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CHAPTER 15

Private Trust Companies: Creating the Ideal Trustee

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This chapter focuses on the role of the private trust company (PTC) as the key fiduciary for wealthy families. We begin by providing a basic understanding of PTCs: what is a private trust company, and why would a family consider establishing one? We then address how a private trust company works by exploring the "nuts and bolts" of creating a PTC. The latter portion of this chapter shifts gear and delves into the standards, goals, and intangibles that a PTC must achieve for success by using a parable and analyzing lessons learned from experienced PTC executives.

The Broader View

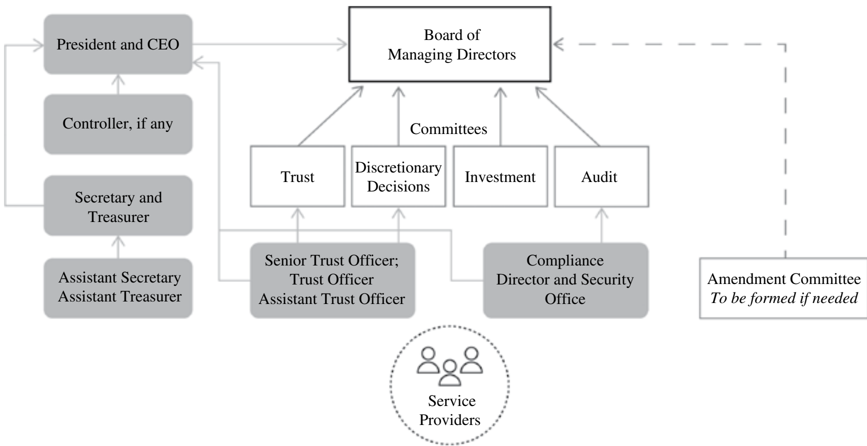
What Is a Private Trust Company?

A private trust company (PTC) is an entity customarily owned by one family and created specifically to serve as the trustee for trusts created by that family, and to serve as the family's fiduciary in certain other contexts, such as an

executor of a family member's probate estate or as the guardian for an incompetent family member. A PTC is typically structured to look like, and function as, a state law corporation, even though in most cases in the US, a PTC is chartered as a state law limited liability company.

A PTC is typically organized to function as if it were a commercial trust institution, governed by a board of directors and managed by them through the use of board committees such as a trust committee, audit committee, and investment committee, and through delegation to officers, such as a president, vice president, senior trust officer, compliance officer, etc. Graphically, this resembles the following (see Figure 15.1):

FIGURE 15.1 Example of Private Trust Company Governance Structure



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What Are the Differences Between a Private Trust Company and a Commercial Trust Company?

Readers may be fairly familiar with commercial trust companies: financial institutions that are (i) licensed, or "chartered," by either a state or the Office of the Comptroller of the Currency, (ii) subject to regulation by state or various federal agencies, or both, and (iii) authorized to conduct trust business with the general public. In contrast, a PTC is legally authorized to conduct trust business generally with only one family.

As a practical matter, a commercial trust institution and PTC operate similarly. Both entities' operations involve:

- An Audit Committee that is responsible for annual audits of the trust company's financials and ensuring compliance with the company's expressed fiduciary processes;
- An Investment Committee that sets investment strategy for the trust company's trust clients and vets investment solutions to implement that strategy;
- A Trust Committee that oversees trust company operations to ensure that they are occurring in proper fashion and that the details of trust client matters are accomplished appropriately and timely (e.g., ensuring the preparation and timely filing of tax returns for trust clients);
- Company officers to execute routine activities, vet prospective clients and client transactions for regulatory compliance, etc.; and
- A Board of Directors to oversee all of the company's operations and set strategy for the trust company.

The primary operational difference consists of the use of a committee in a PTC that makes certain tax-sensitive decisions, such as over discretionary distributions.[1] As implied, that committee is designed to insulate family members from adverse transfer tax results described in guidance from the Internal Revenue Service,[2] but more importantly, that committee provides structure and discipline, as well as flexibility, for the process of making distribution decisions for trust beneficiaries. This function is discussed later in this chapter.

Another difference between a PTC and a commercial trust company is that, while both types of trust institutions make strategic-level investment decisions for their clients' trusts (primarily long-term asset allocation) through an Investment Committee, a PTC family's family office is customarily tasked with execution of that investment strategy, either itself or as a manager of managers, again pursuant to a written agreement (either with the PTC or a trust client itself). Furthermore, back-office functions of a PTC can be performed through a combination of a part-time PTC officer being assigned such tasks in conjunction with delegation (by contract) to a service provider, either the family's family office or a third-party professional firm. In a commercial trust company, most if not all operational functions are performed inhouse. In summary, while both PTCs and commercial trust companies make important fiduciary decisions for their trust clients related to distributions, investment strategy, and so on, unlike a commercial trust company, a PTC looks primarily to others to do the majority of the work required to execute those decisions.

Why Do Families Consider Creating a PTC?

Being responsible for the management and operations of a family-owned financial institution is usually the last thing that senior family members would volunteer to undertake. They correctly suspect that forming a PTC, and managing its operations, requires substantial resources in time and capital, as well as effort. Despite such misgivings, families create PTCs because senior family members and their advisers recognize that there is usually a need to do several of the following:

- Maintain family's control over the family's business in either private (resisting sale) or public contexts
- Attract, retain, and provide for the succession of capable individuals and advisors, particularly liability protection
- Take command of services provided to the family's trusts and their beneficiaries
- Change state fiduciary income tax situs of trusts (for US families)
- Change administrative or substantive law, or both, that govern family trusts
- Maintain family's control over the family's wealth by consciously and systematically addressing the causes of long-term decline, namely minimizing family dissension and avoiding fragmentation of asset management
- Implement coordinated risk management by the family concerning both fiduciary and investment decisions, in part to maintain higher concentrations of illiquid (higher risk/return) assets

Of those, the best reasons to create a PTC are the final two points: (1) maintaining family control of assets and (2) implementing coordinated risk management. Those two items overlap, and both depend upon the family's ability to create and maintain a system for family decision-making that is supported by the family and increases family member engagement and facilitates family member development.

What Are the Key Considerations to Be Addressed Prior to Pursuing a PTC?

Before addressing certain practical aspects of creating a PTC, we should identify two criteria that will indicate whether a PTC will be a suitable choice for the family trusts: (1) cost and (2) commitment to the process required to operate what is technically a financial institution (albeit family controlled).

What Are the Costs?

While the expense of creating a PTC and the cost of its operations, as described below, may seem prohibitive for many families, the required asset base is not as high as one might imagine. While much depends of course upon the circumstances of a particular family and its trusts in question, our rule of thumb concerning the asset base required to justify a PTC is the following:

- Between $100 and $250 million of collective family assets is enough for an exceptionally motivated and unified family that sees a PTC as the only possible way to achieve adequate control over management of trust assets or to obtain one or more other primary benefits of a PTC.
- $500 million is more typical and generally sufficient to justify a PTC's expense for a family seeking to obtain the benefits of a PTC with a more customary level of commitment to family-wide goals.
- $1 billion (or more) makes the costs of properly operating a PTC a rounding error on the family's P&L for each year, and is, as some have said, a "no-brainer" as to the cost issue.

