

With the Continuous Collapse of Major Financial Institutions, Should a Trusted Advisor Become a Trustee?

George F. Burns, Patricia M. Annino, Thomas D. Davidow

Reprinted with permission from *Wealth Strategies Journal 2.0*

It seems that every day another major financial institution crashes with little warning to the public, high net worth families and/or business owners. This financially unstable climate raises the question: Who can best serve families and businesses as trustees--financial institutions or trusted advisors?

In many cases, the relationship between a financial institution and a high net worth family has been established for decades. The financial institution lends money to both businesses and individuals, serves as trustee and provides wealth counsel. However, with world-wide purchasing power declining, positions within financial institutions shifting and the financial institutions themselves changing, key relationship officers may be gone.

Despite the uncertainty about what the future holds, a family needs to make decisions as to how its wealth will be handled and who should take on the trustee/fiduciary role at death. A key family member may rethink whether or not the trusted family advisor--the lawyer, accountant or chief financial officer.--should now be the trustee.

It is tempting, with so much shifting sand in the financial services marketplace, to consider the relationship between a trusted advisor and his or her firm as more comprehensible: the trusted advisor is still accessible by phone; the family and the trusted advisor have a good working relationship; and the trusted advisor knows the firm's succession plans. Nevertheless, the selection of that trusted advisor as trustee ought to be fully vetted for its advantages and disadvantages, its opportunities and risks.

A trusted adviser and his or her client, after many years of sharing business and family issues as well as a common perspective, often develop a personal relationship that extends beyond their professional one. It is understandable in that case for the client to name his trusted advisor in his estate plan as his trustee. The client wants the trustee to guard a whole host of goals and dreams which go beyond the preservation of the assets/wealth. The client/donor believes that his trusted advisor understands him; that he has the wisdom to incorporate the donor's most important values, spoken and unspoken.

However, the dual responsibility of the advisor/trustee can blur the parameters of those roles, and may have legal/financial and psychological ramifications which need to be explored.

SWITCHING LOYALTIES

When a client becomes disabled or dies, the trusted advisor then serves as a trustee with fiduciary responsibilities to the trust and to its beneficiaries. Even though the trusted advisor/trustee should give credence to the founder's intent, the trusted advisor must switch his duty and loyalty from the founder to the trust, where the standard for decision making is significantly different from that of the trusted advisor.

For example, the founder can do anything he wants with his own assets, his own business and his own money. He can take risks, and/or not operate his business strictly with a standard of profitability. He may make business decisions for other reasons--employing friends; keeping on older employees who are no longer productive, but who were loyal to him during his lifetime; or running a division of the company because he has fun with it, regardless of the economic consequences of that decision. (The problem is intensified if one of those non productive employees is a family member who may also become a beneficiary of the trust.) If his net worth or income declines, it is his responsibility; he deals with the consequences.

When the trusted advisor takes over, he cannot take those same risks or maintain those decisions, since it is not his money, his assets or his income. As trustee he is obligated to preserve the wealth for the beneficiaries. He cannot act in the same role as the founder, or even in the same role he had as the trusted advisor to the founder.

TRANSFERENCE AND COUNTERTRANSFERENCE

Fiduciaries not only have the authority of their professional expertise, they have power--real power. While the authority of their professional expertise can have a salutary effect on the individual and the system, the authority of power recreates transference--the original power and control struggles which parents and children face in one form or another all their lives. That authority also re-creates or stimulates the fiduciary's own issues/unconscious/memories.

When that transference/counter-transference is positive, it works well for all concerned. When there is a negative transference--family members are always complaining about the advisor/trustee to each other; or negative counter-transference--the advisor really cannot stand one of more of the family members--the advisor is in the muck.

While it is important that the relationship with the donor/founder be respected, and that the fiduciary's influence be real, it is equally important to have a structure that will balance the authority of the trustee/fiduciary. Otherwise, the consequences of the psychological dynamics of transference/counter-transference will impact everybody in the system.

WHEN THINGS GET ROUGH: LITIGATION THERAPY IS NOT THE SOLUTION.

