

## THE TRUSTEE AS MENTOR

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Every day somewhere in the world a human being who is cast in the role of “beneficiary of a trust” accuses her or his trustee of being unresponsive to her or his request to be heard and to be represented. From this accusation (all too often true!) flows at least distress and disappointment and at worst litigation. How can a trust set up to benefit one human being by another come to such a tragic place? Easily, when we understand that the relationship between the trustee and the beneficiary is an arranged marriage.

Since the beginning of the use of trusts in the Middle Ages, very few, if any, beneficiaries have chosen their trustees. Founders, Grantors, Settlers, whatever term we use (hereinafter I will use Grantor) select the trustees of the trusts they create. Grantors of inter vivos revocable trusts (who are also the beneficiaries of such trusts) select the trustees for the new trusts that often grow out of their original trusts at their deaths. Grantors of all irrevocable trusts select the trustees of the trusts they create. Whether a trust becomes irrevocable by inter vivos deed or by death, it is the Grantor who seeks, interviews and selects the trustee. The beneficiary and the trustee, however, from the date of the trusts irrevocability forward “for richer or for poorer, etc...” “until death (or divorce, *i.e.* litigation) do them part” are irrevocably related.

Unfortunately for this relationship, arranged marriages have not been in vogue for some time. Even in the East they are beginning to be seen as an antique idea. Why? Because human beings believe that if they are going to give up any part of their freedom of action, it must be because the reward of doing so is perceived as being of greater value than the loss of freedom it requires. It is in the choosing that this balancing of risk and reward is carried out. It is the right to choose the party to the new relationship that makes the giving up of freedom possible. To be sure the choice may be a poor one and the relationship may fail but, having made the choice, the responsibility for the outcome is accepted by the chooser. With choice comes both responsibility for the relationship and for participation in it. In the beneficiary/trustee relationship, no reciprocal choice by the beneficiary takes place. The beneficiary is not invested with responsibility for the relationship or in participation in it. The trustee does have some

investment in the relationship since the person named as trustee, whether individual or corporate, agreed to accept the role of trustee and the legal responsibilities associated with it.

Many trustees are not introduced to their new partner, the beneficiary, until the “wedding night,” (following the signing of the trust agreement by the trust’s Grantor or on his or her death) and at this point a new relationship has to be formed. Unfortunately, for most of these new beneficiary/trustee relationships rarely do the parties understand that the human relationship they are entering will be far more important to the trust’s success than the proper maintenance of their legal relationship. How quickly the trustee and beneficiary come to grips with this truth and begin to manage this human relationship will have a profound impact on how beneficial the trust will prove to be for both parties.

How can the beneficiary and trustee begin this relationship with the greatest possibility of success? In a later portion of this article, I will discuss the Roles and Responsibilities that excellent beneficiaries and excellent trustees must accept and fulfill for a successful relationship. For now, let me simply say that every individual or corporation considering accepting the role of trustee must comprehend and be willing to do three things:

- (1) understand that in agreeing to become a trustee she, he or it is entering into a human relationship with the beneficiary not just a legal one;
- (2) do everything in her, his or its power to get to know the potential beneficiary of the trust before the implementation of the trust;
- (3) appreciate from the first meeting with the beneficiary, that this relationship is an arranged marriage.

There is a second significant roadblock to a successful relationship between the trustee and the beneficiary. It is the failure of the Grantor of the trust to perceive that the recipient of a gift (the beneficiary of the trust) in order to have his or her life enhanced rather than depreciated by it, must believe that she or he is worthy of such a gift. We all know how disempowering gifts (handouts) from the government have proven to be for the least privileged in our society. Why should we believe that the beneficiary of a trust is any different? In psychology, a new disease has been defined. It is called “remittance addiction.”<sup>11</sup> Every trust officer and every individual

trustee lives with the knowledge that a poorly administered trust will result in this syndrome. What can be more disempowering to a human being than becoming dependent on, and waiting anxiously for, the check on the first of the month. Obviously, I am not speaking of people with physical or mental disabilities. I am speaking of trust beneficiaries who are perfectly able physically and mentally but who are as dependent on trust remittances as others are on drugs or alcohol.

