THE DEMISE OF DYNASTY TRUSTS: RETURNING THE WEALTH TO THE FAMILY

by Lucy A. Marsh[*]

---

* Lucy A. Marsh teaches courses in Civil Procedure, Property, and Trusts & Estates at the Sturm College of Law at University of Denver.

I. INTRODUCTION

Recently, a flurry of state legislation[1] has made it possible for an individual to create a long-term private trust, called a Dynasty Trust,[2] in close to one-half of the states of the United States. What is unusual about Dynasty Trusts is that they may be established to last for 150 years,[3] 1,000 years,[4] or some other extremely long period of time,[5] depending on the jurisdiction.

Many lawyers, banks, and tax advisors are rushing to try to persuade their clients to set up such Dynasty Trusts, claiming that such trusts will provide a way of protecting the clients' descendants for the next 1,000 years or so.[6]

---

1. *See* ALA. CODE § 35-4-4 (2012); ALASKA STAT. § 34.27.051 (2000); ARIZ. REV. STAT. ANN. § 14-2901A(2) (2009); COLO. REV. STAT. § 15-11-1102.5(b) (2006); DEL. CODE ANN. tit. 25, § 503(a) (1995); FLA. STAT. § 689.225 (2001); IDAHO CODE ANN. § 55-111 (2008); 765 ILL. COMP. STAT. 305 / 4 (1998); KY. REV. STAT. ANN. § 381.215 (West 2010); ME. REV. STAT. tit. 33, § 101-A (1999); MD. CODE ANN., EST. & TRUSTS § 11-103 (West 1998); NEV. REV. STAT. § 11.1031(b) (2005); N.H. REV. STAT. ANN. § 564:24 (2003); N.J. STAT. ANN. § 46:2F-9 (West 1999); 20 PA. CONS. STAT. § 6107.1(b) (2006); R.I. GEN. LAWS § 34-11-38 (1999); S.D. CODIFIED LAWS § 43-5-8 (1983); TENN. CODE ANN. § 66-1-202(f) (2007); UTAH CODE ANN. § 75-2-1201 (West 2003); WASH. REV. CODE § 11.98.140 (2001); WYO. STAT. ANN. § 34-1-139(b)(ii) (2003).

2. According to William J. Turnier and Jeffery L. Harrison:

> Under the Internal Revenue Code (Code), individuals are allowed to place an amount of funds equal to the estate tax exemption in a trust, and all distributions from that trust will be free of all transfer taxes as long as the trust endures. This has led a number of states to repeal the Rule Against Perpetuities (RAP) to accommodate wealthy individuals who hope to establish trusts that will provide support for their descend[a]nts well into the future. Providers of trust services have seized upon the opportunity to promote such trusts with the promise of the accumulation of dynastic wealth for the eventual benefit of the settlor's descend[a]nts. As part of a clever marketing strategy, these trusts have been called "dynasty trusts" by their promoters.

William J. Turnier & Jeffery L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX REV. 779, 780–81 (2009).

3. WASH. REV. CODE § 11.98.130 (2001).

4. ALASKA STAT. § 34.27.051; COLO. REV. STAT. § 15-11-1102.5(b); UTAH CODE ANN. § 75-2-1201; WYO. STAT. ANN. § 34-1-138 (2003).

5. Florida and Tennessee—360 years; Nevada—365 years; Arizona—500 years; Idaho, Illinois, Kentucky, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, South Dakota, and Rhode Island—forever. *Supra* note 1.

6. *See* Steven J. Oshins & Judith K. Ruud, *Dynasty Trusts in Nevada: Countdown to 12/01/02*, 9 NEV. LAW. 18, 18 (2001).

> Imagine a world where there are no state income taxes. Imagine a world where there are no estate taxes. Imagine a world where your assets can't be taken in a divorce. Imagine a world where your assets can't be taken in a lawsuit. Now imagine this world can be created for your descendants forever!

Id.

But who is likely to derive the most benefit from the existence of Dynasty Trusts? Upon close inspection, it seems clear that in reality, corporate fiduciaries—hereafter simply referred to as banks—are likely to reap the major benefits from a Dynasty Trust, rather than the descendants of the settlor. That may explain why the banks lobbied so hard to try to get states to adopt the legislation that made Dynasty Trusts possible.[7]

This article is designed to try to speed the demise of Dynasty Trusts by bringing some common sense to the discussion of Dynasty Trusts. It is time for people to feel confident in leaving assets to their children and grandchildren, rather than to the banks.

After an introductory review of some of the fundamentals of a trust, Part II of this article will attempt to illustrate why banks have lobbied so strongly for Dynasty Trusts and why the existence of such trusts may cause serious problems. Part III will discuss the attractions of Dynasty Trusts. Part IV will point out how little money would actually be available for remote descendants of the settlor of a Dynasty Trust after 1,000 years. Part V will discuss historical experience with fractionalization of beneficial ownership. Part VI will suggest several clear, relatively simple solutions.

A. Some Fundamentals

First, some fundamentals. A trust is basically a "box" into which assets are deposited.[8] The assets then constitute the corpus—also called principal—of the trust.[9] The person who establishes a trust (who puts the assets into the "box") is usually called the settlor.[10] The people who are intended to receive the benefit of the assets in the trust are called the beneficiaries and are described within the trust instrument.[11] The usual

---

7. According to Karen J. Sneddon:

> Abolishing the Rule Against Perpetuities may be in part attributable to a "rush to the bottom" in trust law . . . in order to attract new and more investment. Thus, in the mad frenzy to attract such business, all the policy concerns and the ramifications of abolishing the Rule have not been carefully thought out prior to its abandonment. It appears, as of yet, no state . . . has adequately considered the negative implications of permitting perpetual trusts.

Karen J. Sneddon, *The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts*, 76 TUL. L. REV. 189, 194–95 (2001).

> Ever since the perpetuities loophole in the GST tax was understood, abolition of the RAP has been "pushed by banking associations . . . [that] wish to remain competitive with banks where perpetual trusts are permitted." Joel Dobris put it more bluntly: "When the bankers want something, they get it."

Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 374 (2005).

8. *See* GERRY W. BEYER, TEXAS TRUST LAW: CASES & MATERIALS 2 (AuthorHouse 2d ed. 2009).

9. *Id.*

10. Sometimes also called a trustor. If the trust is set up in a will, the trust will be called a testamentary trust and the person who signs the will is called the testator. *Id.*

11. *Id*. at 2–3.

beneficiaries of a private trust are one's spouse, children, and grandchildren.[12]

Every trust must have a trustee who is charged with managing, investing, and distributing the assets of the trust.[13] Normally, the settlor of a trust names a trustee and several back-up trustees who will serve if the first-named trustee is unable or unwilling to serve as trustee.[14] The trustee and back-up trustees are usually persons known to the settlor and believed by the settlor to have the wisdom and judgment required of a trustee.[15] When the corpus of a trust is particularly large or the assets may require extensive management, the settlor may also appoint a corporate trustee to help with investment decisions.[16] The corporate trustee is usually an institution with which the settlor has had a long-term relationship—usually a bank known to the settlor.[17]

A Dynasty Trust is different. Because a Dynasty Trust may be designed to last for 1,000 years or more, the settlor no longer has the option of appointing a trusted friend or family member to serve as trustee.[18] No human being will live long enough to be the trustee for a long-term Dynasty Trust.[19] Only a corporate trustee has a chance of being around for 1,000 years.[20] Therefore, anyone who sets up a Dynasty Trust must ultimately give management of the included assets to a bank and not to an individual known to the settlor.[21]

B. Long-Term Charitable Trusts

For centuries, the law has permitted some trusts to last "in perpetuity."[22] These have been charitable trusts designed to promote the good of the community through things such as the following: "(a) the relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) the promotion of health; (e) governmental or municipal

---

12. *Id.* at 3–4, 81.

13. The necessity of a trustee is so strong that the rule is no trust will fail for lack of a trustee. *See id.* at 2, 11, 76. If the settlor neglects to appoint a trustee or if no named trustee is available to serve as trustee, the court will simply appoint a trustee. *See id.*

14. *Id.* at 76.

15. *See Role of Trustees*, MONAHANS FIN. SERVICES LIMITED, http://www.monahans-fsl.co.uk/services-trustsandtrustees-rolesandresponsibilitie.asp (last visited Sept. 17, 2012).

16. *See* BEYER, *supra* note 8, at 5.

17. *Id.*

18. *See* Madeline J. Rivlin, *Dynasty Trusts*, 34 ANN. EST. PLAN. INST. 947, 954 (2003).

19. *Id.*

20. *Id.*

21. *Id.* at 951.

22. *Id.* at 960.

purposes; and (f) other purposes the accomplishment of which is beneficial to the community."[23]

It may be helpful to take a brief look at an interesting charitable trust. In 1789, Benjamin Franklin provided a charitable trust for Boston, Massachusetts, designed to last for 200 years.[24] The purpose of the trust was to allow Franklin "to be useful even after my death, if possible, in forming and advancing other young men that may be serviceable to their Country."[25] The trustees were instructed to lend money:

> [U]pon Interest at five percent per Annum for such young married artificers, under the Age of twenty-five years, as have served an Apprenticeship in the said Town; and faithfully fulfilled the Duties required in their Indentures, so as to obtain a good moral Character from at least two respectable Citizens, who are willing to become their sureties in a bond with the Applicants for the Repayment of the Monies so lent with Interest according to the Terms herein after prescribed.[26]

Benjamin Franklin provided that the trust, although charitable, was to end after 200 years, "not presuming to carry my views farther."[27]

Even a person as brilliant as Benjamin Franklin did not presume to be able to foresee the future well enough to design a trust that would last for more than 200 years. As it turned out, Franklin's trust was litigated at various times during the 200 years over issues that could not have been anticipated—even by Franklin.[28]

In a recent entertaining case, Charles Walker attempted to put a small piece of land into a trust:[29]

---

23. Shenandoah Valley Nat'l Bank v. Taylor, 63 S.E.2d 786, 789 (Va. 1951). *See also* UNIF. TRUST CODE § 405(a) (2000) ("A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.").

24. *See* LUCY A. MARSH, WILLS, TRUSTS, AND ESTATES: PRACTICAL APPLICATIONS OF THE LAW 129–32 (Aspen L. & Bus. 1998) (citing Benjamin Franklin's 1789 codicil to his 1788 will).

25. *Id.* at 130.

26. *Id.* at 130–31.

27. *Id.* at 132.