More specifically, the soft-dollar costs of doing the internal work necessary to vet the concept and to participate with external counsel and other advisers in the creation process varies greatly and is not quantifiable (with confidence), given current available data. Nevertheless, anyone who has ever been involved in this process can attest to the fact that those costs are significant. However, while this is not a marketing piece for the legal community, it should be noted that engaging experienced legal counsel early in the vetting process can materially reduce the soft-dollar costs of many families. Experienced counsel can help families conclude that they are not suited for a PTC far earlier than they would reach that conclusion themselves, and for those families that are suitable, can narrow the range of issues for them to consider in the vetting process to those that are most important. Accordingly, applying resources to engage outside counsel early in the process is money wisely spent.

As for hard-dollar costs, our experience has been that the out-of-pocket expense to create a PTC varies widely, between $100,000 and $500,000 for the entire process, and depends among other things upon:

- Whether the PTC will be licensed and regulated by a state;
- The efficiency with which the family and its close advisors participate in the creation process;

- How complex the family's current trust and investment situation is; and
- Most importantly, whether the family's governance system will be designed and implemented at the same time as the PTC, and the complexity of that system.

Fortunately, those costs are materially within the control of the family.

As for operating a PTC business, to do so properly requires between $75,000 and $125,000 annually for most families. This figure consists primarily of insurance, office space, travel, regulatory fees, proper audits, and a required local, part-time employee. However, that figure excludes other personnel costs and the costs of investing, but those excluded costs are of course present regardless of whether a PTC is used and depend on the family's exact situation and needs.

Is There Commitment to Process?

More important than costs and the required asset base, however, is the required commitment to conduct operations properly and to prioritize the *process* of decision-making *over* the decisions themselves. It is axiomatic in the trust legal world that trustees are not liable for bad results; they are liable for failures of process. This concept is particularly acute in a PTC.

Whether a family will be sufficiently dedicated to proper process requires some soul-searching by a family and its trusted advisors prior to embarking on the journey. Unlike investing, there is nothing interesting and engaging about following proper fiduciary process. "Proper process" seems like a euphemism for what is bureaucratic and boring. Most fear process, believing that it will be overly restrictive and constraining; the reality, however, is that process gives order, sets boundaries and expectations, and can help when precedents are achieved. Truth be told, successfully pursuing proper process will likely result in non-events. In other words, the voyage will not be notable for including memorable bad events; if the sailboat avoids the reef, the passengers do not notice.

Accordingly, PTC management and the family must be prepared, at the outset, to perform the hard work and to allocate the necessary resources (not only financial but also intellectual and especially emotional) to prioritizing process, and without expecting to receive much recognition for doing so. However, despite the fact that process is hard and that there is little glamour in doing it well, many families come to realize that when approached as a series of small tasks and steps, the challenge of the required commitment to process becomes quite doable.

What Are the Alternatives?

For those families for whom cost and required commitment for a PTC are problematic, they are left with few alternatives. In brief, those consist of:

- *Commercial Trust Companies:* For some families, this is an acceptable solution, but for most legacy families, the reason they are considering a PTC is dissatisfaction with their current commercial trust company. The advantages (e.g., professionalism, logical decision-making, good compliance, and administrative hygiene, etc.), and disadvantages (risk intolerance, poor service, oriented towards profit for the institution, bureaucratic, etc.) of utilizing a commercial trust company are well known, and so will not be explored here.
- *Individual Trustees:* Individuals have historically been the solution for wealth creators, and for those members of legacy families who were of the Baby Boom generation and older. Those persons utilized their trusted advisors, employees, and family members to serve as fiduciaries for family trusts. Of course, the most significant challenge to this approach is obvious: mortality. The need for a successor to a deceased or retiring individual inevitably arises, but in today's environment, knowledgeable and capable individuals who in the past would have agreed to be successors are now highly reluctant to accept such roles due to potential liability and other drawbacks.

  Less obvious is the challenge presented by an individual who is declining slowly due to age; that person poses an underappreciated yet significant risk to trusts because, in our experience, they become disinterested and less than capable as time progresses but fail to recognize the need to retire from the position until a material mistake has been made.

  Finally and with greater frequency these days, the younger generations typically are dissatisfied with the individuals chosen by the prior generations, either because of an inherent distrust of "dad's trustee" or a demonstrable lack of rapport (and often respect) between the trustees and the younger generation beneficiaries. All of this is not to say that using individual trustees is doomed to failure; there are many instances when that structure works perfectly well, but our experience over the past 40 plus years tells us that such positive outcomes, in the long run, are becoming rare.

- *Directed Trusts:* In short, certain states allow the trustee's role to be divided by the trust agreement. In such agreements, the trust's fiduciary functions are allocated among multiple fiduciaries so that the responsibility for each such function is allocated exclusively to one (or more) rather than all of the fiduciaries. For example, an Investment Director (the labels are not important) can be empowered to give instructions to an Administrative Trustee as to investment decisions, and the Administrative Trustee is required to execute those instructions, all the while being absolved of responsibility for failures of the investments; that responsibility lies solely with the Investment Director. Similarly, a Distribution Director can direct an Administrative Trustee as to distributions, with the same effect.

For certain situations, the directed trust structure is a good solution. For example, the directed trust structure works well for a family that has only a handful of trusts, rather than scores of them. Or, it fits if a family wants to control only one aspect of a trust, such as investments, but is otherwise satisfied with their corporate trustee as to administrative matters and distributions. In those cases, the structure works well.

However, we have observed that the risks and challenges of such multi-participant trust structures are often underappreciated or not recognized whatsoever. For those families that have a material number of trusts, the process of managing a multi-participant structure for each of those trusts is not simpler than using a private trust company. While there are different labels to the participants ("Investment Directors" rather than "Investment Committee," "Distribution Directors" rather than "Discretionary Distribution Committees," etc.), the same volume and types of information are required to be collected, processed, disseminated, and recorded, and the same work and hard decisions have to be made to do it well. In reality, the process may be more complicated when:

- No one knows where the various fiduciaries (e.g., the Distribution Director) of a directed trust are located sufficiently for a state to assess an income tax. If there are three members of the Distribution Director, for example, situs for state income tax purposes could be any of the states of residence of those three individuals or it could be the state where those three individuals meet to make decisions (if indeed they always meet together in the same state). Contrast that with a distribution committee

that is a creature of a state-law entity. There are decades of legal precedents where a committee of a corporate board is located, and it is not per se the state of residence of any one or more of the board members.