Dependence creates all kinds of behavior, none are behavior choices free people make. Why do trusts have this risk? First, many privileged families have been given no early warning messages by their trusted advisors that this problem exists. This is especially true in the families of first generation entrepreneurs where there has been no historic experience with significant wealth or with trusts. Second, the largest number of trusts created each year are created for tax purposes. In my experience, most of these trusts are created without any careful thought being given to the beneficiary/trustee relationship and particularly to the issue of whether the beneficiary will consider herself or himself worthy of the gift. Tax planning is a necessary fact for families with wealth and must be carried out with excellence. However, in the 100 years a family must govern itself to see if it can successfully overcome its ever-present enemy “shirt sleeves to shirt sleeves in three generations,” the tax planning of today will turn out to be barely relevant. “family’s successful wealth preservation is in jeopardy if the family beneficiaries, the family’s critical wealth, its human capital, are remittance addicted and are quickly taking the family out of business. A gift made principally for tax purposes has no life in it for the human beings who are supposed to be benefited. They will properly ask the trustee, “Why was I given this gift? Why am I worthy of it?” Only trouble will follow for a trustee who says, “because grandpa loved you” when the trustee knows that grandpa was actually anxious to take something away from the tax collector rather than to give something to the beneficiary. The trustee’s answer must be the truth or the beneficiary will find the truth on her or his own and never trust the trustee again. All too often the truth is that grandpa wanted to take it with him but since he could not and since the tax man was there, grandpa decided to set up a monument to himself which would remind later generations of his family of his success as a wealth creator. In many instances Grandpa really did not care about the impact of the gift on the beneficiary.

So here we have the trustee and the beneficiary in an arranged marriage where the beneficiary will discover that the question of his or her worthiness to be in this relationship was often never considered except in the context of saving taxes. Necessarily, this fact leaves the beneficiary in a quandary as to how to view the trust and her or his role in it. There are frequently many other unresolved issues of worthiness between the Grantor and the beneficiary. I do not intend to discuss these in this article as they are too specific to each family fact pattern. I will, however, quote my father, who taught me at the beginning of my legal career, that “if at a Grantor’s death he or she has left unresolved issues in his or her relationship with the beneficiary of a trust created by him or her, death will in no way resolve these issues, but rather serve to leave the beneficiary behind to try to answer unanswerable questions.” For the trustee and the beneficiary it will be within the trust, and in the beneficiaries relationship to it, that these questions will surface. How the trustee reacts to them will have a great deal to do with the success of the beneficiary/trustee relationship created by the trust and whether the beneficiary feels worthy of the gift of the trust or falls into remittance addiction.

I imagine many readers by now are saying, “I disagree.” They are saying “I know many Grantors whose trusts were created as gifts of pure love and who had every intention that the trust beneficiary’s life be improved and empowered by the gift.” Happily, I too, represent many such Grantors. My larger experience, however, has taught me that they are not the Grantors whose gifts lead to the need for this article. To the contrary, they and their families are the models who have taught me the lessons I will share with you in the next sections of this article, explaining what it means and how to become an excellent beneficiary or an excellent trustee and how to forge an excellent beneficiary/trustee relationship.

As we move to those sections, I would like to propose the following: **“The solution to a successful beneficiary/trustee relationship lies in the trustee offering and the beneficiary accepting the proposition that at the inception of the trust, the trustee’s role is to be the beneficiary’s mentor and to remain in that role until the beneficiary is fully participating in the beneficiary/trustee relationship, at which time the trustee’s role will evolve to the trustee as a representative.”** In all relationships which are successful learning experiences for both participants, the party with more knowledge at the beginning must offer that knowledge to the party with less knowledge in such a way that the party with less knowledge willingly places

herself/himself in the role of pupil. The Greeks had a saying that when the student was ready, the teacher would appear. I would add that they might also have said that when the student was ready, the teacher would know when to disappear.

In a beneficiary/trustee relationship, normally the trustee has the knowledge both human and legal, of how the relationship is meant to work. The beneficiary normally does not. If the trustee at the outset of this relationship offers to mentor the beneficiary until he or she can achieve excellence, as discussed below, and if the beneficiary experiences the trustee's offer as true and as a gift, their relationship has an excellent chance of being very successful. Unfortunately, all too often, the trustee sees excellence as limited to its investment and administrative success. The trustee fails to perceive that what it knows about the human and legal nature of the beneficiary/trustee relationship must be communicated to the beneficiary, and must be both learned and assimilated by the beneficiary, if their relationship is to be a success. Even more unfortunate for a successful beneficiary/trustee relationship is the situation where the trustee wonders why this beneficiary who seems so intelligent in many areas of life seems so dense about a subject the trustee considers to be so simple. Why should this question even arise in the trustee's mind? All too often, in my experience, the trustee chosen is a person or institution with excellent quantitative skills, and equally, with little or no experience or training in qualitative issues. The beneficiary, on the other hand is, equally often, a person with excellent qualitative skills but lacking experience in quantitative issues. Like the failures to communicate between science and the humanities, it is not surprising that beneficiaries and trustees with different fundamental journeys in life find it hard to understand one another.<sup>[2]</sup> If a trustee can recognize this mismatch, and transcend it by offering to mentor the beneficiary to the end that the beneficiary can learn and then exercise her or his role in the trust, their relationship stands a chance of harmony. A trustee who fails to learn at the outset of the trust what the beneficiary does and does not understand about their relationship, or worse, assumes knowledge on the part of the beneficiary, "since after all this stuff is so simple anyone must understand it," does so at such trustee's peril.

