Planning Opportunities with the Wyoming Private Trust Company

Cecil D. Smith & Carol H. Gonnella

WealthCounsel
Chicago
July 2011

Table of Contents

PLANNING OPPORTUNITIES WITH THE WYOMING PRIVATE TRUST COMPANY

(A Hidden Secret Uncovered)

Cecil D. Smith & Carol H. Gonnella

As estate planners, we create trusts for our clients because of the federal and/or state transfer tax laws, to protect our clients and their families from lawsuits, divorcing and ex-spouses, and to provide guidance and structure for future generations. When designing a trust, we often hit a stumbling block when deciding who should be the trustee. Many clients have become disillusioned with large public trust companies acting as trustee because of their lack of personal contact, their fees, and on occasion, their lack of attention to the investments within the trust. Our clients understand that ownership must be relinquished and control must be compromised to avoid gift and estate taxes. However, many of our clients want to retain as much control as possible without technically owning the property. For a client in this situation, the Private Trust Company (PTC), which is sometimes referred to as the Private Family Trust Company may be the perfect solution.

Private Trust Companies were seldom if ever used before the latter part of the 1990s. In 1997, the Conference of State Bank Advisors published a document entitled the Multistate Trust Institutions Act. This Act and the fact that several states enacted modern trust legislation and modified investment rules were the impetus for the PTC. In essence, the PTC is allowed because it may only serve one family. It is prohibited from transacting business with the general public. Because of this restriction, there is no necessity for strict state regulation and oversight as there is with a public trust company serving a multitude of customers. It is a family owned enterprise that combines the attributes of institutional and individual trustees and can provide many of the same services as an institutional trustee.

Advantages of Private Trust Companies

Advantages of PTCs are as follows:

1. **Control.** Families can retain greater control. Families can be on the investment committee and, with some qualification, on the distribution committee. Thus, control is retained in the family.

2. **Succession.** Trustee succession issues may be resolved. The PTC can be perpetual for as long as the family needs it.

3. **Retention.** The PTC can retain family assets that a public trust company may not wish to

have in the trust. Under the Prudent Investor Rule, adopted by many states, the requirement for diversity has been diluted, allowing the PTC to retain assets important to the family.

4. **Liability.** Persons serving individually as trustee expose themselves to unlimited personal liability. The board of directors of a PTC has less exposure to personal liability. In this context, it is important to choose a jurisdiction having very rigid creditor rights prohibitions for the entity chosen to be the PTC.

5. **Investments.** The PTC can enhance its investment opportunities by creating common trust funds of all the assets held in the various trusts over which it is trustee. This may allow a reduction in fees and expenses for the trusts. One must be aware of SEC Rules, which is more fully addressed below.

There are several states that allow PTCs, but Wyoming, Nevada, Texas, New Hampshire, and South Dakota are states that not only have favorable tax laws and modern trust laws, but also specifically allow Private Trust Companies. There are two ways to create a Private Trust Company, one is regulated and the other is unregulated.

The Regulated Private Trust Company

Some states specifically allow a regulated PTC. The regulated PTC must apply for and obtain a charter from the state where the trust company will be located. It must specifically state that it will provide trust services only for a single family and will not transact business with the general public. Some families may want a regulated PTC, as it provides more structure and regulation. A regulated PTC may be more attractive for a very wealthy family. Some commentators suggest a family having a net worth of at least $100,000,000 would be interested in a regulated PTC. Some requirements and issues of a regulated trust company are the following:

1. **Capital Requirement.** Most states require a capital requirement for a regulated PTC in addition to a filing fee. For example, South Dakota has a capital requirement of $200,000. Texas has a requirement of $1,000,000 for public trust companies, but may reduce that amount up to $250,000 for PTCs. Nevada's minimum capital requirement is $300,000 plus a $3,000 filing fee. Thereafter, Nevada has an annual fee payable to the state of $1500. In addition there will be initial and annual fees for the entity creating the PTC (either a corporation on an LLC).

2. **Charter.** The PTC must submit an application for a charter or license. Information about the family and the trust documents must be disclosed to the banking commission or other regulatory authority.

3. **Interstate Issues.** If the family is using a state for the PTC other than the state where the trusts are sited, there may be interstate issues to be considered.

