

From FAMILY WEALTH REPORT

Families first: Perpetuity and the corporate trustee

Charles Lowenhaupt - 25 March 2008

Charles Lowenhaupt is chairman and CEO of **Lowenhaupt Global Advisors**, a St. Louis, Mo.-based advisory to ultra-high-net-worth families, and managing member of the law firm **Lowenhaupt & Chasnoff**.

When a wealth creator considers the purpose of his wealth, he might conclude that it comes down to "control" -- the ability to control future generations for their own protection. After all, if there's to be any assurance that wealth will continue through multiple generations, measures have to be taken against a string of dangers from taxes to in-laws and outright foolishness.

Until fairly recently this control was generally limited to 21 years plus "a life in being" by the "rule against perpetuities." But many U.S. states have repealed this rule so that trusts can endure "perpetually."

This brings to mind a roadside placard I once saw while driving in rural Missouri. "ETERNITY," it said, "WHERE SHALL I SPEND IT?" Similarly a trust creator has to ask where his trust will reside in perpetuity.

With that in mind, picking a bank as trustee has attractions. After all, banks are perpetual, aren't they? Their corporate charters may be perpetual but we all know that mergers, staff turnover and customer-*unfriendly* "incentivization" make it unlikely that a client's relationship with the local trust company would resemble his grandfather's. Banks change over time periods much shorter than perpetuity.

Thoroughly modern

In fact, according to the "modern" view, corporate trustees don't have the continuity of service personnel to build genuine trust lasting generations, and they have priorities and goals not necessarily shared with the trust and its beneficiaries. I recently spoke to a group of bankers who were lamenting the fact that many of their customers view them as "product salesmen" and see their promotions and movements from bank to bank as preventing any meaningful and lasting relationship. The bankers noted that many "modern" advisors and trust creators eschew corporate trustees altogether.



"I hate private banks," was the view expressed, to general applause, by an otherwise reserved British wealth holder at a recent conference for ultra-high-net-worth individuals and family offices. Wealth holders in the U.S. and around the world have echoed this gentleman's view.

When writing a trust these days -- whether it's to last "forever" or for 10 years -- a common practice is to avoid corporate trustees by building a process of trustee selection to allow *individuals* to continue in the office.

Some jurisdictions give courts liberal powers to replace trustees and continue the trusteeship. The wise trust creator incorporates that process into the trust instrument so that the Trusteeship remains flexible even without legislative protection. And some creators give individual trustees the power to appoint a successor and provide trustees with the right to add or replace a trustee. Similar powers may be given to beneficiaries or even to an otherwise uninvolved person such a "trust protector." The idea is that trusts should be flexible, particularly if they're to last forever.

But there are many trusts still being run by corporate trustees -- and as a result there are many frustrated beneficiaries threatening suits and joining peer groups to compare, complain and conspire to remove corporate trustees.

Remediation

So what can these beneficiaries do?

They can start by determining whether they have a quorum to outvote and supplant the corporate trustee. In many jurisdictions the majority of trustees have considerable power and can often make decisions even against the objections of the minority. A good lawyer can help you navigate these waters.

In my experience, however, it always helps to start by talking to the corporate trustee about what a family wants to do, what's in its best interest and how these things can be achieved.

One family had such a conversation about its wish to hire an investment advisor. As in many jurisdictions the family had the power to change the corporate trustee. The bank was actually comfortable with the investments of the advisor (and most of the investments were on the bank's "approved" list). The bank felt uncomfortable paying the advisor's fee, however, and even more uncomfortable reducing its own.

The result was an arrangement whereby the advisor used the bank's approved list to make recommendations to the bank, and the bank always followed these recommendations. In effect this gave the advisor the management of the portfolio.

The advisor's fees were paid entirely out of trust income otherwise distributable to the beneficiaries. This has worked well for all concerned for many years.

Pursuit of happiness

In another situation, a bank had been named to take over as trustee on the death of an individual trustee who at his death had been using an investment advisor the beneficiaries liked very much. But the bank said it was "uncomfortable" with that investment advisor. After conversations with the beneficiaries, the bank declined to serve. This refusal to serve allowed the beneficiaries to use state law to name an individual trustee -- and he will employ the investment advisor.

There are many such stories. Corporate trustees don't want to serve as trustees for unhappy beneficiaries or, even worse, unhappy grantors. Unhappiness makes the job of trustee very difficult; institutions and their executives (and legal advisors) prefer easier, more harmonious relationships. Corporate trustees are frequently willing to forego service altogether to avoid exposure to unhappiness.

So as you create trusts, or advise others to create trusts, continue your search for the perfect trustee. Individuals can never be perpetual but processes to create succession can last many generations. And when history or exigency thrusts in a corporate trustee, carefully consider your options and then engage in a civil dialogue with a view to designing a solution that works for everyone. -FWR

The illustrations for this column are details from Japanese woodblock prints in the Charles A. Lowenhaupt Collection.

<http://www.familywealthreport.com>