ISSUE 20 - OCT 2025

High Net Worth Litigation, Advisory & Divorce MAGAZINE

Thought Leadership for and by the High Net Worth Community

HOW MUCH TO SAY AND WHEN: A GROWING CONTRADICTION FOR TRUSTEES AND ADVISORS IN UNITED STATES NEXTGEN TRUST PLANNING

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Wealth, in a multitude of forms, values, whether articulated or not, and the power that accompanies wealth have passed, more or less successfully, from generation to generation across millennia and across the globe. The challenge of when, how, and to what extent to engage younger generations in the succession process is a global challenge, but one that has been, and must continue to be, addressed differently based on cultural norms and values, available legal and planning structures, and the personalities and skills of the senior and junior generations of each family.

Over the last two decades, advisors have attached a label to their solution to this challenge - "NextGen" planning and engagement.

While some clients are more open than others to the NextGen having a participatory role, whether in the conversations, or directly in the family business or family office structure, advisors across the spectrum of private wealth services have coalesced around the goal of engaging and educating the NextGen ahead of a wealth transition. NexGen engagement is certainly present as a trend in the legal community. It is, however, even more prevalent in financial service firms, family governance advisory firms, and trust companies. As legal advisors, we frequently focus our discussions relating to how best to transition wealth and values on two components: appropriate communication with NextGens, which is directed toward the senior generation, and education of NextGens, which is directed toward the younger generation.

Discussions can include the values that the senior generation believes have made the family successful (however the family defines "success" at that moment), addressing responsible stewardship of the family's wealth, including with respect to philanthropic endeavors and/or entrepreneurship, conversations about family governance, including where families are aligned and a collective unit, and where individual members find space for autonomy, and learning financial responsibility.

While the content, timing, and detail of discussions varies from family to family, the discussions are marked by the two tenets - communication and education – and involve the participation of both generations.

Standing in opposition to NexGen engagement and education is the rise in succession structures that distance the beneficiaries from traditional information and enforcement rights. In the U.S., we see this in the increasing number of states adopting statutes permitting "silent" or "confidential" trusts, which are designed to defer the requirement that the trustee provide information regarding the trust – including even its existence – to beneficiaries. These silent or confidential trusts are similar, at least as to information and enforcement rights, to the Cayman STAR trusts[1] and to foundations for private benefit in some jurisdictions.[2]

1 Special Trusts Alternative Regime (STAR) in Part VIII of the Trusts Act (2021 Revision). See In the matter of the A Trust; AA v JTC (Cayman) LimitedFSD 12 of 2024 (IKJ)), the Grand Court of the Cayman Islands, in which it was confirmed that an enforcer of a STAR trust has the standing and power to seek confirmation of a momentous decision with respect to a Cayman STAR trust.

2 Private beneficiaries of Liechtenstein stiftungs have rights to information relating to the stiftung and its assets, but only to the extent that the information relates to the rights of the beneficiary. Article 552 §§ 9–12 PGR. However, the information rights of the beneficiaries can be eliminated if the stiftung is subject to supervision or if the founder is the ultimate beneficiary. In the Seychelles, the Foundation Act of 2009 allows the founder to set the beneficiaries' information rights, including to eliminate virtually all information rights.

A Contradiction Of Sorts: NextGen and the Rise of Confidential Trusts

The United States does not have a singular body of trust law. Thirty-six states have adopted some form of the Uniform Trust Code (UTC), drafted and approved by the National Conference Of Commissioners On Uniform State Laws, and for convenience the information and enforcement rights provided for by the UTC are used as an example. The UTC imposes on the trustee a duty to keep "qualified beneficiaries" of a trust reasonably informed about "the administration of the trust and of the material facts necessary for them to protect their interests."[3] This duty includes, for example, (1) furnishing a copy of the trust instrument on the beneficiary's request, (2) providing contact information for the trustee following acceptance, (3) often notice of the existence of the trust and its irrevocability on the death of a settlor, (4) advance notice of changes in rate or method of trustee compensation, and (5) accounting or a report annually to permissible distributees, or upon request of a beneficiary. The comments to the UTC explain this candor and duty to provide information is "a fundamental duty of a trustee."

In seeming contrast to this "fundamental duty" of the trustee, and to the ideal of education of and communication with NexGen family members, a handful of states, including Alaska, Delaware, Nevada, New Hampshire, South Dakota, Tennessee, and Wyoming, permit "confidential" or "silent" trusts.[4] In general, these statutes [5] permit the postponement of a trustee's duty to directly inform beneficiaries about the trust and its administration and, during this postponement, all notice and information regarding the trust is directed to a "designated representative" on behalf of the beneficiary or beneficiaries (who may be one of the beneficiaries, but is more likely to be a trusted advisor of the senior generation). The postponement can last until a beneficiary attains a certain age, until after a settlor's death, or until the occurrence of another specified event or contingency. In fact, many corporate fiduciaries administering trusts in silent trust jurisdictions articulate the availability of silent trusts as one of the advantages of situating a trust in their jurisdiction. The result is codification of protection of the trustee for opaqueness and discouragement of direct communication with the beneficiary.

Silent trusts statutes create a framework where a beneficiary need not even know of the trust, or be able to exercise its rights on its own behalf, until some deferred date, in many instances a point at which the senior generation is no longer present to communicate directly.

While parents and their advisors have skillfully found ways to shield family wealth from the gaze of children without the benefit of silent trust statutes, the statutes provide a codified assent to the conduct, and statutory protection for the fiduciary who participates in the concealment. Much can be explored with respect to both family philosophy and values, how and when to inform beneficiaries, and how to properly guide beneficiaries into responsible stewardship of a family's wealth, which is beyond the scope of this brief discussion. The focus here is a consideration of how to align the concept of communication and education of NextGen beneficiaries with the seeming popularity (or at least marketing of) silent trusts.

Incompatible Concepts They Are Not

If one is seeking a way to reconcile the rise in the discourse around NexGen education and engagement with the simultaneous rise in legal structures designed to authorize the distancing of the NextGen from information and empowerment with respect to family wealth, a silent trust may offer a solution. Done well, it can allow a family to engage thoughtfully, intentionally, and with precision about when, how, and to what extent younger generations should be exposed to — and take on responsibility for — the family wealth, the family values, and the power that accompanies both.

If families structure provisions carefully to advance the values that have led to their success, select fiduciaries who can serve as educators if the senior generation cannot, and set flexible benchmarks for shifting responsibility to younger generations, the silent trust can provide far greater opportunity for success than the common law or statutory default information rights.

Such a trust can be designed to give beneficiaries the greatest chance to be mature, educated, and resilient before the weight of stewarding the family wealth for future generations falls on their shoulders.

3 UTC §813.

4 New Hampshire, Tennessee, and Wyoming have adopted some form of the UTC.

5 Alaska (AK Stat. § 13.36.080(b)), Delaware (12 Del. C. §3303), Nevada (Nev. Rev. Stat. §163.004), New Hampshire (NH Rev. Stat. §654-B:8-813, information rights are statutorily mandated for qualified beneficiaries over age 21), South Dakota (SDCL §55-2-13), Tennessee (Tenn. Code §35-15-813(e)), Wyoming (Wyo. Stat. Ann. § 4-10-103(a)(xv)).