Stewardship Trusts Are Innovative and Electronic Wills Are Inevitable

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Chapter 4

Presentation Slides: Stewardship Trusts as a Tool for Business Planning and Succession

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Situations that Need a New Strategy

- Business founders ready for retirement may want to ensure the continuity of the business operations and may want the mission of the business to continue as their legacy.
- A new business may want a structure that focuses on mission.
- A family business may want to protect the business as it transitions to successor generations and avoid loss of family control if successor generations lose ownership (stock) due to divorce or other creditors.
**Solution: Oregon Stewardship Trust**

- Noncharitable, irrevocable purpose trust, with no beneficiaries
- Management and oversight provided through a trust stewardship committee
- Trust purpose enforced through a trust enforcer
- Company can
  - focus on reinvestment in ongoing business operations
  - share profits and growth with selected stakeholders
  - generate capital through preferred non-voting stock
- No need for liquidity – no owners who want to sell stock
- Trust structure protects mission (purpose) indefinitely
- Trust instrument can provide specific terms, flexibility

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**Key Features: Stewardship Trust (perpetual purpose trust)**

- Designed to hold company ownership for the long-term.

- As the majority owner, the Trust does not expect to extract a profit, nor is its goal to maximize its stock value in preparation for an “exit” since the trust intends to hold the company stock into perpetuity. Thus, eliminates the need to have ongoing energy spent on finding vehicles for liquidity “exit” for past owners.

- Instead, the Trust directs the company leadership to reinvest the profits to keep the business healthy and viable, while focusing on serving its mission and stakeholder community.
The Sustainable Food + Agriculture Perpetual Purpose Trust (SFAPPT)

The trust holds 100% of common stock in perpetuity with “no exit.” The trust is a “steward-owner” that ensures continuity of operations to purpose.

Owns and controls

Owing and controls

The Sustainable Food + Agriculture Perpetual Purpose Trust (SFAPPT)

The Sustainable Food + Agriculture Perpetual Purpose Trust (SFTPPT)

Company provides minimal budget to administer trust

OGC investors receive annual dividend/profit sharing but have no voting rights and no rights to sell the company

Profits reinvested in company & stakeholders: Employees, farmers, community allies, customers

Non-voting Preferred Shareholders
Distributions to Trust and Tax Impact

- Structure is not tax advantaged; distributions from company to trust are taxed at highest individual rate
- Profits of business no longer dedicated solely to stockholder dividends, but available to share with other stakeholders:
  - Extra profit sharing for employees
  - Premiums for producers
  - Discounts for customers
- Additional benefits need to be business expenses (deductible to the operating company)
- Contractual obligations for payment must be “market”
GOVERNANCE AND OWNERSHIP OF ORGANICALLY GROWN COMPANY

Oregon Trust Code

Oregon’s statute on purpose trusts created two problems for a stewardship trust:

130.190 UTC 409. **Noncharitable trust without ascertainable beneficiary.** Except as otherwise provided in ORS 130.185 or by another statute:

1. A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. **The trust may not be enforced for more than 90 years.**

2. A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if a person is not appointed in the terms of the trust, by a person appointed by the court.

3. Property of a trust authorized by this section may be applied only to its intended use, **except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use.** Trust property not required for the intended use must be distributed to those persons designated in the trust. In the absence of a designation, the property shall be distributed to the settlor if the settlor is living when the distribution is made, or to the settlor’s successors in interest if the settlor is not living when the distribution is made.
Oregon Trust Code

130.193. Stewardship trust.
May be created for a business purpose, without a beneficiary, and may seek economic and noneconomic benefits

Trust enforcer
- Enforces the purpose and terms of the trust
- Exercises authority as a fiduciary
- Not a beneficiary but has the rights of a qualified beneficiary (entitled to notice)

Trust stewardship committee
- At least three persons
- Exercises authority as fiduciary
- Vacancy filled: (1) as provided in terms of trust, (2) by unanimous agreement of trust enforcers, or (3) by court
- Action by majority vote unless terms of trust provide otherwise

130.193 Stewardship trust.
Trust stewardship committee has the power, after notice to trust enforcers, to:
- Remove trustee and appoint successor
- Remove trust enforcer
- Remove member of TSC by unanimous vote
- Direct distributions from trust
- Exercise all rights of trustee, including the right to vote stock

TSC must send annual report to trustee and trust enforcer and keep both reasonably informed

Trustee shall act in accordance with directions from TSC (directed trust)

TSC and trust enforcers, acting unanimously, may modify or terminate the trust
On termination, trustee distributes property as terms of trust provide or as court determines to be consistent with purposes of trust

Terms of trust must provide for longer period or perpetuity for trust to last longer than 90 years
GOVERNANCE AND OWNERSHIP STRUCTURE

Articles on Stewardship Trusts


- Susan N. Gary, The Need for a New Type of Purpose Trust, the Stewardship Trust, 45 ACTEC Law J. 701 (2019).

