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THE OREGON STEWARDSHIP TRUST:
A NEW TYPE OF PURPOSE TRUST THAT ENABLES STEWARD-
OWNERSHIP OF A BUSINESS

*Susan N. Gary**

An entrepreneur with a successful business may lack family members with the ability or interest to take over the business. The entrepreneur may want a business structure that will maintain dividend payments for family members but keep control of the management of the business in the hands of valued employees. The entrepreneur may want to avoid a sale to an outsider and may want to keep the business, and its jobs, in the community.

A group of collaborators who started a business with an environmental mission may want to preserve the environmental mission when they retire. They may need to sell their shares to support themselves in retirement, but they may not want the sale to go to a large out-of-state company that might focus on extracting as much money as possible from the business. They will benefit from a structure that can lock in the business's purposes, allow them to retire, and maintain the business's economic viability over time.

Steward-ownership has begun to gain attention in business succession planning.¹ In a steward-owned company, the people actively involved in a business control the business.² Equitable ownership is separated from management, with the goal that management will focus on the business's purposes and not just on the business's profits.³ Financial returns are reinvested in the business, used to service debt and pay dividends to non-voting shareholders. Returns are also shared by stakeholders through such things as decent wages and profit sharing for employees, fair prices for the goods and services produced by the business, and charitable

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1. THE PURPOSE FOUNDATION, STEWARD-OWNERSHIP (2018), https://purpose-economy.org/content/uploads/purposebooklet_en.pdf [<https://perma.cc/Z8WP-LSH9>]; The Purpose Foundation, RSF Social Finance, Organic Valley & Organically Grown Company, *Steward-ownership: Ownership and finance solutions for mission-driven businesses*, presentation prepared for Expo-West 2019 (on file with author); Alexander A. Bove, Jr., *The Purpose Trust Has a New Purpose*, 33 PROB. & PROP. 40 (Jul.-Aug. 2019).

2. THE PURPOSE FOUNDATION, *supra* note 1, at 10.

3. *Id.* In a business with shareholders, management may be separate from equity, but traditionally management's duties have been to maximize profits for the benefit of shareholders. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N. Y. TIMES, Sep. 13, 1970, (Magazine), at 32.

contributions for the community.⁴ Business decisions are not made by those who will benefit directly from an increase in profits, so business decisions can be made with the long-term health of the company in mind, considering the interests of employees and other stakeholders.⁵

Steward-ownership requires a business structure different from the typical equity-based corporation or partnership model. A noncharitable purpose trust provides a tool for structuring a steward-owned business, and purpose trusts have been used for business succession, based on statutes derived from Uniform Trust Code (UTC) § 409.⁶ This UTC section contains restrictions that are problematic for businesses seeking a steward-ownership structure, and the state purpose trust statutes that removed these restrictions failed to create a framework for steward-ownership.⁷ In its 2019 legislative session, Oregon adopted a statute creating the stewardship trust—a purpose trust designed to be used to hold the assets of a business.⁸ The new section of Oregon’s trust code provides a structure for the stewardship trust to guide businesses seeking to transition to steward-ownership.⁹ Much of the statute is default law, so that a business can adopt rules specific to its own needs through its trust agreement.¹⁰

This Article begins with the story of Organically Grown Company, an Oregon company whose use of a purpose trust to transition to steward-ownership led to the creation of the Oregon stewardship trust statute. Part II of the Article takes a look at the history of noncharitable purpose trusts. This history helps explain UTC § 409 and the restrictions that make UTC § 409 problematic for a trust with a business purpose. After an explanation of the history and development of noncharitable purpose trusts, Part III considers the use of existing trust statutes for business purposes. An examination of UTC § 409 in Part IV considers the restrictions that create difficulties when a trust is created to hold the assets of a business. A few states have altered their adoption of the UTC to make their statutes better suited for a trust holding the assets of a business, but none have gone as far as Oregon. Oregon’s new type of trust, the stewardship trust, provides a beneficial statutory structure for a purpose

4. THE PURPOSE FOUNDATION, *supra* note 1, at 9. “What all steward-owned companies have in common is the belief that profits aren’t the primary goal, but rather the means by which their purpose can be furthered.”

5. *Id.* at 14 (citing a study that found that steward-owned businesses are six times more likely to survive over 40 years than businesses with traditional ownership structures. C. Børsting, J. Kuhn, T. Poulsen, and S. Thomsen (2017)).

6. *See* Bove, Jr., *supra* note 1.

7. *See infra* Part IV.

8. H.B. 2598, 80th Legis. Assemb., Reg. Sess. (Or. 2019).

9. *See infra* Part V.

10. *Id.*

trust to be used for steward-ownership of a business. Part V of the article describes the Oregon statute, with an explanation of how the management and control of a business using a stewardship trust works. The article concludes with a look to the future of steward-ownership in the United States and the role the Oregon stewardship trust may play.

I. OGC AND THE NEED FOR A STEWARDSHIP TRUST

Forty or so years ago, a group of “gardeners, small-scale farmers, hippies, environmental activists and dreamers living near Eugene, [Oregon],” banded together to create what eventually became Organically Grown Company (OGC).¹¹ Some of the group had met while working on the Urban Farm, a garden project that started in 1975 at the University of Oregon.¹² Richard Britz, a young architect and professor, worked with students on ideas of sustainability and using open spaces in cities to grow food.¹³ Professor Britz’s ideas inspired some of the students to become organic farmers after graduation, despite limited experience in farming and getting produce to market.¹⁴ As they struggled, the new farmers realized they were competing against their friends in the organic market and decided to support each other instead.¹⁵ In 1977 they began meeting at the Urban Farm once a month to discuss a better way of doing business as organic food producers in the Willamette Valley.¹⁶ By 1978 they had chosen a name, Organically Grown Cooperative.¹⁷ They continued to meet monthly, to share information, educate each other, and buy supplies collectively.¹⁸

The co-op members began coordinating which crops each farm would grow, and they marketed and distributed the crops through the co-op so that they would not compete with each other.¹⁹ This step began the shift into distribution, which eventually became the business of OGC. In 1983 OGC opened a loading dock and hired an employee to sell and deliver produce.²⁰ Sales grew over the next decade, and in 1994 the company

11. *Our History from the Roots*, ORGANICALLY GROWN CO., <https://www.organicgrown.com/about/organically-grown-history/> [<https://perma.cc/G4B4-AYSP>].

12. ANN BETTMAN, *THE URBAN FARM* 45 (JANUARY 2002).

13. *Id.* at 7-11. *See also History of the Urban Farm*, URBAN FARM, DEPT. OF LANDSCAPE ARCHITECTURE, U. OF OR. <https://urbanfarm.uoregon.edu/about/history-of-the-urban-farm/> (last visited July 3, 2019).

14. BETTMAN, *supra* note 12, at 45.

15. *Id.*

16. ORGANICALLY GROWN CO., *supra* note 11.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

opened a facility in Portland.²¹ The company now has additional distribution facilities in Washington state, and they serve customers in Alaska, Idaho, Montana, Oregon, Washington, and beyond.²²

The co-op model worked well for a time, but the co-op had been structured as a farmers' cooperative, which meant that distributors could not be members of the co-op.²³ Inclusivity had always been important to OGC members, and an organizational structure that excluded people who shared OGC's goals did not fit the organization.²⁴ Further, the organization was shifting focus to include distribution as a significant part of its efforts. The nonprofit co-op structure was limited to farmers and farming, and OGC was moving beyond that original purpose.

In 1999 OGC incorporated as an S corporation.²⁵ An S corporation can have only 100 shareholders, and by 2008 OGC had outgrown that limit.²⁶ The next idea was to incorporate as a C corporation with an employee stock ownership program (ESOP).²⁷ This structure allowed employees to have a voice in the business but did not directly involve other stakeholders.

As the founders of OGC began to think about retirement, they realized that the structure they had created would not protect their mission²⁸ and values on a long-term basis.²⁹ The structure worked well when everyone agreed to embrace OGC's mission and the purposes beyond profitability, but the founders worried that ESOP obligations and fiduciary duties under ERISA could prioritize financial interests over mission. The founders had

21. *Id.*

22. *Where We Deliver*, ORGANICALLY GROWN COMPANY, <https://www.organicgrown.com/organic-produce/distribution-map/> (last visited July 3, 2019).

23. The co-op was exempt from taxation under 26 U.S.C. § 521(b)(1), which provides that a co-op must be operated "for the purpose of marketing the products of members or other producers and turning back to the members the proceeds of sales."

24. Conversation with Natalie Reitman-White (Aug. 10, 2018).

25. ORGANICALLY GROWN CO., *supra* note 11. An S corporation is a small business corporation governed by the rules of subchapter S of the Internal Revenue Code. An S corporation must be a domestic corporation with fewer than 100 shareholders, and the shareholders must be individuals (with a few exceptions). 26 U.S.C. §1361 (2019).

26. Conversation with Natalie Reitman-White, *supra* note 24.

27. *Id.*; *Our History from the Roots*, ORGANICALLY GROWN CO., *supra* note 11 ; *ESOP Case Study: Organically Grown Company*, SES ADVISORS, <https://sesesop.com/esop-knowledge-center/esop-case-studies/esop-case-study-organically-grown-company/> [<https://perma.cc/HP3D-BJPA>] (last visited July 2, 2019).