To be asked to be a mentor is the highest honor that can be bestowed by one human on another. The Grantor of a trust when selecting a trustee will be well advised to consider the potential trustee's ability to mentor the beneficiaries she or he loves as the highest qualification

among all of the many things a trustee must do. If a trustee is an excellent administrator, a superb prudent investor, and a Solomonic and humane distributor, but is perceived by the beneficiary to be distant, aloof, and unable to communicate in a way the beneficiary can understand, their relationship will be unsuccessful. It is in the role of mentor that a trustee's real worth to the beneficiary, and thus to the original grantor's purpose to make a gift that is empowering to the beneficiary, can be found.

In my original proposition, I suggest that there must be an evolution of the trustee relationship with the beneficiary from mentor to representative. The term representative suggests some form of relationship, of governance. Trusts contain within their terms systems of governance. After all, whenever two or more persons are in any relationship, they must make joint decisions. Joint decision making means that the parties are in one of a variety of systems of governance. In the beneficiary/trustee system of governance, the trustee is the representative of the beneficiary as it is to her or him that the trustee is accountable. If the trustee makes unilateral decisions and imposes them on the beneficiary, and if the beneficiary has no choice but to accept them, in political science terms we have a "tyranny". Tyrants have not fared well in history when called to account. If the trustee makes joint decisions, while always exercising the casting vote, the beneficiary will quickly determine that there is no purpose in dealing with the trustee and opt out by silence or anger. If the trustee and the beneficiary make joint decisions, and the beneficiary has been mentored by the trustee, and has become an equal party to the representative system of governance, the trustee will almost never have to exercise a casting vote. The beneficiary will know that, even if the trustee makes a decision with which she or he disagrees, the trustee's view, acting as her or his representative, is likely to be a fair and even one.

This system of representative governance, was the system called a Republic by Aristotle and is the system of governance of the United States.<sup>[3]</sup> Aristotle thought, and I believe most Americans agree, that a republic is the best system of governance for human beings. It is the system of governance in which we select people to represent us and give them the power to make decisions regarding us. It is also a system which requires the representative to be accountable to us for how he or she represents us. It is my contention that the beneficiary/trustee system of governance works best when the trustee evolves from mentor to representative and

thus the trust system of governance becomes a republic. This is the system of beneficiary/trustee governance permitting the greatest freedom to each party to the relationship and thus, the system which offers the greatest chance of mutual respect and, ultimately, trust between the parties. It would seem to me that every trustee, knowing that one day accounts must be rendered and judged, will want the beneficiary judging these accounts to receive them in a spirit of mutual respect and trust. The alternative is the antithesis of trust and symbolic that no **TRUST** ever existed.

We turn now to the reciprocal “Roles and Responsibilities of Beneficiaries and Trustees.” These next paragraphs offer the lessons I have been taught by the families and institutions which have honored me by asking me to accompany them on their individual journeys; whether they be to preserve the wealth of their families, the human beings who made up their families, or to promote the well-being of their institutions through the provision of excellence to their clients and customers.

### **The Beneficiary**

Every year someone walks through my door who wants to sue her or his trustee. Each has a sad and sometimes horrifying story to tell about what happened to her or him as the beneficiary of a trust. Were the ancestor who created their trust to hear their stories, it is likely that the trust would never have been formed! Why do these stories keep happening when the purpose of a trust is to improve the beneficiary’s life? Strangely, as with so much of modern life, the answer as I have experienced it is a paradox.

The fundamental problem nearly always lies with the participation of the beneficiary and only secondarily with the trustee. Many readers who have similar stories to tell may now be upset and wondering how the beneficiary can be the problem. In meeting after meeting with aggrieved beneficiaries, I discover that they have never been educated as to what it means to be a beneficiary of a trust. Consequently, the roles and responsibilities given to them in that capacity have never been exercised. On what basis can I make such a sweeping statement? Simply that over the 30 years of my law practice, less than 10% of beneficiaries, when they first seek my advice, have actually read and understood the terms of the trust of which they are the beneficiary.

