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BUILDING ON "THE OFTEN UNEXPECTED CONSEQUENCES OF THE CREATION OF A PERPETUAL TRUST"[1]

AUTHORS

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I met a traveler from an antique land
Who said, "Two vast and trunkless legs of stone
Stand in the desert. Near them on the sand
Half-sunk, a shattered visage lies, whose frown,
And wrinkled lip, and sneer of cold command
Tell that its sculptor well those passions read
Which yet survive, stamped on these lifeless things,
The hand that mocked them, and the heart that fed.
And on the pedestal, these words appear:
'My name is Ozymandias, King of Kings.
Look on my works, ye Mighty, and despair!'
Nothing besides remains. Round the decay
Of that colossal wreck, boundless and bare,
The lone and level sands stretch far away.
Percy Shelley, "Ozymandias" (1819)

LOOKING BACK

In his classic reflection, "On the Often Unexpected Consequences of the Creation of a Perpetual Trust," James Hughes marshaled decades of experience as a leading trust and estates attorney, as well as insights from physics and philosophy, to counsel planners and trust creators on how to meet the potential negative consequences of perpetual trusts.

Hughes points to an explosion of perpetual or "dynasty" trusts in the second half of the 20th century. This movement—which has continued full force into the 21st century—is all the more striking, given that perpetual trusts were "once almost unheard of for estate planning." [2]

The obvious reason for the growth in perpetual trusts has been the desire of trust creators and their advisors to avoid federal transfer taxes (the gift tax, estate tax, and generation-skipping tax). In the past this goal was complicated by the "Rule Against Perpetuities," which holds: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest ... " [3] In rough terms, that meant that grantors could not expect to create trusts that would last for more than 90 years.[4] But, as Hughes observes, in the United States, the movement for perpetual trusts has reached sufficient scale that many states interested in competing for trust business eliminated their rules against perpetuities to permit the creation of perpetual trusts within their boundaries.

Hughes offers three main reasons for planners and trust creators to be wary regarding the creation of perpetual trusts:

1. The law of unintended consequences. As Hughes writes, "... the planner is mortal and the trust he or she is creating is theoretically immortal. Certainly, in such a case, many questions regarding the natures and experiences of the descendants of the trust's founder, and the environment in which they and the trust will exist will not only not be known or discernible by the founder but will also not be known by or discernible by the planner. The planner in assisting the founder in creating such a trust must recognize that he or she will be significantly impacting the lives of each of the trustee's beneficiaries, as each beneficiary in turn integrates the trust's existence into his or her own. I would suggest that it ought to be a humbling experience for trust planners and trust founders to imagine what life might be like for these beneficiaries even just two or three generations from those alive today, much less the seventh, eighth, and ninth and those generations thereafter."
2. Society's interest in not allowing vastly unequal accumulations of private wealth. Here he cites the experiences of England, France, and Russia, and in particular the unintended consequences of the accumulation of wealth in the hands of the Church (contributing to the Reformation in England), the economic harm caused by trust funds in England and France, and the revolutions sparked in France and Russia by the unequal accumulation of private wealth. Hughes also intimates that even though modernity makes possible the private accumulation of wealth beyond any historical precedents, and enshrines the principle that wealth creators may (more or less) pass on that wealth freely to whomever they will, modern liberal society is deeply antagonistic to an hereditary idle class. In this respect, modern liberalism retains some of the wisdom of previous ages, which saw acedia—which can mean both sloth and frenetic busyness—as a harmful state of soul, promoting distraction rather than the refinement of truly well-cultivated leisure.
3. The Second Law of Thermodynamics (the law of entropy), which holds that in any system matter and energy move from order towards a state of maximum disorder (entropy). Hughes points to the creation of great financial wealth as the materialization of energy. In contrast, the entropic results of a perpetual trust include the dependence of beneficiaries on their trust remittances, the disappearance of work and creativity from the family addicted to these remittances, and the general malaise or lack of self-worth (which can lead to addiction to substances, gambling, or spending as a compensation for that lack) that many beneficiaries describe suffering from during a "life in trust." One could add to this list the establishment of fee-addicted trustees and trust-advisors; the investing of financial capital in diversified "little-risk, little-reward" ways; the focus on compliance rather than results by parties in the trust system; the obsession with tax-minimization rather than life enhancement; and the colonization (as we might call it) of beneficiaries' lives, as the trust comes to own or control the beneficiaries' homes, businesses, charitable efforts, etc., reducing the beneficiary to a foreigner in his or her own affairs. Hughes, et al. have described this result elsewhere as a "meteor" crashing into the beneficiary's life.[5]The result of this impact is just another expression of the increase of entropy.