- Except for lawyers who draft multi-participant trust structures well, few people appreciate the difficulty of getting the internal governance of a directed trust correct, until a problem becomes apparent. A simple example would be: If the Distribution Director wishes to make a distribution for a beneficiary but the Investment Director refuses to raise the cash needed because doing so would necessitate selling assets during a market decline . . . whose determination trumps? Matters such as this are not an issue in a PTC because the committee structure of a PTC is able to rely on customs built over the last 170 years for state law corporations, as well as state statutes, regarding internal governance procedures and authority. In other words, the PTC, inherently, imposes structure on internal activities and governance due to its entity nature, applicable laws, and the customs present in the commercial trustee industry, whereas in directed trusts that structure has to be imposed by each and every trust document with the result that consistency over time is often difficult to achieve.
- With a PTC, there is an entity wrapped around the fiduciary activities being conducted by the individuals involved in trust administration. In the case of litigation against an individual involved in such administration, this creates two advantages over a multi-participant (directed) trust. First, the wrapper itself provides a liability shield. Secondly, a trust might procure insurance for a trustee to protect the trustee from claims of breach of fiduciary duty, but that is different than the wrapper *itself* providing a liability shield. In the context of a PTC as compared to insurance, there is no dispute as to whether something is a "covered claim" or whether the deductible has been met. Moreover, we are unaware of any litigation that has tested, and approved, the use of trust assets to pay for insurance against the trustee's negligence. We do know, however, that an entity (the PTC) serving as trustee can use its own assets to buy insurance for itself.

Thus, as a general rule, directed trusts can be a good solution for a limited number of families who have a small handful of large trusts, but are not the optimal solution for families with dozens or scores of trusts. More importantly, even in those cases where a directed trust is appropriate, there are still drawbacks that should be appreciated fully and that are not present in the context of PTC entity.

Steps to Creating a PTC

Once a family has determined that its needs and resources justify the creation of a PTC, and that the alternatives are not feasible or palatable, then the family is immediately faced with an overarching, practical question: In which jurisdiction should the PTC be located? The choice will affect how efficiently and effectively the trust company performs important trust company activities, conducts actual operations in some circumstances, manages risk, and addresses the inevitable challenges. Those factors can be organized into the following areas:

- *Regulatory Regime:* Whether the PTC must be primarily concerned with being regulated by the US Securities and Exchange Commission (SEC) or a state banking agency, or what is required not to be regulated by those agencies?
- *Geographic Convenience:* How much travel will be required and how much travel is palatable to senior management?
- *Substantive Trust Laws:* What are the laws governing the administration of trusts for which the PTC serves as trustee and the interpretation of those trusts, as well as the determination of the property interests of the beneficiaries?
- *Substantive Trust Company Laws:* How demanding are the banking laws governing the PTC itself and its operations?
- *Public Policy Milieu:* How responsive and robust is the judicial and legislative systems in the jurisdiction of the PTC?
- *Tax Laws Impacting the Entity and Trusts It Administers:* How costly is the tax drag to operate the PTC in a jurisdiction and for a trust to be tax resident in that jurisdiction?

Choice of Regulatory Regime

Almost all PTCs provide investment advice as defined by the US Securities and Exchange Commission (SEC), whether in the basic form of making recommendations to the PTC's clients regarding where to park cash temporarily or in the form of full-blown investment advisory services to trusts and family members, such as asset allocation, stock selection, and manager due diligence. Because most families determine that they wish to have as little regulation as possible, the family's proposed PTC must conform to the requirements of the SEC's "single-family office rule" (SFO Rule).[3] If the proposed PTC's activities can conform to that rule and thus the PTC does not need a license issued by a state

banking regulator, this will narrow the selection of the possible jurisdictions for the PTC because only a handful of states permit unlicensed PTCs.[4]

If, however, the proposed PTC's activities cannot conform to the SFO Rule (e.g., because the intended clients of the PTC exceed those permitted under the SFO Rule), then a family must abandon pursuing an unlicensed PTC and must choose between having the PTC's investment advisory activities, either regulated directly by the SEC (or the applicable state securities regulator) as a registered investment adviser or regulated by a state banking regulator as a licensed trust company.[5] Being regulated by a state banking authority is a way to avoid direct oversight by the SEC (or applicable state securities agency), because there is an exclusion from being considered an investment adviser under the US Investment Adviser Act of 1940 for "banks" (including trust companies) that are licensed by a state banking authority and in fact examined by it.[6] Thus, if a PTC cannot meet the requirements of the SFO Rule, then the PTC can be licensed by a state banking authority as a state trust company. In those situations, where the PTC would otherwise be forced to register as an investment adviser (either with the SEC or the applicable state securities agency), being a licensed state trust company allows the PTC to avoid registration as an investment advisor in exchange for regulation and examination by state banking authorities.

At this stage, there is a single logical question for a family contemplating a PTC that will not meet the requirements of the SFO Rule: *Will regulation by the SEC (or state securities agency) be equally (or less) burdensome as regulation by a state banking authority?* The simple answer is "no, it will not." The SEC does not care about the success or financial health of registered investment advisers; instead the SEC only cares about whether it is "protecting investors" based on the SEC's view of what is in investors' best interests. In contrast, bank regulators must care about the safety and soundness, which includes financial well-being of regulated entities not only as their mission but also as a practical matter: If a regulated state trust company fails, the state banking regulator has full responsibility for dealing with the failure. This leads to state banking regulators seeking to be helpful to their regulated institutions as long as they have confidence in management. Most regulated PTCs find that the banking regulators are in fact helpful to them in understanding how to operate a trust company and the applicable standards and practices of trustees. After advice, families in this situation almost always prefer to be regulated by a state banking authority.

Accordingly, when seeking a license from a state banking agency, selection of the jurisdiction becomes even more important because the family is really choosing the regulatory team that will oversee the operations of the

proposed PTC, that is, the team that will "examine" the PTC's operations. As one can imagine, there is significant disparity between regulatory teams of the various US states whose laws permit PTCs; in other words, some state banking authorities are more helpful and less demanding than others:

- For example, at least one US state specifically examines a licensed PTC not for safety and soundness, but only for qualification as a "family trust company" under that state's statute; thus, even though a PTC would hold a license to conduct a trust company business from that state's banking agency, that PTC by definition cannot avail itself of the above described exclusion from securities regulation as an investment advisor.[7]
- Other states are quite interested in assisting PTC management in running a better trust company business for the family and so try to be helpful whenever possible with advice and forgiveness of the occasional straying from standard commercial trust company operating procedures.

Accordingly, selection of the jurisdiction from which to seek a license is important in part because it is essentially the choice of the PTC's regulatory partner.

Geographical Convenience

Inherent in the choice of jurisdiction is the practical consideration of how much the family and its advisors are willing to travel. At a minimum, they will be required to travel to the jurisdiction of choice at least once, and in some cases, sometimes multiple times per year, to conduct the business of managing a PTC.[8] We advise our clients that all true fiduciary actions (e.g., board and committee meetings in which decisions about trust distributions, investment policy, etc. are made) must occur in the situs jurisdiction.[9] Also permitted are such activities when conducted from a trust office not in the situs jurisdiction but in a jurisdiction that has approved specifically the opening of a trust office by the PTC at issue. We strongly advise our clients not to conduct material fiduciary activities outside of those two locations, because doing so runs the risk of the jurisdiction where such activities in fact take place viewing the PTC as conducting a trust business in that jurisdiction without legal authority and contrary to that state's law. Indeed, conducting such activities without legal authority oftentimes carries a substantial civil penalty and sometimes a criminal one.[10] Suffice it to say that being physically in the proper jurisdiction to execute certain activities and the related willingness to travel are real, practical issues to be considered by a family.