28. *Id.* at 133. Probably the most entertaining litigation revolved around theological questions, which the court ultimately decided to dodge. In his will, Franklin had provided that the trust was to be managed (without any payment to the trustees) by the Boston "Select Men, united with the Ministers of the oldest Episcopalian, Congregational and Presbyterian Churches in that Town." *Id.* at 130.

> Sometime during the first hundred years of the trust the Episcopalian church which had been the oldest Episcopalian church ceased being Episcopalian; later the Court had to decide whether or not the oldest Congregational church was still Congregational, or had become Unitarian because of changing religious views with regard to the trinity.

Id. at 133. The court decided to go with the buildings, thus avoiding making rulings on theological matters. *See id.*

29. Marsh v. Frost Nat'l Bank, 129 S.W.3d 174, 176 (Tex. App.—Corpus Christi 2004, pet. denied).

> The trust is to be called the James Madison Fund to honor our fourth President, the Father of the Constitution. The ultimate purpose of this fund is to provide a million dollar trust fund for every American 18 years or older. At 6% compound interest and a starting figure of $1,000,000.00, it would take approximately 346 years to provide enough money to do this. My executor will head the Board of Trustees. . . . When the fund reaches $15,000,000 my Executor's function will cease, and the money will be turned over to the Sec. of the Treasury for management by the federal government. The President of the U.S., the Vice President of the U.S., and the Speaker of the U.S. House of Representatives shall be permanent Trustees of the Fund. The Congress of the United States shall make the final rules and regulations as to how the money will be distributed. No one shall be denied their share because of race, religion, marital status, sexual preference, or the amount of their wealth or lack thereof. . . .[30]

In 2004, the courts held that the attempted trust was void under the common law Rule Against Perpetuities because the provisions did not comply with the traditional list of charitable purposes.[31] Congress was thereby saved from the responsibility of making one more set of difficult financial decisions.

Today, in close to one-half of the states in the country, this attempted trust would be legal—as a Dynasty Trust.[32]

C. Supervision by the Attorney General

For every charitable trust, state legislatures have provided outside supervision in addition to the specific oversight provisions of the trust itself.[33] The attorney general of each state is charged with monitoring the conduct of all charitable trusts within that state to be sure the trust is managed appropriately and the assets of the trust are used for charitable purposes.[34] Thus, a built-in "watch-dog" exists for any charitable trust. That is one of the major reasons that charitable trusts have been allowed to continue "in perpetuity."[35]

Dynasty Trusts, however, are intended to benefit only individuals, not the community as a whole.[36] Therefore, Dynasty Trusts are private trusts.[37] The attorney general has no responsibility to monitor private trusts and no

---

30. *Id.*
31. *Id.* at 179.
32. *See supra* note 1.
33. *See* GEORGE GLEASON BOGERT, THE LAW OF TRUSTS & TRUSTEES 31 (West 2d ed. 1991).
34. *See id.* at 3.
35. *See id.* at 8.
36. *See* Catherine Colombo & Kristin Tyler, *Build Your Dynasty Trust in Nevada*, NEV. LAW., May 2010, at 6.
37. *See id.*

authority to do so.[38] The intended beneficiaries of a private trust are expected to monitor the conduct of the trustee themselves and to seek the assistance of a court when necessary.[39] No agency exists to ensure that the conduct of the trustee of a private trust is appropriate.[40]

D. Historic Limits on Duration of Private Trusts

Historically, private trusts have been limited to a relatively short period of time during which the beneficiaries of the trust—usually the settlor's spouse, children, and grandchildren—are expected to have the motivation to keep an eye on the trustee.[41]

The time limit for private trusts was provided not by any specific statute, but by the application of the common law Rule Against Perpetuities.[42] The basic statement of the Rule Against Perpetuities is "[n]o 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."[43] Without going into the fascinating details, this basically meant that any private trust was limited to last only for the lives of the settlor's spouse, children, and grandchildren.[44]

---

38. *See id.* Except for criminal prosecutions, of course. But the day-to-day operations of private trusts are not subject to review by the Attorney General. *Id.* Joel Dobris has suggested that "[w]e could have a Sarbanes-Oxley for perpetual trusts. If these trusts are going to be around forever we'll need a bureau of trust enforcement." Joel Dobris, *Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2537, 2543 (2006).

39. *See* BOGERT, *supra* note 33.

40. The probate court has jurisdiction over litigation involving the trust. *See* ALEX WILSON ALBRIGHT, TEXAS COURTS A SURVEY: CASES & MATERIALS 12 (Imprimatur Press 2011). Normally, the beneficiaries or the trustees must specifically initiate that litigation in court. *Id.*

41. Because of the Rule Against Perpetuities (discussed later), most private trusts could not continue much beyond the lives of the settlor's spouse, children, and grandchildren. Sitkoff & Schanzenbach, *supra* note 7, at 365. As Robert H. Sitkoff and Max M. Schanzenbach have pointed out,

> The Rule is said to have two purposes: to keep property marketable and to limit "dead hand" control. Preventing indefinite fracturing of property ownership implements the first policy. The idea is that ownership of land periodically will be reconstituted into fee simple because all contingent future interest in the property must vest or fail within the perpetuities period.

Id.

42. *Id.* at 364–65.

43. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 191 (Roland Gray ed., 4th ed. 1942).

44. At the death of the settlor of a testamentary trust, the testator's spouse and children will be known; the common law has always allowed for relation back to include a child who was in gestation—although not yet born—at the death of his father. *See, e.g.*, BEYER, *supra* note 8, at 45. There are no "unborn widow" problems with the spouse of the testator because no matter how much younger she may be than the testator, she was the testator's spouse at the death of the testator and, therefore, a life in being at the creation of the interest when the will went into effect at the death of the testator. *See id.* The testator's spouse and children will all be good measuring lives because they were in existence at the creation of the interest. *Id.* So the trust may easily continue until the death of the testator's spouse and all of the testator's children. *See id.* It is likely that some—but not all—of the testator's grandchildren will have been born before the testator's death. *Id.* With proper drafting, they may be used as measuring lives. *Id.* Because the unborn grandchildren cannot be used as measuring lives, under the

Even when the common law Rule Against Perpetuities limited the duration of private trusts, various cantankerous individuals still found ways to keep their wealth away from any family members without giving the money to charity.[45]

E. Examples of Long-Term Private Trusts

In 1786, Lady Denison's will was upheld even though she creatively directed that her estate was to be held in trust with the income accumulated "until there shall be a second son of [Lady Denison's niece, who was an infant at the time], who shall have attained the age of twenty-one."[46]

Peter Thellusson, who became somewhat famous in academic circles[47] and evidently had little affection for any living member of his family, wrote a will in 1796 that directed that the vast majority of his very large estate, including all his "manors, messuages, lands, tenements, and hereditaments at Brodsworth, and certain other places in the county of York"[48] and the income accumulated and invested in the purchase of more land in England, be held until after the death "of my sons Peter Isaac Thellusson, George Woodford Thellusson and Charles Thellusson and of my grandson John Thellusson . . . and of such other sons as my said son . . . may have as shall be living at the time of my decease or born in due time afterwards."[49] Then the accumulated assets of the trust were to go to whomever was then the "eldest male lineal descendant . . . of my son Peter."[50] Everyone was required to continue using the name Thellusson.[51]

The provisions of this trust were called "morally vicious"[52] at the time but were upheld because the trust did not violate the common law Rule Against Perpetuities.[53] However, when the trust finally ended, the assets of

---

common law Rule Against Perpetuities, any private trust must end not later than twenty-one years after the death of all the "measuring lives" in being at the death of the testator—normally, that would be around 100 years. *See id.*

45. *See id.*

46. Thellusson v. Woodford, (1799) 31 Eng. Rep. 117, 146; 4 Ves. Jun. 227.

47. Herbert Barry, *Mr. Thellusson's Will*, 22 VA. L. REV. 416 (1935–36). *See also* The Accumulations Act, generally referred to as The Thellusson Act, which was enacted in 1800 specifically to put an end to accumulations like those Peter Thellusson directed in his will. Accumulations Act, 1800, 55–56 Vict., c. 58 (Eng.). According to the New York Times from April 12, 1887, another person in England had given "instructions for a will which should postpone all enjoyment of his property until the death of the last survivor of all the members of the peerage living at his death." *Peter Thellusson's Will*, N.Y. TIMES, Apr. 12, 1887. Such provisions were considered absurd at that time. *Id.*

48. *Thellusson*, 31 Eng. Rep. at 119.

49. *Id.*

50. *Id.*

51. *Id.* at 121.

52. Like v. Beresford, (1979) 32 Eng. Rep. 1029, 1031; 11 Ves. Jun. 114.

53. *Id.*

the trust had increased only marginally, thanks in part to almost constant litigation during the term of the trust.[54]

More recently, in May 2011, a private trust established in 1919 finally ended.[55] The trust, as required in 1919, complied with the common law Rule Against Perpetuities.[56] The settlor of that trust, Wellington Burt, was one of the wealthiest Americans at the time[57] and evidently did not like any of his known descendants.[58] Burt provided that most of his estate was to be held in trust until twenty-one years after the death of all his grandchildren who were alive at the time of his death.[59] In 2011, about $100 million was scheduled to be distributed among twelve descendants ranging in age from nineteen to ninety-four.[60] Burt would have done better had he included that ninety-four year old descendent (who was two years old when Burt died and therefore a "life in being") as a "measuring life" in his will; the trust would have gone forward another twenty-one years, into 2032, for a total of 113 years.[61]

So there have always been a few cantankerous individuals who want to keep their money away from any family members known to them but do not want to give the money to charity.[62] Until recently, however, the Rule Against Perpetuities limited such aberrational distributions.[63] It is now possible for people like Lady Denison,[64] Peter Thellusson,[65] Wellington Burt,[66] and Charles Walker[67] to establish trusts that may last for 1,000 years

---

54. PATRICK POLDEN, PETER THELLUSSON'S WILL OF 1797 AND ITS CONSEQUENCES ON CHANCERY LAW 395–98, 407 (Edwin Mellen Press 2002).

55. *See* Robert Frank, *Shutting Out the Kids From the Family Fortune*, WALL ST. J., May 10, 2011, http://blogs.wsj.com/wealth/2011/05/10/shutting-out-the-kids-from-the-family-fortune/.

56. *See id.*

57. *Id.* According to Wikipedia, he was "one of the eight wealthiest men in America" at his death with a fortune "estimated to be between $40 and $90 million." *Wellington R. Burt,* WIKIPEDIA, http://en.wikipedia.org/wiki/Wellington_R._Burt (last visited Sept. 21, 2011).