When I participate in seminars on this subject, over and over the participants readily agree that they don't understand their trust documents and, in many cases, have never read them. (Very rarely have any of their advisors or trustees ever even suggested that they should do so). Clearly, you can't expect good relations in a complex legal relationship if one party to the relationship hasn't even understood her or his basic rights and responsibilities. Frankly, no beneficiary can honestly know if the trustee is or is not performing the trustee role correctly without understanding the trust instrument.

Let's turn back to the "aggrieved" beneficiary in my office and help her start a new process. Her brother will be coming in next week and I'll be teaching him the same things.

After the beneficiary has told her story and explained that she is very angry and wants to sue, I advise her that I don't litigate and that I'll be happy to give her references to a specialist in the field of trust litigation. I do suggest that since she's here, why not discuss the matter with me to see if some course other than litigation might serve her better. Assuming she agrees to keep talking, my first question to her is, "Are you an excellent beneficiary?" This is the one question the beneficiary least expects, and after an hour or so with me, the one she wishes I hadn't asked. Why? Because if she decides to try my way of solving the problem through education instead of litigation, she is going to go away from the meeting with lots of homework. Let me quickly add that trustees who act for my client/beneficiaries get lots of homework too!

Before the meeting is over, I'll also explain to her that every well-educated beneficiary demands, and in my experience frequently receives, excellence from her trustee. After all, the trustee is accountable to her, which is something she initially finds hard to comprehend since she feels as if she has been accountable to the trustee for many years. A clear understanding of who is accountable to whom underlines much of the problem in these failed relationships.

Lack of beneficiary education leads to another problem: the typical annual trustee's meeting. What's wrong with the typical meeting? First, it's scheduled at 11:15 with lunch to follow at 12:00. No real business meeting takes this format unless it's designed to avoid real work. Second, the meeting consists of an overview of trust accounts. These accounting statements are usually well prepared, correct and have cost the trust substantial fees to create. Unfortunately, the beneficiary rarely has had a financial education, and even more rarely a fiduciary accounting education, and therefore has no way to comprehend them.

What then happens at the meeting? The beneficiary, to avoid the embarrassment of admitting that she or he doesn't understand the statements and further being well-bred and wanting not to "waste the trustee's time in teaching," accepts the account as prepared. There will then normally be an investment presentation, again, well-prepared and, again, of little use unless the beneficiary has had an investment education. Lunch will then be served and all possible useful work will conclude.

A properly educated beneficiary will change this whole picture. How? First, the annual trustee's meeting will begin at 9:00 and conclude at 10:30. If the parties want to have a social lunch, that's fine but not in conjunction with the trust business meeting. Second, the beneficiary will receive the trust accounting to review two weeks before the meeting. The accounting information will be accompanied by a proposed meeting agenda and specific questions from the trustee. Third, a week before the meeting, the beneficiary will adjust the agenda to put the issues she wishes to discuss first and will add specific questions for the trustee.

Now a real business meeting will take place, important issues will be addressed, strategic planning will occur and, most importantly, the beneficiary and the trustee will be carrying out the roles and responsibilities necessary to create a successful beneficiary/trustee relationship.

How can a beneficiary achieve excellence in her or his role in the beneficiary/trustee relationship? Here is the list that I use to educate a beneficiary and to measure her or his success in achieving excellence. These are subjects that family members with moderate general education can learn. They are designed for family members whose journeys in life do not include professional activity in any of the financial professions. These are the family members most at risk of failed relationships with trustees and thus, are those whom trustees will most want to mentor.

### **Roles And Responsibilities Of Beneficiaries**

Each beneficiary has an obligation to educate herself or himself about the duties of a beneficiary, as well as the duties of her or his trustees. Listed below are the specific roles and responsibilities of beneficiaries:

- ◆ To gain a clear comprehension of each trust in which the beneficiary has an interest and a specific understanding of the mission statement for each trust as prepared by the trustee.

