Choice of fiduciary

We’re too modest to toot our own horn, but we love it when someone else has good things to say about corporate fiduciaries. That was the case in one of the presentations at the 2019 Heckerling Institute on Estate Planning in January. We provide a summary of high points in our lead article.

Do you remember the bet on commodity prices made by Professors Paul Ehrlich and Julian Simon in the last century? A new study has been done to check on whether the outcome was a fluke. Spoiler alert: It wasn’t. Details on page 2.

What are the biggest concerns that your clients have about estate planning these days? We would love to hear about them. If you have ideas that you would like to see addressed in Trusted Insights, please let us know.

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The case for using a corporate fiduciary

Attorney Stuart Bear gave a presentation at the 2019 Heckerling Institute on Estate Planning titled “Why Can’t My Brother-in-law Bob be the Executor of My Estate?” He reviewed some of the important, practical considerations for choosing the best fiduciary to supervise the implementation of an estate plan, beginning with this job description:

1. Correspond with disgruntled beneficiaries
2. Manage family drama
3. Provide accounting to disgruntled beneficiaries
4. Invest assets (don’t lose money or you will hear from disgruntled beneficiaries); and
5. Receive phone calls from disgruntled beneficiaries inquiring when they will receive their inheritance (but remember it’s not about the money).

Some highlights from Bear’s talk are below.

Resist the first impulse

Very often a client’s first thought in selecting an executor or trustee is that either a spouse or adult child can handle the job. Bear recommended probing the family dynamics before greenlighting such a decision. Sample questions might include:

• Do your children communicate regularly?
• How would one child react to his or her sibling receiving compensation for managing and distributing assets?
• Is any child likely to demand an inheritance immediately?

Clients often need to be brought up to speed on what fiduciary duties are, how much time and expertise they may require, and the value of having an impartial third party involved in decisions that may not always be popular.

Individual fiduciaries

The benefit of naming an individual to serve as fiduciary chiefly is familiarity with the client’s values, family members, and...
Corporate fiduciary . . . continued

family dynamics. There is a perception that an individual will be less costly, or may even waive fees for serving as fiduciary. Bear warned that most individuals will need to hire experienced professionals to help in the discharge of fiduciary duties, so the total cost of administration actually may be higher with an individual in charge.

Corporate fiduciaries

Corporate fiduciaries bring experience, expertise, professionalism, and objectivity to the jobs of trusteeship and estate settlement, noted Bear. Continuity of service is another advantage. Although there may be employee turnover, and the banking industry has experienced a series of acquisitions and mergers, a trust division doesn’t take vacations, get sick, or retire. Corporate fiduciaries are regulated and bonded.

Bear recommended interviewing a handful of candidates before deciding upon a corporate fiduciary. Sample questions include:

- What services will be performed?
- What services will not be performed?
- Are distribution requests handled by an individual, or by a committee?
- How long does it usually take to decide on a request for a discretionary distribution?
- At what asset level would the trustee terminate the trust and distribute the assets outright?
- Will specific language need to be included in the trust document?

If the client is having trouble deciding between an individual or a corporate trustee, it may be possible to have multiple fiduciaries, a sort of “best of both worlds.” However, someone needs to be in charge, and that should be made plain in the estate plan. Don’t overlook the importance of planning for the selection of a successor trustee, perhaps through the appointment of a trust protector.

Follow-up on a famous bet

Fifty years ago Professor Paul Ehrlich published The Population Bomb, warning that the world was running out of resources and predicting mass starvation. There was no way that food production could be increased fast enough to feed the ever-growing pool of humanity, he argued. The best-selling book sold over two million copies and sparked lively policy debates.

The strongest pushback came from Professor Julian Simon. He believed that far from being a burden, humans and human ingenuity were the ultimate resource. He theorized that as any resource becomes scarce, its price rises, which leads to lower consumption of that resource and then innovation in search of new ways to acquire it.