4. **Presence.** Although the states allowing regulated PTCs are not uniform in their requirements, the general requirements for contacts are 1) at least one officer who is a resident of the state; 2) a physical office in the state where original or true copies of material business records are kept; 3) a registered agent with an office a physical address in the state.

The Unregulated Private Trust Company

A few states have either by specific legislation or by its regulatory board allowed PTCs that are totally unregulated by any state regulatory board, such as the Banking Commission. These unregulated PTCs are becoming more and more popular in the few states that allow them. Massachusetts, Nevada, Pennsylvania, Virginia and Wyoming are such states. Some states provide an exemption from regulation by statute, such as Nevada. Wyoming does not provide an exemption by statute, but its Division of Banking grants and recognizes unregulated PTCs under its regulatory authority. Some requirements and issues of an unregulated PTC are as follows:

1. **No Capital Requirements.** There are no capital requirements for the PTC. There are no filing fees or ongoing annual fees payable to the state for the PTC. The only fees are for the entity (the corporation or LLC) creating the PTC, as the unregulated PTC must be created as either a corporation or as an LLC. The fees and expenses associated with an unregulated PTC in Wyoming are as follows:

Legal fee to form PTC ………………………………………………..	$????
Initial filing fee paid to the Wyoming Secretary of State …………	100
Annual fee paid to the Wyoming Secretary of State: …………….....	50
Annual fee paid to a Registered Agent, (such as Teton Agents)……	250
Preparation and filing of Federal Income Tax Return by CPA ...…..	????
Fees paid to directors, committee members, etc….…………………	????

2. **Presence.** There are few mandates for what presence is needed for an unregulated PTC. The only statutory requirement is to have a registered agent with an office at a physical address in the state. It is highly recommended to have more of a presence than just the registered agent. These contacts could include:

   - Scheduling annual board of directors meetings in Wyoming.
   - Having a bank account located in Wyoming.
   - Having a safe deposit box in a bank in Wyoming holding documents pertinent to the PTC.
   - Having an office in Wyoming.
   - Having one of the directors of the PTC be a Wyoming resident.
   - Having directors or officers of the PTC perform some tasks in Wyoming.

3. **Interstate Issues.** If the family is using a state for the PTC other than the state where the trusts are sited, there may be interstate issues to be considered.

4. **SEC Issues.** The non-supervised nature of an unregulated PTC may cause it to be defined as an investment advisor for purposes of the SEC registrations under the Investment Advisors Act of 1940. The Frank-Dodd Act repealed the private adviser exemption which allows family offices to provide investment management services without being subject to SEC registration. Congress amended the Investment Adviser's Act of 1940 by creating a new exclusion from the definition of an investment advisor for a family office (as subsequently defined by the SEC), as long as the family office (or unregulated PTC) falls within the SEC's definition of the family office exemption. If it falls within the exemption, the family office or PTC will be exempt from SEC regulation. The proposed definition of family office exemption requirements are:

    - Clients must only be "family clients";
    - Family office must be wholly owned and controlled (directly and indirectly) by "family members"; and
    - The family office cannot hold itself out to the public as an investment adviser.

5. **Family Members Defined.** It is wise to define the family to be included as part of the PTC in the operating agreement or shareholder's agreement.

Requirements to Form an Unregulated Private Trust Company in Wyoming

Wyoming does not provide an exemption from regulation by statute, but the Wyoming State Division of Banking honors unregulated PTCs if formed correctly. The entity must be either a corporation or an LLC. If the name of the entity that is shown in the Articles of Organization or Articles of Incorporation includes words such as "Trust Company," or "Private Trust Company" or "Family Private Trust Company," the Wyoming Secretary of State forwards the Articles to the Division of Banking. This division then insures that the body of the Articles states that the company will only serve one specific family and will not hold itself out to the general public. Once that language is reviewed for compliance, the PTC is recognized. The Division of Banking has no idea of the number of unregulated PTCs that have been formed in the State of Wyoming and it does not keep a record of the entities it has reviewed.

Structure of a Private Trust Company

The IRS issued Notice 2008-63 in July of 2008. It in essence gives some guidance as to how a PTC should be structured. The following is suggested:

1. **Board of Directors.** This board can consist of family and non-family members. This board is responsible for overall management of the PTC.

2. **Investment Committee.** This committee is responsible for the prudent investment of the PTC assets. If there is concern about SEC regulations, this Investment Committee could include a public trust company or a professional investment advisor.