Substantive Trust Laws

Another important element of the choice of jurisdiction for a PTC is whether a state's substantive trust laws provide the necessary tools to manage a trust institution and various client situations over the long term. By "substantive trust laws," we are referring to those laws of a state governing administering a trust as well as determining and interpreting the beneficial interests in a trust. For example, administrative laws would (i) dictate the type and frequency of information to be provided to beneficiaries of a trust, (ii) provide rules concerning the liability of trustees, and (iii) determine what receipts constitute trust accounting "income" compared to trust accounting "principal," etc.[11] Likewise, determining and interpreting the beneficial interests in a trust would include matters such as (i) whether adopted persons are included in the terms "children" or "descendants," (ii) how long property can remain in trust and who receives the property at the end of the trust, and (iii) whether the language of a trust entitles a person to distributions or creates a mere expectancy that is subject to the trustee's discretion, etc.

We advise clients to seek a jurisdiction that has a demonstrable commitment to the maintaining top-notch laws for each of the following:

- *Flexibility for Settlors Creating Trusts:* Includes providing statutory support for the supremacy of settlors' choices as articulated in their trust documents, especially when those choices diverge from common law or statutory defaults; adopting a robust Prudent Investor Rule[12] and a progressive trust statute (as in the Uniform Trust Code) that impose few mandatory default rules for trust documents and disengaging from the prior common law of the enacting state; explicit authority for directed/multi-fiduciary trusts and rules governing the relationships between the various fiduciaries of such trusts; and allowing specialized trusts that are used frequently in modern trust practice, such as Dynasty Trusts (can last forever or nearly forever), Purpose Trusts (need not have identifiable beneficiaries but instead can be for a particular purpose such as owning the stock of a closely held business as an end unto itself), Quiet Trusts (limits duty to inform beneficiaries of the existence of a trust) and Asset Protection trusts (trust assets protected against beneficiary or settlor creditors).
- *Flexibility for Beneficiaries:* Includes providing strong and efficient downstream course correction ability, such as decanting authority and trust reformations, modifications, and terminations (both judicial and non-judicial); and strong virtual representation that allows older family members or similar situation beneficiaries (and certain others) to represent the legal interests of younger or absent beneficiaries.

- *Reasonable Protections for Trustees:* Includes a shortened statute of limitations on legal actions against the trustee, strong authority to delegate prudently and protection to fiduciaries for doing so, and explicit characterization of fiduciary standards as "administrative law" and therefore applicable to every trust administered in the state unless a trust specifies otherwise. Reasonable protections allow trustees to make the kinds of difficult decisions which are required by today's world (and often by a family's circumstances) and which they otherwise would avoid making if the risks of liability are too great under the average applicable law, and yet would not provide so much protection that a trustee could feel as if it could act with impunity and without accountability.

These issues are usually the most relevant to choosing a jurisdiction. Each US state has unique trust laws, and currently no one state's trust laws are ideal for all trust issues. How each of the leading states addresses each of these issues changes frequently, and the test of what is "ideal" is also a bit of a moving target. Given this constant evolution, including of the issues most important to a set of family trusts at any given time, it would be misleading to identify here the "ideal" choice of jurisdiction for a family's PTC. Fortunately, each of the leading states come close, and more importantly, each of those states is committed to maintaining its reputation as a leading candidate.

Trust Company Laws

Another important element of the choice of jurisdiction for a PTC is consideration of a state's trust company laws. As noted earlier in the chapter, only certain states provide the authority for a PTC to conduct a trust business, and some of the states permitting PTCs allow only licensed PTCs. Moreover, each of the states allowing PTCs has variations regarding those to whom a PTC may provide fiduciary services (i.e., who can be a PTC client), regulatory capital requirements, notice filings, and so on. Each state's requirements must be carefully compared when determining the location from which a family would be best situated to conduct a trust business. Again, a detailed, state-by-state analysis of the various nuances is beyond the scope of this chapter (yet should be done prior to embarking on the creation of a PTC), but when we assist clients in examining jurisdictions as potential situs candidates for their PTCs, we look to the following issues:

- *Regulated vs. Unregulated:* We generally prefer states that offer both unregulated and regulated PTCs. Even if an unregulated PTC is not desirable for the long run, we often encounter clients who begin operations as an unregulated PTC, usually due to a short time frame within which to begin operations and which does not allow for the licensing process. For those clients, circumstances arise later that require a regulated PTC (e.g., an out-of-state trust office becomes necessary that was not contemplated at the time of formation), and thus, starting in a state that allows both enables an easy conversion without having to move to a new jurisdiction.
- *Directors (Number, Number of Meetings and Residency):* The most attractive states typically require only a modest number of directors for the board of directors of a trust company (sometimes only one) and require only a modest number of board meetings each year. Jurisdictions that require at least one resident director are typically seen as marginally less desirable.[13] In practice, however, such a requirement is merely an annoyance because, where the client lacks such a person among the client's cast of characters, there are third-party service providers whose business offering is to provide such an individual.[14]
- *Application Process; Public Notice and Hearing:* In the event a license is sought, we prefer states whose license application process is not onerous—that is, among other things, does not require public notice of the application or a hearing before a special board, proceeds with modest alacrity, and does not require voluminous and time consuming disclosures.
- *Express Authority to Use Affiliated Advisors and Investments:* We insist upon states that allow a PTC to employ related companies, including affiliated investment advisors and related funds, and to pay them for their services; a self-executing ability to do so is preferred (i.e., no notice required to trust participants or other parties).
- *Capital and Insurance Requirements:* Shareholders' equity capital requirements range from $200,000 to $500,000, and most states require a fidelity bond against theft, whether by a PTC employee or outside party. Moreover, certain states require that shareholders' equity capital be invested in low risk investments. Such requirements, however, typically apply only in the context of a licensed PTC, but in all events, we advise clients with licensed and unlicensed PTCs (i) to capitalize the PTC sufficiently to ensure that it is respected as a business entity by all parties, (ii) to maintain errors and omissions, and directors' and officers' liability insurance policy(ies), in each case appropriate for the level of business and risks of the PTC, and (iii) to maintain sufficient working capital to run the trust business properly.

- *Interstate Offices-Regulated PTCs:* Many states allow an out-of-state, licensed PTC to establish a full-service trust office in their state on a reciprocal basis.[15] This not only can provide convenience for the PTC and its clients but also allows a PTC chartered in one state to take advantage of a special trust law or client need (e.g., estate administration; holding real estate outright in trust) in another state. Equally important, it provides the PTC a hedge against the risk of adverse changes in the laws or policies in its home state, and it should be noted that, when a licensed PTC establishes an out-of-state office, its home state regulator continues to exercise primary regulatory authority, thereby limiting exposure to duplicative or inconsistent regulation.