28. OGC's website states its mission as follows: "Promoting health through organic agriculture as a leading sustainable organization." *The OGC Way: The pillars of our organizational culture*, ORGANICALLY GROWN CO., <https://www.organicgrown.com/about/organizational-vitality/> [<https://perma.cc/6MQ5-BVN3>]. Another website page explains, "Our goal is to support organic agriculture and help it thrive, by doing business in a way that is 'good, clean and fair.' That goes for our customers, our vendors, our employees, our community and our environment." *Who We Are, In an Organic Nutshell*, <https://www.organicgrown.com/about/> [<https://perma.cc/R9Y9L-27DJ>].

29. Conversation with Natalie Reitman-White, *supra* note 24.

built a strong company, with 200 employees, an extensive distribution network, and a commitment to mission that went beyond generating profits as the sole focus.³⁰ The founders knew that the financial success of the company made it attractive to external buyers. They feared, however, that outside buyers might not care about OGC's mission. They also worried that the financial success of OGC made it an attractive target for a corporate takeover, and that the fiduciary duties of the directors to maximize benefit for shareholders might make it impossible to resist a takeover attempt.³¹ The founders needed a way to retire and get a share of the equity they had created in developing the company, while leaving the company in a position to continue to pursue its mission.³² The stewardship trust became the solution.³³

OGC enlisted the help of Ronald D. McFall, a lawyer with the Minneapolis office of Stoel Rives, to consider a variety of potential options.³⁴ Together they developed the idea of a stewardship trust.³⁵ Once this decision was made, Steven G. Bell and Penny Serrurier at the Stoel Rives Portland office helped OGC work out the details.³⁶ Oregon had adopted the UTC, with § 409, and the lawyers determined that Oregon's purpose trust structure was not optimal for OGC.³⁷ The lawyers instead recommended a Delaware trust, because Delaware had removed the troubling restrictions when it adopted its purpose trust statute.³⁸ The Delaware statute provided basic authorization and the lawyers provided

30. See SES ADVISORS, *supra* note 27. The case study describes OGC's "core values of health, integrity, partnerships, and sustainability" and explains that OGC strives to pay employees at or above market; provides health, dental, and other coverage, matches contributions to employee's 401k plans, and provides other benefits to employees. The case study adds that OGC contributes a portion of profits to nonprofits engaged in work aligned with OGC's mission, reduces waste sent to landfills, and works "to create a highly engaged collaborative, and accountable workforce that is focused on the success of the company." *Id.* All of these uses of company resources carry out the purposes and mission of OGC.

31. Conversation with Natalie Reitman-White, *supra* note 24.

32. *Id.*

33. OGC calls its trust a "perpetual purpose trust." The term is accurate, but the term does not distinguish the trust as a new structure specifically for use by a business. I coined the term "stewardship trust" after noting the use of the term "steward-ownership" in the book *Steward-Ownership*, published by the Purpose Foundation, and in other literature describing mission-driven businesses. In drafting the Oregon statutory language, I used the term stewardship trust for the trust authorized by the new section, with the approval of others involved in the drafting process.

34. Conversation with Natalie Reitman-White, *supra* note 24.

35. The trust agreement OGC used calls the trust a "perpetual purpose trust." This article uses the term stewardship trust throughout, even when referring to the OGC trust. As OGC explored these ideas with the lawyers, they learned that some mission-driven businesses in Europe were using structures similar to purpose trusts to establish steward-ownership, through the Purpose Foundation and Purpose Evergreen Capital. Conversation with Natalie Reitman-White, *supra* note 24.

36. *Id.*

37. Memorandum from Steven G. Bell to Natalie Reitman-White (May 21, 2018) (on file with author).

38. Conversation with Natalie Reitman-White, *supra* note 24.

the rest—a trust agreement that filled in the missing pieces and provided the structure needed for an effective stewardship trust.³⁹

Although OGC was able to accomplish its goals by using Delaware’s stripped-down statute and a Delaware trustee, the adoption of a comprehensive stewardship trust statute will improve trust law. The statute can provide the basic framework for a business seeking to use a trust to preserve its mission, with clarity about the roles of the various players in this type of trust. Mission-driven businesses will tailor their trusts to their own purposes and stakeholders but having a statute with a structure in place will facilitate the use of stewardship trusts. Although inspired by OGC, the stewardship trust statute is not limited to mission-driven businesses and will be useful for any family business seeking to adopt a steward-ownership structure.

II. THE HISTORY OF NONCHARITABLE PURPOSE TRUSTS

Before examining the structure of a stewardship trust, a look at the history of the legal treatment of trusts for non-charitable purposes helps to explain the structure of UTC §§ 408 and 409. The history explains why UTC §§ 408 and 409 were drafted the way they were and explains the types of trusts they were intended to cover. The history also clarifies the reasons the drafters included the restrictions. UTC §§ 408 and 409 authorize the types of trusts that courts had been treating, at least in some instances, as honorary trusts. The cases finding honorary trusts did not include trusts holding the assets of businesses, and the UTC provisions were presumably not drafted with business trusts in mind.

Professor Adam Hirsch published a detailed history of bequests for purposes and trusts for purposes prior to the promulgation of the UTC.⁴⁰ This article need not repeat his excellent work, and a curious reader can review his analysis and extensive footnotes. For purposes of understanding UTC § 409, a quick overview of the development of the common law treatment of purpose trusts and the parameters for these trusts will suffice.

39. The Sustainable Food and Agriculture Perpetual Purpose Trust, between Organically Grown Company and The Northern Trust Company of Delaware (Apr. 6, 2018). (on file with author). The OGC trust agreement uses different terminology from that used in the stewardship trust statute. For example, the statute and this article refer to the trust stewardship committee, which OGC calls the trust protector committee. This article will use the statutory terms even when describing OGC with the hope that a single set of terms will be less confusing.

40. Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33 (1999) [hereinafter Hirsch, *Bequests for Purposes*]; see also Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913 (critiquing the Uniform Probate Code section that authorized trusts for purposes) (1999) [hereinafter Hirsch, *Trusts for Purposes*].

A. Purpose Trusts in the Common Law

As the common law of trusts developed, a trust with neither an ascertainable beneficiary nor a charitable purpose was usually unenforceable.⁴¹ Such a trust might be permitted to continue as an honorary trust, but often the trust was void *ab initio*.⁴² Gradually, courts began to permit honorary trusts,⁴³ but the courts and the Restatement indicated that treating trusts for purposes as actual trusts would require legislative action.⁴⁴

Under the common law a trust must have a beneficiary so that someone can enforce the trust.⁴⁵ Most trusts are created for individuals or classes of individuals, but some trusts are created for purposes.⁴⁶ The common law has long provided that a trust created for a charitable purpose is exempt from the beneficiary requirement.⁴⁷ A charitable purpose is defined as a purpose beneficial to society but means something more than a merely benevolent purpose.⁴⁸ The public benefit provided by a charitable trust creates an incentive for the law to enforce the charitable trust, and the public benefit also provides the means for enforcement.⁴⁹ The attorney general's office, or some other government office, provides the necessary enforcement on behalf of the public.⁵⁰ A trust for a purpose that is not a public purpose does not warrant enforcement by the attorney general.

Trusts for non-charitable purposes tend to fall into two categories, which Professor Hirsch calls social purposes and personal purposes.⁵¹ In a trust for social purposes, a settlor might direct the trustee to distribute

41. See Hirsch, *Bequests for Purposes*, *supra* note 40, at 35-44.

42. RESTATEMENT (SECOND) OF TRUSTS § 123, Reporter's Note (citing cases holding trusts invalid) (AM. LAW INST. 1959).

43. RESTATEMENT (THIRD) OF TRUSTS § 47, Gen. Cmt. a (AM. LAW INST. 2007).

44. *Id.* at Reporter's Notes to Gen. Cmt. a ("The reasons for a cautious approach in this Restatement to noncharitable 'purpose' trusts, and for leaving fully enforceable trust status and more aggressive development of the law to the enactment of legislation and amendments, can be recognized in reviewing Comments f and i to § 29, and the Reporter's Notes thereto . . .").

45. RESTATEMENT (THIRD) OF TRUSTS § 44 (2003); GEORGE G. BOGERT, ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 161 (2019).

46. Hirsch, *Bequests for Purposes*, *supra* note 40, at 33-34.

47. England first recognized trusts for charitable purposes in 1601. Statute of Elizabeth 43 Eliz. 1, c. 4 (1601) (Eng.). BOGERT, *supra* note 45, at § 323. See also Hirsch, *Bequests for Purposes*, *supra* note 40, at 35-36.

48. RESTATEMENT (THIRD) OF TRUSTS § 22 (AM. LAW INST. 2007); BOGERT, *supra* note 45, § 362.

49. See Susan N. Gary, *Restricted Charitable Gifts: Public Benefit, Public Voice*, 81 ALBANY L. REV. 101,106-09 (2018); Hirsch, *Bequests for Purposes*, *supra* note 40, at 36-37.

50. In most states the office of the Attorney General monitors charitable assets, but in a few states another government office has that function. MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* 306 (2004).