In response to these risks, Hughes offers three main counsels:

1. In response to the law of unintended consequences, Hughes invites planners and trust creators to remind themselves to "Do No Harm," and to ask themselves, "... have we considered as many possible outcomes of the creation of this trust as we can imagine, with our greatest focus being on those that may decrease rather than those that increase the pursuits of individual happiness of the beneficiaries of the trust? Have we used the seventh-generation wisdom of the Iroquois? Have we hastened slowly? Have we asked: 'What harm will we do before we try to do good'?"
2. In response to society's concerns about the wealth accumulation and an idle class, Hughes prompts planners and trust creators to ask themselves, "... what society's view and impact might be, and have we considered it not just from the viewpoint that society is adverse to what we may first perceive as our goal of having a trust last perpetually but that perhaps society may have a valid point of view that might cause us to modify how we go forward? Have we at least considered that society as a system will in some way impact and even constrain our goals of having a trust last perpetually?"
3. And in response to the entropic nature of trust systems, Hughes principally recommends the introduction of a Trustee as Mentor. Such a trustee would see his goal as fostering a partnership with the beneficiary, to ensure that the beneficiary takes true ownership of his or her life. Such a trustee would understand how to adapt as the beneficiary grows and changes. In particular, such a trustee would aim at helping the beneficiary
    a. Become fully self-aware and achieve personal freedom so as to be able to live an independent life.
    b. Achieve the fulfillment of his or her life's dreams through knowing and fulfilling his or her life's calling.
    c. Be able to take full responsibility for his or her actions

LOOKING AHEAD

It has been over twenty years since the original publication of Hughes' "Reflection." In that time, the business of creating perpetual trusts has boomed. There has been ample opportunity for observing the negative consequences of such trusts as well as to consider means for mitigating those consequences. In particular, time has justified Hughes' focus on the power that the relationship of the trustee to the beneficiary can have in enhancing the beneficiary's life. In what follows, we aim to build upon Hughes' original suggestions to help planners and trust creators maximize the probability that these trusts will be a source of good rather than harm.

Perhaps unsurprisingly, when it comes to "perpetual" trusts, the main antidote we see to their doing harm is the reintroduction, by planners, trust creators, and trustees, of the concept of time into the trust system.

Perpetuity—because of its connection to entropy—is the enemy of life. Life flourishes under constraint, particularly the constraint of time. Reintroducing time is key to ensuring that trust systems become life-enhancing rather than entropic.

A lesson from the past is illustrative here: While the Rule Against Perpetuities reigned supreme, it was common for trusts to distribute their assets to beneficiaries at specific ages: 25, 30, and 35, or the like. Many older trusts allowed the (male) beneficiary to "come into" possession of the trust upon majority, at age 21, giving the beneficiary the power to remove and appoint trustees or even withdraw property from the trust. This expectation focused the attention of trustees on preparing the beneficiary to "come into" the trust well; that is, to develop the skills and knowledge to handle the trust and its property maturely.

We are not recommending that planners and trust creators simply return to a rigid requirement of distribution at specific ages—though such a system has its virtues. Rather, we are pointing to the creative qualities of such an approach, and asking planners and trust creators to consider and learn from it.