- ◆ To educate himself or herself about all trustee responsibilities.
- ◆ To understand the trustee's responsibility to maintain the purchasing power of the trust's capital while maintaining a reasonable distribution rate for the income beneficiaries.
- ◆ To have a general understanding of "modern portfolio theory" and the formulation and process of asset allocation.
- ◆ To recognize and look for proof that the trustee equitably represents all beneficiaries.
- ◆ To meet with each trustee once each year to discuss the beneficiaries' personal financial circumstances and life goals and to advise each trustee on his or her assessment of the trustee's performance of the Trustee Roles and Responsibilities.
- ◆ To become knowledgeable about the functions and importance of each element of his or her trust's governance structure.
- ◆ To develop a general capacity to understand fiduciary accounting.
- ◆ To demonstrate a willingness to participate in educational sessions and to become financially literate.
- ◆ To know how and in what amount trustees and other professionals are compensated, and to obtain a general understanding of the budgets for the trust and investment entities in which the trust will be invested. <sup>[4]</sup>

This set of Beneficiary Roles and Responsibilities is being used as a template for learning by many beneficiaries. In my practice, it has already proven its worth by changing charged relations between beneficiaries and trustees. It has given both parties a way to measure each other's commitment and willingness to participate in a successful relationship. When the above list is combined with the reciprocal list ("Trustee Roles and Responsibilities"), the beneficiary understands her or his role in relation to the trustee. Each beneficiary has, by virtue of the list of Trustee Roles and Responsibilities, a way to evaluate how well her or his trustees are fulfilling their duties and with this knowledge each beneficiary becomes an educated consumer. She or he can now take a proper place in trust governance. She or he can finally begin to appreciate the gift the founder of the trust intended when the trust was created, and how privileged she or he is to have received such a gift.

## **The Trustee**

The multiple roles and complex responsibilities of trustees are extraordinarily difficult to carry out with excellence. Like one of the representations of the Hindu God Shiva, you need six hands. On one hand, you have the grantor's mission for the trust to manage and to explain to the beneficiaries; on the next hand, the income beneficiaries' need for financial help and education; on the next hand, the remaindermen's goals; on the next hand, the complexity of the modern investment markets; on the next hand, managing the federal, state, and local tax affairs of the trust; and on the sixth hand, a comprehension of trust law and the court system that administers it. The risks that trustees will fail to be good representatives, or worse, will become time-servers, or worst of all, will be guilty of assuming they know better than anyone else, are real. The fundamental issue for Grantors is how to gain the enormous long-term benefits to successful wealth preservation that come from trusts, while avoiding risks of trustee lassitude leading to entropy and the draining away of beneficiary wealth.

How can a beneficiary measure a trustee's performance of his, her or its multiple roles and what system of trust governance is likely to create the most successful beneficiary/trustee relationship? I suggest that a system based on the following four components will best achieve these goals:

FIRST, a well-educated beneficiary using the Roles and Responsibilities for Trustees outlined below will be able to measure and thus judge whether his or her trustee is achieving excellence.

SECOND, a Protector, an individual or entity with the power to change the trustee, should form an element in the trust's governance structure to create a dispute resolution mechanism when beneficiaries and their trustees have significant disagreements on the trustee's performance.

THIRD, trust governance should include a system of "Peer Review" for measurement of trustee excellence. Such a system, I believe, introduces a needed element of outside expert participation into the evaluation process to assure fairness.

FOURTH, a system of trustee reaffirmation should be included in the trusts' governance structure.

These four techniques provide the necessary checks and balances within a trust's governance plan to ensure that the trustee's performance will be judged fairly by the trust's beneficiaries. They further ensure that the trustee is given the necessary room for the exercise of discretion in the most responsible way. This is especially likely since the trustee will be dealing with an educated beneficiary.

Let us now turn to each of these techniques:

FIRST, how can a beneficiary know if her or his trustee is achieving excellence? Here is a list of Roles and Responsibilities of Trustees which I recommend to beneficiaries and trustees. It is the reciprocal of the list of the Roles and Responsibilities of a Beneficiary discussed above.

### **Roles And Responsibilities Of Trustees**

Each trustee has an obligation to educate himself, herself or itself on the duties of a trustee, as well as on the duties of the trust beneficiaries. The trustee's specific duties are as follows:

- ◆ To be fully aware of the grantor's original purposes in creating the trust and the current purposes of the trust if these have changed over time.
- ◆ To guide his, her or its decisions by these purposes.
- ◆ To act so that the actual operation of the trust is empowering to the beneficiaries within the provisions of the trust.
- ◆ To put mechanisms in place to increase the level of financial awareness of the beneficiaries, to act to see that such financial education of the beneficiaries is carried out effectively.
- ◆ To meet at least annually with each beneficiary in order to renew the beneficiary's understanding of the trust, as well as to obtain from each beneficiary full information, financial and otherwise, about his or her specific personal situation.
- ◆ To evaluate and advise each beneficiary on how well he or she is meeting the Roles and Responsibilities of a Beneficiary.
- ◆ To educate himself, herself or itself about all beneficiary responsibilities.
- ◆ To implement effectively the trust's general policies and procedures as they relate to:
  - the trust's investment goals and acceptable risks