58. He directed that his private secretary should be paid $4,000 per year for as long as he worked with the trustees, and each of his four daughters was to receive $5,000 per year until he cut his daughter Marion out entirely by a codicil executed on Sept. 25, 1917—a little over a month after the signing of the will. *See* Will of Wellington R. Burt, para. 5, 13; Codicil #1, September 25, 1917. His housekeeper received $3,000 for life as did someone named Flora Fallas, Codicil #2, Dec. 13, 1917, which was the same amount he gave to his sister, Will of Wellington R. Burt, ¶ 8. Both his cook and his chauffeur were to get $1,000 per year for life. Will of Wellington R. Burt, ¶ 9. The trustee was to be paid $3,500 per year or one-half of 1% of the income each year—whichever was larger—and was to invest only in U.S. government bonds and bonds of New York, Chicago, and Detroit, as long as those bonds were paying at least 3% a year. *Id.* ¶ 21.

59. Will of Wellington R. Burt, ¶ 20.

60. *Wellington R. Burt*, *supra* note 57.

61. For example, if Burt had said that the money was not to be distributed until twenty-one years after the death of the last to die "of all my descendants alive at my death," this would have allowed him to use the life of the ninety-four-year-old (whoever that might be) as one of the measuring lives.

62. *See supra* note 47 and accompanying text.

63. *See supra* note 47 and accompanying text.

64. Thellusson v. Woodford, (1799) 31 Eng. Rep. 117, 146; 4 Ves. Jun. 227.

65. *Supra* notes 47–54.

66. *Supra* notes 55–61.

or more due to the recent statutory changes in close to one-half of the states in the country.[68]

II. WHY BANKS HAVE LOBBIED FOR DYNASTY TRUSTS

In 1969, Wisconsin abolished the Rule Against Perpetuities[69] and no one particularly noticed.[70] In 1983, South Dakota followed Wisconsin in abolishing the Rule.[71] Still, no one paid much attention.[72]

The real excitement did not begin until 1986, when Congress enacted an exemption to the Generation Skipping Transfer Tax (GST tax).[73] Within a few years, attorneys and bank trust departments realized that if the Rule Against Perpetuities was abolished or greatly modified, then private trusts might be created to last for very long periods of time.[74] And the rush began.[75]

---

67. *Supra* notes 29–31.

68. *See supra* notes 1–5 and accompanying text.

69. WIS. STAT. ANN. § 700.16 (West 2012).

70. "For reasons unrelated to the GST tax, Idaho, South Dakota, and Wisconsin had already abolished the Rule Against Perpetuities before 1986. But . . . these states experienced little to no resulting advantage in the jurisdictional competition for trust funds prior to 1986." Sitkoff & Schanzenbach, *supra* note 7, at 373.

71. S.D. CODIFIED LAWS § 43-5-1 to -8 (1983).

72. In their empirical study, Max M. Schanzenbach and Robert H. Sitkoff stated the following:

> We find no evidence that, in the years prior to the GST tax, states that abolished the Rule Against Perpetuities garnered more trust business relative to states that retained the Rule. On the contrary, prior to the GST tax, the abolishing states had the same or lower trust assets than similar neighboring states, and were no match for leading trust jurisdictions that retained the Rule such as Delaware.

Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2494 (2006).

73. According to Robert H. Sitkoff and Max M. Schanzenbach:

> Congress first levied an inheritance tax to help fund the Civil War and did so again in the 1890s to fund the war with Spain. During World War I, Congress turned to an estate tax, which it has continued to levy ever since. Prior to 1986, however, the estate tax could be avoided by using successive life interests. Because a life tenancy terminates at death and the estate tax applies only to the decedent's transferable interests, there is no tax on the death of a life tenant.

Sitkoff & Schanzenbach, *supra* note 7, at 370. This created a loophole for successive life estates. *Id.*

> Congress sought to close the successive-life-estates loophole with the generation-skipping transfer (GST) tax under the Tax Reform Act of 1986. In rough terms, a transfer to a grandchild, great-grandchild, or any other person who is two or more generations below the transferor . . . [would be taxed in the estate of the transferor, at the highest marginal tax rate].

Id. at 371.

74. *Id.* at 372.

75. *Id.* at 376.

A. Bank Lobbyists

Bank lobbyists in each state pushed for modification or abolition of the Rule Against Perpetuities[76] and sometimes for abolition of income taxes that some states had been collecting on trust income.[77] The federal government continues to collect income tax on trust income in a rather complex way.[78] The announced goal of the bank lobbyists was to attract more trust business into the state for the benefit of the banks.[79]

From the beginning, Dynasty Trusts were championed by lobbyists for banks—not by settlors who had suddenly developed a desire to hang onto control of their money for the next 1,000 years.[80] Most people have always wanted their assets to go to close family members, such as children and grandchildren.[81] Some people of great wealth, such as Warren Buffett, do

---

76. *Id.* at 373.

77. "Although grantors may go out of their way to avoid the Rule Against Perpetuities for long-term family welfare planning purposes, the primary modern motivator is tax planning." John A. Warnick & Sergio Pareja, *Selecting a Trust Situs in the 21st Century*, PROB. & PROP., Mar.–Apr. 2002, at 53, 54. "[W]e find that the only states that experienced an increase in trust business after abolishing the Rule were those that did not levy an income tax on trust funds attracted from out of state." Sitkoff & Schanzenbach, *supra* note 7, at 362. "[A]bolishing the RAP attracted trust funds, but only if those funds would not be subject to a state fiduciary income tax." Schanzenbach & Sitkoff, *supra* note 72, at 2487.

78. *See* Sitkoff & Schanzenbach, *supra* note 7, at 385–86. Under federal law, in some situations trust income is subject to federal income tax, and in other situations it is not subject to federal income tax. Under federal law:

> Income distributed to a beneficiary in the year it is received is taxable to the beneficiary, not to the trust; income that is not so distributed is taxable to the trust, not the beneficiary. Hence, from the perspective of minimizing federal income taxes, trust income should be distributed or accumulated depending on the relative applicable tax rates. . . .[A]s Jeffrey Pennell has remarked, the rates applicable to trusts "by far are the most onerous applicable to any taxpayer under the Code." The Internal Revenue code thus creates an incentive for trust income to be distributed to the beneficiary in the year it is received.

Id.

79. Chris Stevenson, *Maine's Dynasty Trust Statute: The Product of Informed Judgment?*, 23 ME. B.J. 224, 229–30 (2008). In fact, as Chris Stevenson has pointed out, having money locked up in Dynasty Trusts may actually hurt the local economy:

> Although the ability to accumulate wealth in Dynasty Trusts is astonishing, the accumulation may have significant detrimental effects on Maine's economy because funds held in Dynasty Trusts have effectively been removed from the local marketplace for most goods and services and instead largely placed in conservative bank investments, and to a lesser extent, in publicly traded corporations which tend to be located out of state. Maine's economy would be better served if RAP operated to terminate these trusts at a certain point to make these resources available to the local marketplace.

Id.

80. *See* Ray D. Madoff, *America Builds an Aristocracy*, N.Y. TIMES, July 11, 2010, http://www.nytimes.com/2010/07/12/opinion/12madoff.html.

81. According to Randall W. Roth:

> In my personal experience, settlors of dynasty trusts have always provided for the possibility of discretionary distributions to their descendants, and they never have had a goal of building vast wealth simply for the sake of building vast wealth, or to fund a lottery of sorts that would produce a jackpot for some lucky descendant(s) many, many, many years into the distant future. The clients who wanted badly to have a perpetual impact on the earth—other than by having transferred rock-solid values to their descendants—generally tried to

not intend to leave all of their wealth to their descendants.[82] Instead, the very wealthy may make very large charitable gifts.[83] In addition, many people have recognized the damage that may be caused to beneficiaries who become "trust fund babies."[84]

> have that impact through a charitable trust or foundation of their own creation. The vast majority of wealthy clients have liked the idea of leaving a substantial portion of their wealth to their descendants in trust, rather than outright, for a host of reasons that included creditor-protection and tax minimization. Sometimes they also wanted professional management, but at least as often they liked the idea of having one or more descendants serve as a trustee, using non-general powers of appointment to maintain flexibility without necessarily losing the benefit of tax minimization or asset protection. As each trustee would die or become disabled, someone from the next generation of that trustee's branch of the family would typically step into the trustee's shoes. Of course the details of these dynasty trusts varied considerably from family to family, but I don't recall a single client expressing significant concerns about descendants distant generations down the road.

Interview with Randall W. Roth, Professor of Law, Univ. of Haw. at Minoa, in Honolulu, Haw., (Nov. 6, 2011).

82. According to Joshua C. Tate:

> Billionaire Warren Buffett—who has recently announced plans to give the bulk of his vast fortune to the charitable Bill and Melinda Gates Foundation—was famously quoted in *Fortune* magazine as saying that the perfect amount to leave to one's children is "enough money so that they would feel they could do anything, but not so much that they could do nothing."

Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 447 (2006).

Attorney Henry Christensen III has stated the following:

> Many clients have asked us over the years to design trusts which will be a safety net for their descendants, but which won't remove all incentive for them to take care of themselves. The problem can be acute when both parents die at an early age, and children's shares are vested, and known to them, when they are young. . . . While a number of donors prefer that beneficiaries not know that they are beneficiaries of a trust until they have matured, the Uniform Trust Code now requires, in those states that have adopted the UTC and in particular section 813 thereof, making it mandatory that beneficiaries over the age of 25 be told of their interest in a trust.

Henry Christensen III, *Encouraging Accomplishment and Discouraging Sloth in Trust Beneficiaries*, 2007 ALI-ABA COURSE OF STUDY, SOPHISTICATED EST. PLAN. TECHS., Sept. 24, 1998, at 189.

John J. Scroggin has stated:

> During the 1990s wealthy clients have tended to increase their charitable bequests more than their family inheritances. According to Paul Schervish of the social Welfare Research Institute at Boston College: "A growing number of wealthy Americans are shifting their financial legacies from heirs to charity." According to Mr. Schervish, from 1992 to 1997 the value of charitable bequests went up 110%, but bequests to heirs only grew 57%; for estates above $20 million, charitable bequests went up 246%, yet heirs received only 75% more.

John J. Scroggin, *Protecting and Preserving the Family—The True Goal of Estate Planning, Part I: Reasons and Philosophy*, PROB. & PROP., May–June 2002, at 30.

83. *See* Scroggin, *supra* note 82, at 30.