51. Hirsch, *Bequests for Purposes*, *supra* note 40, at 51-52.

property among the settlor's friends or for such benevolent purposes as the trustee selected.⁵² Although a trust for these purposes provides some benefit to society, the law creates a distinction between these benevolent purposes and charitable purposes.⁵³ Thus, the validity of a trust could turn on whether a court found its purpose to be charitable or merely benevolent. If the former, the trust would be valid and enforceable. If the latter, the trust would be invalid, and the interest would pass as a resulting trust to the settlor's estate, unless a court permitted the intended trustee to distribute the property as an honorary trust.⁵⁴

In a trust for personal purposes the settlor directs the devisee to make distributions that relate personally to the settlor.⁵⁵ This category of trusts includes a trust for the care of the gravesite of the settlor and a trust to make distributions related to religious observances for the settlor, such as for the saying of masses.⁵⁶ Personal distributions related to the settlor also include distributions for the care of an animal, because animals do not have legal capacity.⁵⁷ As property owned by the settlor, the animal is seen as an extension of the settlor's personal needs or wishes.

The common law treated both of these categories—trusts for social purposes and trusts for personal purposes—in the same way.⁵⁸ When a settlor created a trust for a noncharitable purpose, the trustee had no duty to carry out the terms of the trust.⁵⁹ In some cases, courts held such trusts invalid, even though the trustee was willing to follow the settlor's wishes.⁶⁰ A court might find the trust invalid for several reasons. The

52. For example, a gift of a small sum of money to each child in a particular school, to celebrate the last day of school by buying candy or some other treat, would be benevolent but not charitable. The children would appreciate the gift, but the gift is not charitable in the trust law sense of the word. The gift does not relieve poverty and cannot be considered educational, unless perhaps its purpose were restricted to buying a book for summer reading. [case]. Prof. Hirsch notes that a trust for a benevolent purpose may in fact be the settlor's attempt to create a memorial to himself. Hirsch, *Bequests for Purposes*, *supra* note 40, at 55.

53. Despite arguments that a trust to distribute small amounts of money to school children once a year had a charitable purpose, the court declared the purpose benevolent and trust invalid. *Shenandoah Valley National Bank v. Taylor*, 63 S.E. 2d 786 (Va. 1953).

54. See RESTATEMENT (THIRD) OF TRUSTS § 47 (AM. LAW INST. 2007).

55. See Hirsch, *Bequests for Purposes*, *supra* note 40, at 52 (describing a bequest for personal purposes as one that enables the testator "to spend money on herself postmortem.").

56. See RESTATEMENT (THIRD) OF TRUSTS § 47, cmt. d, illus. 4-6 (AM. LAW INST. 2007).

57. *Id.* at cmt. d.

58. See RESTATEMENT (SECOND) OF TRUSTS § 123 (AM. LAW INST. 1959); RESTATEMENT (THIRD) OF TRUSTS § 47 (AM. LAW INST. 2007).

59. See RESTATEMENT (SECOND) OF TRUSTS § 123 (AM. LAW INST. 1959); RESTATEMENT (THIRD) OF TRUSTS § 47 (AM. LAW INST. 2007).

60. RESTATEMENT (SECOND) OF TRUSTS § 123, cmt. d (AM. LAW INST. 1959); *Id.* at Reporter's Notes ("In the following cases it was held that the purposes were not solely charitable and that the attempted disposition failed, even though the legatee was ready and willing to apply the property as directed.") The cases cited in the Reporter's Notes are primarily from the late nineteenth and early twentieth centuries, with the most recent being from the 1940s.

trust might be invalid due to the lack of a beneficiary who can enforce the trust.⁶¹ The court might be concerned that the scope of the purposes is so indefinite that no one can know whether the trustee is in compliance with the settlor's directions.⁶² And without beneficiaries to serve as measuring lives in being, the trust might permit or require distributions beyond the period of the rule against perpetuities.⁶³

Some courts held that if the intended trustee were willing to carry out the trust, the intended trustee could do so, even though the trust was not enforceable.⁶⁴ If the intended trustee did not comply with the settlor's instructions or failed to make distributions as directed within a reasonable time, as determined by the court, the individuals entitled to the settlor's estate could petition the court and obtain the property.⁶⁵ The intended trustee was deemed to hold the property on a resulting trust and was required to return the property to the settlor's estate.⁶⁶

The Restatement (Third) of Trusts § 47 confirms that trusts “often called ‘purpose’ or ‘honorary’ trusts”⁶⁷ are not enforceable and treats the devisee of the property as a trustee of an “adapted trust” with the power to carry out the trust, although not a legal duty to do so.⁶⁸ The Restatement explains that the trustee can apply the property pursuant to the terms of the trust for a reasonable period of time and indicates that the period should normally not exceed twenty-one years, the period of the rule against perpetuities when there are no lives in being.⁶⁹ Any property not distributed or not reasonably needed for the purpose will be

61. *Id.* at cmt. d.

62. *Id.* at cmt. e.

63. *Id.* at cmt. f. Although the rule against perpetuities does not apply to purpose trusts directly, courts have held that the period of the rule applies. *See Hirsch, Trusts for Purposes, supra* note 40, at 930-35. As Professor Hirsch explains, the cases require that a purpose trust terminate within the period of the Rule—a life in being plus twenty-one years. *Id.* at 931.

64. *See* cases cited in RESTATEMENT (SECOND) OF TRUSTS § 123, Reporter's Notes (AM. LAW INST. 1959); *see also* cases cited in RESTATEMENT (SECOND) OF TRUSTS § 127, Reporter's Notes (AM. LAW INST. 1959) (trusts for specific purposes upheld if they did not violate the rule against perpetuities). Restatement (Second) § 123 states that the intended trustee can apply the property for the intended purposes, unless the trust permits distributions “beyond the period of the rule against perpetuities, or the purpose is so indefinite that it cannot be ascertained whether any application falls within it.” RESTATEMENT (SECOND) OF TRUSTS § 123 (AM. LAW INST. 1959).

65. RESTATEMENT (THIRD) OF TRUSTS § 47, cmt. c (cmt. on Subsec. 1) (AM. LAW INST. 2007).

66. *Id.*; RESTATEMENT (SECOND) OF TRUSTS § 123, cmt. d (AM. LAW INST. 1959).

67. RESTATEMENT (THIRD) OF TRUSTS § 47, Gen. Cmt. (AM. LAW INST. 2007).

68. *Id.* § 47. Comment d explains, “Such a willing devisee holds the property in trust, adapted by operation of law, for the successors in interest of the testator, subject to the devisee's nonmandatory power to carry out the testator's intended purpose.” *See also id.* at cmt. c.

69. *Id.* at cmt. d. Comment d(2) provides the 21-year rule need not apply to a trust for an animal, which should be permitted to continue until the animal's death, or a trust for the care of a grave, which should be allowed to continue until the death of the settlor's spouse and children. The comment explains, “These exceptions to the 21-year limit are based on the special nature of the permissible noncharitable objective and the modest commitment of resources involved.”

distributed to the reversionary takers.⁷⁰

Restatement (Third) reflects the growing acceptance of treating noncharitable purpose trusts as honorary trusts, but it did not go so far as to state that purpose trusts should be enforceable. The Reporter's Notes explain that the Restatement takes a "cautious approach" and leaves "fully enforceable trust status and more aggressive development of the law to the enactment of legislation...."⁷¹ The next Part examines statutory developments.

III. STATUTORY CHANGES

A. *Early statutes*

In the years leading up to the drafting and promulgation of the UTC, the Uniform Probate Code (UPC) made a first pass at developing purpose trust provisions. The Uniform Law Commission completed an overhaul of the UPC in 1990 and included provisions for purpose trusts in Section 2-907.⁷² Subsection (a) provides for honorary trusts for purposes and subsection (b) validates a trust for the care of an animal.⁷³ In 1993, the ULC adopted technical corrections to the UPC, including the purpose trust sections. The revisions made both types of purpose trusts enforceable by someone named by the settlor or by the court on application "by an individual."⁷⁴ These provisions still exist in the UPC, but they have been supplanted by the UTC provisions.

Another development worth noting is that some states have statutes permitting a perpetual trust for the care of a cemetery plot or grave.⁷⁵ Without a statute a trust for the care of a grave would eventually terminate due to the rule against perpetuities. These statutes are limited to the specific purposes related to care of graves and do not apply to other types of purpose trusts.⁷⁶

70. *Id.* § 47(1).

71. *Id.* at Reporter's Notes on Gen. Cmt. A and Cmts. b-d. The Reporter's Notes described legislation in off-shore jurisdictions including Jersey and Bermuda that authorize non-charitable purpose trusts.

72. For a critique of the Uniform Probate Code's purpose trust provisions, and an explanation of the 1993 revisions, see Hirsch, *Trusts for Purposes*, *supra* note 40.

73. UNIF. PROB. CODE § 2-907 (amended 2010).

74. *Id.* § 2-907(c).