What would such learning look like? Here are some initial suggestions[6] :

- First, consider adding to new trusts or restated trusts something like Hughes' classic statement, "This trust is a gift of love. Its purpose is to enhance the lives of the beneficiaries." This sounds like a timeless statement. But love always exists in time, between particular people. Such an expression makes the beneficiary feel seen and acknowledged as another person, capable of being loved. It also acts as a reminder to the trustee, at any given moment, that the purpose of the trust is to enhance the lives of these-here beneficiaries at this-here time.
- Next, living grantors should write a statement of wishes for their trusts. This statement can be a few lines or a few pages. The statement should capture the grantors' key values—what matters most to them—and specific uses they would like the trust to have in the beneficiaries' lives. This statement need not be legally binding. Its benefit is to convey what we call in our book The Cycle of the Gift "the spirit of the gift."[7] That's certainly a benefit to the trustee. But even more for the beneficiary. Again, as a result of such statements, the beneficiary can feel seen, spoken to, like a real human being.
- If the grantors are not living, beneficiaries can do the same thing with the trustee: to create a statement or "Preamble" as we call it in Family Trusts. The Preamble explains what purpose the beneficiaries and trustee hope that the trust will fulfill in the beneficiaries' lives. This Preamble gives them a "north star" to orient towards in future decisions. Again, the process of working on a Preamble together makes the beneficiary feel honored and included, as a person.

This last point applies to beneficiaries who are mature enough to engage with the trustee in the process of creating a Preamble. What about younger beneficiaries—how can a mentoring trustee help them?

Most parents don't want their teens or pre-teens to be meeting with "their trustee." "Family wealth" is not an appropriate topic for most 12-year-olds.

But the right trustee[8] can still be extremely helpful for parents of teens or younger children. When serving as trustee for young children, the goal is to establish oneself a kind but secondary presence in their lives so that when the trustee and beneficiary can work directly together in the beneficiary's late teens, the beneficiary feels comfortable with the trustee.

While children are young, the main work of the mentoring trustee is with their parents. That work involves helping the parents recognize what beliefs they have about family wealth that are helping or hindering their raising their children well. The trustee can invite parents to reflect on their money histories and to assess their own qualitative capitals (see below). On the basis of these assessments, the trustee can lead the parents in thinking about what messages around money, work, personal responsibility, achievement, and friendships would be developmentally appropriate for them to give to their children. Sometimes families expect a trustee to act in loco parentis. In contrast, when serving as a mentoring trustee for young children, the work is to help their parents parent them all the more effectively, so that these children develop good character, which is something no amount of money can buy.

As beneficiaries enter adolescence or approach adulthood, the trustee can invite them (and their parents too) to complete something like Wise Counsel Research's Family Balance Sheet assessment at least every 2 or 3 years.[9] The use of the Family Balance Sheet or similar assessment is to give an objective picture of the family members' strengths and weakness in various forms of "qualitative" capital, such as physical and mental health, resilience, clarity of values, ability to manage difficult conversations, sense of purpose in vocation, ability to maintain strong relationships, understanding of family wealth structures, and connection to communities beyond themselves. These results then help the trustee to build a development plan with beneficiaries and their parents to increase family members' complete wealth. Beneficiaries can then retake the assessment every 2-3 years to track progress and identify new areas of focus.

What about reviewing financial statements or balance sheets or other financial skills? These are important, and we support beneficiaries in developing them. But at the same time, timing is crucial. Especially with beneficiaries in their 20s, we encourage them to say, "Not yet," to any financial involvement with their trust. They often need space to grow, to prove themselves, to "make it on their own," without being made to feel overly "responsible" for trust financial assets. "Not yet" gives younger beneficiaries space while keeping the door open to further learning and involvement in the future, when they're ready.

The practices are especially helpful with beneficiaries who are in their early adulthood. This is a crucial time of life with regard to trusts when beneficiaries are "coming into" their trusts in a legal sense. But they're also grappling with the developmental tasks of separating from their families of origin, establishing their own individual lives, building a career and a family of their own, deepening friendships, and questioning their life paths. Having a mentoring trustee for beneficiaries at this time of life is a great gift.