The trustee, in the sometimes unfortunate role of surrogate parent, will also be responsible for unresolved family issues, which are inevitable. Since family businesses contain the two parts of life that matter most--family and career--family members are connected to each other both emotionally and financially. Whether they work together in the business or are connected through a trust, as a consequence of their inherent dual

connection, they will act out their family issues with what one may call "strength of feeling."

That strength, when harnessed through good communication and clarity of purpose among family members, gives family businesses a competitive edge, especially in today's awful economic conditions. Likewise, communication and clarity of purpose among family members connected through trusts makes it more likely that they will pass on their values and legacy to the next generation intact.

However, when family members are connected financially, either through their business or as a consequence of a choice that they did not make (e.g., their parents created the trust) that same "strength of feeling," if it is a consequence of disappointments and misunderstandings, is very difficult to contain and can easily spin out of control. Add to those strong feelings the emotional confusion that often exists in families, and a conflict can easily arise which needs to be addressed in an effective and timely manner. Otherwise, the parties will drift away from discussing the quantitative elements in the issue and move instead towards a situation where anger can be satisfied only through fighting.

As the emotions ratchet up, the trusted advisor/trustee may become increasingly uncomfortable with the situation. Handling the family and emotional issues is outside the box for the accountant or attorney who has been handling legal and accounting matters for the family.

Many traps lie ahead, one of which appears as an easy fall back position: using a legal or financial solution to remedy a relationship issue. We call that litigation therapy. That it is a mistake. It is very expensive and it rarely works. The relationship component will either stand in the way of an agreement or drag the process out much longer than necessary.

A BETTER SOLUTION: USE A FAMILY BUSINESS CONSULTANT AND MEDIATION

A better alternative and a pivotal step to heading off family litigation is a mediation process that includes a psychologist who has experience as a business consultant and a mediator who understands the dynamics.

It is often said that although there are no winners in litigation, some litigation is worth pursuing. However, in the world of family business litigation, to lose a case or to win a case is to lose family affections and loyalties for a long time, often permanently. No monetary victory can offset such permanent damage to a family.

If family litigation is on the one hand the worst kind of litigation, on the other hand, it also yields the highest benefit from mediation for at least four reasons:

1. Family disputes almost never involve matters of fact. Rarely do we see a witness on the stand suddenly recanting his narrative about what happened and when. It is usually obvious or it can be made obvious what the facts are. Shareholders have rights of accountability and transparency, and indeed most family businesses honor those rights; those that do not can be made to do so without a

great deal of legal effort. The issue is not what happened or what will happen, but rather what it means.

2. The vast majority of family disputes turn on matters of opinion or expert testimony. For example: Is my older sister, the CEO of the business held in the trust, receiving too much compensation? Are the trustees' fees reasonable? Do the trustees have the authority to retain an asset even if it is unproductive? Is the sale price fair to the trust beneficiaries?
3. The stakeholders almost always know each other all too well. The informality of fact gathering in a mediation context makes a lot more sense to family members than hiring a lawyer to take depositions in active litigation.
4. The theme of resolution through objectivity by third parties is consistent with trust and fiduciary standards.

WHEN THE TRUSTED ADVISOR SHOULD CALL A FAMILY SPECIALIST OR MEDIATOR FOR HELP

1. The family dynamics are out of the trusted advisor's control, and s/he is not sure how to proceed.
2. A number of family members are unhappy with the trustee or trusted advisor.
3. Any mention by a family member or beneficiary that s/he might take legal action.
4. A particular family member or beneficiary is out of control.
5. The family is constantly changing legal agreements (e.g., the estate plan) in order to solve a problem that is driven by relationships.

RISKS THAT THE TRUSTEE/TRUSTED ADVISOR SHOULD STRIVE TO OVERCOME WHEN CALLING IN THE FAMILY SPECIALIST:

1. The intervention won't work and s/he will be blamed for that.
2. The family starts the process and stops prematurely.
3. The process will stir up emotions and put more pressure on the trustee/trusted advisor.
4. The trustee/trusted advisor will have to follow suggestions that s/he finds counter-intuitive.
5. The trustee/trusted advisor fears losing control of the case.

