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Finding An Outstanding Trustee: What Wealthy Families Look For In A Trustee and How They Get It

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The Passant family was at a crossroads. Unfortunately, being told – even by well-meaning advisors – that their problem was “a nice one to have” was not as encouraging as intended. The family was the beneficiary of substantial trusts (more than \$100 million of assets) and had funded a substantial charitable foundation. But the family had outgrown, or perhaps outworn, their trustees – an old-line, traditional corporate trustee and individual trustees who were senior, trusted family members.

The individual trustees, who were past the retirement age even for most avocations, were not likely to be able or willing to continue as trustees much longer. To some family members, the corporate trustee’s product and services offerings seemed frozen in time. Worse yet, some of its actions – and its reluctance to act when requested – could be explained only by a tendency to regard family assets as its own legacy rather than the family’s.

Individual trustee succession was problematic. No obvious Passant family member seemed to be available to step into these difficult and responsible roles for the entire family. The family, and therefore the trust beneficiaries, had descended vertically to four living generations and had spread horizontally to include five main branches as well as distant cousins, stepchildren and estranged spouses raising fourth-generation children. This breadth and diversity made a subjective consensus about new individual trustees difficult. Also, there were objective concerns about exposing family members, or even friends who were trusted professionals, to the potential liability of acting as a trustee. And there were seldom-voiced but genuine concerns about whether any individual would have the time or skill to meet the entire family’s growing expectations of its trustees. These considera-

tions foretold a heavier – and someday, probably, an almost exclusive – reliance on corporate trustees, at least for the major trusts and the foundation.

Further complicating matters was the fact that not all family members were discontented with their long-standing corporate trustee. Family members and branches receiving more than adequate income from conservatively invested but subpar-performing trusts, or who never required a service other than a quarterly distribution, did not seek or necessarily understand the need that others felt to change the corporate trustee. But given the large number of second-generation family members who were dissatisfied with the corporate trustee, a major decision was at hand.

WHAT INITIALLY SEEMED TO BE A NARROW PROBLEM OF FINDING THE RIGHT TRUSTEE FOR THE FAMILY THREATENED TO ESCALATE INTO A MAJOR FAMILY MANAGEMENT CRISIS ...

As is often the case, riding on the outcome of that decision was more than a choice of trustees of the family trusts. Also at stake was whether the family, or major parts of it, would continue, in crucial respects, to operate as “a family” and, perhaps, come closer together. If a consensual, family-wide solution for the trustee problem could not be found, the family risked fragmentation: separate trustees for each trust serving a major family branch or, worse, a trustee (or trustees) of major, indivisible trusts

whom not all family members had chosen or accepted.

What initially seemed to be a narrow problem of finding the right trustee for the family threatened to escalate into a major family management crisis if a family-wide solution could not be found.

Family Resource

Fortunately, the Passant family had some significant and critical resources available. First, and perhaps most important, the members of the oldest two generations and of many of the families that made up the younger generations shared the view that substantial social and



financial benefits were to be gained if family groups and branches acted together as much as possible. In other words, acting as “one family,” rather than going their separate ways.

Another major resource was the family office, which could take the lead in a trustee succession project by helping the family articulate its criteria for its trustees; identifying the available alternatives for meeting the family’s fiduciary needs; and performing due diligence on the candidates. Also valuable were the family’s awareness of and access to experienced professional advisors who could help to identify the strengths and weaknesses of not only corporate trust company candidates but also the major types of trustees available – individual trustees, institutional corporate trustees, and private (“boutique”) trust companies.

Critical Early Decisions

A first and, in retrospect, vital step taken by the Passant family to resolve its trustee problem was to open the lines of communication among family members. In phone calls and meetings, representatives of the family branches that were dissatisfied with the current trustee explained their concerns to those who did not initially share or understand them. This led to a meeting of family representatives in which three decisions were made. First, it was agreed that a corporate trustee was necessary for the major trusts, even though individual trustees could act as co-trustees of those trusts, if desired, or as sole or co-trustees of the smaller trusts that benefited individual family branches.