- the selection and/or provision of investment advice and management to accomplish such investment goals
- the trust's tax position and the selection of tax services, and
- the trust's legal position and the selection of legal services. <sup>[5]</sup>

SECOND, the role for a Protector in trust governance is to provide a representative of the beneficiaries of a trust who is prepared to remove the trustee of that trust if the beneficiaries request the representative to do so. In all governance systems, checks and balances must be created to ensure that no part of the system can become a law unto itself and that all parts of the system remain accountable to the others. In a trust governance system the beneficiaries must have a way to ensure the accountability of their trustees and to be able to remove and replace unsatisfactory trustees for the trust governance system to be properly balanced.

Few trust agreements prior to the 1980's provided a system for removal of trustees. During the 1980's as beneficiaries became more educated about their governance system, they learned how to measure whether they were receiving excellence from their trustees. Beneficiaries discovered, unfortunately, that not all trustees had been performing at a level of excellence and, in such cases, sought to replace under-performing trustees. Many beneficiaries, to their distress, learned from their counsel that unless a trustee voluntarily resigns, it is nearly impossible, within the court system, to remove a trustee. Although beneficiaries can prove that a trustee has been anything but excellent, most courts will not agree to a trustee's removal unless the trustee has committed theft, is an alcoholic, is mentally incapacitated, or has acted recklessly. They also discovered that the trust from which they requested the trustee's removal had to bear the costs of the court proceeding, and that these costs were substantial. What costs? The hard costs for the preparation of an accounting and for lawyers on both sides of the case, as well as the soft costs of loss of beneficiary financial privacy due to the public nature of court proceedings. Clearly, checks and balances in the system of trustee/beneficiary governance were unsatisfactory from the perspective of a beneficiary seeking excellence from her or his trustee. This set of facts called for an alternative governance solution.

The answer to this governance problem is to put into all trust agreements provisions for a Protector along with provisions that give the beneficiaries the power to request the Protector to

remove the trustee. At one time, there were tax concerns with beneficiaries having this direct power of removal; for the present, these concerns appear to have been overcome. Normally, in matters of governance, I advocate that people act for themselves by taking responsibility for their own affairs.

In the case of the power of removal of a trustee, however, I prefer the interposition of the Protector between the trustee and the beneficiary. Why? Because the Protector does not have to remove the trustee. The Protector can look at the situation dispassionately and, if he or she believes it is in the best interest of the beneficiaries, act as a mediator between the beneficiaries and the trustee. Albeit, he or she is a mediator with a steel hand inside a velvet glove. If the mediation does not work, the trustee knows that the Protector can and probably will remove him or her. The further advantage of this procedure is that it settles disputes between the beneficiaries and the trustee outside the court system. This process saves time and money and, more importantly, maintains the privacy of the family's financial affairs.

THIRD is Peer Review - When an individual creates a long-term trust, he or she rarely considers that such an organism will suffer the same entropy or gradual decay and eventual depletion of its energy as do all other living things. This reality is only discovered when later generations of beneficiaries find they are dealing with atrophied trustees. Necessarily, the law provides remedies in cases of serious misfeasance and neglect, but the law offers no positive program to overcome or even to reduce the effects of entropy.

After watching the action of entropy on trusts, I decided to try to find a method of governance that might counteract, or at least substantially retard its effect. To this end, I studied various systems of governance used by family and non-profit organizations to see if I could find a model that worked. My search ultimately led to the system of accreditation used by educational institutions called Peer Review.

In this process, an institution voluntarily submits all aspects of itself to a rigorous review by its peer organizations. In the academic context such a review can lead to a negative conclusion as drastic as loss of accreditation. Despite this risk, the review is generally seen as a very positive process by institutions which would otherwise have little sense of how well they were doing. When this process is applied to trusts it is used only as a positive process. The negative process would be handled by the courts. Peer Review provides a trust with an

opportunity for its peers to determine how well it is meeting its mission and how it might do so in even more successful ways. If executed properly, Peer Review is energizing to the trust and, therefore, offers great hope that the process of entropy can be effectively retarded.

Assuming a family wished to include Peer Review in its governance, how would it work in the context of a trust?