75. See RESTATEMENT (SECOND) OF TRUSTS § 124, cmt. f (AM. LAW INST. 1959). ("By statute in many States dispositions of property for the perpetual maintenance of graves, tombs and monuments are permitted."); Hirsch, *Bequests for Purposes*, *supra* note 40, at 107 ("In most jurisdictions today, bequests for the upkeep of a cemetery lot...are by statute permissible in trust form."). For a list of state statutes see BOGERT, *supra* note 45, § 342, note 10.

76. See, e.g., NY EST. POWERS & TRUSTS § 8.1-5 (McKinney 2019). This statute provides that trusts for the care of cemeteries or private lots within cemeteries are not subject to the rule against

B. UTC §§ 408 and 409

Two UTC sections address trusts for noncharitable purposes that lack an identifiable beneficiary. UTC § 408 validates a trust for the care of an animal; UTC § 409 validates other purpose trusts. Under § 409, a trust may be created for a specific noncharitable purpose or for a valid but noncharitable purpose selected by the trustee.⁷⁷ Sections 408 and 409 both address the enforcement problem caused by the lack of a beneficiary by providing for enforcement by a person named by the settlor, or if the settlor fails to name an enforcer, by the court.⁷⁸

Sections 408 and 409 limit the time period for which the trust can continue, in line with the common law rule that the period of the Rule against Perpetuities applies to purpose trusts.⁷⁹ Under § 408 an animal trust can continue until the animal's death, or if a trust is created for more than one animal until the death of the last animal.⁸⁰ The Comment to the section explains that the trust can provide only for an animal that is either alive or in gestation when the settlor dies.⁸¹ A purpose trust's duration is limited by a fixed number of years.⁸² The UTC suggests twenty-one years but places the number in brackets to indicate that a state may choose a different number.⁸³ For example, a state that has adopted the Uniform Statutory Rule Against Perpetuities with its ninety-year-wait-and-see period might choose to use ninety years, to keep the limit on noncharitable purpose trusts in line with the state's version of the Rule.⁸⁴

Sections 408 and 409 provide that the court can reduce the amount in the trust if the court determines "that the value of the trust property exceeds the amount required for the intended use."⁸⁵ This provision

perpetuities and will not be invalid for indefiniteness or for the lack of an ascertainable beneficiary. This section does not alter a court's authority to reduce the amount held in such a trust. *Id.*

77. UNIF. TRUST CODE § 409(1) (amended 2010).

78. *Id.* §§ 408(b), 409(2). In a purpose trust, a trust enforcer must be appointed to enforce the trust. If the enforcer is one individual or one corporate entity, the question of ongoing control arises. A corporate trustee could presumably serve as an enforcer, but a bank, even with a strong trust department, might not provide the ideal oversight for a business. An individual involved with the business could be the trust enforcer, but eventually the individual will be unable to continue in the role. A mechanism for appointing a successor is possible, but one individual may not be able to reflect the wishes of all stakeholders. Some mechanism that allows the stakeholders a role in management and enforcement of management is preferable, so the stewardship trust uses a stewardship trust committee to provide that mechanism.

79. See Hirsch, *Trusts for Purposes*, *supra* note 40, at 930-35.

80. UNIF. TRUST CODE § 408(a) (amended 2010).

81. *Id.* at cmt. Although an animal is not a legal person and cannot be a life in being for perpetuities purposes, the statute in essence makes the animal a life in being.

82. *Id.* § 409(1).

83. *Id.* at cmt.

84. Oregon's purpose trust statute uses 90 years. See OR. REV. STAT. § 130.190 (2019).

85. UNIF. TRUST CODE §§ 408(c), 409(3). UTC 404 provides that trust purposes cannot be contrary to public policy. *Id.* § 404. The Comment explains that purposes contrary to public policy include purposes

relates to the common law requirement that a trust purpose cannot be capricious. Courts have sometimes refused to permit a trust to continue if the purpose was “capricious,”⁸⁶ and if that happens the trustee will hold the assets on a resulting trust.⁸⁷ A Comment to the Restatement (Third) explains that a purpose is not capricious “if it satisfies a desire that many (even if not most) people have with respect to the disposition of their property... and the amount of the property to be devoted to the purpose is not unreasonably large.”⁸⁸ Thus, the authorization in the UTC for a court to reduce the value of property in a trust avoids invalidity if an amount held for a purpose is so excessive as to be considered capricious.

With § 409 the drafters of the UTC wanted to validate trusts that had been permitted to exist as honorary trusts.⁸⁹ The drafters created rules that made sense for the sorts of transfers of property that had been treated as unenforceable honorary trusts. The Comment to § 409 provides examples. A trust created for a general noncharitable purpose might be “a bequest of money to be distributed to such objects of benevolence as the trustee might select.”⁹⁰ The Comment continues, “The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot.”⁹¹

The Restatement (Third) of Trusts provides additional examples of noncharitable purposes.⁹² Under the Restatement each of these purposes would be treated as an adapted trust⁹³ for the settlor’s successors in interest, subject to a nonmandatory power. The UTC drafters drew from the Restatement and would have been influenced by the examples.⁹⁴ The

that are frivolous or capricious. *Id.* at cmt.

86. Capricious purposes have included destruction of a house, *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo. App. 1975), a direction to publish worthless writings, *Fidelity title & Trust Co. v. Clyde*, 121 A.2d 625 (1956), and the exhibition of worthless objects of art, *Medical Society of South Carolina v. South Carolina Nat. Bank*, 14 S.E.2d 577 (S.C. 1941). RESTATEMENT (SECOND) OF TRUSTS § 124, cmt. g and Reporter’s Notes (AM. LAW INST. 1959); RESTATEMENT (THIRD) OF TRUSTS § 29, cmt. m (AM. LAW INST. 2007).

87. RESTATEMENT (THIRD) OF TRUSTS § 47(2) (AM. LAW INST. 2007); RESTATEMENT (SECOND) OF TRUSTS § 124 (AM. LAW INST. 1959).

88. RESTATEMENT (THIRD) OF TRUSTS § 47(2), cmt. e (AM. LAW INST. 2007).

89. *See* UNIF. TRUST CODE § 408, cmt. (“This section and the next section of the Code validate so called honorary trusts.”); *see also id.* § 409, cmt.

90. *Id.* § 409, cmt.

91. *Id.*

92. *See* RESTATEMENT (THIRD) OF TRUSTS § 45, cmt. d(1) (AM. LAW INST. 2007). Illustration 4 describes a trust to provide for the erection of a monument on the settlor’s grave and Illustration 6 describes a trust to be used to pay for the saying of masses for the repose of the souls of the settlor and the settlor’s spouse.

93. The Restatement uses the term “adapted trust” for a situation that does not meet the requirements of a trust. The Restatement provides that the property should be treated as if held in a trust, but the trustee’s power is nonmandatory and the settlor’s successors in interest will take the property if the trustee does not distribute it as the settlor intended.

94. *See* UNIF. TRUST CODE § 409, cmt. (citing the Restatement “[f]or examples of types of trusts

Restatement includes examples of powers for nonspecific purposes, both a power to distribute property “to objects of benevolence and liberality” and one to distribute income for “worthy purposes” as the intended trustee selects.⁹⁵ The Restatement’s examples of specific purposes are limited to erecting a monument on a grave, providing for the care of a grave, providing for the offering of masses, providing for the care of a dog, and an example based on the George Bernard Shaw alphabet trust case.⁹⁶

Looking at both the Restatement and the UTC Comments, it is clear that noncharitable purpose trusts were being used for relatively limited purposes—care of animals, care of graves, and a power to distribute property for benevolent purposes. One other idea for the use of noncharitable purpose trusts surfaces in the Comment to Restatement § 47, but the Comment uses it to say that further development of purpose trusts should be left to the legislatures. The Comment cites an article describing the use of purpose trusts in the off-shore jurisdiction of Jersey.⁹⁷ Jersey permits the creation of Special Purpose Vehicles, used as the issuer of debt securities.⁹⁸ The SPV is incorporated and may be held as an independent entity with the shares held by a charitable trust or by a noncharitable purpose trust.⁹⁹ Thus, in Jersey, noncharitable purpose trusts may be used in finance-related strategies. Although the Restatement Comment notes the article, Jersey law does not appear to have influenced the development of the Restatement or the UTC.¹⁰⁰

authorized by this section....”).

95. RESTATEMENT (THIRD) OF TRUSTS § 47, cmt. on Subsection (1) (AM. LAW INST. 2007). English law clearly, therefore, does not recognize that trusts can validly exist where there is no ascertainable beneficiary and now regards purpose trusts as valid if they are either created for charitable purposes, in which case the purpose must fall within the strict rules determining the meaning of charity, or created for one of the anomalous ‘concessions to human weakness or sentiment’ [i.e., certain “honorary trusts”] in which the English courts have upheld a non-charitable purpose trust as being valid [in a limited way and to a limited extent, it might be added].

96. *Id.* at cmt. d(1) and Reporter’s Note on cmt. d.

97. *Id.* (citing Simon M. Gould. *Jersey and Non-Charitable Purpose Trusts: The Product of an Evolutionary Process?*, 5 J. of International Trust & Corporate Planning 87, 87-89 (1996)).

98. *See id.*; *see also The Use of Jersey Special Purpose Vehicles in Structured Finance Transactions* CAREY OLSEN (June 1, 2013), <https://www.careyolsen.com/briefings/the-use-of-jersey-special-purpose-vehicles-in-structured-finance-transactio> [<https://perma.cc/Q2JV-5BUE>].