The family representatives considered, but then set aside, the option of forming their own “private trust company.” They concluded that although the family’s wealth was at least marginally sufficient to support an exclusive, family-owned-and-managed trust company, the commitment of family members’ time and effort necessary for such an undertaking was not there.

After accepting the need for a corporate trustee and rejecting a family-owned private trust company, the family representatives made a third important decision. They assigned the executive director of the family office to identify possible succession candidates, including

the existing corporate trustee. Toward that goal, she would first articulate and prioritize the criteria the family members should consider when they selected trustees.

These criteria were to be proposed based on her familiarity with the family’s needs, the issues and concerns family members had expressed, and any objective standards that she would develop with the assistance of legal and financial advisors. Using the criteria she put forth and such other criteria that resonated with family representatives, she would propose a list of candidates for corporate trustee. The family would choose, at another meeting, three or four leading corporate trustee candidates to investigate in depth. Personal interviews of senior trust company personnel would be conducted by family members.

DISTINGUISHING BETWEEN THESE TWO TYPES OF CORPORATE FIDUCIARIES CAN SOMETIMES BE DIFFICULT, ESPECIALLY BECAUSE MANY BOUTIQUE TRUST COMPANIES STARTED AS PRIVATE TRUST COMPANIES

Identifying Types of Corporate Trustees

Responding to these decisions, the Passant family office executive, in consultation with outside advisors familiar with a broad range of potential corporate trustees, developed a list of 12 companies that potentially could offer the desired products, services, philosophy and pricing. These companies were consciously drawn from three groups:

1. Traditional institutional trust companies.
2. New-style, “boutique” or independent wealth management trust companies
3. Multifamily private trust companies.

Given the family’s unsatisfactory experience with its traditional institutional trustee, the advisors suggested including other prominent examples of that genre, mainly to ensure that the family was exposed to the current offerings

and price structures that the best of them had to offer. If the family chose to stay with a traditional institution as its main trustee, it would probably stay with the one it already had, rather than bear the burden of replacing one trustee with another in the same mold.

The more interesting candidates, the family office executive felt, were the “boutique” and multifamily private trust companies. These two types of corporate trustees are very similar in services, size and methods of operations. Their definitive difference lies in the fact that multifamily private trust companies are family-owned but also serve unrelated families of similar wealth and disposition. Boutique wealth management trust companies tend to manage larger amounts of assets than private trust companies and are not primarily owned by the families they serve or by traditional banking institutions. Both types of candidates focus exclusively on wealth management, but private trust companies’ clients usually average more than \$50 million of assets under management. A boutique trust company is more likely to serve families with lower levels of wealth as well. Distinguishing between these two types of corporate fiduciaries can sometimes be difficult, especially because many boutique trust companies started as private trust companies.

Discovering and Applying the Family’s Criteria

The Passant family office executive grouped a long list of criteria she felt to be relevant for selecting a corporate trustee into seven categories. They appear here as she prioritized them, based on her understanding of family’s needs and expectations.

1. Responsive and flexible
2. Loyal and independent
3. Multi-competent
4. Efficient; controls costs
5. Convenient and accessible
6. Secure and private: protects assets and family
7. Promotes family’s non-financial objectives

Applying these criteria, the office executive recommended to the family four companies that seemed to excel under the first two categories and perform at least adequately under



the others. All four “finalists” were private or boutique trust companies; neither the current institutional corporate fiduciary nor any other was recommended. Notably, all four finalists performed especially well on the criteria in the final category; they were aware of and they promoted their clients’ non-financial objectives.

The importance of the first two criteria in separating the finalists from the pack was, of course, not accidental. Many companies have the essential professional qualifications embodied in the third through sixth categories, but few exhibit the client orientation necessary to excel in loyalty, flexibility and responsiveness to family’s financial and non-financial needs.