3. **Discretionary Distribution Committee.** This committee reviews beneficiary requests for distributions pursuant to the guidelines and instructions of each trust. Within the parameters of Notice 2008-63, no family member serving on this committee should participate on this committee if that family member or his/her spouse is either a grantor or a beneficiary, or to any trust having a beneficiary to whom that family member or his /her spouse owes a legal obligation of support. Thus this Committee could have different with subgroups serving as the Distribution Committee for the various trusts, based upon the trust terms and beneficiary designation so as not to violate this provision.

4. **Amendment Committee.** This committee has the authority to amend the trust company's governing documents. This committee is somewhat akin to a Trust Protector, in that it allows modification to the documents to reflect changes in the law or other possible negative ramifications to the PTC if such amendments to the PTC documents were not made.

5. **Reciprocity.** Family members are not allowed to enter into reciprocal agreements as to discretionary distribution decisions.

6. **Personnel Decisions.** Only officers of a corporation or managers of an LLC can participate in personnel decisions of the PTC.

Using the Corporate Format for the Private Trust Company

Generally the authors prefer LLCs as the entity for the PTC. However, there may be a situation wherein a Client is named as the beneficiary of a trust that has a corporate trustee. There is a provision in the trust document allowing the beneficiary to remove the current trustee, only if the beneficiary replaces the current corporate trustee with another "corporate" trustee. The solution is that the Client can form a Wyoming Corporation to serve as a PTC. This is done by using the typical Articles of Incorporation with a couple of exceptions:

1. The Articles of Incorporation should state that the company is being formed to serve as trustee for only one specific family, and

2. The Articles of Incorporation should grant fiduciary powers to the corporation, which allows the corporation to serve as a trustee.

3. The Articles should state in the title that it is the [Family Name] Family Private Trust Company or the [Family Name] Family Trust Company.

The Bylaws of the corporation should be custom drafted to reflect the administration of the PTC. It is suggested that the PTC have some of the connections to Wyoming as stated above.

Using the LLC Format for the Private Trust Company

Clients may (and should) prefer the LLC format over the Corporate format, just to have the protection from outside lawsuits for the ownership interests in the PTC and to have the check-the-box flexibility for income tax treatment. This is done by using the typical Articles of Organization with a couple of exceptions:

1. The Articles of Organization should state that the company is being formed to serve as trustee for only one specific family, and

2 The Articles of Organization should grant fiduciary powers to the LLC, which allows the LLC to serve as a trustee.

3. The Articles of Organization should state in the title that it is the [Family Name] Family Private Trust Company or the [Family Name] Family Trust Company.

The operating agreement of the LLC should be custom drafted to reflect the administration of the PTC. It is suggested that the PTC have some of the connections to Wyoming as stated above.

Qualified Trustee for Domestic Asset Protection Trusts

The PTC can be the trustee for many different trusts of the family. However, it may be the solution for clients who wish to have a Domestic Asset Trust (DAPT). Generally, if the family is using Wyoming as the jurisdiction for the PTC, it will use Wyoming as the jurisdiction for the DAPT. Wyoming requires that the Trustee of a Wyoming DAPT be a “qualified trustee.” This means the Trustee must be either:

(a) an “individual” who resides in Wyoming and is independent, or
(b) a “person” (defined as an individual, a corporation or an LLC) qualified under Wyoming law to serve as a Trustee, or
(c) a regulated bank or trust company.

The only problem with someone living outside of Wyoming is that they are not likely to know anyone residing in Wyoming who can serve as their Trustee.

Many of our clients would prefer not to use a large bank or trust company as Trustee because of fees and service issues.

ALAKAZAM! Ultimate Cowboy Cocktail

A client can form, for example, a Wyoming LLC to serve a Wyoming PTC with the client and his family being the Members and Managers of the LLC. By statute, an LLC formed as a PTC qualifies to serve as Trustee of a DAPT. Thus, no bank or trust company has to be involved and no independent individual (who might be your best friend today) need be involved. That being said, some clients will actually need and want professional help administering their DAPT. For those clients, the PTC may hire professional help or have a professional as one of their managers or directors. Banks and trust companies are available to be hired as agent of the Trustee.

Cecil and Carol call this combination of *(i) a Wyoming LLC that is owned by (ii) a Wyoming DAPT that is administered by (iii) a Wyoming PTC* the **Ultimate Cowboy Cocktail**.