84. *See id*. at 31.

> The dynasty trust creates an inevitable issue: What will be its effect on future generations? Assume a great-grandson has a right to . . . annual income for the rest of his life . . . of $240,000. When his father tries to convince him to go to college, the son's response is: "Dad, I have a quarter-million a year coming to me —why do I need to go to college? Why do I need to work?" A 1992 study showed that almost 20% of the people who inherited as little as $150,000 quit working.

Nevertheless, it is now possible in nearly one-half of the states to establish a Dynasty Trust that may last for a remarkably long time.[85]

Once a Dynasty Trust is established, all of the property in the trust—both real and personal—will be subject to the control of the bank for as long as the trust continues.[86] What is wrong with that? Plenty of things.

B. Basic Problems with Bank Control of Assets

There is a popular saying in the probate field: How do you make a small fortune? Give a bank a large one to manage in trust.[87] Here is a summary of some of the major reasons that saying rings true. More details will be provided in Part III.

1. Banks Charge Fees

Basic trustee fees normally include a set annual fee plus a percentage of income, principal, or both.[88] In addition, banks charge for an assortment of other expenses, including the expenses of litigation and the use of special investment advisors.[89] These fees may become quite substantial. Unless it is clear that bank investments will be significantly more profitable than the investments that might have been made by the settlor's descendants (without the overhead expenses of the bank), then it would financially be better for the settlor to give the money directly to the descendants and let them do their own investing free from the administrative expenses incurred by a bank.[90]

Id. There are pattern clauses to try to prevent trust money from being distributed to beneficiaries who have a substance abuse problem. *See* Christensen, *supra* note 82, at 196. "A number of organizations have been established in the last several years to deal with the negative effects of inherited wealth." John J. Scroggin, *Protecting and Preserving the Family: The True Goal of Estate Planning, Part II—Some of the Tools*, PROB. & PROP., July–Aug. 2002, at 41. "Giving an heir an unearned healthy annual income often takes away ambition and self worth." *Id.* at 34.

> Too much unearned income can have a negative impact on productivity. Some studies suggest that individuals who inherit large sums of money are more likely to leave the labor force. Psychological costs, such as substance abuse, anxiety, and depression, also are associated with being a child of wealthy parents. Receiving large unconditional bequests could compound these psychological costs. "Affluenza," a term "coined to describe an epidemic of over-consumption and its often negative effects on children—alienation, laziness, arrogance and low self esteem," is not merely a hypothetical problem.

Tate, *supra* note 82, at 488.

85. *Dynasty Trust States*, LAW OFF. OSHINS & ASSOCIATES, LLC, http://www.oshins.com/dynastytrusts.html (last visited Sept. 13, 2012).

86. Scroggin, *supra* note 82, at 40.

87. Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1335 (2003).

88. *Id.* at 1337.

89. *See id.*

90. Turnier & Harrison, *supra* note 2, at 802–03 ("Professor Burton Malkiel has, in a fairly conclusive fashion, established that the net return on professionally managed portfolios does not, over

2. Banks Are Usually Very Conservative Investors

Do bank trust departments have a record of consistently beating the market? Far from it. Banks, like nearly all trustees, normally stick to very conservative investments.[91] The law, in various ways, essentially requires that focus on safety.[92] Trustees are normally more concerned with safety than with maximizing growth.[93] Banks are conservators, not entrepreneurs. They attempt to avoid risks. Therefore, the returns from a bank-managed trust are likely to be considerably below the market.

Banks put a great deal of time and money, however, into investigation and analysis of investments.[94] They have layers of investment committees who are usually handsomely paid.[95] However, the actual financial benefit to the trust and beneficiaries from all of this effort seems to be minimal.[96]

Of course banks are not the only ones who fail to beat the market. The growing popularity of index funds reflects the realization that putting a great deal of time and money into analysis of investments does not, in most cases, actually result in significantly more profitable investments.[97] It merely provides salaries to those doing the analysis. The detailed investment analysis engaged in by banks is not likely to increase returns; it is designed primarily to limit loss.

---

the long haul, exceed that on portfolios of randomly selected stocks. This has given rise to the extensive interest in index funds that have become the rage in the last twenty-five years.").

91. Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 622 (2005). "Because of potential liability for imprudent investments, the trustee is likely to invest more conservatively than the beneficiaries would." *Id.* Or banks may decide not to invest at all. On October 25, 2011, the New York Times reported that banks are now flush with cash but are still not making loans. Eric Dash & Nelson D. Schwartz, *In Cautious Times, Banks Flooded With Cash*, N.Y. TIMES, Oct. 25, 2011, at B11. For example, Donald Sturm, owner of American National Bank and Premier Bank, is quoted as saying that

> [H]e had pared his banks' portfolios of loans by more than two-thirds . . . over the last few years because of concerns that the loans could go bad. . . . [H]e said fewer businesses in Denver and Colorado Springs were seeking financing. Yet, his banks remain flush with over $1.55 billion of deposits. He would like to make more loans so that he could earn more money, he said, but there are too few of what he calls "quality borrowers," whose credit record, income and assets suggest they would reliably pay him back. . . . As a result, Mr. Sturm is keeping savings rates below 0.15 percent and setting C.D. rates below those of nearby competitors. "I don't want to take deposits in and lose money," he said.

Id.

92. Tate, *supra* note 91, at 622.

93. *Id.*

94. *See generally* Dash & Schwartz, *supra* note 91.

95. Turnier & Harrison, *supra* note 2, at 792.

96. *Id.* at 802.

97. *Id.*

3. Banks Make Mistakes

As clearly illustrated by the financial crisis that exploded in 2008, banks—many of them—sometimes make resoundingly poor financial decisions.[98] Sub-prime mortgages, derivatives, and hedge funds are examples that come readily to mind.[99]

Over the next millennium, does any reason exist to believe that banks will not make similar mistakes or that some government will always be available and willing to bail out the banks? It is unlikely.

To be more specific, does any reason exist to believe that no one like Bernie Madoff will appear during the next 1,000 years to con banks into making bad investments?[100] Or that no rogue investor will cause an unauthorized $2 billion[101] or $6.7 billion[102] loss for a bank?

Con men have been around throughout the ages. They do not limit their prey to the poor. Remember, Bernie Madoff fooled many sophisticated investors[103] in addition to fooling the SEC.[104]

Banks, like individual investors, may make serious errors in investing and may be seriously misled on investments. With control of great concentrations of wealth, banks will be tempting targets for theft and embezzlement.[105]

4. Problems with Concentration of Wealth

Any large concentration of wealth in a small group of people or entities may cause problems for the entire economy. Examples are the "too big to fail" problem and the "economic bully" problem.[106] Banks controlling the assets of various Dynasty Trusts could easily become dangerous economic bullies. Presently no antitrust-type law exists to regulate how large the assets of a private trust may be or how those assets

---

98. *See, e.g.*, *Will Subprime Mess Ripple Through Economy?*, NBC NEWS, http://www.msnbc.msn.com/id/17584725#.UGNSt1GOzkc (last updated Mar. 13, 2007, 11:46:35 AM).

99. *Id.*

100. Thomas Zambito, Jose Martinez & Corky Siemaszko, *Bye, Bye Bernie: Ponzi King Madoff Sentenced to 150 Years*, N.Y. DAILY NEWS, June 29, 2009, http://www.nydailynews.com/news/money/bye-bye-bernie-ponzi-king-madoff-sentenced-150-years-article-1.373445. Madoff was convicted and is now serving a 150 year sentence for the frauds involved with a huge Ponzi scheme. *See id.*

101. Julia Werdigier & Ben Protess, *Arrest of USB Trader Rattles Banks in Europe*, N.Y. TIMES, Sept. 16, 2011, at A1.

102. *Id.*

103. Louise Story & Eric Dash, *Lawyer Defends Role in S.E.C. Madoff Case*, N.Y. TIMES, Sept. 23, 2011, at B3.

104. *Id.*

105. *Id.*

106. *See* Eric Dash, *If It's Too Big to Fail, Is It Too Big to Exist?,* N.Y. TIMES, June 21, 2009, at WK3, *available at* http://www.nytimes.com/2009/06/21/weekinreview/21dash.html; Jeff Mason, *Is Apple Injunction Against Samsung 'Market Bullying?'*, YAHOO! VOICES (June 5, 2012), http://voices.yahoo.com/is-apple-injunction-against-samsung-market-bullying-11522450.html.

may be allocated within the trust. If a settlor directs that all of the assets in the trust shall be invested in land, for example, the trustee would be permitted to do so.[107]

The United States Supreme Court recognized in *Hawaii Housing Authority v. Midkiff* that too much economic power in a small group of people or entities is dangerous, even when not in violation of any laws or regulations.[108] In *Midkiff*, seventy-two private landowners acquired ownership of all but 4% of the land in Hawaii that was not owned by some governmental entity.[109] Acquisition and retention of the land had been done legally.[110] Buying and retaining land turned out to be a very effective investment strategy. The owners involved intended to continue that strategy and had no intention of selling the land.[111] Therefore, it became nearly impossible for the majority of people in Hawaii to buy any land.[112]

The Supreme Court upheld a state statute that authorized the government of Hawaii to condemn land that renters of the land wished to purchase and required the land to be sold directly to the former renters.[113] The Supreme Court based its decision on the over-riding importance of preventing oligopoly within the United States.[114] Therefore, the Supreme Court has recognized the serious dangers of too much concentration of private wealth in this specific instance.[115] But there is still no overall limit on the amount of wealth that may be held in a private trust.

If banks retain large amounts of property in trust for very long periods of time, there may be real dangers of too much concentration of wealth.[116] If banks invest in land, for example, they may achieve almost a monopoly

---

107. *See* BEYER, *supra* note 8.

108. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

109. *Id.*

110. *Id.*

111. *Id.* at 233.

112. *See id.*

113. *See id.* at 233–36.

114. *Id.* at 241–42.

> [W]e have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted, much as the settlers of the original [thirteen] colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.

Id.