Public Policy Environment

Our experience teaches us that the top PTC states provide public policy environments conducive to forming and operating a PTC, whether unregulated or licensed. In advising clients on the selection of situs jurisdiction for their PTC, we look for the following:

- *Responsive State Legislature:* Showing a willingness to consider and enact legislation to make and keep its trusts and trust company laws attractive and to adapt to advances in other states in a timely fashion (all of course due in part to their trust companies' lobbies and state trust bars being actively involved and for the most part committed to keeping their trust laws among the best).
- *Responsive State Banking Regulator:* Ideally encouraged by the legislative and executive branches to only impose regulatory burdens on PTCs proportionate to the more limited risk they pose to the public; this aspect applies almost exclusively to licensed PTCs. For example, we customarily wish to see an expedited time frame for approval of a license for a PTC, and less frequent and less burdensome examinations.
- *Quality Judicial System:* Assuring that knowledgeable jurists and court administrators, without anti-wealth biases, will hear trust disputes and otherwise address trust issues requiring court participation, and which assures that matters brought before a court can be promptly addressed. For example, the best states have sizable, specialized legal bars that remain focused on trust and trust company issues.[16] Moreover, some states have a specialized probate or district court system where judges, experienced in trust and probate matters, supported by experienced administrative staff (that local counsel advise are in most cases also knowledgeable), and not prejudiced against wealthy clients, hear trust cases exclusively.[17]

- *Avenues for Properly Informing the Law and Rule-Making Process:* Including private-public working group and/or other public-private cooperation between executive and legislative branches of the state and bar groups, banking associations, trust institutions, and wealthy families, dedicated to ensuring that state laws, regulations, and the PTC environment remain current with that of other leading states, the needs of wealthy families, and the requirements for PTCs to be successful.
- *Robust Supporting Business Infrastructure:* Clients starting trust companies at a distance from their primary locations require support in the PTC situs jurisdiction; they require local resources that can provide an adequate office, receptionist, and assistant trust officer and possibly additional back-office and/or compliance services, all at a reasonable price.

While it may appear less relevant at the time of formation, over time, a jurisdiction's public policy environment takes on greater importance because it directly affects how the PTC conducts its business and ongoing operations.

Trust and Trust Company Taxes

Finally, taxation at the state level must be addressed in selecting the jurisdiction for the PTC since the location of the PTC often determines whether undistributed trust income will be taxed. Accordingly, the selection process targets states where there are:

- Low or no state and local income taxes on trust income;[18] and
- Reasonable trust company taxes, regardless of form (e.g., business corporation, non-corporate franchise taxes, or profits tax, etc.).

There are few jurisdictions that permit PTCs and that also impose no taxes on either the PTC or its trust clients.[19] However, other choices are available where the tax burden is modest enough to be tolerated as the cost of doing business.

Achieving Success in a PTC: Setting Priorities

So far, we have explored the following: what a PTC is, how it is structured and generally how it operates, why a family would pursue a PTC, when a family is not suited to a PTC, and certain fundamental topics through the lens of jurisdiction selection. We have deliberately not addressed the details of PTC operations at length. A detailed discussion of most operational issues

(such as proxy voting, anti-money laundering compliance, board meeting mechanics, etc.) would not be interesting to the reader.

Instead, we will emphasize here a much more important question about how to run a PTC: what operating principles and practices will contribute to the long-term success of the trust company? The recommendations we will offer here are, generally speaking, not legally prescribed by any trust or tax law, but we believe that the success of the trust company enterprise will be put at risk if these principles and practices are disregarded as optional and therefore unnecessary. The previous discussion has been task-oriented; this discussion now goes beyond the task level and considers how to tap the full potential of the PTC as a strategic, long-term structure for managing a family's wealth.

Fostering Beneficiary Development Should Be the Primary Objective of the PTC

Whether expressly stated or not, the overriding goal of every trust is to make the lives of its beneficiaries better. Virtually every wealthy family wants to use its resources to support the development of individual family members. Successful support for individuals also helps the family as a whole. Fortunately, the PTC can provide a near-perfect environment for achieving that success because it can naturally use the family's substantial resources in the thoughtful pursuit of that objective.

Pursuing that objective requires a reorientation in the way trusts are ordinarily managed. Success in investing and tax planning, and proper accounting and compliance, should no longer define success for the trust and the trustee. Creating and preserving financial resources provide the pre-conditions for success but do not stand for its full measure. Since the major objective of the PTC should be to support beneficiary development, its operations should focus on the third function of a trustee—the use of the trust funds through distributions.

This increased attention to distributions will require creativity, patience, continuity, and caring. Making distributions to serve this primary purpose will not be as easy as it seems. The trust company in its operations must make a deliberate effort to know, and sometimes determine, the needs, desires, and resources of a trust's beneficiaries, and doing that properly requires building a working, trusting relationship with those beneficiaries. This effort will involve repeated opportunities to help beneficiaries to develop or refine their individual needs, wants, and aspirations and to lead them in a non-patronizing way to develop the ability to deepen their personal relationships and their understanding of their family's values and their own.

This process requires gathering, creating, and keeping relevant information current and creating a strong relationship between those representing the PTC and the trust beneficiaries. Those bonds will help family member beneficiaries become kinder, more resilient, and more "individualized" humans, and also facilitate meaningful engagement between a beneficiary and the family at large (through the family's avatar, the PTC). In this way, family resources would be used to better the lives of beneficiaries; and this effort will indirectly improve how different generations understand each other.

This effort will be the responsibility of the PTC's Discretionary Decisions Committee, or the committee will help the beneficiaries find others who can serve that role to the extent that the members themselves lack the personal skills or time to serve that enhanced role. One would think this orientation would come naturally to trust managers. Not so, for these reasons:

- The trust distribution process tends to be mechanical because quantitative steps are much more easily tracked and reviewed than making qualitative progress in how the distributions can support the personal development of the beneficiaries. Hear the beneficiary's request, read the document, write the check or not. The default in this process is "keep it simple" and "measure it."[20]
- Financial assets require regular care and feeding of some degree. Beneficiaries do not customarily attract the same attention. They are regarded as either an undifferentiated class of individuals responsible for their own welfare, or the responsibilities of their parents.
- A proactive distribution practice is also time consuming. Unlike asset management, it cannot be scaled up by applying technology and systems.

Hartley Goldstone, who has chronicled several positive trust histories, recounts the experience of a young woman who sought his help in understanding her role as a trust beneficiary. She was one of eight beneficiaries in her generation in a trust managed by "quite elderly" gentlemen trustees. After preparation, here is how she presented herself at the next meeting with the trustees: "She asked the trustees at the beginning of the meeting, 'Will you receive me as myself? Will you listen to me as myself? Will you suspend your likely thought that I am simply one of eight to be treated the same way?'"[21]

Keep in mind that in many circumstances the beneficiary does not pick the trustee. As Ellen Perry described it, "He or she may be quite unhappy that there even is a trustee. . . . The marriage, so to speak, has been arranged. The question is: how can it best be managed?"[22] Given that starting point, it takes

work. This new orientation to develop an interactive relationship between the trustee and the beneficiary will not be a simple casual adjustment in how trust management usually works.