99. *See* OLSEN, *supra* note 98.

100. Alexander Bove has written about the use of offshore jurisdictions for purpose trusts. *See* Alexander A. Bove, Jr., *ASSET PROTECTION STRATEGIES: WEALTH PRESERVATION PLANNING WITH DOMESTIC AND OFFSHORE ENTITIES, VOLUME II* (ABA: 2004). Bove has written that “[t]hese jurisdictions include, among others, the Isle of Man Jersey, the British Virgin Islands, Bermuda, the Cayman Islands, the Cook Islands, and Nevis.” Bove, Jr., *supra* note 1, at 35.

IV. USE OF EXISTING STATUTES FOR BUSINESS TRUSTS

A. *Limitations in Section 409*

Section 409 as drafted is not limited to specific types of purposes. Although the drafters apparently had benevolent distributions and the care of graves in mind, the statute itself does not preclude its use for other purposes, including business purposes. However, UTC § 409 contains restrictions that make the use of a noncharitable purpose trust to hold the assets of a business unattractive. A noncharitable purpose trust is limited by the period of time fixed in the statute, which in the UTC version of § 409 is twenty-one years.¹⁰¹ A state that has adjusted its perpetuities period to ninety years, under the Uniform Statutory Rule Against Perpetuities,¹⁰² would likely use that longer period for its purpose trusts, but even ninety years is a concern for a company that hopes to continue indefinitely. A number of states have repealed their rule against perpetuities, so perpetual purpose trusts would be possible in those states.¹⁰³

The second problematic restriction in § 409 is the power given a court to reduce the amount held in a purpose trust to the extent the total amount is “not required for the intended use.”¹⁰⁴ This power addresses the common law rule prohibiting capricious purposes.¹⁰⁵ The power allows a court to reduce the amount in the trust so that the amount remaining would not be considered capricious, thus saving the trust from invalidity.¹⁰⁶ Although the persons managing a business could argue that the entire amount placed in trust was necessary for the purpose of the trust (operating the business), a statutory rule that permits a court to decide otherwise can make business managers nervous.

101. Many states no longer apply the rule against perpetuities or apply it in a way that makes the rule almost meaningless. In states that follow the common law rule or the UTC rule however, the rule will limit the length of time a purpose trust can continue. Under the common law rule, a purpose trust will be void ab initio, so it will be struck down before it starts. In a state with the Statutory Rule, the trust can last for 90 years. Although 90 years is a significant period of time, a large business may be unsatisfied with the idea that the business will end after 90 years.

102. See BOGERT, *supra* note 45, § 214 (describing the history and status of the rule against perpetuities in the states).

103. *Id.* OGC used Delaware for its perpetual purpose trust.

104. UNIF. TRUST CODE § 409(3) (amended 2010).

105. See *supra* text accompanying notes 85-88.

106. Section 408 contains a similar provision for animal trusts and was famously used to reduce the amount in a trust Helmsley left for her dog, Trouble. The court reduced the trust from \$10 million to \$2 million, with the difference being distributed to a charitable trust that was the residuary beneficiary under Helmsley’s will. Jeffrey Toobin, *Rich Bitch – The Legal Battle Over Trust Funds for Pets*, THE NEW YORKER, (Sept. 29, 2008), <https://www.newyorker.com/magazine/2008/09/29/rich-bitch> [https://perma.cc/3SSM-DWW3].

B. Other Statutory Options

One option for making a state's purpose trust statute more appealing for a trust holding a business is to remove the two restrictions. Delaware has taken that approach.¹⁰⁷ The Delaware statute provides that a trust for a purpose "that is not impossible of attainment"¹⁰⁸ is valid, even if the trust purpose is not charitable and even if the trust lacks an ascertainable beneficiary.¹⁰⁹ Trust property may be applied "only to its intended use" but the statute does not include the provision that would permit a court to reduce the amount held in trust.¹¹⁰ Delaware has no time restriction in its statute,¹¹¹ so a noncharitable purpose trust can last indefinitely.¹¹²

Delaware's statutes permit a business considering a business purpose trust to write a trust agreement setting out its own rules for the trust, but the statute lacks a structure that provides default rules for the trust. The statute follows the UTC in this regard, providing for an enforcer¹¹³ and for the distribution of the property if the trust terminates,¹¹⁴ but lacking other guidance for a purpose trust.

South Dakota has added a number of details to its statute, providing more default rules for a purpose trust.¹¹⁵ For example, in addition to providing for an enforcer (as the UTC and the Delaware statutes do),¹¹⁶ the South Dakota statutes provide for court direction if the purpose becomes "impossible, inexpedient, or unlawful[;]"¹¹⁷ state that the trust enforcer is a fiduciary;¹¹⁸ provide for compensation for the enforcer unless the trust agreement provides otherwise;¹¹⁹ create a process for removal of an enforcer;¹²⁰ and provide that no filings, reports, or accountings are required for a purpose trust unless a court requires

107. DEL. CODE ANN. tit. 12, § 3556 (2008).

108. *Id.* at (a).

109. *Id.* at (a), (b).

110. *Id.* at (d).

111. Delaware has repealed its Rule against Perpetuities. DEL. CODE ANN. tit. 25, § 503(a). Although real property held directly in a trust must be distributed no later than 110 years from the date of its acquisition by the trust, DEL. CODE ANN. tit. 25, § 503(b), interests in a corporation or partnership that holds real property are not subject to the rule. DEL. CODE ANN. tit. 25, § 503(e). Thus, the lack of a time period restriction in Delaware's purpose trust statute aligns with its decision to abolish the Rule against Perpetuities.

112. Delaware's statute states specifically that the common law rule against perpetuities does not apply to a noncharitable purpose trust. DEL. CODE ANN. tit. 25, § 503(a).

113. *Id.* at (c).

114. *Id.* at (d).

115. The legislature added these provisions in 2018. *See* H.B. 1072 (S.D. 2018).

116. S.D. CODIFIED LAWS § 55-1-21.4.

117. *Id.* § 55-1-21.3

118. *Id.* § 55-1-21.4.

119. *Id.*

120. *Id.* § 55-1-21.5.

them.¹²¹ The statutes also provide rules for “hybrid trusts,” defined as trusts with both identifiable beneficiaries and a purpose separate from those beneficiaries.¹²²

South Dakota’s statute includes no time restriction. To be sure that no common law restriction applies, the statute states that “[n]either the common law rule against perpetuities, nor any rule restricting the accumulation of income, nor any common law rule limiting the duration of noncharitable purpose trusts is in force in this state.”¹²³ South Dakota does permit a court to reduce the value in a purpose trust.¹²⁴ The court is instructed to be reasonable and to allow the trust to continue for some period of time before deciding to reduce the property in the trust. This power in the court will be helpful for some types of noncharitable purpose trusts, but for a trust holding all of the assets of a business, however, the judicial power may be a concern.¹²⁵

C. Use of Current Statutes

As early as 2004, Alexander Bove wrote about business planning using purpose trusts.¹²⁶ More recently he has described the use of a purpose trust as a way to protect a family business from “shareholder disputes, disruptive lawsuits, divorce of key parties, early deaths, hostile takeovers, creditors’ claims, and if planned properly, even estate taxes.”¹²⁷ He explains that the owners of the business could transfer their shares to the trust, either by gift or through a sale or a combination of the two.¹²⁸ Family members, employees, or independent persons could be trustees, or a combination of those trustees could manage trust.¹²⁹ A trust enforcer would enforce the trust.¹³⁰ The family members could benefit financially

121. *Id.* § 55-1-21.9.

122. *Id.* §§ 55-1-22 to -22.6.

123. *Id.* § 55-1-20.

124. *Id.* § 55-1-21.2 (“A court may reasonably reduce the amount of the property transferred to the trustee of a purpose trust if the court determines that the trust corpus substantially exceeds the amount required for the intended purposes. The court should consider allowing the trust to be administered for a reasonable period of time before undertaking a determination.”).

125. Other state statutes may permit perpetual purpose trusts, but these statutes continue to provide that property not required for the intended use must be distributed to the settlor or the settlor’s successors in interest. *See, e.g.*, N.H. REV. STAT. ANN. § 564-B:4-409; ME. REV. STAT. tit. 18-B, § 409; WYO. STAT. ANN. § 4-10-410.

126. *See* Bove, Jr., *supra* note 1.

127. Alexander A. Bove, Jr., *A Trust Without Beneficiaries—A New Purpose for Purpose Trusts*, LISA Estate Planning Newsletter #2711 (Mar. 20, 2019), <http://www.leimbergservices.com>; *see also* Bove, Jr., *supra* note 1 (discussing steward-ownership in Europe).