115. *See id.*

116. REBECCA LOVE KOURLIS & DIRK OLIN, REBUILDING JUSTICE: CIVIL COURTS IN JEOPARDY AND WHY YOU SHOULD CARE 37–51 (Fulcrum Publication 2011). As Rebecca Love Kourlis and Dirk Olin have pointed out, there may be serious dangers to the judicial system when groups or entities have the ability to make excessive contributions to the campaigns of people running for election to a judgeship or to any legislative position. *Id.*

of the land available for investment or private use with serious consequences.[117]

If banks invest primarily in things such as stocks and bonds, there may also be the problem of economic bullies. As Fran Hawthorne pointed out, "[A] giant fund . . . cannot easily move its $237.5 billion around without causing financial tidal waves."[118]

5. Are Banks Better Investors than the Settlor's Descendants?

What if the settlor's descendants simply do not have the wisdom or self-restraint to make wise investments? Certainly individuals, like banks, may make mistakes and may be seduced by con men like Bernie Madoff. However, individuals have every reason to watch their own investments very closely and have the ability to act quickly when circumstances change. Nevertheless, it is true that some individuals simply are bad investors.

Would a bank be safer then? If the settlor is convinced that all of his or her descendants for 1,000 years will be incapable of handling money wisely, then a trust might be better—but what a depressing attitude toward one's own descendants!

In fact, it appears that most people are not that pessimistic about the capabilities of their own descendants.[119] Except in the case of minor children, grandchildren, or people with known disabilities for whom a special needs trust is appropriate, most testators have been content with leaving their assets to the people they actually know—their spouse, children, and grandchildren.[120] Historically, most people have been willing to let the living control the property.[121] As Thomas Jefferson said, "[T]he earth belongs . . . to the living . . . the dead have neither powers nor rights over it."[122]

---

117. *See Haw. Hous. Auth*., 467 U.S. at 241–42.

118. Fran Hawthorne, *The Risks of Investing Like the Big Pension Funds*, N.Y. TIMES, Sept. 16, 2011, at F5.

119. *See* Roth, *supra* note 81.

120. "[T]he movement to abolish the Rule and the corresponding rise of the perpetual trust reflect strategies to minimize taxes, not a burgeoning desire among donors for perpetual control." Schanzenbach & Sitkoff, *supra* note 72, at 2497.

121. *See id*.

122. THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON V6: 1792–1794 115 (Paul Leicester Ford ed., photo. reprint 2009) (1895) (discussing Thomas Jefferson's letter to James Madison from 1789). Or as Blackstone stated, "[N]aturally speaking, the instant a man ceases to be, he ceases to have any dominion." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 10 (Univ. of Chi. Press 1979) (1766).

III. WHAT IS THE ATTRACTION OF DYNASTY TRUSTS?

Why would anyone put money into a Dynasty Trust? Three primary reasons exist: dreams of glory,[123] pressure from banks and attorneys,[124] and potential tax savings.[125] Each will be discussed below. Throughout this discussion, it is important to remember that any potential tax savings achieved by a Dynasty Trust are based on the quite remarkable premise that no changes will be made to the Internal Revenue Code during the next 1,000 years.[126]

A. Dreams of Glory

Perhaps at this point it might be helpful to try to understand the time period we are talking about when we refer to 1,000 years—when the settlor's dreams of glory will finally be fulfilled. In the year 1012, King Aethelred paid tribute to Viking Raiders, and Mael Morda started a rebellion against Brian Boru in Ireland.[127] The Anasazi were still living in the cliff dwellings in what has now become southwestern Colorado.[128]

But in case you missed hearing about some of these events in your history class, in 1066 William the Conqueror invaded England.[129] That was only 946 years ago, but it gives an idea of how long 1,000 years actually is. Perhaps the United States Tax Code and various Revenue Rulings have changed a bit since 1066. But Dynasty Trusts are based on the assumption

---

123. "Several articles and websites make reference to the great industrial dynasties of the early twentieth century, such as the Carnegies, Rockefellers, and Fords, apparently with the implication that the settlor of a dynasty trust can help make sure his or her family name is similarly honored." Tate, *supra* note 91, at 619. "Your heirs, for unlimited generations to come, will be grateful to you, their great, great ad infinitum, grandparent." *Id.* "Who knows—if you take advantage of Nevada's 365-year dynasty trust laws, your average Joe client could be the next great American tycoon." Colombo & Tyler, *supra* note 36, at 13.

124. *See supra* Part III.B.

125. Ashley Vaughan, *You Can't Take It With You: Property Rights After Death and Rethinking the Rule Against Perpetuities*, 47 S. TEX. L. REV. 615, 629 (2006).

> The reason [for setting up a Dynasty Trust] has little if anything to do with some wish on the part of wealthy people to control the lives of their unknown descendants; rather, it has to do with their interest in saving on federal transfer taxes imposed at the descendant's deaths, and on competition among the states to cater to that interest.

Id.

126. Even the strongest supporters of Dynasty Trusts do not actually expect this to happen. "Undoubtably [sic], the tax environment will continue to experience change. . . . [E]state plans must remain flexible to meet future needs of the beneficiaries and to avoid unintended and unforeseen tax consequences." Stephen E. Greer, *The Alaska Dynasty Trust*, ALASKA L. REV. 253, 285 (2001).

127. *See* FRANK STENTON, ANGLO SAXON ENGLAND 88 (Oxford Univ. Press 3d ed. 2004).

128. *See Ancestral Pueblo Culture*, BRITANNICA ONLINE ENCYCLOPEDIA, http://www.britannica.com/EBchecked/topic/22804/Ancestral-Pueblo-culture (last visited Oct. 31, 2011).

129. *See William I*, BRITANNICA ONLINE ENCYCLOPEDIA, http://www.britannica.com/EBchecked/topic/643991/William-I (last visited Nov. 12, 2012).

that nothing significant, including tax laws and the structure of society, will change in the next 1,000 years.[130]

The Pilgrims landed at Plymouth Rock in 1620—a mere 392 years ago.[131] The Internal Revenue Service is itself a young whipper-snapper, historically speaking; the concept was introduced by President Lincoln in 1862, with the current organization dating from the 1950s—roughly seventy years ago.[132]

If no changes in tax laws or the value of a dollar occur in the next 1,000 years and few or no distributions are made to the settlor's descendants, then a Dynasty Trust established today might be worth a great deal of money at the end of 1,000 years. The settlor will have finally achieved his or her dreams of glory. What enticing dreams!

A quicker way of achieving glory is to donate enough money to have one's name put on a building, set up a scholarship fund, or establish a charitable foundation.[133] But for some reason, those routes to glory are not rigorously promoted by banks or attorneys.

B. Pressure from Banks and Attorneys

With truly remarkable innocence, banks and attorneys vigorously promote the concept of Dynasty Trusts.[134] Assuming all tax laws stay exactly the same, Dynasty Trusts will allow very impressive tax savings and increase the corpus of the trust dramatically over the next 1,000 years.[135] Who could resist?

C. Promised Tax Savings

What is the pitch being used for tax savings? First, it is important to note that only about 2% of the people in the United States are currently

---

130. *See* Greer*, supra* note 126.

131. *See Plymouth*, BRITANNICA ONLINE ENCYCLOPEDIA, http://www.britannica.com/EBchecked/topic/465335/Plymouth (last visited Oct. 31, 2011).

132. *See Brief History of IRS*, IRS, http://www.irs.gov/uac/Brief-History-of-IRS (last visited Sept. 24, 2012).

133. According to Ronald Chester:

> One way for a decedent to be remembered by future generations is through charitable giving. As two noted psychologists wrote, "That $2,000,000 Chair in Psychosocial Gerontology which you have just been kind enough to endow at your local university . . . bestows social immortality; your name will be linked forevermore to the professor who holds that enviable title."

Ronald Chester, *The Psychology of Dead Hand Control*, 43 REAL PROP. TR. & EST. L.J. 505, 506 (2008).

134. "[I]t is probably malpractice *per se* not to suggest a perpetual dynasty trust to any client who can afford to fund one." Martha W. Jordan, *Requiem for Pennsylvania's Rule Against Perpetuities*, 46 DUQ. L. REV. 555, 572 (2008).

135. Julius Giarmarco, *Generation Skipping Trusts*, PRODUCERSWEB (Apr. 11, 2012) http://www.producersweb.com/r/pwebmc/d/contentFocus/?pcID=b9535401dc9a3350b37d25f2c925388c#.

subject to any sort of estate tax or GST tax.[136] So we are not dealing with everyone who has $500,000 or more but only with the very few people who might actually incur an estate tax.[137]

Here is an example of how a Dynasty Trust is intended to work: In 1986, Congress created an exemption to the GST tax in amounts that have changed frequently since then.[138] Rather than trying to specify how much the exemption will be in any given year, I will use a GST tax exemption of $1.3 million. Under this exemption, Adam may give up to $1.3 million to his grandchild, Clara. This gift avoids the estate tax that would have incurred if Adam had instead given the money to his son, Bob, and then Bob gave the money to Clara.[139] The GST tax was enacted to tax money at the highest marginal rate in the estate of the donor if the money was given in such a way as to skip a generation, that is, if Adam had given the money directly to Clara and skipped Bob's generation.[140] The 1986 exemption to the GST tax allows Adam to transfer up to $1.3 million to Clara without incurring the GST tax.[141]

The tax savings may get even better. If Adam puts the $1.3 million allowed as a GST tax exemption into a Dynasty Trust, tax planners assume that Adam will be able to pass the benefit of the money down to his descendants for the next 1,000 years without ever incurring any GST tax.[142]

Remember, however, if Adam was not in the top 2% at his death or did not give the money to Clara, no GST tax would have been due anyway. All of the impressive tax savings depend on the assumption that Adam, Bob, Clara, and everyone in succeeding generations would have died with assets exceeding the exemption limit (putting them in the top 2% of the people in the country and thus subject to estate tax), and neither the tax laws nor the value of money would have changed since the moment the trust was first established.[143] Remember, this whole scheme is based on current tax laws staying exactly the same as they are today for the next 1,000 years.

---

136. Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, IRS 118, 125 http://www.irs.gov/pub/irs-soi/ninetyestate.pdf (last visited Sept. 24, 2012).

137. Colombo & Tyler, *supra* note 36, at 6. Others are not quite so aggressive. For example, attorney Edward V. Atnally suggests that "[i]n the largest estates, especially those exceeding $5-10 million, consideration should be given, among other things, to the creation of a dynasty trust." Edward V. Atnally, *Estate Planning and Retirement Benefits—An Approach Toward Simplification, Part 2*, PROB. & PROP., Sept.–Oct. 2009, at 56, 59. He also points out why retirement plan benefits should not be used to fund Dynasty Trusts. *Id.*

138. Giarmarco, *supra* note 135, at 2.

139. The actual amount of the exemption has varied over the years, as have the estate tax rates. *See* Jacobson, *supra* note 136, at 124. In 2011, the exclusion for estate tax purposes was $5 million. *Id.* For 2013 it will be $1 million, and the maximum tax rate will return to 55%. *Id.* This illustrates how significantly tax law has changed in a period of only two years. *Id.*

140. *See* Giarmarco, *supra* note 135, at 1.