- ◆ The instruments creating the trust should include a requirement for such periodic review. While there are many existing trusts whose instruments cannot be modified to include provisions for Peer Review, families may still implement the process by requesting existing trustees to voluntarily agree to be Peer Reviewed. In the case of successor trustees who undertake their duties following implementation of Peer Review, such trustees can be required to accept the principle of Peer Review as a condition of their qualification as trustees.
- ◆ All trustees should reaffirm their understanding of the process and their commitment to its successful conclusion before beginning a Peer Review.
- ◆ The selection of Peer Reviewers should be undertaken by an individual designated to carry out this function in the trust agreement (in a case where a trust names a Protector, a Protector would be an excellent choice for this role) or by a committee of selectors chosen by such an individual. Persons selected to be Peer Reviewers should have no close relationship to the trust or with any trustee. The Reviewers should also have no close association with any beneficiary of the trust being reviewed. Preferably the Reviewers should be individuals or organizations of proven excellence in the trust area and with long experience in the field. Peer Reviewers should serve only once in this capacity in order to ensure that each review stands on its own and in order to minimize the possibility of contamination of the process by politicization.
- ◆ Peer Reviewers should be compensated in order to assure that they apply the same degree of rigor to the process as they would to all of their other professional endeavors. The selector should be responsible for the negotiation of the Reviewers' compensation.
- ◆ A Peer Review should occur every five years, although some families are considering every three years.
- ◆ The Peer Review should cover all aspects of the trust.

In reviewing a trust, the Reviewers should consider the following issues and such others as are specific to that case:

- The trustee's awareness of the purposes of the trust; the grantor's original purpose in creating the trust and whether these purposes are guiding the trustees.
- The trustee's relations with the beneficiaries in general and, specifically, whether the trust's actual operation is empowering to the beneficiaries.
- The trustee's awareness of the beneficiary's situations and the trustee's success in enhancing their situations within the provisions of the trust.
- The level of financial awareness of the beneficiaries and what mechanisms are in place to continually improve their financial capabilities.
- The trustee's awareness of each beneficiary's choice of life journey and what mechanisms are in place to continually enhance pursuit of each such beneficiary's goals.
- The trustee's general policies and procedures and the implementation of them as they relate to:
  - the trust's investment goals and its success in meeting them.
  - the selection and provision of investment advice and management.
  - the trust's tax position
  - the selection of tax services
  - the trust's legal position
  - the selection of legal services.

- ◆ The Peer Reviewers should have access to all documents, reports, accounts, tax returns, professionals retained by the entity, beneficiaries, and other information necessary to properly carry out their Review and to determine whether the recommendations of any prior Review were implemented. In the process, the Peer Reviewers will interview the trustees, beneficiaries and professionals involved with the trust.
- ◆ The Peer Review itself should last one day and should be wholly constructive, since its purpose is to create a positive basis for the trust's ongoing operations. The review should offer a clear picture of the current status of the trust. It should raise important issues,

problems and questions on how the trust might better meet its mission. The Peer Review should not itself focus on the negative. In fact, should the Peer Review discover any serious deficiencies, the Review should be aborted and the problem issues brought to the attention of the Peer Review selector for proper correction. While termination of the Peer Review may seem a drastic result, once the positive atmosphere of the Review has been reduced, the full positive effects of the Review can no longer be achieved. The Peer Review should not attempt to solve problems or answer important questions raised by the Review; solutions and answers are the province of the trustees not of the Peer Reviewers. The difference between the Reviewer who raises issues and the implementer who resolves the issues is a critical component of the process and must be recognized as vital to the success of the process. The Peer Reviewers are not the trustees and must not enter into the discretionary realms that the latter properly exercise.

- ◆ Sole responsibility for implementation of the Peer Review's suggestions must be with the trustees.
- ◆ Peer Reviewers should have no responsibility to review whether any of the Peer Review's suggestions are implemented, although it may be appropriate in a specific instance and without further compensation for further inquiry to be made of a Peer Reviewer on the details of a specific issue raised during the Peer Review.
- ◆ Implementation of suggestions arising out of the Peer Review process should not be assigned to any individual or organization which served as a peer reviewer during the Peer Review which initiated the suggestion. It is imperative that no possible professional self-interest on the part of any Peer Reviewer enter into the process.

FOURTH, I suggest that all trust agreements provide for trustee reaffirmation every five years.

If we believe in representative government as the best choice for long-term trust governance, why not ask our Trustees to offer themselves for reaffirmation on a periodic basis like all other representatives in a republic. There are now families in the United States who have implemented this plan for reaffirmation of trustees. Some of these families, when they adopted this system, had long-term irrevocable trusts in place that had neither contemplated this idea nor

which could be amended to incorporate it. The currently enfranchised trustees simply decided that, if the family beneficiaries wanted a system for reaffirmation of trustees they were entitled to have it. The trustees voluntarily put themselves up for reaffirmation and agreed that, if they weren't reaffirmed by a vote of the beneficiaries for a new term, they would resign.

