

# Forever after

What you need to know about dynasty trusts

by Charles A. Lowenhaupt

The sign on an old church in rural Missouri used to read: "Eternity! Where shall I spend it?" As more and more estate planners encourage perpetual trusts and more and more jurisdictions sanction them, whether and how your portfolio spends eternity reposing in trust should be considered.

First, a bit of history. Beginning 400 years ago, the British developed the notion that property should not be tied up too long. This led to a "Rule against Perpetuities," which directed that trusts terminate within a certain period, usually within 21 years after the death of people alive when the trust was created. This not only assured that wealth could be wasted every few generations, but also allowed the estate tax to bite every century or so, after skipping several generations. After the U.S. enacted the estate tax in 1916, wealthy families realized long-term trusts allowed them to avoid estate and gift taxes on generations whose shares remained in trust.

In 1986 the generation-skipping transfer tax, the GSTT, was instituted to impose taxes on each generation whether or not its wealth was owned by the individual dying or the trust feeding that individual's health, support and maintenance. Congress graced us with an exemption of a certain amount—the "GST Exemption"—that it said could go into trust forever free of the GSTT. Otherwise, trusts would suffer an estate-like tax on the death of each generation.

There have always been several jurisdictions that thumbed their noses at the Rule against Perpetuities' limitation on trust term. Some extended the term for additional years; others, starting with Idaho and Wisconsin and spreading to other states (for example, Delaware, South Dakota, Alaska and Missouri), eliminated all restrictions so that a trust can last forever. Some families used those jurisdictions before the GSTT was enacted.

Now generations of those families will be able to suckle at the breast of the family trust because the GSTT will not apply at all to trusts created irrevocably before it took effect.

Most planners and their clients have found the perpetual-trust jurisdictions since 1986, which is where you are today: in a world with perpetual (sometimes called "dynasty") trusts subject to the rules of the GSTT (unless you are one of the for-

tunate few to die in 2010, when it is supposed to take a one-year holiday along with the estate tax).

If you are a U.S. citizen, the dynasty trust today has tax attraction primarily as a cup into which you pour your GST Exemption. That exemption is now \$1.12 million, but it increases to \$1.5 million in 2004 and 2005; to \$2 million in 2006 through 2008; and to \$3.5 million in 2009. Marriage allows you to double the amount if your spouse agrees.

Whatever amount is held in a perpetual trust and is sheltered by the GST Exemption remains free of all estate and gift and GSTT taxes (after those you pay to place the amounts in the trust) so long as it stays there. Compounding and optimism can create visions of huge values; if Columbus had invested the cost of his voyage at 4% compounded, the portfolio would today be worth more than North America, I am told. A perpetual trust can have more limited tax benefits for certain taxpayers; both non-U.S. and adventurous U.S. taxpayers can find creative tax uses for it.

But an attractive benefit, regardless of taxes, is that the dynasty trust represents your mark forever. Your enlightened philosophy, your love, your ducats and your control are bundled in the trust wrapper forever, allowing your memory to be cherished always by the family that never returns to shirtsleeves. Incidentally, that is sometimes called the "dead hand." Forever is a long time.

Should you want that "forever" control? Here's where your lawyer needs to be more than a technician and should counsel you, listening to your attitudes toward your wealth and your family and helping you develop strategies. Then, if you conclude you want to perpetuate your "dead hand," consider some of the following points.

Where do you find the perpetual trustee? The hands of a majority of the audience at a seminar for ultra-high-net-worth individuals went up when I asked how many wanted perpetual trusts. But when I asked how many had found appropriate trustees, only one raised his hand, and he stated that he would be trustee himself. Corporations are perpetual, and they come in the form of banks; private trust companies, increasingly popular, require humans to run them, and humans are rarely perpetual. The perpetual trust requires careful consideration of the trusteeship and institutionalization process to keep it alive

and remain responsive to the economy and the beneficiaries.

How do you provide for events not contemplated? The old trusts that specifically limit investment to railroad bonds illustrate that flexibility is paramount in any long-term trust. Trustees need flexibility in investment decisions; beneficiaries, trustees and, if used, trust protectors should have powers giving them flexibility to terminate the trust and to make distributions where you do not now contemplate making them. Powers of appointment (generally, powers held by beneficiaries to direct where and how the trust goes), powers to accumulate and distribute trust assets and powers to renounce are extraordinarily useful in long-term trusts. Administrative powers of trustees and trust protectors, the people wandering through perpetuity in your shoes, should be broad and complete.

Do you want to take from your descendant the power to decide how wealth is held for his or her children? The father beneficiary whose son is irrevocably a successor beneficiary may well have had his parenthood stunted. Consider giving every parent the ability to determine whether, how and when his or her child will enjoy the benefits of your "dead hand."

Consider our client who now has the perfect estate plan—trusts to last forever and free of almost all taxes—but no grandchildren at all, even though his youngest child is 45. Where does your perpetual trust go if your line becomes extinct? Consider charities and even powers in your progeny to send the trust to charity.

The pastor of that church in rural Missouri did not expect the reader of his sign to respond that he would spend eternity as a trustee of a dynasty trust or in the contemplation that his wealth was neatly packaged for an equal duration. But that pastor was relatively naive and could not have known that his state, among others, could allow a trust for eternity and that his bank could become an eternal trustee. ■

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