The theories were put to the test in a bet between the two men that became famous. Simon issued the challenge. Ehrlich would choose a basket of raw materials that he was confident would go up in price, and would then choose a time period for the wager. Ehrlich picked ten years to monitor the prices of copper, chromium, nickel, tin, and tungsten. The bet was $1,000, and the payoff would be the difference in the inflation-adjusted price of the basket of goods. Note that Ehrlich therefore could lose at most $1,000, while Simon’s loss could theoretically be infinite, as there was no ceiling on the prices.

In the event, Simon won the bet. The price of the five metals went down by 57% in ten years, and Ehrlich sent Simon a check for $576.07.

New study

Inspired by this story, Gale L. Pooley and Marian L. Tupy have done a new study on a larger pool of resources tracked over a longer period of time [The Simon Abundance Index, published by The Cato Institute]. They hoped to assess whether Simon’s victory was a fluke. It was not.

Fifty items were tracked for the period from 1980 to 2017. Metals, such as were the object of the original bet, made up just 20% of the new basket. The rest was 48% food,
beverages, and grains; 14% raw materials; 12% energy; and 6% precious metals. Data came from the World Bank and the IMF, which has tracked these prices since 1980.

In nominal terms, 41 of those commodities rose in price during the period, and nine fell. However, total inflation during the period of the study was 156%. After applying inflation adjustments, only five items went up in cost. Two were static, and the remaining 43 had gone down in price. On average, the basket of commodities fell in price by 36.7%.

**Hourly labor**

However, the authors believed that a better measure of the availability of any resource is how much labor must be traded to acquire it. The price of labor rises faster than inflation as human productivity increases. The better measure of value therefore would be how much one may acquire by trading a given amount of labor.

To determine the world hourly wage, the authors divided the average annual per capita income, which rose from $6,431 to $10,495 during the period of study, by the average number of hours worked per year, which fell from 2,168 to 1,964. That gave an increase of more than 80% in the value of one hour or work over those 37 years.

When the prices of the commodities were measured in terms of the hours needed to acquire them, the cost fell by 64.7%. See the graph below for details.

**The Simon Abundance Index**

The next step in the authors’ analysis is to demonstrate a correlation between increasing population and increasing abundance of resources. They created a Simon Abundance Framework to describe the relationship between population and resources, and the Simon Abundance Index (SAI) as a metric of resource availability.

The base year, 1980, is 100. Today the SAI stands at 479.6. “Put differently, the Earth was 4.796 times as plentiful last year as it was when Ehrlich and Simon commenced their famous wager,” the authors conclude. During that period, the population only rose by 69.3%.

Although the authors forecast continuing declines in the price of resources, they warn that there must be ups and downs in prices. The occasional spike in prices is a prerequisite first to conservation, and then to innovation, which are the long-term price drivers.

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**PERCENTAGE CHANGE IN NOMINAL, REAL, AND TIME-PRICE OF A BASKET OF COMMODITIES, 1980-2017**


**Briefly noted**

**Trust termination denied**

Yvonne Cosden’s revocable trust became irrevocable at her death in 2010. The trustees of the trust were Yvonne’s only child, Christopher, and Yvonne’s personal assistant and friend, Joseph Horgan. The trust paid all trust income to Christopher at least quarterly for life. At Christopher’s death, the remainder will be divided among several charities.

After five years of payments, Christopher grew dissatisfied with his income interest. He negotiated a termination of the trust with the charitable remaindermen, under which he would receive some $2 million immediately and the remaindermen would get the balance, about $1 million. Horgan refused to go along with the plan.

The trial court found for Christopher and ordered the trust to be terminated, essentially to avoid the expenses of additional trust administration.

The Florida Court of Appeals now reverses. The intent of the settlor was expressed clearly in the design of the trust—she wanted to protect her son with an income for life, and she may not have trusted him with a lump sum distribution. Although there was no trust provision prohibiting early termination, the other provisions make clear that termination would frustrate the settlor’s intentions [*Cosden v. Horgan*, 249 So. 3rd 683 (2018)].

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