141. *Id.*

142. There has not yet been any determination as to whether this will actually be permitted. *See* Fisher, *infra* note 145.

143. Whatever the specific amount may be in any given year. Giarmarco, *supra* note 135, at 3.

Adam, instead of giving the money directly to Bob or to Clara, puts it into a magical Dynasty Trust set up to last for the next 1,000 years. In theory, the Dynasty Trust will then provide some support for Adam's descendants (as well as many happy bankers and lawyers who will act as trustees, advisors, litigators, and "trust protectors"[144]) for the next millennium. However, promoters of Dynasty Trusts suggest that if all of the money remains in trust for 1,000 years (not actually being distributed to the settlor's descendants), the tax savings and growth of the corpus will be even more impressive.[145] How could anyone pass up such a good deal?

Remember, impressive tax savings are promised based on the expected occurrence of two highly unlikely events: (1) the tax laws will not change, and (2) for the next 1,000 years, all of Adam's descendants will be so financially successful that the descendant will end up in the top 2% of the population and therefore will have a taxable estate.

If the Dynasty Trust holds the assets rather than the remarkably successful descendants of Adam and the tax laws do not change, the assets in the Dynasty Trust will escape taxation at each generation.

The last of an unbroken line of remarkably successful descendants—not one of whom could be trusted to handle the trust assets himself or herself—will be able to enjoy the benefits, if any, from the trust after 1,000 years. Rather than letting any of these remarkably successful descendants handle the assets for himself or herself, the assets will instead be entrusted to good, sturdy financial institutions, such as Lehman Brothers,[146] Goldman Sachs,[147] Merrill Lynch,[148] or Bank of America,[149] for the next 1,000 years. Of course, some administrative expenses will accrue.

---

144. According to Joshua C. Tate:

> A trust protector is a person other than the trustee selected by the settlor to stand in the shoes of the settlor after the settlor's death and make decisions regarding the trust. An obvious problem with giving an individual trust protector the power to amend the trust is that such a person eventually will die, as will any individual chosen as trustee. . .A corporate trustee does not have this drawback, but the settlor may have less confidence that a corporate trustee will share her ethical framework.

Tate, *supra* note 82, at 464.

145. "A trust can grow to remarkable size . . . in 90 years. . . . [T]hese simple examples assume no consumption of the assets or their income." Julia B. Fisher, *Dynasty Trusts: Problems & Drafting Considerations*, ALI-ABA 53 (February 2002).

146. Lehman Brothers failed in 2008. Victoria Ivashina & David Scharfstein, *Bank Lending During the Financial Crisis of 2008*, 97 J. FIN. ECON. 319, 319 (2010).

147. Goldman Sachs received $10 billion in TARP money, plus $69 billion in federal loans in the 2007–2010 bank bailout by the federal government. Bob Ivry, Bradley Keoun & Phil Kuntz, *Banks and Fed Kept Scope of Bailout Under Wraps*, DENVER POST, Nov. 29, 2011, at 1.

148. Merrill Lynch was purchased by Bank of America to avoid total failure. *See* Jef Feeley, *BofA's Merrill Lynch Settlement Inadequate, Lawyers Contend*, BLOOMBERG (Apr. 27, 2012, 5:29 PM), http://www.bloomberg.com/news/2012-04-27/bofa-s-merrill-lynch-settlement-inadequate-lawyers-contend-1-.html.

149. Bank of America received $45 billion in TARP money plus $91.4 billion in federal loans. Ivry, Keoun & Kuntz, *supra* note 147, at 1.

D. A Closer Look at Expenses Which Are Likely to Offset Tax Savings

1. Bank Fees—More Details

As indicated above, banks charge fees.[150] Interestingly, banks usually do not make a list of those fees available to the public, so shopping among possible banks to serve as trustee may be difficult. However, it has been estimated that the usual bank fee at this time would be, on average, 100 basis points (and, of course, the promoter of the Dynasty Trust assumes that the banks would never raise the fees once they had secured the account).[151] So, roughly 1% of income and 1% of principal will go to the bank trustee every year.[152]

There may be additional fees for annual accountings, for example. Because no public entity, such as the attorney general, will be supervising the conduct of the trust, someone should be charged with the responsibility of making sure that the trust is properly managed. Normally, responsibility for this monitoring falls on the beneficiaries.[153] In some states, the trustee is required to present an annual accounting to a court.[154] In any case, an accounting should be made by the bank at least once a year.[155]

To whom should the accounting be sent? To the court? To each of the increasingly numerous beneficiaries? Furthermore, how much money should be spent to keep track of the beneficiaries to determine whether each beneficiary still has sufficient mental capacity (has had financial matters turned over to a conservator or agent acting under a durable power of attorney) or has died?

The safest practice for the bank is to give good notice to each of the living beneficiaries and also to give notice to at least one person or entity that may serve as a representative of unborn future beneficiaries. Then the bank should have a formal accounting approved by the court each year.[156]

---

150. Stuart A. Ober, *Comparison of Bank Trust Department Fees*, FINANCIALCOUNSEL.COM, http://investor.financialcounsel.com/Articles/EstatePlanning/ARTEST0000102-BankTrustDepartment Fees.asp (last visited Sept. 24, 2012).

151. *Id.*

152. *Id.*

153. *See* IAN NEWMAN ET AL., BOGERT'S TRUST AND TRUSTEES § 966 (2012).

154. *See id.*

155. This gives some protection to the bank against future litigation by the beneficiaries in that beneficiaries are expected to read and act upon the accountings as received. *See id.*

156. *See In re Orpheus Trust*, 179 P.3d 562, 564–65 (Nev. 2008) (illustrating how a technical accounting issue may be litigated to the state supreme court).

2. Additional Administrative Fees

Serious estate planners now frequently recommend the use of trust protectors[157] and investment advisory committees[158] to keep an eye on the trustee. Lawyers will make fine trust protectors, and various investment specialists will make fine investment advisors. Of course, all of them will charge for their time, presumably at fairly high rates.[159]

---

157. "The Problem: Most grantors do not 'trust' a trustee, in particular a corporate trustee, to exercise discretion over time. Naming a trusted friend as a protector will be responsive to these concerns. But what happens 50 years out?" Henry Christensen III, *The Use of Trust Protectors or Boards of Advisors in Long-Term Irrevocable Trusts*, 2007 ALI-ABA COURSE OF STUDY, SOPHISTICATED EST. PLAN. TECHS. 149, 172.

> Instead of giving a discretionary beneficiary an unrestricted power to remove and replace the independent trustee, the trust instrument could name a trust protector who has an unrestricted power to remove and replace the independent trustee. The trust protector would need to be independent of the beneficiary within the meaning of I.R.C. section 672(c). The difficulty with using a trust protector is that dynasty trusts can extend beyond the lifetime of anyone in existence at the time the trust is established . . . One solution is to give the initial trust protector the ability to appoint a successor trust protector who in turn has the power to appoint a successor trust protector. How does one remove an unwanted trust protector? It would appear dangerous for both tax and creditor protection reasons to give a discretionary beneficiary the unrestricted power to remove and replace a trust protector with another trust protector . . . If a trust protector is named, a discretionary beneficiary should not have the power to remove the trust protector but only the power to appoint a successor trust protector should the original trust protector resign.

Greer, *supra* note 126, at 267–68 (footnote omitted) (emphasis omitted).

158. This may get quite complex. For example, Madeline J. Rivlin has suggested:

> Consider dividing the functions between an Investment, Independent and (if necessary to secure perpetual status) Administrative Trustee . . . Further division, e.g., dividing the Investment Trustee function, so that there is a special voting trustee . . . Oversight mechanisms may also be included if appropriate, e.g., requiring the Independent Trustees to approve certain investment decisions . . . Minimum and maximum numbers of Trustees for each function and/or unanimity requirements for certain decisions may be considered.

Rivlin, *supra* note 18, at 957.

159. One protector reimbursement clause sample provides:

> Any Protector of any trust held hereunder shall be entitled to reimbursement for all ordinary and necessary out-of-pocket costs and expenses (including attorneys', accountants', consultants' and other expert fees and charges) incurred by such Protector in the performance of his or her duties under this Trust agreement . . . Each of the Protectors shall be indemnified for his or her reasonable legal expenses incurred in defending himself or herself in any action or actions brought against him or her in which it is finally determined that his or her conduct did not constitute gross negligence, willful misconduct, or a crime, and further, such reasonable legal expenses may be advanced to a Protector provided that he or she executes an undertaking, with a supporting promissory note, to repay such advanced amounts in the event that the conduct of such Protector is finally determined to have constituted gross negligence, willful misconduct, or a crime.

Christensen, *supra* note 157, at 180.

3. Litigation

Every so often a dispute as to the quality of particular investments[160] or the size of distributions[161] being made to the various beneficiaries is likely to arise. Such disputes may end up being settled by litigation. For any such litigation the trustee is entitled to take all expenses, including attorneys fees, from the assets of the trust.[162] Because litigation fees are chargeable to the trust, a trustee does not have much motivation to avoid litigation.[163] The trustee's cost of litigation will come out of the corpus of the trust, not from the pocket of the trustee.[164]

If the court decides the litigation is not beneficial to the trust, the beneficiaries must pay their own litigation expenses and cannot recover their attorney's fees from the trust.[165] Thus, the beneficiaries are likely to think twice about spending their own money on litigation designed to keep the trustees in line. Any beneficiary contemplating litigation must weigh the likely expenses involved against the potential benefit to the individual beneficiary. Due to the exponential increase in the number of people who are descendants of the settlor, the share of any individual beneficiary decreases, thus significantly decreasing the likelihood of any beneficiary stepping forward to question the conduct of the trustee.

If the trustee is given discretion as to how much money should be paid to any particular beneficiary, the likelihood of anyone trying to hold the

---

160. According to Lawrence W. Waggoner:

> Four hundred fifty years after a . . . perpetual trust is created, the number of living beneficiaries of that one trust could rise to 1.8 million—yes, 1.8 million beneficiaries of a single trust, each with standing to bring a lawsuit against the trustee for violation of any of the trustee's fiduciary duties, including the duty of impartiality. The *Restatement of Trusts* states that the duty of impartiality may require the trustee 'to consult with beneficiaries and obtain information from them concerning their financial needs and circumstances.' How can the trustee of a 1.8-million-beneficiary trust hope to fulfill that duty?