The family office head and her advisors were confident that the family could not go wrong by choosing any of the four finalists. Ultimately, the choice made by the family was as much a result of gut reactions to the interviews of the four finalists as of any quantifiable differences among the four. The success of the Passant family in resolving its trustee succession problem was perhaps best demonstrated by the fact that most family members who did not initially seek or see the need for a new corporate trustee were pleased with and approved the one selected.

Drawing Lessons from the Passant Family’s Story

The story about the Passant family’s success in overcoming its trust succession crisis offers a lesson that may be imparted to other families confronting a similar need. As the Passant family showed, the keys to finding a corporate trustee without undermining family unity are:

- Articulate all of the family’s needs and expectations, including those of each branch and generation.
- Recognize that there is a wide range of alternative trustee types and look for the type of trustee who can meet your family’s requirements.
- Find the right trustee within that right type.

A critical first step is to have the family decide whether it really prefers to be “a family” rather than a group of related families. In this context, the test of whether relatives are “a family” is whether they want to and can work together, to a significant degree, on trustee suc-

cession. For some families, uniting to choose a fiduciary will only serve a limited purpose: it allows them to combine their assets in order to access corporate fiduciaries with minimums of millions (or tens of millions) of dollars held in trust accounts. For others, collective action will be both a result of and a tool for family social unification as well as financial unification. Both types of families can benefit from a clearly articulated understanding of their needs and their expectations of their fiduciary’s role, and instruction on what is available from corporate fiduciaries and how to find the right one.

No amount of experience with wealthy families or corporate fiduciaries qualifies a family advisor to generalize about the best fiduciary for every family or the most important criteria for a particular family. However, the criteria for a corporate fiduciary that families typically deem important, and what they should expect from corporate fiduciaries, can be learned from experience. Our experience has led us to believe that the seven broad criteria considered by the Passant family represent those that are most important to a majority of families. Each family then must confirm whether all of its important criteria are included among these seven, add any others that seem appropriate, and then determine which criteria reflect its highest priorities.

Our experience has also led us to believe that some types of corporate fiduciaries perform better on some of the criteria than

others. Whether a particular trustee runs true to its type, or even excels within that type, is for a family to investigate and decide with whatever help its advisors – and the trustee candidates themselves – can provide.

Developing Wealth Management Fiduciary Criteria

In the remainder of this article, we will flesh out the seven criteria for trustees that were found meaningful not only by the Passant family but also by many others. We will then detail the typical strengths and weaknesses of the three types of wealth management corporate trustees available to families: traditional institutions, private trust companies and boutique trust companies. (We will also explain why another type, which we dub “product channel trustees,” should probably be avoided.) Finally, we will elaborate on the process by which trustee succession decisions can be made confidently and provide tips for binding your trustee to a performance that fulfills your expectations.

Table 1 breaks down, into numerous component parts, the seven broad wealth management fiduciary criteria we have put forth. When reviewing the table, it is important to keep in mind that there is really only one criterion for the family’s trustees: they must meet the family’s needs. All the other criteria and their components merely represent attempts to iden-

**Table 1.
Key Criteria for Fiduciaries**

A.	Responsive and Flexible. Networks with third-party providers. Provides choice of trustee’s contact personnel. Settlor/beneficiary involvement. Willingness to amend trust instruments.
B.	Loyal and Independent. Avoidance of conflicts. Avoidance of sales culture.
C.	Multi-Competent. Trust administration. Investment management/alternative investments. Safekeeping/custody. Financial reporting. Tax. Specialized expertise.
D.	Efficient; Controls Costs. Controls overhead costs. Provides economies of scale. Has/Uses leverage with third-party services providers.
E.	Convenient and Accessible. Online. Delivers locally useful out-of-state trust/tax laws.
F.	Secure and Private: Protects Assets and Family. Quality fiduciary risk management. Capital adequacy. Adequate regulation/supervision. Privacy culture.
G.	Promotes Family’s Nonfinancial Objectives. Succession planning. Family member development. Wealth issues expertise. Facilitates charitable objectives.



tify the ways in which trustees can meet those needs. A family may choose to de-emphasize, or even disregard entirely, any criterion that does not “speak” to that family.