Again, the mentoring trustee should not disappear during the beneficiary's twenties—far from it. This is a time of life when it is very helpful for the trustee to establish a regular process of meeting, not to talk about money or legalities but about the beneficiary's life, to affirm the beneficiary's strengths and to keep him

or her focused forward. For example, the mentoring trustee can meet at least twice per year with adult beneficiaries and center those meetings around the questions, "What's new, and what can I do to help?" Beneficiaries can come to those meetings prepared to discuss the questions, "What is going well in your life? What's proving challenging? And what are your thoughts about what to do about those challenges?"

Such meetings are also excellent times for the beneficiary to reflect, with the trustee's prompting, on some of those fundamental questions that Hughes first wrote about in his book Family Wealth:

1. Am I free, or dependent?
2. Have I found my calling? Am I pursuing it? If not, why not?
3. Do I have friends? Who am I to my friends?
4. Can I express love? Compassion? Gratitude? Joy?
5. Have I found a role for myself in society?
6. Where do I feel competent? Where do I want to grow?

CONCLUSION

Perpetual trusts are here to stay (quite literally). In a perpetual trust system, beneficiaries and trustees can feel like atoms floating in an eternity of time, drifting towards entropy—and often they are.

The antidote to this entropic drift is to reintroduce time into the trust system. To expect that mentoring trustees will focus on the success of these beneficiaries, at this moment in time. To set goals and plans that comport with this beneficiary's stage of life. We would even encourage planners and trust creators to consider aiming trustees' attention at some milestone in the beneficiary's life (such as age 35). Even though trusteeship is not a contractual arrangement, one can use an informal agreement—a "covenant" let's call it—to structure the relationship. Such a "covenant" would keep everyone focused. The grantor could give the trustee the option, at the end of the covenant term, to re-up the arrangement or to distribute the corpus to the beneficiary (which the trustee wouldn't do to a spendthrift but might to a flourishing heir). Less radically, the grantor could build provisions into the trust to allow the beneficiary at a specific age to take over important aspects of the trust relationship, such as administration, investment, and even parts of the distributive function. The beneficiary's ownership of his or her own life would be uppermost as a goal.

Such would be a truly living legacy, as opposed to perpetuity in which "boundless and bare, the lone and level sands stretch far away."

[1] The following is a response to James Hughes' "Reflections on the Often Unexpected Consequences of the Creation of a Perpetual Trust," published most recently as Appendix Six of Hughes, Goldstone, and Whitaker, Family Trusts: A Guide

for Beneficiaries, Trustees, Trust Protectors, and Trust Creators (New York: Wiley, 2016). The original version of this reflection was published in the Chase Journal (5:3), 2001. © Hughes & (G. Warren) Whitaker.

[2] Kathleen Laipply, "Hiding Money In The United States: How State Repeal Of The Rule Against Perpetuities Guided The United States Into Tax Haven Dominance." Golden Gate University Tax Review, 8/6/2022. https://ggutaxreview.org/2022/08/06/hiding-money-in-the-united-states-how-state-repeal-of-the-rule-against-perpetuities-guided-the-united-states-into-tax-haven-dominance (retrieved 11/26/24).

[3] Scott, 62.10, citing John Chipman Gray's 1886 treatise on the Rule in common law.

[4] For an example of a statutory codification of the Rule, see Massachusetts General Laws, Chapter 190B, II.2-101.

[5] Hughes, Massenzio, and Whitaker, The Voice of the Rising Generation (Wiley: New York, 2013).

[6] Some of these recommendations are adapted from "Choosing an Independent Trustee" by Keith Whitaker (Investments and Wealth Monitor, Nov-Dec 2024, pp. 46-48).

[7] Hughes, Massenzio, and Whitaker, Cycle of the Gift: Family Wealth and Wisdom (Wiley: New York, 2012).

[8] In what follows, by "trustee" we me the team that includes the actual fiduciary as well as agents hired by the fiduciary who can assess and meet the needs of the beneficiary depending on the beneficiary's stage of development. Such a "trustee" includes within itself something like the "Office of the Beneficiary" that we have written about (along with Hartley Goldstone) in Family Trusts, Chapter 20.

[9] One can find a fuller description of the Family Balance Sheet at https://www.wisecounselresearch.com/deliverables.