Lawrence W. Waggoner, *Message to Congress: Halt the Tax Exemption for Perpetual Trusts*, 109 MICH. L. REV. FIRST IMPRESSIONS 23, 25 (2010).

161. According to Edward J. McCaffrey:

> [A]s the trust corpus grows, so, too, can the desire to litigate over the growing pot of gold—especially when the warring factions are distant relatives who may have never met before litigation. Dynasty trusts have the significant potential of bringing extended families together in new and possibly destructive ways.

Edward J. McCaffrey, Alan T. Yoshitake & Keith A. Davidson, *The Advantages of Creating Out-of-State Trusts*, L.A. LAW., Sept. 28, 2005, at 19, 21.

162. UNIF. TRUST CODE § 709 (2000).

163. Whenever a trustee does anything that might subject the trustee to litigation, it is safest for the trustee to seek court approval in advance. Uniform Trust Code section 201(c) provides that "[a] judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights." UNIF. TRUST CODE § 201, 7C U.L.A. 455 (2000).

164. § 709.

165. UNIF. TRUST CODE § 1004 (2000).

trustee accountable becomes even more remote.[166] As a practical matter, there may be no one to question the conduct or decisions of the trustee. No wonder banks are so enthralled by the concept of Dynasty Trusts.

4. Dilution by Trustees

The book *Broken Trust* by Judge Samuel P. King and Professor Randall W. Roth[167] provides a description of how the assets of the Bishop Trust, a charitable trust with assets greater than the combined endowments of Harvard and Yale, was shockingly mismanaged by the trustees for many years despite the fact the trustees were appointed by the Hawaii Supreme Court and, theoretically, subject to the supervision of the attorney general.[168] Other than paying themselves annual fees of $1 million dollars each, the trustees did remarkably little for the benefit of the trust.[169] For any trust, there must be someone with the motivation and the power to supervise the trustee.

IV. MONEY LIKELY TO BE AVAILABLE FOR DESCENDANTS

A. Rate of Return

After payment of all of these expenses, will any money remain for the benefit of the settlor's descendants? No worries. Dynasty Trusts are expected, magically, to increase in value by 12% per year[170] for the next 1,000 years even though the Dow Jones Industrial Average, for example, closed at 7,422 on October 31, 1997, and closed at 7,400 on March 19, 2009, roughly twelve years later after many exciting ups and downs between these two dates.[171] But with the unflinching optimism required of one trying to sell any new product to the public—trying to "create a demand" for a product the public has not yet realized that it needs or

166. As Michael L. Graham pointed out, "The settlor should be advised that a broad discretionary trust shifts the balance of power substantially away from the beneficiary and toward the trustee." Michael L. Graham, *Divining the Intent of the Trust Settlor*, 2007 ALI-ABA SOPHISTICATED EST. PLAN. TECHS. 149, 183.

167. SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST: GREED, MANAGEMENT & POLITICAL MANIPULATION AT AMERICA'S LARGEST CHARITABLE TRUST 1–9 (2006).

168. *Id.* at 1.

169. *Id.*

170. According to Gideon Rothschild:

> Assuming that $1 million is invested for 85 years at a 12% annual return . . . the $1 million will have appreciated to $1.9 billion (assuming no distributions and no state income tax) by the end of the 85 year period. This is made possible by the fact that no transfer taxes have been paid for approximately three generations.

Gideon Rothschild, *Understanding the Generation-Skipping Transfer Tax*, PRACTISING L. INST., Nov. 2004, at 457.

171. *Dow Jones Industrial Average Historical Prices*, YAHOO! FINANCE, http://finance.yahoo.com/q/hp?s=^DJI&a=09&b=31&c=1997&d=02&e=19&f=2009&g=d (last visited Sept. 13, 2012).

wants—all current global financial difficulties are dismissed as a mere blip in an assumed future rate of growth of 12% per year for Dynasty Trusts.

Proponents of Dynasty Trusts confidently predict a rate of growth of 12% per year because that was the average rate of growth for the most recent fifty years.[172] The rate of growth for the fifty years before that was only 6%.[173] But no worries.

B. Payments to the Intended Beneficiaries—The Descendants of the Settlor

1. Payments During the Term of the Trust

It might be nice if some payments were made to beneficiaries over the life of the trust. Any such payments, of course, would significantly reduce the magic of a Dynasty Trust.[174] Some commentators have assumed that no payments will be made during the first fifty years.[175] This excludes the settlor's own spouse, children, and grandchildren, who normally would have been considered to be the "natural objects of the settlor's bounty."[176]

2. Payments at Termination of the Trust

During the early years of the trust, if the trustee resists making payments to the settlor's spouse, children, and grandchildren—people the settlor actually knew—and the money is instead accumulated in the trust to make a really big "splash" at the termination of the trust, how much will each beneficiary actually get after that 1,000 year waiting period? That, of course, will depend on how many beneficiaries are then in existence and what the actual rate of growth turned out to be.[177]

---

172. *Id.*

173. *Id.*

174. According to Turnier and Harrison:

> As soon as we start accessing the trust income, the rate at which trust assets are increasing will decline. Even modest access to a portion of the income can have a significant effect. Suppose that, in our example, we decided to use only three percent of trust assets each year to support the extended family. If we assume an annual net rate of return after all expenses and taxes of 8%, this would result in close to a static rate of return adjusted for inflation and rising standard of living, because as has been developed above, given the experience of the last fifty years, we need a return of approximately 4.9% per year just to keep pace with the average national wage. Given that the family is likely to continue to grow geometrically whereas the trust will remain virtually static when adjusted for inflation and rising expectations generated by a rising standard of living, succeeding generations will see their relative shares shrinking dramatically as the years slip by.

Turnier & Harrison, *supra* note 2, at 800–01.

175. *Id.* at 786–87.

176. *See* BLACK'S LAW DICTIONARY 1177 (West Publication Co., 4th ed. 1968) (defining "natural object of testator's bounty" as the person who would take under intestacy).

177. Turnier & Harrison, *supra* note 2, at 807.

Professor Waggoner has calculated the numbers for likely beneficiaries for trusts which are of much shorter duration than 1,000 years:

> If, for simplicity, we assume that two children and four grandchildren are living at the transferor's death, that the average interval between generations is 25 years, that at least three generations of descendants are living in any particular time frame, and that the transferor and each member of the senior descendant generation dies at the age of 75, the following projections can be made: On average, a transferor will have about 450 descendants (who are beneficiaries of the trust) 150 years after the trust is created, over 7,000 beneficiaries 250 years after the trust is created, and about 114,500 beneficiaries 350 years after the trust is created. Although the beneficiaries would share a common ancestor, they would not likely consider themselves members of the same family. To get a visual image of the scale of the problem, it would be like attending a college football game in Michigan Stadium (capacity around 110,000), and everyone in the stadium plus a few thousand tailgaters in the parking lots outside are beneficiaries of the same trust. Four hundred and fifty years after the trust is created, the number of living beneficiaries could rise to 1.8 million.[178]

And how close would the genetic relationship be between these happy beneficiaries and the settlor? Again, Professor Waggoner has provided some numbers:

> On average, and disregarding nongenetic descendants such as adoptees, a transferor's genetic overlap with his or her genetic descendants is cut in half at each succeeding generation. Specifically, a transferor's genetic overlap with his or her children is 50 percent, with grandchildren 25 percent, with great-grandchildren 12.5 percent . . . [G]reat-grandchildren of the transferor's great-grandchildren—the transferor's great-great-great-great-grand-children—are six generations removed from the transferor: They will be born about 100 years after the transferor's death and have a genetic overlap with the transferor of a mere 1.5625 percent. At the 14th generation below the transferor, the genetic overlap is about 0.0061%, which— due to our common origins—is about the same overlap that one has to any randomly selected member of the population.[179]

In fact, with the possibilities of adoptions and the recent complex statutory definitions of "child" in some states that set forth the legal family relationships created by sperm donors and surrogate mothers, someone who

178. Lawrence W. Waggoner, *Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised*, at 5–6 (U. Mich. Pub. L., Working Paper No. 199, 2010) (footnotes omitted).

179. *Id.* at 4–5.

is legally considered to be a descendant of the settlor might have no DNA in common with the settlor at all.[180]

Does that not, in itself, demonstrate the foolishness of Dynasty Trusts? Not to a true believer. What if each of the settlor's descendants were also the beneficiary of a Dynasty Trust set up by each of his or her other very numerous ancestors? Then everything would work out fine. What fascinating dreams.

V. HISTORICAL EXPERIENCE WITH FRACTIONALIZATION OF BENEFICIAL OWNERSHIP

Financial planning need not be based on dreams. There have been some real-life demonstrations that illustrate what happens when trust assets are retained for several generations.[181] Perhaps the best demonstration comes from a fairly recent United States Supreme Court case, *Hodel v. Irving*.[182] In *Hodel*, the Bureau of Indian Affairs (BIA) held tribal lands in trust for members of the tribe.[183] This was not the usual private trust, but the fractionalization of ownership in successive generations was almost exactly the same as it would be with a private Dynasty Trust after the same number of years.[184] In both situations, all descendants and heirs of a person who died intestate were included in the distributions to be made.[185] So there were a great number of people who were expected to share in the wealth, thus creating the problem of fractionalization.

A major reason the British aristocracy used a system of primogeniture was to keep land in the family.[186] Similarly, Peter Thellusson, in attempting to make a big "splash" left his property only to the one eldest male descendant of each of his sons—not to all of his descendants.[187] Centuries ago, people who wanted to keep land in the family or make a big "splash"

---

180. *See, e.g.*, COLO. REV. STAT. ANN. § 15–11–120 (West 2010). "Usually, the trust is created for the benefit of the descendants of the grantor. In some cases others, such as spouses of descendants . . . may also be beneficiaries." Rivlin, *supra* note 18, at 949.

181. *See. e.g.*, Hodel v. Irving, 481 U.S. 704, 704 (1987).

182. *See id.*

183. *Id*.

184. *Id.*

185. *Compare Hodel*, 481 U.S. 704, *with* discussion *supra* Part IV.B.

186. *See* Vaughan, *supra* note 125, at 624. Various rules of primogeniture and fee tail male, for example, usually selected just one person in each generation to have ownership rights to the land so the problems of fractionalization were avoided. *See id.* Dynasty Trusts, like the system imposed on the tribal members, includes all descendants. *See* Turnier & Harrison, *supra* note 2, at 780–81. Therefore, the fractionalization problems that were avoided by primogenitor will not be avoided with Dynasty Trusts. *See id.* And it is to be expected that Dynasty Trusts will turn out to have exactly the same fractionalization problems we have a already seen in *Hodel v. Irving*. Ashley Vaughan has pointed out that one of the benefits of the common law Rule Against Perpetuities is that "it avoids the 'administrative difficulty of dealing with overly fractionalized interests in trust assets, as the group of descendant-beneficiaries grows exponentially.'" Vaughan, *supra* note 125, at 639.