Responsive and Flexible

Families are complex, and invariably, like the Passants, they develop multiple branches. Also, a family’s needs, the economic and social milieus in which it exists, and the offerings of the financial services industry change frequently. Consequently, trustees of trusts intended to fulfill their purposes for generations must be aware of those changing needs and be flexible enough to respond to them, not only over the near term but, hopefully, far into the future as well. This is what the first category of criteria – responsiveness and flexibility – is all about, and it is why families typically place it first.

Today, responsiveness and flexibility are indicated by awareness of families’ needs, an ability to customize products and services to meet those needs and encouragement of family involvement in important trust decisions and the choice of trust officers. Tomorrow, it will still mean being aware of family needs, but it is impossible to predict the financial products and services a trustee will be asked to provide to meet those needs. Therefore, a viable trustee candidate must be able to explain convincingly why it will be able and willing to respond to changing needs and opportunities as they arise in the future.

Loyal and Independent

The second criterion is equally important to most families. Being loyal and independent means putting the family’s needs first. This requires acting as the family’s advocate, not as its arm’s-length purveyor. More specifically, it means “buying” for trusts only what they need and, if possible, the best of what is needed, rather than “selling” to the trusts only the trustee’s own products or those of third parties that are most profitable.

The need for and the desirability of a loyal and independent trustee are obvious. But, ironically and unfortunately, wealthy families, like other trust customers, are often seduced by cost considerations to forgo these vital qualities in

their corporate trustees. That fate can be avoided by a sophisticated customer of trust services, but to become a sophisticated customer, some insight into the history of corporate trusteeship will be helpful.

Historically, banks and trust companies have provided all the services of trust administration, other than investment management, for fees that were below their cost of providing those services. The not-wholly-unintended result of this approach to trust marketing has been a subsidy that must be repaid through the other services provided – notably, investment management. This historic pattern continues today at many institutions, even when the trustee does not itself provide the investment management. The low fees quoted and paid for trust administration must be made up through

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investment services, whether those services are provided directly by the trustee or through affiliates or third parties.

Clients who pay less than cost-plus-a-reasonable-return for trust administration may think they have struck a good bargain, but losses must – and will be – made up through investment management fees or, perhaps, through brokerage services or other financial products provided to the trust. In such an arrangement, the trustee can only break even – let alone become profitable – by selling other products and services to the customer. Its loyalty and independence can be undermined, and it may turn into a sharp seller to the trust instead of an astute buyer for it.

Sophisticated trust customers, recognizing this dynamic, not only want trust administration, investment management and the other

elements of trust services unbundled (separately offered and priced), they also want to pay a fair price for trust administration. This eliminates the need, if not the entire incentive, for the trustee to put its own interests first when providing or buying products and services for that trust. Hallmarks of independent trustees, then, are not only their willingness to unbundle all their products and services but also their insistence on a fair and reasonable fee for accepting the significant burdens and responsibilities of acting as trustees. The hallmark of the sophisticated trust client is that he or she willingly pays a fair and reasonable price for trust administration.

Our emphasis on these criteria for trustees – flexibility and responsiveness; loyalty and independence – is not to slight any others, such as convenience; efficiency and cost control; security of family assets and privacy; and breadth and depth of product and services offerings (whether provided internally or through third parties). No trustee will qualify as even an “adequate” trustee if the scores for any of these criteria are poor. However, performing well in the first two areas tends to distinguish an excellent trustee from a merely good one.