Carrying this idea for a trustee reaffirmation system further, all of the corporations in America who offer their services as trustees and who follow best practices have affirmative resignation policies written into the brochures describing their policies and practices to prospective clients. I'm frequently surprised when, in trusts created many years before the adoption of these enlightened policies, the beneficiary requests the selection of a new trustee following a trustee's admitted poor-to-unsatisfactory performance, and the beneficiary discovers that these policies don't seem to apply. Why, I wonder, would any trustee, individual or corporate, want to be the trustee for a beneficiary who has said, "You have not represented me properly and I wish to select someone else"? How can they continue in a representative relationship based on trust if the basic trust isn't present between them?

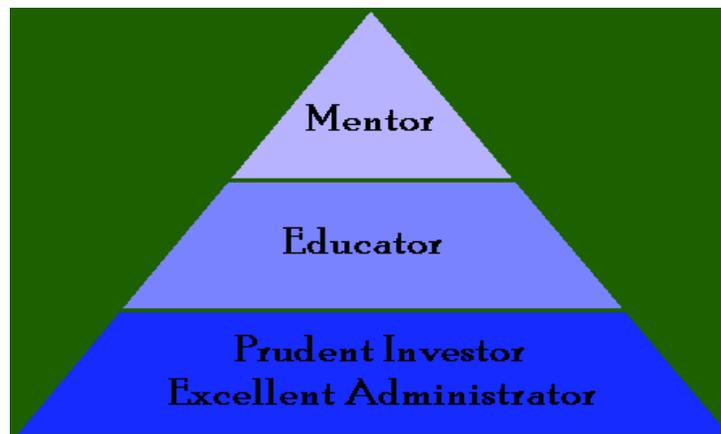
I believe that many Grantors could strengthen their trust governance practices by implementing a trustee reaffirmation system. I appreciate that being an excellent trustee probably won't win any trustee a popularity contest and that there is, therefore, a risk of "mobocracy" in the reaffirmation process. I believe this risk to be very small if the beneficiaries are educated to carry out their Roles and Responsibilities, in trust governance, there is a process of Peer Review of trustees, and a system of alternative dispute resolution using a Protector that employs the wisdom and the presence of long-term trust practitioners acting either as peer reviews or as protector. Trusts need not depreciate the lives of people; they have every reason to enhance the lives of people, but they need to be parts of a system of representative governance to assure the achievement of that purpose.

### **In Conclusion**

I believe that the beneficiary/trustee relationship, if it follows the above principles of joint learning based on mutual trust and respect, can be an extraordinarily successful one for both parties. It can offer to each a fulfilling role in the long-term wealth preservation planning for the beneficiary.

However, without the trustee accepting a role as the beneficiary's mentor and ultimate representative, the trust may never achieve the success the Grantor hoped for it when he or she created it as a gift of love and as a gift of hope that it would help to lead to the successful achievement of the beneficiary's individual pursuit of happiness.

To help Grantors and beneficiaries see clearly how to measure an excellent trustee, I close with a picture showing ascending levels of trustee excellence.



The first level represents an excellent quantitative trustee who fulfills all the legal requirements of a trustee. The second level represents a trustee who in addition to excelling at the first level provides, when requested, the education the beneficiary seeks. The highest level, trustee as mentor, represents a trustee who proactively seeks out the beneficiary to provide both quantitative and qualitative excellence. As I said earlier, the title of mentor is the highest honor one human being can bestow on another. For a trustee to be so honored by a beneficiary is to achieve true excellence.

To each beneficiary and to each trustee who sets out on the journey to achieve excellence, in this complex relationship, I salute your courage and trust your journey together will be crowned with success.

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<sup>11</sup>O'Neil, Jessie H., *The Golden Ghetto*, Center City, Minnesota Hazelden 1997.

<sup>[2]</sup>For a helpful guide to the different ways we learn, refer to Daniel Goleman's book, *Emotional Intelligence*, New York, Bantam Books, 1995.

<sup>[3]</sup>Aristotle, *The Politics*, translated by T.A. Sinclair, revised by T.J. Saunders, London, Penguin Books, 1992.

<sup>[4]</sup>I am indebted to Richard Bakal and Joanie Bronfman for their assistance in the creation of this list.

<sup>[5]</sup>I am indebted to Richard Bakal and Joanie Bronfman for their assistance in the creation of this list.