THE TRUSTEE AS REGENT WITHIN A FAMILY GOVERNANCE SYSTEM

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This reflection continues an ongoing exploration of the ways in which a family may successfully preserve its wealth long into the future. In prior reflections, Jay Hughes has explored how a trust functions, through a discussion of the Roles and Responsibilities of the Trustee and Beneficiaries[1], and how the trustee should ideally serve as a mentor to the beneficiaries in order to ensure a successful trustee/ beneficiary relationship[2]. More generally, in his book entitled *Family Wealth: Keeping It in the Family*, he has begun development of the theory that a family can successfully preserve wealth for more than 100 years by the creation and practice of a system of representative governance founded on a set of shared values that express that family's "differentness". In the present reflection, we find that there is an important connection between the ideas presented in these prior reflections and this overriding theory of wealth preservation.

This reflection explores how a trust (referred to in the singular, although a family may, and probably will, use more than one trust) fits into the system of family governance. In our experience, although many families have relied upon trusts for the purpose of managing and disposing of their wealth, the most successful ones understand that the term or life span of a trust represents a period of regency within the representative governance system created by the family. Some thoughts on this relationship follow.

Traditionally, the term "regency" has been used to describe a period during which a king, or other leader, is unable to rule due to minority, prolonged absence, or a disability such as mental incompetence. A trust is essentially a period of regency, as it represents a time during which the full ownership of property is suspended. During this interval of suspension of ownership the trustee takes possession of property from the prior owner and holds the property for the benefit of the beneficiaries, who at some point, or at several points over a period of time as set forth in the trust agreement, will become the next owners of such property.

One need not dig too deeply into the history books to find numerous examples of periods of regency, especially in the history of government. Although the most notable examples are found in the history of monarchies, the experiences are nonetheless relevant to the representative system which we consider the preferable family governance system. Often, a prince has become king before attaining an age at which he is able to exercise his powers, or has been required to be away from the seat of government for prolonged periods, e.g., during war. The most well-known regencies in Western history are the leadership of England's King John during the imprisonment of Richard the Lion-Hearted and the stewardship of France by Phillipe duc d'Orleans during the minority of Louis XV. In each of these periods, the rightful king was unable to rule; as a result, his closest relatives were selected to perform his duties until the disability ended. History tells us that the regency of John was a period of chaos in England, leading to the famous story of Robin Hood, while the regency of Philippe duc D'Orleans was a period of general success and order in France. In Richard's case, the period ended with the payment of ransom for his return; for Louis XV, his attainment of the age of majority terminated the regency. When Richard died, John assumed the kingship and was such a poor king that he was forced, after losing a war to his barons, to sign the Magna Carta and thus gave away substantial portions of his power. Louis, on the other hand, with careful guidance by his uncle on how to become a king, ruled through most of the eighteenth century, during which period France retained its position as a great power in Europe and Phillipe duc d'Orleans died peacefully in his own bed.

These two historic patterns have much to teach us about the trustee's role as a regent. The creation of a trust by a family member or members commences a period of regency in a family governance system. In much the same way as Phillipe duc d'Orleans or King John assumed a set of rights, responsibilities and obligations as regent, so too must the trustee oversee and manage the trust property and nurture a relationship with trust beneficiaries to ensure a successful regency period.

What are some of the things a trustee, in this capacity as regent, can do to help ensure that the period is prosperous for all involved so that there will be a satisfactory conclusion of the regency for the beneficiaries as future owners of the trust property?

We would propose that there are some characteristics of successful periods of regency in the governmental context which provide a model for success of a regency in the family governance system. These characteristics are as follows:

- The trustee must focus on the education of the beneficiaries to prepare them for the ultimate ownership of the property. This responsibility always transcends all other duties of a regent, who is primarily responsible for preparing the sovereign for future leadership in the case of minority or incapacity or upon the return of an absent sovereign. This duty, performed excellently by the trustee, assures that the trust will prove to be a contributing asset. It will aid in the preparation of the beneficiaries for the possibility of lives in which they will successfully pursue individual journeys of happiness. While the trust cannot assure the outcome of these journeys, the trustee acting as mentor can seek to assure that the beneficiaries will not be "remittance addicted." The mentoring trustee can thus also be a powerful force in working to overcome the psychological issues of dependence which arise from lack of ownership and which frequently have made trusts counter-productive in the lives of their beneficiaries. A trustee who fails to address the education of the beneficiaries as owners fails its highest obligation to the founder of the trust, which is to create educated owners of the trust assets.
- The trustee must earn its authority and cannot take its position of power for granted. A regent cannot successfully act in the place of the appointed king unless the regent has the respect and loyalty of the king's subjects. Without this, there is a danger of debilitating conflict, despotism, or anarchy. The trustee must understand the issues that "control without ownership" present in the family governance system[3]. All too often the trustee assumes that his ownership constitutes control. In fact, for a trust to be successfully governed for the benefit of the beneficiaries, it is necessary for the trustee to understand that it is no more, and no less, than the representative of the beneficiaries.
- The regent must be responsible to all beneficiaries, whether current or future, in accordance with the provisions of the trust. In a monarchy, and in family governance, there is a very real danger that a regent or trustee can abuse its power by favoring certain individuals or groups over others. In government, the regent must be aware of the