Value of Trustee’s Own Product Offerings – A Reassessment

This criterion, the breadth and depth of product and services offerings, requires further mention. Sometimes, when selecting a trustee, undue emphasis is placed on its internally provided financial products. These should not be disregarded, but the sophisticated buyer of financial services will realize that at least three disadvantages may be associated with a trust company business plan that emphasizes internally provided products over those obtainable from networking with third-party providers.

1. Such emphasis may stem from incentives to prefer the company’s profits over the client’s interests.
2. No company, however large, can internally provide every product required by wealthy families today, or be a leading provider of even most of the products such families require.



3. Financial institutions are far less reluctant to change third-party providers as client's needs and financial markets change, than to abandon a faltering, or obsolete, internally-provided product.

Business plans that emphasize internally provided products are more often associated with traditional institutional trustees than with private or boutique trust companies. At a minimum, the sophisticated client should look for a range of product offerings that balance high quality, internally and externally provided, financial products and a trustee who is equally willing to provide a third party's products as its own products, particularly when third party offerings provide a performance or cost advantage for the trust customer.

Should Non-Financial Objectives Be a Factor?

For most families, wealth management is not just about maintaining and enhancing wealth or using it for the necessities of life and for such luxuries as a family member may consider consistent with his or her means. A family's concern with other uses of wealth is often reflected in a mission statement, which may deconstruct as the goal of "assisting every family member in reaching his or her potential in life." A trustee can either aid or impede the accomplishment of a family's mission.

Many families will also want their trustee to be sensitive to their charitable leanings and goals, both as a family and as individuals; their desire to keep in the family certain assets, such as commercial enterprises or the family's manor or ranch; or their goal of promoting individual development through formal education or, equally important, life experiences.

For many families, the difference between a "great" trustee and an excellent one will be whether the trustee scores well on this final criterion and not just on the other six.

Does the Ideal Company Exist?

Perhaps you are saying, "This is all very well, but isn't the unavailability of trustees who meet all these criteria – and have a fair chance of continuing to do so in the future – driving wealthy families, who can afford to do so, to form their own private trust companies?" Well, yes – and no.

Yes. Many families have become dissatisfied with the offerings that seem to be available to them from corporate trustees, and they prefer to form their own trust companies rather than to hire a private trust company or a boutique wealth management trust company. But having its own private trust company is not right for every wealthy family. It requires not only an extraordinary level of wealth, but also an extraordinary level of commitment and personal involvement, by at least some family members, to the business of wealth management. Not every family has members able and willing to shoulder those burdens, and it can be even more difficult (socially, if not legally) to walk away from a family-owned trust company that is not meeting a family's or a family branch's needs than from an unrelated trustee.

And, no. There are excellent alternatives for families who do not qualify or prefer to have their own private trust company. The key to finding an excellent corporate trustee is to commit to a trustee succession process such as the one that was completed by the Passant family. And the keys to that process, again, are (1) a full and clear understanding of the family's needs and its expectations regarding its trustees; (2) the ranking of trustee criteria consistently with those needs and expectations; and (3) the rigorous application of those criteria to the available trustees.

Trustee Strengths and Weaknesses, By Type

To help narrow the search to include only the types of trustees most likely to exhibit the characteristics sought by a family, it is useful to

consider the strengths and weaknesses typically exhibited by the various types of corporate trustees that provide wealth management fiduciary services. These again are: the traditional institutional trustees, multifamily private trust companies, and the similar boutique wealth management trust companies. Our view of their strengths and weaknesses within the seven criteria we have been considering are set forth in Table 1.

When reviewing this table, it is important to keep in mind that our assessments of various types of trustees involve classes, not specific trustees. Individual trust companies within each class can and do significantly vary, for good or ill, in their performance. Consequently, generalizations may be useful to narrow the list of candidate trust companies, but until the criteria are carefully applied to a specific company, it cannot be told whether that company outperforms or underperforms its peers or will meet a family's needs.