187. *See* Barry, *supra* note 47, at 421.

financially realized that goal could be achieved only if most of the descendants were excluded from sharing in the wealth.[188]

It might be helpful to learn from the tribal members' problems, as described in *Hodel v. Irving*, when original landowners passed their land down to all or most of their descendants.[189] It was a disaster.

In 1887, the General Allotment Act permitted portions of tribal land to be allocated to individual tribal members.[190] However, the BIA still acted as the trustee for all of the land.[191] This was like having the BIA as the trustee of a Dynasty Trust with the heirs and devisees of particular tribal members in the same position as the descendants of the settlor of a Dynasty Trust. So how did it work out in reality?

Due to the difficulties of fractionalization of ownership, only forty-one years after passage of the General Allotment Act "[a] 1928 report commissioned by the Congress found the situation administratively unworkable and economically wasteful."[192]

"Ownership continued to fragment as succeeding generations came to hold the property, since, in the order of things, each property owner was apt to have more than one heir."[193] Of course, the same thing would likely happen with the descendants of the settlor of a Dynasty Trust.

By 1984, only ninety-seven years after Congress passed the General Allotment Act, fractionalization among the heirs in *Hodel* became a real problem.[194] Congress heard testimony about one forty-acre parcel of land:

> [The land] produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.[195]

True, a Dynasty Trust would likely start with assets of more than $8,000. And it might be hoped that, unlike the trustees of Thellusson trust, for example, the trustees would gradually increase the value of the

---

188. *See, e.g.*, Vaughan, *supra* note 125, at 624.
189. *See Hodel*, 481 U.S. at 709–10.
190. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C.A § 331 (1887) (repealed 2000)).
191. *See Hodel*, 481 U.S. at 707.
192. *Id.*
193. *Id*. at 708.
194. *Id.* at 712.
195. *Id.* at 713.

corpus.[196] Still, after the beneficial ownership is divided into 439 pieces, the expenses of administration may far outweigh the actual benefits to the descendants of the settlor.

VI. PROPOSED SOLUTIONS FOR THE FUTURE

In 1641, Lord Nottingham stated, "[W]henever the bounds of reason or convenience are exceeded, the law will quickly be known."[197] Years later it was argued, "[W]henever . . . it is evident that accumulation, and not a family purpose, is the object of the trust, the bounds of . . . reason and convenience . . . are exceeded."[198] Now that the banks have successfully lobbied for legislation to allow the establishment of private trusts that may last for thousands of years, the bounds of reason and convenience have clearly been exceeded.[199] Lord Nottingham and Lord Thurlow promised that judicial action would be taken.[200] That would be one solution.

Legislative action, however, may be a swifter and more certain route. Under lobbyist pressure from the banks, the legislatures created the conditions under which Dynasty Trusts became possible. The legislatures should now take responsibility for the quick demise of Dynasty Trusts.[201] Legislative action should be taken to put an end to this abuse.

A. Help from Congress?

Congress might easily destroy the attractiveness of Dynasty Trusts simply by amending the tax code to deny use of the GST tax exemption

---

196. Thellusson v. Woodford, (1799) 31 Eng. Rep. 117, 146; 4 Ves. Jun. 227.

197. Thellusson v. Woodford, (1805) 127 Eng. Rep. 502, 507; 1 Bos. & Pul. (N.R.) 357, 370.

198. *See id.*

199. The American Law Institute now agrees. Waggoner, *supra* note 160, at 26.

> A rule that curbs excessive dead-hand control is deeply rooted in this nation's history and tradition. At the 2010 annual meeting of the American Law Institute ("ALI" or "Institute"), the Institute honored that tradition by taking the position that the perpetual-trust movement is ill advised. The Institute also proposed a new approach to perpetuities, one that would impose a two-generation limit on dead-hand control. Under the ALI's perpetuity rule, a trust would be required to terminate no later than the death of the youngest beneficiary who is no more than two generations younger than the trust settlor.

Id.

200. *See Thellusson*, 127 Eng. Rep. at 507.

201. According to Ashley Vaughan:

> It is good public policy to allow each person to dispose of his property as he pleases. The policy extends not only to the present generation but to future generations. If we are to permit the present generation to tie up all existing capital for an indefinitely long period of time, then future generations will have nothing to dispose of by will except what they have saved from their own income, and the property which each generation enjoys will already have been disposed of by ancestors long dead.

Vaughan, *supra* note 125, at 641 (citing Dukeminier & Krier, *supra* note 87, at 1312).

beyond one generation.[202] Such a tax code change would be a quick, national solution that would be immediately applicable in every state.[203]

But if what is currently being called "the Circus in Washington" continues, not much hope can be put in the United States Congress at the present time.[204]

B. Help from the States?

Instead, it is time for budget-strapped states to decide that schools, police, hospitals, fire protection, and roads are more important than giving more financial breaks to banks via Dynasty Trusts.[205] Several steps are possible.

First, states could begin to tax trust income.[206] Second, states could enact relatively short, clear termination dates for all Dynasty Trusts. However, the banks would be expected to lobby strongly against this. But as it turns out, the states have not derived added income because of the existence of Dynasty Trusts.[207] Only the banks profit from Dynasty Trusts. Generally speaking, banks are not currently very popular with voters.[208]

C. Simple, Clear Modifications of the Rule Against Perpetuities

The common law Rule Against Perpetuities has always been complex and difficult for many law students and laymen to understand.[209] The

---

202. According to Robert H. Sitkoff and Max M. Schanzenbach:

> A principal tax policy underlying the 1986 code, the relevant features of which remain in effect today, is to prevent the "enjoyment of property followed by its movement down the generations without being subjected to estate or gift tax." If Congress wants to put this policy into practice, it will need to close the loophole opened by the states that have abolished the Rule Against Perpetuities. Successful implementation of federal tax policy necessarily requires attention to its interaction with state property law.

Sitkoff & Schanzenbach, *supra* note 7, at 363.

203. "Amending the federal tax code would probably be simpler than rewriting the law of trusts in every state that has abolished the Rule." Tate, *supra* note 91, at 625.

204. As noted in the Harvard Law Review:

> Unfortunately, Congress seems unlikely to concern itself with such a complicated and long-term issue, since dynasty trusts will deprive federal coffers of revenue too far off in the future for even a senator to take note. Elected politicians do not think in terms of centuries, let alone decades, and it seems unlikely they will spend political capital on this issue.

Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2609 (2003).

205. *See supra* Part I.A.

206. *See* Helvering v. Butterworth, 290 U.S. 365, 369 (1933). *See also* Sitkoff & Schanzenbach, *supra* note 7, at 420.

207. States that have attracted out-of-state trust funds have done so only by abolishing any state income tax on trust assets. Sitkoff & Schanzenbach, *supra* note 7, at 362. As Chris Stevenson has pointed out, accumulating funds in a trust removes those funds from the local economy, thus depriving the state of sales tax revenues and the like. *See* Stevenson, *supra* note 79, at 230.

208. *See* Joe Nocera, *Why People Hate the Banks*, N.Y. TIMES, Apr. 2, 2012, http://www.nytimes.com/2012/04/03/opinion/nocera-why-people-hate-the-banks.html.

209. *See* Lucas v. Hamm, 56 Cal.2d 583, 592 (1961).

Uniform Statutory Rule Against Perpetuities (USRAP) was designed to bring uniformity within the United States on issues as to the time during which the dead would be allowed to control the assets of the country.[210] The hope was that individual state legislatures would adopt the USRAP so that the law would become essentially the same in a large number of states. That desired uniformity has not been achieved.[211] Nevertheless, the process has the potential to work. The Uniform Commercial Code is an outstanding example in the commercial field.[212]

An easy, logical solution is simply amending the USRAP, or better yet, adopting a new uniform act, which would provide that no document—will, trust, option contract, or the like—shall be legally binding more than 100 years after the date that the document went into effect.[213] Options, for example, would no longer be subject to litigation on the issue of whether or not the particular words used caused an unintended violation of the Rule Against Perpetuities.[214] These documents would simply expire at the end of 100 years, and the complexities of the Rule Against Perpetuities would no longer threaten the validity of commercial transactions.[215] Lady Denison, Peter Thellusson, Wellington Burt, and others might still play games by keeping their money away from their families, but the games would end after 100 years. Dynasty Trusts could no longer be used to lock up the assets of the nation (under the control of the banks) for extremely long periods of time.

A benefit of applying the clear-cut test of 100 years is simplicity. A great deal of unproductive, complex litigation could be avoided, and the assets of the community could be put to far better uses for the benefit of the community.[216] A century of "dead hand" control should be enough! It is time for families to reclaim their wealth from the banks.

---

210. See Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 502–03 (2006).

211. Debra Cassens Weiss, *States' Repeal of Rule Against Perpetuities Creates US Aristocracy, Law Prof Says*, ABA J. (July 12, 2010), http://www.abajournal.com/news/article/states_repeal_of_rule_against_perpetuities_creatomg_us_aristocracy_law_prof/.

212. *Uniform Commercial Code*, CORNELL L. SCH., http://www.law.cornell.edu/uss/uniform.html (last visited Sept. 24, 2012).

213. *See* Estate of Hearn v. Hearn, 101 S.W.3d 657, 663 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (stating a will goes into effect at the death of the testator); Hayhurst v. Paylor, 293 S.W.2d 531, 534 (Tex. App.—Amarillo 1956, no writ) (stating a deed goes into effect when it is signed and delivered).

214. *Cf.* Douglas Good & Adam L. Browser, *The Rule Against Perpetuities Lives On*, RUSKIN MOSCOU FALTISCHEK (Jun. 16, 2003), http://www.jdsupra.com/legalnews/the-rule-against-perpetuities-lives-on-58658/ (explaining that option contracts are intended to last indefinitely).

215. *Id.*

216. It is easy to calculate the passage of 100 years. It will be clear from the face of the document whether it is still in effect or not. *See* Gray, *supra* note 43, at 191. There will be none of the cumbersome investigation into "lives in being at the creation of the interest" and no complexity in ascertaining whether one or two generations have died since the instrument went into effect. *Id.*