128. Bove, Jr., *Newsletter*, *supra* note 127.

129. *Id.*

130. *Id.*

from salaries or from dividends paid by non-voting stock, but they would no longer own the business.¹³¹ The trust would prohibit the sale of the business, and future family issues could not undermine the business.¹³² The success of the business would not depend on the ability of the next generation of family members to run the business. As Bove notes, a number of European companies are operating in this way.¹³³

OGC created a structure similar to the one Bove describes when it created its purpose trust. OGC's trust was created in Delaware because Delaware's statute had removed the UTC restrictions. Although a company can use a Delaware trust or consider a state that permits perpetual purpose trusts, even with the judicial authority to reduce the value in the trust, a business with a commitment to the local community may prefer to use a local trust company for its trust.¹³⁴ Further, the adoption of a comprehensive stewardship trust statute will provide better guidance for businesses considering a purpose trust strategy.¹³⁵ For these reasons Oregon's stewardship trust statute will be an attractive model for other states.

V. OREGON'S STEWARDSHIP TRUST

A. *The Idea*

A statute adopted by the Oregon legislature in 2019 provides a new model for a purpose trust that holds and manages the assets of a business. The idea for the stewardship trust statute grew out of a perceived need for a new structure for businesses engaged in succession planning. The new type of trust provides a means to protect a business's mission and to maintain local control of the business. This new type of trust is limited to a trust that holds the assets of a business. Two types of businesses, family businesses and mission-driven businesses, may find it useful.

The founder of a family business may have no children or other family members who want to work in the business. The owner could sell the company, but if the company has ties to a community and valued employees, the owner may not want to sell—especially to a buyer from outside the community. The owner may instead want the company to

131. *Id.*

132. *Id.*

133. Bove says that “over 100” European companies are using purpose trusts. *Id.* The most well-known, and one of the oldest of these, is Bosch. See THE PURPOSE FOUNDATION, *supra* note 1, at 46-50.

134. Conversation with Natalie Reitman-White, *supra* note 24. OGC would have preferred an Oregon trustee, and Reitman-White suggested the legislation so that other Oregon companies could keep the trust business in Oregon.

135. A goal of Reitman-White is to encourage companies to use the steward-ownership structure. *Id.*

continue operating as an independent company, providing jobs to the employees and valued goods or services to the community. The owner might consider creating an employee stock ownership plan, but that option can be complex and expensive to manage and may not provide the assurance of continuity the owner seeks.

Even if the founder of a family business has children who want to continue in the business, the founder may worry about family discord or problems that could disrupt the business in future generations.¹³⁶ The founder of a family business may want to protect the business by transferring the business into a trust. The founder must be willing to transfer ownership and future profits, but financial benefits for the family members can be preserved through salaries and non-voting stock.¹³⁷

While some companies focus solely on financial returns, other companies may consider a variety of benefits in addition to profits. The founders of a mission-driven company may want to ensure that its mission will continue, even after the founders retire. These companies may also want to allow those who are actively engaged in the business to have decision making authority, even if they are not owners of the business. Founders may not want distant shareholders and managers to take control of the business.

No existing corporate structure will protect a company's mission indefinitely, because future owners can change the structure. For example, a mission-driven business might incorporate as a Benefit Corporation, to provide for non-financial purposes as well as business purposes. However, that structure, or any other corporate structure, can be changed by future owners to the regular corporate form. A purpose trust provides a way to lock in the purposes the founders have for the business.

The group that created the proposal for an Oregon stewardship trust¹³⁸ wanted to do more than just remove the two obstacles identified in ORS

136. See Bove, Jr., *Newsletter*, *supra* note 127.

137. See *id.* Some business owners may not want to transfer a business to family members. Ernst Shültz led the German company Waschbär for 4 years before buying the company when Shültz was 55. As he planned for the succession of the business, he decided not to transfer it to his children, who were "already adults who had "already chosen their own professional paths." Instead, he decided to transfer the company to steward-ownership, using the Golden Share model. He explains, "Firstly, I wanted to preserve the values and purpose of Waschbär. Secondly, I wanted to give something back to the people who helped me reanimate the company. Waschbär would not have had its successes had it not been for all its employees work and dedication." THE PURPOSE FOUNDATION, *supra* note 1, at 73-74. For an explanation of the Golden Share model see note 195 below.

138. I worked with Natalie Reitman-White, Vice President of Organizational Vitality and Trade Advocacy for Organically Grown Company, and Steven G. Bell and Penny Serrurier, attorneys with Stael Rives LLP, to draft the stewardship trust statute. Alexander Bove, Melissa Langa, and Christopher Michael provided input. Oregon Representative Julie Fahey sponsored the bill, and her Legislative Director, Katherine Ryan, assisted in the preparation of the bill.

130.190, Oregon's enactment of UTC § 409. The group wanted to create a statutory structure that could guide companies considering this new form of ownership. The proposal creates a structure for a stewardship trust that protects the mission of the company using this structure, provides adequate mechanisms for enforcement of the purposes, and creates enough flexibility so that the managers of the business can adapt to changes over time. A business creating a stewardship trust can set its own rules in the trust instrument, providing additional instructions and directions.

Most of the provisions in the statute can be changed, but a few provisions are mandatory for a trust to qualify as a stewardship trust and get the benefits of being a stewardship trust.¹³⁹ Oregon continues to follow the Uniform Statutory Rule Against Perpetuities and imposes a ninety-year restriction on noncharitable purpose trusts. The goal of the legislative reform was to remove the ninety-year limit for stewardship trusts but not change the requirement for other purpose trusts. A settlor can use a noncharitable purpose trust for family purposes other than running a business¹⁴⁰ but will have to comply with the ninety-year limit and will be subject to the authority of the court to reduce the value in the trust.

B. *The New Statutory Provision: HB 2598*

A stewardship trust is a trust created for a business purpose, without an identifiable beneficiary.¹⁴¹ The purpose can include both financial and non-financial benefits,¹⁴² and the trust may hold interests in a business as a way of pursuing that purpose.¹⁴³ The expectation is that the stewardship trust form will be used to hold a business that is, itself, organized as a corporation, partnership, or in some other legal form. The trustee of the stewardship trust will have legal title to the shares or partnership interests. In addition to a trustee, a stewardship trust will have a trust enforcer¹⁴⁴ and a trust stewardship committee.¹⁴⁵ The trust stewardship committee

139. Oregon follows the Uniform Statutory Rule Against Perpetuities, so noncharitable trusts must terminate within 90 years. A stewardship trust may last in perpetuity, but a trust must meet the requirements of the statute in order to avoid the rule against perpetuities limitation.

140. A family might want to use a purpose trust to hold the family vacation house, an art collection, or other family memorabilia. See Al W. King III, *Trusts Without Beneficiaries—What's the Purpose?* WEALTH MANAGEMENT.COM: TRS. & ESTATES (Feb. 2, 2015) <https://www.wealthmanagement.com/estate-planning/trusts-without-beneficiaries-what-s-purpose> [<https://perma.cc/GPE7-GVJU>] (listing common purposes for establishing a noncharitable purpose trust).

141. H.B. 2598, 80th Leg. Assemb., Reg. Sess. § 2(1) (Or. 2019).

142. *Id.*

143. *Id.* § 2(2).

144. *Id.* § 3.

145. *Id.* § 4.

holds powers to direct, and a stewardship trust can be considered a directed trust.¹⁴⁶

The trustee of a stewardship trust will have the usual duties of a trustee and will be subject to the other provisions of the trust statutes. The duty to inform and report that is owed to beneficiaries of a trust will be owed to the trust enforcer,¹⁴⁷ because a stewardship trust has no beneficiaries. The trustee must follow directions from the trust stewardship committee, unless a direction is “manifestly contrary to the terms of the trust or the trustee knows that the action would constitute a serious breach of a fiduciary duty...”¹⁴⁸ As in any directed trust, the trustee remains a fiduciary with oversight responsibilities. For that reason, the trust stewardship committee must keep the trustee reasonably informed about the administration of the trust.¹⁴⁹

Like other noncharitable purpose trusts without identifiable beneficiaries,¹⁵⁰ a stewardship trust will have a trust enforcer to enforce the purposes of the trust.¹⁵¹ The terms of the trust may name a trust enforcer and may set forth a process for naming successor trust enforcers.¹⁵² If at any time no person is acting as a trust enforcer, a court will name someone.¹⁵³ The trust enforcer is essential to the functioning of the stewardship trust. To ensure that the trust enforcer receives the information necessary to fulfill the enforcement role, the statute gives the trust enforcer the rights of a qualified beneficiary, even though the trust enforcer is not a beneficiary of the trust.¹⁵⁴

The trust stewardship committee, which must have at least three members,¹⁵⁵ will be responsible for the administration of the business held by the trust. The statute authorizes the trust stewardship committee to exercise all rights belonging to the trustee.¹⁵⁶ The trust stewardship committee can vote the shares of the business¹⁵⁷ and thus will be responsible for electing or appointing the directors or managers of the businesses. The trust stewardship committee will also be responsible for

146. The UTC’s directed trust provision is UNIF. TRUST CODE § 808 (amended 2010).

147. H.B. 2598 § 3 (providing that a trust enforcer has the rights of a qualified beneficiary). The duty to inform and report is owed to qualified beneficiaries. OR. REV. STAT. § 130.710; UNIF. TRUST CODE § 813 (amended 2010).

148. H.B. 2598 § 10.

149. *Id.* § 9.

150. *See* UNIF. TRUST CODE §§ 408, 409.

151. H.B. 2598 § 3.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* § 4.

156. *Id.* § 7(f).