Individuals as Trustees

Table 2 also considers how individuals score on our seven criteria. As the table suggests, in addition to their limited life spans, individuals typically have some weaknesses that are not found in corporate trustees. These weaknesses, combined with the increasing difficulty families experience over time in finding individuals who will serve as trustees and will meet all of their subjective and objective criteria, often spur a family to search for a corporate successor trustee.

Table 2. Perceptions of Fiduciaries by Type

Fiduciary Needs/Wants	Individual Trustee	Institutional Trustee	Multifamily Private Trust Company	Boutique Trust Company
Responsive and Flexible	■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■
Loyal and Independent	■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■
Multi-Competent	■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■
Efficient and Controls Costs	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■
Convenient and Accessible	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■
Secure and Private	■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■
Promotes Family Objectives	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■	■ ■ ■ ■ ■ ~ ■ ■ ■ ■ ■
Average Score	1.9 ■ ■ ■ ■ ■'s	1.9 ■ ■ ■ ■ ■'s	2.5 ■ ■ ■ ■ ■'s	2.3 ■ ■ ■ ■ ■'s



Institutional Trustees

In our experience, a second main spur to commencing a search for a new trustee is dissatisfaction with an existing institutional trustee. Many of the reasons for such dissatisfaction are suggested by Table 2. But, as the table also shows, there is a great range in performance by institutional trustees under most of the criteria. A particular institution may well perform better on one or more criteria than its peers or even than all the other trust companies considered by a family.

A particular strength of traditional institutional trustees is their strong capital bases, which are suited to the requirements of any trust instrument. Also, traditional institutional trustees are often strong in product and services offerings (such as providing an international network), in providing security for financial assets, and in trust administration expertise. They also have great potential to deliver economies of scale to their large client bases; many have offices convenient to client families whose members are dispersed through many states; and many can offer trusts sited in states with advantageous trust or tax laws. But, in practice, many institutional trustees do not pass along the cost savings from their economies of scale, nor do they promote conservative but sensible tax and fiduciary strategies that take advantage of the trust laws of states such as Delaware or the tax laws of states without trust income taxes.

The benefits from an institutional trustee's broad product offerings, and from its trust and financial services expertise, are sometimes overwhelmed by the impact, on families, of a particular institution's inflexibility, unresponsiveness or lack of independence. Inflexibility and lack of independence can be manifested by an unwillingness to unbundle investment management from trust administration or, even though unbundled, by a replacement of the trust institution's historical "client relationship" culture with the now more fashionable "sales" culture. As a result, the company's and its preferred providers' products may be over-sold to trust clients. In the area of non-financial needs of clients, institutional trustees' efforts often are limited to seminars for family members and other educational offerings that

have not been customized to meet the needs and interests of particular clients.

Private and Boutique Trust Companies

Taking each as a class, multifamily private trust companies and boutique wealth management trust companies have some significant strengths. Again, these strengths are not shared by every member of either class of trustee.

Such companies almost invariably take a "best of breed" approach to the investment managers and other financial products providers they make available to clients, instead of attempting to provide most investment management or financial products themselves. This is one of the reasons they tend

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to have relatively small back-office staffs and low overhead expenses to pass on to clients. This also results in greater flexibility in product offerings. When performance flags, outside managers can be more readily abandoned than employee managers. When financial products are found less effective than had been touted, it is easier to replace an outside provider's products than those the trustee provides itself.

Multifamily private and boutique trust companies are in a superior position (compared to single-family private trust companies and individuals) to achieve economies of scale because they generally have a larger client/asset base over which to spread their fixed costs. Because of their typically low overhead, economies of scale are more likely to be passed on to clients as cost savings by independent trust companies than by institutional trustees.