Principles and Practices for a Successful Private Trust Company

The success of the trust company depends upon thoughtfully managing the relationship with the trust beneficiaries, and that requires a different orientation than managing assets and taxes. Success will depend on looking at the intangible drivers of success. Accepting the need for this distinct orientation is critical. Think of it this way: When investing in a new venture, the decision depends on much more than quantifiable factors such as the business model and deal structure. The decision depends on intangibles such as: Who's in leadership? What is their vision, knowledge, and expertise? Their energy . . . resilience . . . creativity . . . network . . . advisors . . . governance . . . oversight?? These are all questions a prospective investor wants answered because they are all factors in a successful venture.

Intangibles of a different sort are factors too in the success of a private trust company, and the difference in the intangibles must be understood and valued in managing trust company operations:

- A private trust company for family trusts is not a business in the ordinary sense; its function is more akin to a nonprofit corporation; the distribution function is the nonprofit function—the benefit function. It addresses "health, support, and education" (or "best interests"), but all of these are in the broad sense "helping."
- There is no market in the sense of customers choosing to buy goods.
- Beneficiaries are stakeholders rather than customers, although even that term does not capture the point; there is no "us versus them" and no classic separation between buyer and seller.
- If the above are not understood, then the distribution function becomes boring and routine, especially as compared to the dynamic process of making investments and building wealth, and beneficiaries become merely debits to cash.
- Success is not easily measured by metrics; the trustee organization must be financially self-sustaining but maximizing financial returns is not the goal.
- Success is not determined on a quarterly or even annual scale; indeed, one may never notice success because, in a sense, a successful trust relationship is one where nothing goes seriously wrong.

As a result, special skillsets are required that resemble those in a profession more than a business, especially when considering trust functions other than investments and administration. A parable can help illustrate this "intangibles" issue and some ways to address it.[23]

The Parable Family

The Parable family is working on a plan to manage the transition to a private trust company from relying on a close-knit group of advisors who have served the family for decades, including as individual trustees.

The advisor group is still intact but plans staggered retirements over the next few years. The family is seeking input from the advisors, and the advisor group is actively committed to helping the transition succeed. That's a blessing. The Parable family knows of several family offices where the incumbent advisors resisted change and were unwilling to give up their positions as individual trustees, looking to their trustee fees to supplement their income in retirement. In one case the litigating attorney told the family trustees she was representing: "I can defend you on the tax issue you missed. It really wasn't your fault. But you must resign. The judge has signaled to me that he will find a way to remove you if you don't resign. He sees you as trustees holding on in semi-retirement who were close to the settlor but have no relationship with the beneficiary. No emotional connection at all."

So who in the Parable family will take the lead in this effort? Enter Elizabeth, the family member in the middle generation who has been asked to lead the transition with help from her brother, John. Effectively, those two will control how the new trustee plan is constructed. Both subscribe wholeheartedly to the introduction of the family private trust company. It was an easy choice. The family's highly regarded new legal counsel explained the limitations of the leading alternative (a directed trust with multiple fiduciary roles), and it proved difficult to recruit candidates to fill those roles due to concerns of personal liability. Elizabeth also concluded that the trust company structure would make it over time much easier to manage and adjust the relationship between investment and distribution decisions. Also, the overall trust governance structure will need adjustments from time to time, either because of oversights and miscues in the prior version or because of changes in the family's dynamics. The PTC's legal "space" to house decision-making is much more easily remodeled than a collection of directed trusts.

Elizabeth and John are working through the varying recommendations of the existing advisors on how to organize the functions of the trust company. John has sorted those into two competing management concepts: the

traditional trustee role as applied in the past by many, if not most, families, and the "reformist" approach that seeks to shift priorities in trust management and apply new methods. He presents Elizabeth with a deliberately polarized version of the competing approaches, in order to highlight the differences. John has labeled the proponents of the traditional approach as the Traditionalists and those proposing the new ways as the Radicals. Here is his write-up.

Selection of Individuals to Serve as the Key Executives for the Trust Company

The Radicals see the trust company as a way to avoid the limitations of the tradition of using individuals as trustees. In that "system," there is little or no specialization of roles. A trustee must be trusted to make all the right decisions across the board, and thus the grantor chooses trustees from among his or her contemporaries and peers, though usually these individuals have little or no experience or training in the trustee function or no natural rapport with the younger beneficiaries.

The Radicals contend instead, with acknowledged irony, that in choosing trusted decision-makers one must trust people one does not know (or know well). The trust company needs to be run by a team of experienced trained specialists. The same people who make highly effective investment or business decisions (the grantor's peers) do not tend to have the particular experience, motivation, and mind-set that is needed to make highly effective distribution plans and decisions for and with trust beneficiaries, or to plan strategically for how the trust funds can help the family and how the generational transitions will play out. Nor are they much interested in (or see the importance of) the more mundane administrative decisions or process.

The Radicals believe that the trust company can help the family only if its executives know and care deeply about trusts and benefiting people rather than building net asset values. As they put it: "We need decision-makers who can confidently challenge the natural instinct to grow accumulations in trust rather than focus on how the assets can be used. Their motivations must go beyond fear—fear of loss from taxes, improvident beneficiaries, divorce, creditors . . . bad things happening."

The Traditionalists have a simple response: "Accomplished, smart individuals can do more than one thing at a time, even if one of the things is not their strong suit. We need to rely on people we know, peers and contemporaries who have been tested and succeeded, people who know us well and our past struggles, our values and our ambitions for the future. Besides the distribution function of a trust company is just not that difficult—not 'rocket science'—and can be managed by the staff. Legacies are not built by the Discretionary Decisions Committee."

Dealing with a Naturally Dissolving Community

The Radicals challenge the spoken or unspoken assumptions in family succession. It is all simply mythology. The future will not replicate past experiences.

- By definition "extraordinary" financial success as an entrepreneur or astute investor is indeed extraordinary, not likely to be repeated in each member of each succeeding generation or perhaps in any member of any succeeding generation.
- Many of the potential successors for filling the trustee positions are otherwise engaged in their own endeavors, interests, and lives.
- Unlike the initial building of wealth, the husbanding of inherited money is not a naturally all-consuming activity. Therefore, the generations that follow "the Founder" will not be fully occupied by wealth management alone. They will seek their own opportunities and face different challenges.

The Radicals are not claiming that the wealth does not matter. Most members of succeeding generations will naturally desire independence, and yet the extraordinary success that created the wealth provides a bond of financial security that tends to keep the family connected. The geographic mobility of the family and the mobility and liquidity of its asset base can promote, or dampen, the desire for independence. Cultural and social factors can also influence the desire for independence, but that centrifugal force won't disappear. Accordingly, the Radicals point out that, for better or worse, trust company executives will need to anticipate and accommodate these competing forces and not be taken by surprise or see it as threatening if some family members want to break away, or somehow gain more control, without adverse consequences of course.