While the above risks are real, they are not sufficient reasons to avoid calling a family specialist and mediator. The rewards for doing so are greater than the perceived risk. Nor should the trustee/trusted advisor be concerned that bringing in a non-legal counseling professional would dilute his rights and obligations. It is, after all, a relatively rare case where giving the process a bit more time for negotiation will irrevocably impair or reduce a client's rights. On the contrary--bringing in related professionals to work with the trustee/trusted advisor on the situation can lead to a much better result.

Although the combination of dealing with the disability or death of a friend and significant client, switching roles, understanding the risks and navigating the family issues is a Molotov cocktail--and where the trouble begins--we are not saying that being both a trusted advisor and a trustee is necessarily a bad idea. It can be gratifying

work to earn fees while helping people/families in a significant way. The problem arises when the trusted advisor/trustee has to deal with a set of circumstances which might impact the family and succeeding generations. It is therefore prudent for the trusted advisor/trustee to be aware of potential pitfalls and to sense when it may be wise to call in outside advisors to assist with his duties and responsibilities.

WHAT TO DO IF YOU ARE A TRUSTED ADVISOR AND ARE CONSIDERING BECOMING A TRUSTEE:

1. If you are a trusted advisor, seriously consider whether you want to take on the "mess." The family may be better served by a dispassionate third party, leaving you to continue in your role as trusted advisor and to maintain your authority as wise counsel--a role in which you might best serve the family. If you sincerely believe you can make the greatest contribution by assuming the dual role of advisor and trustee, then take it on; otherwise do not. There are other ways to contribute.
2. If you do decide to take on the role of trustee, make sure that everybody in the family knows it and can give at least tacit approval.
3. Develop a resource with whom you can discuss the many dilemmas you face. Get your own trusted advisor. Remember, though, that one factor that may have led to your considering assuming your dual role is the savings in advisor fees that might be achieved. That advantage diminishes the more reliance you place on your own advisors.
4. Understand that you will never figure it out by yourself. Given the principle of transference/counter-transference, it is very easy to get lost in the dynamics. It is important that you choose another professional with whom you can sort out your thoughts and ideas.
5. Consider serving as a co-trustee, rather than a sole trustee. Partnering with a financial institution which serves as a professional trustee can be an important buffer with tremendous resources. Established trust services with decades of experience have dealt with any issue you may face many times before and will be less burdened by the emotional connection you have to your founder.
6. If you decide to take on the role, review the legal documents before you agree to serve in that capacity to be sure you understand the scope of your responsibilities; are comfortable with the investment and business risk that are associated with the trust assets; have the right to resign; determine who would appoint a successor in your stead; the grounds by which you may be removed as trustee; how you will be compensated; the language by which you will be liable for your actions or inactions; and the right to seek reimbursement from the trust for your legal fees and expenses. Remember in particular to check your insurance and indemnification arrangements; a lawyer-trustee, for example, presents a mixed professional role to his or her insurer; do not assume that a lawyer's errors and omissions policy covers trustee functions.

7. If the estate plan includes "riskier assets," such as a closely held business, encourage the founder to understand that after his death or disability the fiduciary has risk in operating the business that the founder did not have. Make sure that the founder's intent is clearly stated in the document, and the risks associated with serving as trustee are covered in the document. If, for example, the founder wishes the trustee to hold the business as a trust asset, the document should state that and should go further than that and state (assuming it is the founder's intent) that he understands the risks associated with that decision, and the trustee is authorized to maintain it even if it is not a productive asset, or declines in value or does not produce income. It can also be helpful to have the founder's intent expressed in an outside "Mission Statement" that the trustee can use as guidance and can show to beneficiaries who may put pressure on the trustee to change the direction of the trust--for example, to force the sale of a business or to lay off key employees.
8. Explore and understand the roles of related professionals--family business consultants, non-legal counseling professionals and mediators who can serve as a valuable resource to you as you navigate your role.

At its best, the advisor/trustee role is greater than the sum of its parts. Your ultimate decision will turn on a combination of intellectual analysis and simple emotional response: your head may tell you that there's danger and confusion ahead, but your heart may tell you that you are the best person to chart the future course of the founder's family and business.