Independent trust companies usually seek to offset not offering expensive expertise in-house for every financial product needed by clients by

offering strong networks of independent financial products providers and consultants. By not bundling investment management with trust administration (unless desired by the client) and by generally not providing investment management and financial products in-house, they may limit their need or desire to make up for low-margin services through the investment services sold to trust clients.

Because these companies tend limit themselves to serving wealthy families, they clearly have an exclusive focus on – and perhaps greater familiarity with – the needs of wealthy clientele than would a company that also provides retail trust and investment services and products. Also, as private and boutique trust companies grow in size and sophistication, they are increasingly adding offices in states that provide advantageous fiduciary and tax laws, and effectively promote those advantages to clients who can benefit from them.

A significant disadvantage of most of these relatively small trust companies, however, is their lower capital as compared to institutional trust companies. Consequently, some "legacy" trusts require successor trustees with capital levels that exceed those of many private and boutique trust companies. If such a trust cannot be amended, a company without requisite capital must be eliminated from consideration.

All of the private and boutique trust companies considered here are regulated by state or federal regulators, and therefore must have strong risk management and adequate capital. On the other hand, they may be less likely to be excessively conservative than traditional trust institutions, when they respond to clients' requests for assistance in solving their problems. For instance, in our experience, they are far more likely to be willing to assist a family in amending trusts to meet their evolving needs.

Product Channel Trustees

As we suggested earlier, there is one type of trust company that wealthy families may want to view with circumspection and perhaps even avoid. These are what we call "product channel trustees" because they were formed more as marketing channels for an affiliate's financial



services products than as a platform for providing top-drawer trust services. At first blush, they may look like boutique trust companies, but they can be recognized by a pronounced tendency to low-ball trust services in order to sell their financial products; an unwillingness to unbundle trust administration unless they (or an affiliate) provide a substantial portion of the investment management; and, in general, an emphasis on selling financial products over personalized trust services. They often have a large retail trust business. Obviously, such companies tend to perform poorly on the vital criteria of loyalty and independence.

Boutique trust companies, in contrast to product channel trustees, have a clear focus on providing quality trust administration and objective investment advice. A boutique company may also be affiliated with an investment services provider, but it will not favor its affiliates' products over others' unless they are objectively superior in performance, price or suitability to client needs.

Six-Step Trustee Selection Process

The trustee selection process diligently and successfully pursued by the Passant family is summarized in this article's "Words to the Wise" section. As we have seen, the first three steps in the process are introspective: (1) identifying family circumstances and goals, (2) examining its fiduciary services needs and (3) determining its key criteria for its trustees. These are the most difficult and most rewarding steps, for in choosing the right trustee, as in life's other arenas, knowing who you are and what you want is better than half the battle. The final three steps in the process are the most easily completed not only because they consist of objective analysis rather than soul-searching, but also because the information required by these steps is readily available from legal and financial advisors and the trustee candidates themselves.

Two critical elements of the selection process warrant a final word. First, to realize maximum value, the family must decide at the outset if it is at least unified enough to pursue this process jointly and to try to meet collective and individual needs through a shared trustee. If not, the process will still prove invaluable,

but the result may be selection of multiple trustees for family branches rather than one for at least the major trusts.

Second, having decided to embark on a joint process, the family must commit substantial time and resources to it. Trade-offs can be made between family members' time and the use of the family office or other non-family resources, but ultimately, to get it right, family representatives of all adult generations and all branches must devote time and effort to both the introspective part of the process and the selection of the trustee(s) from among the final candidates. As with the Passant family, substantial levels of communication among family members will be necessary to complete the process successfully.