conflicting needs of all citizens and would favor court insiders over the general public only at great risk to the regent and the state. The trustee must adhere closely to the founder's wishes and must at all times weigh and balance competing interests (often between income beneficiaries and remaindermen) in light of the provisions of the trust. Like the regent, the trustee is accountable to the beneficiaries for its acts and will receive praise or blame when the trusteeship comes to an end for the actions taken during the period of suspended ownership. Woe to a trustee, like King John, who must explain to the beneficiary, King Richard, why the affairs of state are in chaos. Praise to the trustee, like Phillipe duc D'Orleans, as regent, who turns over the entrusted property to the beneficiary with its affairs in reasonable order.

- The trustee must always subordinate its own interests to those of the beneficiaries. While it is obvious that a king's uncle, while serving as regent, cannot raid the public community chest for his own purposes without risking disaster for himself and the state, it is also important for a trustee to remember that the beneficiaries' interests always supersede its own. On the most basic level, the trustee cannot under any circumstances use trust property for its own needs or purposes. This does not mean that the trustee cannot receive reasonable compensation for its services or reimbursement of its expenses as trustee. The trustee, or regent, violates the governance system, however, if it takes advantage of its position as legal owner of the property to improve its own position.
- The trustee must possess, or soon obtain, the necessary skills and expertise to properly perform the tasks required under the trust. Obviously, it would be quite dangerous for a regent to assume control of a country without any background or experience in government. Too often this is forgotten in choosing a trustee. A close, warm relationship with the trust founder cannot be considered to be a substitute for the expertise required to be an excellent trustee. Investment experience, administrative skills, and a sense of diplomacy are just some of the skills that a successful trustee must possess.
- The trustee must always remember that its ownership of the property is only temporary. In all periods of regency, there is a moment of transition when the regent, as surrogate leader, must transfer the reins of government over to the king, as rightful sovereign B e.g., upon the return of the monarch from abroad or the attainment of the age of majority.

From the beginning, the trustee must always be prepared to cede ownership to the beneficiaries at a moment's notice should the period of the trust's life come to an end or through an early termination of the trust upon completion of its terms. The trustee must be mindful of the fact that exerting so much power over something which ultimately must be released is a difficult yet empowering position. Each trustee chosen must understand, and be ever mindful of the temporariness of, their relationship with the trust property. In a sense, from the beginning the trustee must be preparing to let go.

- The trustee must strive to maintain open and honest communication with the beneficiaries. A regent must obtain information on the needs and circumstances of all citizens to understand fully the government's obligations to ensure the welfare of its subjects. As a representative of the beneficiaries, the trustee must make every effort to know the beneficiaries intimately in order to represent them fully. In this relationship, the trustee and the beneficiaries will mutually form those policies for the trust which will best carry out the trust's mission and which will prepare the beneficiaries for ownership.
- The regent must know when to relinquish power and how to effectively transfer it over to the rightful beneficiaries. A regent should not, indeed cannot, overstay its welcome as the surrogate leader. Even if the trust provisions do not provide a single moment at which full ownership and control of the property is to be transferred over to the beneficiaries, the trustee must be willing to admit when it is time to hand over power, usually to the beneficiaries but sometimes to a successor trustee who is more suited to the task. Once decided, the trustee must discuss carefully with the beneficiaries the logistics of transferring over the property and in what form they wish to receive it.

Comprehending the trustee's role as mentor and the trust's characteristic as a period of regency brings the reality of this complex legal arrangement into more clear focus for trustee and beneficiary alike. Too often, the trustee is seen only through the lenses of prudent investor, competent administrator, and humane distributor. There is no doubt that these trustee functions are important and if not performed excellently will lead to negative consequences for the trust and its beneficiaries. However, even if these functions are performed with brilliance, a trustee's failure to understand its most important role as mentor and the trust's most important characteristic as a period of regency in the family governance system will lead to the failure to realize the ultimate goal of development of the beneficiaries as the eventual owners of the trust assets.

The trustee's full participation in the family governance system assures the suspended owners of the trust property the proper representation in that system of governance that they deserve while they are waiting to assume actual ownership. When a trustee fails to understand its role as regent and its responsibility to develop excellent beneficiaries as owners, the trustee does not meet its duty toward the founder's gift of love in creating the trust -- a gift given to enhance the capacity of each beneficiary to pursue his/her individual happiness and to achieve the most useful and fulfilled life.

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[1] Hughes, Jr., James, E. *Family Wealth: Keeping It in the Family*, Chapters VIII and XI. Princeton Junction. Net Wrx, Inc. 1997

[2] Hughes, Jr., James, E. *The Trustee as Mentor*, The Chase Journal, Volume II, Issue 2, Spring 1998

[3] See Chapter IV, *Family Wealth: Keeping It in the Family*