Questions: sgary@uoregon.edu
Are E-Wills Statutes Necessary?

- Other estate planning documents can be executed electronically
- Uniform Electronic Transactions Act excepts wills and testamentary trusts
- Millennials and others assume they can execute an E-will
- Company sponsored bills
- Cases have raised questions

Est. of Javier Castro (Ohio 2013)

- Samsung Galaxy tablet
- Castro dictated will to brother who wrote on tablet with a stylus
- Castro and two witnesses signed on the tablet, using the stylus
- Issue was whether this was a “writing”
Estate of Horton (Mich. 2018)

- Horton wrote a “Last Note” on his phone, providing instructions about distributing his property
- Horton left a journal with instructions about accessing the Last Note
- Horton then committed suicide
- Court applied harmless error statute

Nevada - 2017

- Earlier statute adopted in 2001 - not used much
- Self-proving affidavit executed remotely requires a qualified custodian to maintain custody
- Treats a testator as being virtually in Nevada – does not require physical presence in Nevada
Arizona (2018)

- Witnesses must be physically present with testator
- To be self-proving, E-will must be electronically notarized and a qualified custodian must maintain custody

Indiana (2018)

- Witnesses must be physically present
- E-will must be held by testator, attorney, named PR, distributee, or custodian as defined in the stat.
- E-will recognized as valid only if T physically present or domiciled in state where E-will executed
Florida (2019)

- Witnesses need not be physically present unless T is “vulnerable adult”
- E-will can be self-proving using online notary if E-will stored by “qualified custodian” who must be resident or domiciliary of FL or business with principal place of business in FL and meet requirements

Goals of the E-Wills Act

- Allow a T to execute a will electronically
- Maintain safeguards for T (concerns about capacity and undue influence)
- Create requirements that don’t require court hearing for validity
- Do not put a company’s business model in the statute
Will Formalities

- Evidentiary function
  - Online notarization process may improve evidence – tamper-evident

- Channeling function

- Cautionary – Ritual function
  - Show that T has thought about it (E-will may be better than holograph)

- Protective function
  - Witness requirement retained

Remote Online Notarization - RULONA

- Signer and notary can be in same place physically but can be remote

- Notary must use audio-video technology and keep a record of the process

- Notary must identify signer using two forms of identification

- Process locks the document
Electronic Presence

- A state can allow an E-will to be executed using electronic presence but not permit the will to be self-proving if presence is electronic
- Electronic presence allows accommodations using other law

State’s Wills Law Applies

- An E-will is a will for purposes of the state’s other law for wills
  - Capacity
  - Intent to create a will
  - Undue influence
  - Duress
  - Fraud
Choice of Law

- Committee’s concerns:
  - Not forcing a state to allow E-wills
  - Not invalidating a will executed by a T who moves to another state
- Decision
  - State must recognize will as valid if T resides in, is domiciled in, or is physically present in the state that authorizes the E-will

Requirements

- A writing readable as text at the time signed (not audio or video)
- Witnesses must see T sign or hear T acknowledge signature (follow state’s wills law on “line of sight”)
- State may permit electronic presence or require physical presence for witnesses
- State can allow notarization in lieu of witnesses
Harmless Error

- Court can excuse defect in execution formalities
- Clear and convincing evidence and court determination required
- Eleven states, including Oregon, have adopted
- May be particularly useful for E-wills

Revocation

- Subsequent will
  - Email saying “I revoke my will” is an attempt to revoke by subsequent will
- Physical act on the will
  - Intent to revoke shown by preponderance of the evidence
  - Physical act on one copy is enough
  - Hitting delete button is a physical act if evidence of intent
Self-Proving Affidavit

- If T and Ws all in same place, any electronic notarization will do
- If someone is remote, “remote online notarization” under RULONA or a similar statute
- Affidavit must be made at time of execution, not later

Validity if E-Wills Act Enacted

- An E-will is valid even if executed before the effective date of the Act
- If it meets the requirements of the Act
- And the testator dies on or after the effective date
More Information

- Uniformlaws.org – Electronic Wills Act with Comments
- Oregon Law Commission Probate Modernization Work Group, Reporter Susan Gary, sgary@uoregon.edu