That possibility leads to more questions concerning whether to build in some independence (or even an exit ramp):

- Must the trust company therefore allocate decision-making along branch lines (or otherwise) in order to disperse control over distributions and therefore investments?
- Does this require multiple committees, comprised of different individuals whose portfolios of responsibility are the same as to subject matter just with different stakeholders, or even more than one trust company?
- Is there a balance to be struck, and adjusted from time to time, between centralization and independence depending on how many beneficiaries have other outlets for independence such as control over assets not under the trust company umbrella?

The Traditionalists believe, however, that decentralized control is inefficient; and, even by its own standards, a plan to decentralize to accommodate a degree of independence is not practical because there is no suitable substitute for centralization. For example, if the trust company were to disperse control over distributions, it is unrealistic to assume that control can always be divided along family branch lines in order to accomplish that objective. Decision-making along branch lines can be tainted, for example, by poor parent-child relationships within a given branch in ways that affects even the outside advisors who serve on committees. According to the Traditionalists, it is far better to have a centralized distribution and investment committee for all covered trusts, and if necessary, to manage the issue by choosing not to take all assets and all trusts under the trust company umbrella and by providing different choices on the level of service provided to the trusts covered by the trust company, to the extent that trustee services can be modulated.

How the Parable Family Trust Company Was Then Organized, and the Results 20 Years Later

- Because a substantial part of the Parable trust assets consisted of a controlling position in an established family business, the new trust company included a distinct *strategic-planning committee* at the outset that focused exclusively on the future, in order to deal, for example, with potential disruptions to the business and the effect on the trust and beneficiaries. This committee consisted of trust company executives who specialized in strategic business planning. A non-voting observer position was created and filled on a rotating cycle by members of the younger generations, so the trust company wasn't just "my parents' idea." Their mission was to see and plan for possible outcomes that the family business executives could overlook.
- Change did come to the door. Over the next 20 years the business evolved from a traditional manufacturing company producing commodity fasteners for commercial products in the auto industry into a highly technical and specialized manufacturer of customized connections and parts for applications in robotics. While this transformation saved the company, it tended to displace family involvement (because of the need for outside capital and specialized executive talent). The headquarters moved from its historical roots in a single community where the family had substantial social standing to a more suitable location disconnected from the family. At the same time the younger generations dispersed in order to follow their own new career opportunities, and not coincidentally, they enjoyed the greater financial freedom provided by the substantial increase in the cash dividends received by their trusts from the reorganized business.

- The strategic planning committee had anticipated this dissolution of some of the family "glue" and had caused the trust company to create certain committees years ago to keep the trust company relevant to the younger beneficiaries. In particular, the trust company now has a set of small committees that focus on what the beneficiaries need and think they need. Distribution decisions are still centralized in a single committee, but that committee relies heavily on input from the different "beneficiary relationship committees" and is grateful for that resource.
- The beneficiary relationship committees try hard to avoid being paternalistic and controlling, which is especially difficult when there is a breakdown due to neglect in parenting or to beneficiary substance abuse. *The theme is "help and mentoring" but it is a work in process*. The committees are generally comprised of a parent of the beneficiary, as well as a counselor and investment team that serves several committees. The extra expense of bringing in more outside professionals has been offset by reducing the portion of assets for which active manager fees are paid.
- The trust company structure is not only dynamic and proactive in these ways but is *protective of its executives and staff.* While the liability insurance coverage is substantial, the trust company also maintains significant liquid equity capital as a backup. The general plan is to curb unwarranted claims by providing for graduated deterrents (in the trust documents and beneficiary agreements) to discourage baseless claims (rather than just blunt all-or-nothing "no contest clauses" that tend to be waived in negotiations). The beneficiary relationship committees noted above also inhibit the development of frictional relationships between beneficiaries and the trust company.
- Education has become a key operating practice on several levels and in the broadest sense. *The Chief Learning Officer makes sure the trust company educates its executives, not just its trust beneficiaries*. Most importantly the company engages in a *peer review* process every five years to compare its practices with other trust companies, focusing on certain functions each time. Beneficiaries are encouraged to pursue, and indeed are financially supported in pursuing, life-long learning, both for their personal careers and for better understanding wealth management. This has been particularly useful when a beneficiary has been forced to make an entire career change due to industry disruptions.
  - As to wealth management, the goal of trust company management (and the beneficiaries themselves) is to help the beneficiaries of long-term trusts to acquire the skills necessary to manage the trust assets *as if the trusts were going to terminate in their lifetime, in, say, a 10-year horizon*. In that way, the beneficiaries' participation in the ongoing trust is more meaningful, and there is a sense of urgency around beneficiary development.

- Beneficiaries are exposed to the thinking that created the trust company and how adjustments may be made over time. For example, they are encouraged to learn more about the *methods the trust company has used to plan for the future*, a point driven home by the reorganization of the family business

Insights from the Parable Family Trust Company

We trust that our parable has helped to illustrate the benefits of forward planning, engaging new advisors, and adopting a new orientation so that the PTC and the family trusts can be successful in their primary objective of supporting beneficiary development.

This new orientation will also encourage and enable the family to address the larger issue that's always a challenge—how to manage transitions from one generation to the next—because it will promote a culture of forward planning, communication and empathy.

- The "forward" modifier is used here to emphasize that the planning horizon has to be more than a few years, not 100 but maybe a dozen years. The planning skills and acumen that build wealth are not the same as needed for planning on how to pass it on. But creating wealth and passing it on have two things in common: You cannot dictate the result, but you can improve the results by planning. (As Yogi Berra could have put it, "The future is coming. Pick more than one.") Fortunately, there are many resources and methods available today to help the leaders project ahead and be prepared to deal with more than one outcome.[24]
- In this new orientation, the need to develop and apply communication skills becomes a priority, supported by empathy, because of the need to bridge the information and experience gaps between trustee and beneficiary, and thus between generations.[25] Similarly the finance and investment quants in the family need to engage with the artists and other creatives. This is particularly productive when the trusts have a stake in active businesses, either family-controlled or through private equity.[26] It also forces the recognition that not everyone in the family needs to work together. There is a widespread assumption that holding the family together in as many ways as possible is the hallmark of success. If instead you plan for a more realistic result of blending togetherness and independence, that can be achieved and heralded as a success.

- In this process, it is helpful to remember that, as the family moves through time, it is influenced by the larger communities around it, both local and global and in between. Senior generation family members must acknowledge the reality that societal norms change, causing younger family members to develop different values on topics such as climate change or "humane" H.R. policies. More fundamentally, the differences in how people learn, as influenced today by ubiquitous media and technology, can influence how they work together.