157. *Id.*

directing distributions from the trust, if there are any.¹⁵⁸ A trust reaches the top income tax bracket much more quickly than individual taxpayers,¹⁵⁹ so the expectation is that any profits from the business will be distributed or reinvested at the company level and will not flow through to the trust.¹⁶⁰

In a stewardship trust, control and oversight is shared among the trustee, the trust enforcer, and members of the trust stewardship committee. The statute makes explicit that the persons holding all three roles exercise their authority as fiduciaries.¹⁶¹ The trust enforcer enforces the trust, filling the role a beneficiary holds in a trust with a beneficiary. The trust stewardship committee can remove the trust enforcer but not appoint a successor,¹⁶² unless the terms of the trust give the trust stewardship committee that authority. For many stewardship trusts, providing a separate process for naming a successor trust enforcer will create an appropriate separation of power. The trustee is subject to removal and replacement by the trust stewardship committee,¹⁶³ but only after notice to the trust enforcer¹⁶⁴ and by a majority vote of all members of the trust stewardship committee.¹⁶⁵ The trust enforcer and the trustee both have duties to protect the purposes of the trust if the trust stewardship committee begins to operate the business contrary to the purposes set forth in the trust.¹⁶⁶

As the authority just described indicates, the trust stewardship committee will guide the management of the business and will have more direct control than the trustee. For that reason, the trust stewardship committee must provide the trustee and the trust enforcer with annual reports and other information necessary for them to carry out their duties.¹⁶⁷ The trustee has the duty to report to the trust enforcer¹⁶⁸ and

158. H.B. 2598 § 7(e).

159. In 2017 the top rate for trusts was 39.6%, applied to income above 7,500. I.R.C. § 1(j)(2)(E). Beginning in 2019, the top rate will be 37%, applied to income over \$12,750. Rev. Proc. 2018-57, Sec. 3.01.

160. Natalie Reitman-White, *OGC Ownership 40 Years of Evolution*, power point slides, slide 12 (2018) (on file with author).

161. H.B. 2598 § 3 (trust enforcer); § 4 (each member of trust stewardship committee); § 10 (trustee). Because the trust is a directed trust, the trustee's fiduciary duties are limited. *Id.* In contrast, UTC § 808 provides that a person given powers to direct a trust is "rebuttably presumed to be a fiduciary...."

162. *Id.* § 7.

163. *Id.* § 7(a), (b).

164. *Id.* § 7.

165. *Id.* § 6.

166. *Id.* §§ 3, 10. The trustee has a duty to administer the trust in accordance with its purposes. OR. REV. STAT. § 130.650; UNIF. TRUST CODE § 801 (amended 2010).

167. H.B. 2598 § 9.

168. OR. REV. STAT. § 130.710; UNIF. TRUST CODE § 813 (amended 2010).

will need information from the trust stewardship committee's reports to carry out that fiduciary duty.

A stewardship trust can continue indefinitely, and the ninety-year limit on Oregon purpose trusts does not apply to an Oregon stewardship trust.¹⁶⁹ Although the difficulty to amend the trust is an attractive feature of this new structure, if a modification becomes necessary, the trust enforcers and the trust stewardship committee, acting unanimously, can modify the trust.¹⁷⁰ If the trust terminates, the terms of the trust can provide for the final distribution.¹⁷¹ If they do not, a court can order the distribution, consistent with the purposes for which the trust was created.¹⁷²

The statute provides a structure for a stewardship trust but does not attempt to dictate the membership of the trust stewardship committee. The committee will depend on the type of business and the reasons behind transferring the business into a stewardship trust. If the business is owned by a family, the committee might include family members, key employees, and non-family, non-employee members.¹⁷³ Election to the committee could be by existing members, specified family members could elect all members, or some combination of family and employees could elect members. The specifics will depend on the business and should be drafted into the trust instrument.

The membership of the trust stewardship committee of Organically Grown Company provides an example of how a mission-driven business might structure its committee. OGC's stewardship committee is comprised of members from each of five stakeholder groups: employees, farmers, customers, community allies (nonprofit organizations and trade allies), and investors.¹⁷⁴ These stakeholders elect the members to the stewardship committee, so that the committee will reflect all the interests that have been important to OGC and will continue to be important as the business continues to expand.¹⁷⁵ In order to be considered a stakeholder with the right to vote for the trust stewardship committee, a member of one of the groups of stakeholders must be an active participant in the business of OGC and must meet requirements for that stakeholder

169. H.B. 2598 § 14. To extend beyond the 90-year rule applicable to other noncharitable purpose trusts, the statute requires that "the terms of the trust provide that the trust will be enforceable for a specific period not less than 90 years or in perpetuity."

170. *Id.* § 11.

171. *Id.* § 12.

172. *Id.*

173. See Bove, Jr., *Newsletter*, *supra* note 127.

174. See THE PURPOSE FOUNDATION, *supra* note 1, at 83; Reitman-White, *supra* note 160, at slide 30.

175. Reitman-White, *supra* note 160, at slide 30. OGC calls the stewardship committee the trust protector committee.

category.¹⁷⁶ A voting stakeholder is expected to show a commitment to support OGC's mission and its governance.¹⁷⁷ The requirements mean that not every employee or farmer-supplier will be a stakeholder permitted to vote.¹⁷⁸

C. Financing

A stewardship trust holds all the voting shares of a business, which means the business cannot issue voting stock to raise money. The business can, however, issue non-voting redeemable preferred stock to investors, who may include family members in a family business or stakeholders in a mission-driven business. The preferred stock can provide for payments to family members who no longer own the business, including family members who do not take salaries as employees. For both a family business and a mission-driven business, the preferred stock provides a way to attract investment capital to grow the business.¹⁷⁹ The preferred nonvoting stock can also be used to address the liquidity issue that occurs when a for-profit business transitions into a structure with ownership by a stewardship trust, often at a time of succession from ownership by founders or key early shareholders.

For Organically Grown Company, external financial investment was needed for the business to buy the voting shares. OGC could self-fund some of the stock buy-back but could not do so entirely without adversely affecting other mission priorities and the business itself. OGC created non-voting preferred stock as a way to bring enough funds into the company to be able to buy the voting stock.¹⁸⁰ The goal was to create “a perpetual low-risk financing option to enable business development and growth”¹⁸¹ for OGC. OGC structured its preferred non-voting stock with an annual dividend of five percent and an option to redeem the stock after five years.¹⁸² The preferred stock also provides for possible additional

176. *Id.*

177. *Id.*

178. For example, an employee stakeholder must have been employed with OGC for at least three years, must express interest in being a member of the stakeholder group, must pass a written test with questions concerning OGC's governance structure, purposes and mission, must participate in the annual meeting and committee work, and must have expressed interest in being a stakeholder, and must have that interest approved by OGC's board of directors or by the trust stewardship committee. A farmer-supplier must be an active grower with an average of over \$18,000 in sales to OGC for at least three years and those sales must represent 20 percent or more of the grower's fresh sales. OGC must be the exclusive distributor within OGC's primary active distribution areas. *Id.* at notes.

179. See THE PURPOSE FOUNDATION, *supra* note 1, at 29-34 (describing alternative financing, including equity and debt, for steward-owned businesses).

180. Conversation with Natalie Reitman-White, *supra* note 24.

181. Reitman-White, *supra* note 160, at slide 2.

182. *Id.* at slide 19. The initial offering was for “a minimum 5 year investment with ability to request

payments depending on the financial success of the business.¹⁸³

Investors who acquired the nonvoting stock in OGC were attracted by OGC's mission and the combined non-financial and financial returns.¹⁸⁴ Impact investors, as that term is increasingly used,¹⁸⁵ look for non-financial as well as financial return, and for those investors, OGC is an appealing investment. The investors could include individuals, community foundations, private foundations, or other charities who want a triple-bottom-line investment.¹⁸⁶ For OGC, some shareholders of voting stock could choose to reinvest the proceeds from the sale of the stock in the non-voting preferred stock.¹⁸⁷ Other stakeholders might also invest their profits from the business in the preferred stock.¹⁸⁸

In order to convert to trust ownership more quickly, OGC also obtained a loan from a social finance company, RSF Social Finance.¹⁸⁹ OGC used the loan to buy half the shares of voting stock at the outset, to give the trust control of the business.¹⁹⁰ OGC then used earnings to pay down the loan and to continue buying the stock of minority shareholders.¹⁹¹ The preferred non-voting stock provided additional funds for purchasing the voting stock and for further development of the business.

OGC intends to use or distribute earnings at the company level, so that no profit will be distributed to the trust. OGC pays the administrative expenses for the trust, but the expectation is that the trust will have no taxable income. The earnings will be distributed in the following order: (1) reinvestment in business operations, including research and development, (2) debt service, (3) operational reserves, with a goal of three months of operating cash, (4) base dividend for preferred stock, (5) variable compensation, (6) redemption requests, and (7) distributions to shareholders (beyond the base dividend) and other stakeholders.¹⁹²

redemption over 3 years, with a 5% baseline dividend, and a minimum \$25,000 investment." OGC plans to have future offerings, potentially with a lower investment threshold. *Id.*

183. *Id.* at slide 2.

184. *Id.* at slide 19, notes.