**THE TRUSTEE MUST STILL BE
"BOUND" TO THE FAMILY'S
VISION AND EXPECTATIONS
FOR ITS FIDUCIARY SERVICES
PROVIDER**

The Family Fiduciary Contract

Even after it selects a corporate trustee, the family's task is not quite complete. The trustee must still be "bound" to the family's vision and expectations for its fiduciary services provider. This is largely accomplished by picking a trustee who shares that vision and those expectations in the first place, but more can and should be done. After the trustee is chosen, the process usually ends by having the trustee accept the family trusts and adding the family's signature(s) to whatever forms the trustee presents regarding its fees. This means, though, that the trustee's only legal obligation to the family will be to meet the minimum requirements of fiduciary responsibility set by laws and trust instruments. Even the least qualified of the trustee candidates considered by the family was prepared to undertake, and probably was competent to perform, this minimum obligation.

One may well ask: Where, in this scheme of things, is the obligation of the new trustee to provide that attentive level of service it mar-

keted to the family? Where is the obligation to communicate with the family in extraordinary detail regarding investment performance and to learn of and respond to evolving family needs? Where is the obligation to make available the most current financial products and technologies? Finally, where does the trustee agree to relinquish amicably the reins of the trusts in the future if that is the desire of the family?

All of these, and any other expectation of the family of the trustee that are consistent with law and trust instruments, can be incorporated into a "Family Fiduciary Contract" between the family and the trustee, confirming the trustee's performance promises and the family's expectations. After all the work of finding the right trustee, it would be a pity if the result was not

as expected merely because the mutual understandings of the family and the trustee were not reduced to writing at the outset of the relationship.

Now the job is complete. The family that carefully pursued this trustee selection and binding process has not been guaranteed an ideal trustee relationship or assured that an excellent initial relationship will not someday sour. But that family will have dramatically improved its odds for a long-lasting partnership with an excellent fiduciary. ■

About the Author

John Duncan is the founder of Duncan Associates Attorneys and Counselors, P.C. He concentrates on the representation of private and public trust companies, family offices, investment advisors and private investment funds. He frequently lectures and writes on legal topics affecting wealth management activities of private and public financial institutions and family offices and the special needs and requirements of extraordinarily wealthy families.

John has assisted in forming more than 30 trust companies in 15 states. He is the author of numerous statutes and regulations, including the *CSBS Model State Trust Company and Trust Modernization Acts*, the model for trust company acts adopted in whole or in part in almost one-half of the states, including Alaska, Connecticut, Illinois, Minnesota, New Hampshire, New Jersey, North Carolina, Tennessee, Texas and Virginia, and currently

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John is a graduate of Yale University (B.A. cum laude, 1971) and The University of Chicago Law School (J.D., 1974). Prior to forming Duncan Associates, John headed the banking and investment practice of the international law firm, Jones, Day, Reavis & Pogue. He is a member of the Banking Law Committee of the American Bar Association (Co-chairman, ABA Financial Privacy Task Force, 1998-2001; Chairman, Securities

Activities of Banks Subcommittee, 1995-1998) and past chairman of the Financial Institutions Committee of the Chicago Bar Association (1985-86). He is a member of the faculty (Fiduciary Activities) of the ABA National Institute on Banking Law Basics and listed as one of the world's best banking lawyers by both Euromoney and Mondaq.

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Words to the Wise

The trustee selection process has six steps. The first three consist of family introspection.

- Step One. The family identifies its decision-making style, mission, objectives and strategies; the wealth that will be managed and distributed by fiduciaries; and where family members and their assets are located.
- Step Two. The fiduciary services needed by the family for existing and planned trusts are identified, as are non-trust assets requiring investment advice and management, and the need for fiduciary services such as global custody, guardianships and charitable giving support.
- Step Three. The family determines and prioritizes its key criteria for its trustees, using the seven categories the article discusses and any others the family cares about.

In the last three steps, the family applies these insights to an objective analysis of trustees.

- Step Four. The family confirms the "universe" of trustees available for its needs: individuals, traditional institutions, private trust companies and boutique wealth management trust companies.
- Step Five. A comparison of available trustees, using the family's own criteria, allows the family to focus on the most promising types and candidates.
- Step Six. The trustee candidates are analyzed for their match to the family's criteria, and the final selection made.

Notes

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