The resources and commitment applied to creating and operating a PTC provides the ideal environment for the family to address in this way the full potential of the family trusts by creating and maintaining the best trust management culture. That's not a burden. That's an advantage that will reward the effort with an enduring and productive trustee-beneficiary experience. Time and effort devoted to family governance in this way is well spent. As Patricia Angus explains, "Whether they realize it or not, families already have a way of governing themselves. There are psychological ways of making decisions that are ingrained in the family. And, for the lawyers in the group, it's obvious that they already have governance responsibilities—corporate boards, owners, trustees, beneficiaries, and co-owned assets. The question is whether they want to be intentional—and successful—at it, or not."[27]

Conclusion and Final Thoughts

Deciding whether and how to create and operate a PTC involves a lot of choices. Some of these choices provide the opportunity to the family to address their specific needs, while others are more of a burden than a benefit. In weighing the choices, and in deciding the more fundamental question of whether to create a PTC, it is important to acknowledge that none of the choices for managing and transitioning family wealth are simple, unless the family is prepared to give up substantial control and flexibility (and likely create a structure that has a shorter life before it or will need to be fixed).

In its operating principles and practices, we recommend that the family take advantage of the power of a PTC to encourage their trustee's active engagement with the beneficiaries to help them assess their needs and to support their dreams, rather than be a passive adjudicator. The PTC offers the best environment for re-orienting the family trusts to fulfill this primary purpose, that is, benefiting the beneficiaries.

This recommendation also grows out of observations that the most enduring structures in wealth management follow principles and practices that positively embrace the transition to the next generation rather than follow a negative culture that dwells on fear of loss. Creating a culture based on shared knowledge and values will become even more important in the future as the pace of change accelerates and nothing seems permanent. Every generation is naturally inclined to challenge inherited decisions, and the increasing pace of change in almost every aspect of society will accentuate that instinct. Trusts used to be immune from change, but those days are past. The success in wealth management can only continue over time in a culture that naturally engages the next generation to "buy in" so that the younger family members have had a meaningful voice in where the family and its trusts are headed.

Notes

1. Often called the "Discretionary Decisions Committee" or "Beneficiary Relations Committee."
2. See IRS Notice 2008-63, 2008-2 CB 261.
3. See 17 CFR Section 275.202(a)(11)(G)-1 (2015).
4. Permitted at this time only in Missouri, Nevada, New Hampshire, Ohio, Wyoming, Pennsylvania, and Florida.
5. Federal banking regulators are specifically not mentioned as an alternative regulator because, currently, procuring a national banking association license with related trust powers is very difficult and extremely expensive (e.g., in terms of required regulatory capital, etc.). Accordingly, a national charter is not a practical option for even the most affluent families in the United States and will continue not to be an option until major change occurs at the respective federal agencies.
6. A "bank" is exempt from the requirement to register as an investment adviser with the SEC under the Advisers Act of 1940. For this purpose, a "bank" includes a trust company that is *licensed and examined* by a federal or state regulator. Investment Advisers Act of 1940, 15 USCS Section 80b-2(a)(2) & (11) (2020).
7. Fla. Stat. Section 662.141 (2020).
8. For example, South Dakota requires quarterly meetings in that state for a private trust company created in that state. S.D. Codified Laws Section 51A-6A-15 (2020).
9. That is, the jurisdiction that provides the entity with the legal authority to conduct a PTC trust business.
10. For example, South Dakota treats the unauthorized conduct of a trust business (that is, unauthority provision of fiduciary services) as an unclassified criminal misdemeanor, punishable by fine. S.D. Codified Laws Section 51A-6A-11 (2020).

11. In the context of a marital trust, this distinction between "income" and "principal" is important because often a person's surviving spouse is entitled to all trust accounting "income" but may not be entitled to any principal.
12. The Prudent Investor Rule creates the parameters within which a trustee generally can invest trust assets, for example, can a trustee employ modern portfolio theory and look at the risk and return profile of a portfolio as a whole when investing in particular assets, or must the trustee make a determination on an asset-by-asset basis without regard to the overall portfolio?
13. For example, Florida and South Dakota require one state-resident director: Fla. Stat. 662.125 (2020) and S.D. Codified Laws Section 51A-6A-13 (2020).
14. For example, South Dakota Trust Company.
15. Wyoming historically did not allow reciprocity for trust companies but in recent legislation allows reciprocity for regulated PTCs but interestingly not commercial trust companies. Wyo. Stat. §13-5-219 (2020).
16. For example, New Hampshire, Nevada, Tennessee, and South Dakota.
17. For example, New Hampshire and Tennessee.
18. We also seek states that permit elective community property asset trusts, resulting in 100 percent step up in basis for federal income tax purposes at time of first to die of a married couple, but such laws are currently found only in Alaska and Tennessee.
19. For example, Wyoming.
20. As Mary Duke has commented from her wide experience, "A trust would not exist but for the existence of the beneficiary, and yet so much of the work of trustees has been focused on administration and investing. . . . Many trustees treat distributions as a mechanical, "tick-box" exercise. . . . the work of fiduciaries has become a business. . . . This focus on numbers—by both regulators and business heads—has reinforced the tendency of trustees to focus on things that are easily measured." Correspondence with Mary K. Duke, independent advisor to families, and Founder, High Road Advisors, February 2020.
21. Hartley Goldstone and Kathy Wiseman, *Trustworthy: New Angles on Trusts from Beneficiaries and Trustees* (Denver: Trustscape, LLC, 2012), 45.
22. Ellen Miley Perry, *A Wealth of Possibilities: Navigating, Family, Money, and Legacy*, (Washington, DC: Egremont Press, 2012).
23. This is a composite fictional set of facts and issues that represents the views and experiences of several different families and advisers.
24. We can manage for future risks if we admit our level of ignorance and adjust accordingly. "The core of the illusion is that we believe we understand the past, which implies that the future also should be knowable, but in fact we understand the past less than we believe we do." Daniel Kahneman, *Thinking, Fast and Slow* (Macmillan, 2011). Rafael Ramírez and Angela Wilkinson, *Strategic Reframing: The Oxford Scenario Planning Approach* (Oxford University Press, 2016). Thomas J. Chermack, *Scenario Planning in Organizations: How to Create, Use and Assess Scenarios* (Berrett-Koehler Publishers, 2011).

25. Ellen Miley Perry *A Wealth of Possibilities: Navigating, Family, Money, and Legacy*, (Washington, DC: Egremont Press. 2012), points out: "A common and complicating factor for G2 and G3 is that inheritors hardly ever learn fabulous communication skills from their parents. Why? Because highly successful entrepreneurs are often poor listeners. They are rarely patient, curious about the other's perspective, or sensitive about ensuring that the other person feels heard. (Should I say this more gently, dear reader?)"
26. As a board member of an international PTC put it: "When a family business is an asset of one or more trusts of which the PTC is trustee, the PTC must address the fact that the beneficiaries (i) will have differing levels of knowledge of and interest in the business, financial sophistication, and business acumen; (ii) may not all have had an identical relationship with members of the senior generation, which can affect how members of the younger generation value the retention of the business; and, (iii) may ascribe different weight to the idea of "legacy" or "lineage." Consider having a person whose primary job responsibility is to act as a liaison between the business and the family members. Family members who work "in" the business need to similarly be thoughtful about those who do not."
27. Patricia M. Angus, "Governance for Business-Owning Families: Part II," March 2018, *Trusts & Estates,* p. 47.