185. "Impact investing" is a term used for many types of sustainable and responsible investing. I am using the term here to mean "investing that intentionally seeks both a financial return and a specific environmental or social result." Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 UNIV. COLO. L. REV. 733, 742 (2019). Impact-first impact investing accepts below-market financial return in exchange for non-financial benefits. *See id.* at 742-45 (describing impact investing and citing additional sources).

186. Reitman-White, *supra* note 160, at slide 19, notes.

187. *Id.*

188. SEC rules permit 35 non-accredited investors for OGC. OGC holds those investor positions for OGC staff and growers. *Id.*

189. THE PURPOSE FOUNDATION, *supra* note 1, at 84; Reitman-White, *supra* note 160, at slide 17, notes.

190. *Id.*

191. *Id.*

192. Reitman-White, *supra* note 160, at slide 21. OGC provided that of the Tier 7 cash available

VI. FUTURE OF THE STEWARDSHIP TRUST

The idea of steward-ownership is not new, but it has been used more in Europe than in the United States. The German company Bosch has operated under a trust-foundation structure since 1964,¹⁹³ and Carl Zeiss AG has been owned by a foundation for 120 years.¹⁹⁴ A book by the Purpose Foundation, describes several structures: the Golden Share model,¹⁹⁵ the Single-Foundation ownership structure,¹⁹⁶ the Trust-

for distribution, preferred shareholders would receive 40% of the amount available up to a 7% effective dividend (up to 2% above the 5% base dividend). After the preferred shareholders have received 7%, they will receive 20% of any additional Tier 7 cash. The remaining amounts of Tier 7 cash will be distributed to other stakeholders, as determined by the trust stewardship committee. *Id.* at slide 22.

193. Robert Bosch founded the Bosch Group, a German technology and service company, in 1888. He arranged for its transition to a trust-foundation ownership structure in his will. The structure uses two classes of stock. A-Shares have voting rights but no economic rights, and B-Shares have economic rights but no voting rights. Ninety-three percent of the A-Shares are held by the Robert Bosch Industrietreuhand KG (IK), an entity comparable to a limited liability partnership. Ten trustee-shareholders control IK. Four are current or former Bosch executives and six are external business professionals familiar with the business. Bosch's family holds seven percent of the voting rights. The B-Shares are held 92 percent by the Robert Bosch Foundation, a charitable foundation, and eight percent by Bosch's family. In 2017 the Bosch Group had over 400,000 employees in 60 countries with € 78 billion in revenue and around € 4 billion in profit. The company invests heavily in research and development, including green technologies, and the foundation has distributed more than 100 billion in money to support projects around the world in health care, international understanding, arts and culture, and research and teaching. THE PURPOSE FOUNDATION, *supra* note 1, at 46-49.

194. The Carl Zeiss Foundation, created in 1888, owns Carl Zeiss AG and Schott AG. The companies develop, produce and sell products in the fields of optics, precision engineering, electronics, and precision glass technology. The companies operate in 35 countries with over 40,000 people, and in 2016 they reported revenue of € 7 billion. A description of the Carl Zeiss Foundation explains:

The Zeiss single-foundation structure ensures that the two firms' profits are either reinvested or donated to science and mathematics education and research. It has enabled both firms to stay true to their original purposes and their mission of technological innovation, corporate responsibility, and the importance of fair treatment of their employees. The foundation is responsible for the economic security of both firms and their social responsibility to their employees, and works to advance the interests of precision industries, support research and instruction in the natural and mathematical sciences, and provide community facilities for the working people of Jena.

Id. at 40.

195. The Golden Share model uses three classes of stock: voting stock with no dividend rights, non-voting stock with dividend rights, and a single Golden Share with 1% of the voting rights "and the right to veto an attempted sale of the company or any changes to the structure that would undermine the separation of voting rights and dividend rights." *Id.* at 17. The voting shares (steward shares) cannot be sold or inherited and are passed on to "able and aligned successors" determined based on the company's rules. *Id.* at 18. The non-voting preferred shares, if issued, are held by founders, family members of founders, investors, or a charitable entity. *Id.* The Golden Share is held by a foundation that agrees to use the veto power to protect steward-ownership. *Id.* The Purpose Foundation holds the Golden Share for several companies.

196. As the name suggests, in a Single Foundation structure, a charitable foundation owns a majority of the shares of the business. In this model, the Foundation typically has two boards, a corporate board to exercise voting rights and a charitable board to make distribution decisions. This model is common in Denmark and the Netherlands. *Id.* at 20.

Foundation structure,¹⁹⁷ the Trust Partnership model,¹⁹⁸ and the Perpetual-Purpose Trust, which this article calls a Stewardship Trust.

The companies using steward-ownership in any of these forms¹⁹⁹ share two basic concepts: (1) the purposes of the company should drive decision-making, so that profits made by the business serve its purposes;²⁰⁰ and (2) control over management of the business should be held by people close to the business and not by external and distant shareholders or parent companies.²⁰¹ The purpose of a company can include an external mission, such as improving the availability and accessibility of organically grown produce. The purpose can also involve internal goals such as fair wages, good working conditions, the development of products that minimize harmful impacts to the environment, or the provision of services that improve the quality of life for the people buying the services. The specific purposes depend on the business, but the overall ideas behind steward-ownership are that the purposes guide business decisions and that profits are the means to attain the mission.²⁰² Profits are reinvested in the business or used to compensate exiting founders, repay investors, or benefit stakeholders.²⁰³

Steward-owned businesses have a long-term focus because they do not need to be responsive to the stock market's emphasis on quarterly returns.²⁰⁴ As a result, steward-owned businesses may be more likely to

197. The trust-foundation structure is the structure used by Bosch. For a description of the model see note 193 above.

198. The Trust-Partnership model is used by John Lewis Partnership in the United Kingdom. A trust owns the company on behalf of a group of partners, typically the employees. All partners (employees) participate in the operation of the business, perhaps through a representative group, and all partners share in the profits. Profits distributed are small, so the model prioritizes the business purposes over profits. THE PURPOSE FOUNDATION, *supra* note 1, at 23.

199. The Purpose Foundation presents case studies of the Carl Zeiss Foundation, the Robert Bosch Foundation, the John Lewis Partnership, Sharetribe, Ecosia, Ziel, Waschbar, OGC, and Elobau. *Id.* at 40-91.

200. Profits are important, but the goal is to balance the purpose and the financial health of the business.

201. The Purpose Foundation summarizes steward-ownership by identifying three key principles. First, "economic and voting rights are separated" so that decisions about what is best for the long-term success of the business are not influenced by short-term economic interests. Second, "stewardship is closely linked to the organization," meaning that the stewards must understand the business, including both its mission and its operations. Third, "profits are not extracted," and profits are primarily reinvested in the business, allowing for significant research and development. *Id.* at 108.

202. *Id.* at 9.

203. *Id.* at 108 (explaining that employees may benefit from job security or better pay and consumers and other partners will also benefit). The stewardship trust model is scalable and can be used for multiple operating companies, each owned by the stewardship trust. Each operating company would define its own stakeholders, and the stakeholders of each company would elect representatives to a single trust stewardship committee. See Reitman-White, *supra* note 160, at slide 15.

204. THE PURPOSE FOUNDATION, *supra* note 1, at 109 ("Without short-term pressure from financial markets and investors, steward-owned companies can take a long view on what is best for their business, their employees, and their stakeholders.")

survive economic downturns.²⁰⁵ Because steward-owned businesses do not distribute profits to owners, more money can be dedicated to research and development.²⁰⁶ The research can spur innovation and prepare a company to take advantage of future developments in its area of business.²⁰⁷ The long-term focus can help the company ride out economic downturns and strengthen the company for success in the future.

In 2018 representatives from RSF Social Finance, Organically Grown Company, and Purpose Foundation started a U.S. nonprofit initiative. The goal is to encourage and support steward ownership in the United States, building on the ideas of equity structures developed in Europe to maximize mission and self-governance. The stewardship trust is a structure that aligns with these efforts. The structure provided in the Oregon statute should help companies considering steward-ownership adapt to a new ownership model.

Like the “hippies, environmental activists and dreamers” who founded OGC, a new generation of business owners increasingly expresses interest in goals beyond financial rewards.²⁰⁸ Founders of mission-driven business ready to retire and new business owners looking for a better business model may find steward-ownership attractive. For these business owners a stewardship trust may be the right tool to protect the financial stability of their business while also preserving its overall purposes and mission. The Oregon stewardship trust statute provides a good framework for a company seeking to adopt a purpose trust for its business.

205. *Id.* at 13 (citing a study that found that “[s]teward-owned companies are six times more likely to survive over 40 years than conventional companies.” C. Børsting, J. Kuhn, T. Poulsen, and S. Thomsen (2017)).

206. *Id.* (citing S. Thomsen (2017)).

207. A steward-owned company with a long-term focus can invest without the pressure of quarterly reports. “For example, Bosch invested heavily in green technologies decades before they became a trend. Although these investments significantly lowered the company’s profitability in the short-term, they have given it a market advantage in the long-term.” *Id.* at 49.

208. *See id.* at 58-72 (describing start-up companies Sharetribe, Ecosia, and Ziel).