by allowing younger generations to select causes and take ownership of their own charitable investments. As with entrepreneurial development, no funds will be distributed directly from the FAST for charitable purposes. The distribution committee makes recommendations and approves charitable initiatives, while the actual charitable funds are drawn from the family's typical charitable gifting vehicle (for example, a family foundation or donor-advised fund).

Helping to preserve a family and prepare heirs for their inheritance may not be traditional estate-planning tasks, but there's a growing demand for this type of expanded planning. Our world is rapidly changing, and the estate-planning landscape has changed along with it. Clients are increasingly expecting more than just a set of documents from their estate planners, and those planners who refuse to adapt their practices, or move too slowly, will ultimately be left behind. The current state of estate planning may be one scenario where slow and steady won't win the race—it's time to act FAST.

Endnotes

1. Timothy J. Belber, Ian McDermott and John A. Warnick, "Innovate or Die," *Trusts & Estates* (September 2017), at p. 53.
2. This trust was jointly developed by Thomas Rogerson, a senior managing director and family wealth strategist at Wilmington Trust, NA and The Blum Firm, P.C.
3. Bruce Feiler, "The Stories that Bind Us," *The New York Times* (March 15, 2013).
4. James E. Hughes, Jr., "The Trustee as Mentor," *The Chase Journal* (Volume II, Issue 2, Spring 1998).