

Family Trusts

— *A Guide for* —
Beneficiaries, Trustees,
Trust Protectors, and Trust Creators



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CONTENTS

[Cover](#)

[Additional Praise for Family Trusts](#)

[Title Page](#)

[Copyright](#)

[Dedication](#)

[Acknowledgments](#)

[Foreword](#)

[Preface](#)

[What Can This Guide Do for You?](#)

[From Positive Stories to Action Steps](#)

[Note](#)

[Introduction](#)

[Principles](#)

[Notes](#)

[Part One: Introducing the Trustscape](#)

[Chapter 1: Navigation Works Better When You Have a Destination in Mind](#)

[Beyond the Thought Experiment](#)

[Questions for Reflection](#)

[Note](#)

[Chapter 2: The Trustscape](#)

[Introducing Your Trustscape](#)

[A Dynamic Tableau](#)

[A Closing Exercise](#)

[Note](#)

[Chapter 3: Some Key Terms](#)

Chapter 4: Know Your Narratives

Depends Where You're Sitting

A Thirst for Education

Note

Part Two: The Players

Chapter 5: The Trust

A Short Description of a Long History

A Closing Exercise

Notes

Chapter 6: The Trustee

The Trustee

Choices

Chapter 7: Beneficiaries and Trust Creators

Beneficiaries

Trust Creators

Notes

Chapter 8: The Trust Protector and the Trust Adviser

Trust Advisers

Trust Protectors

Choices

Part Three: Building Great Relationships

Chapter 9: Considerations Prior to Accepting Appointment as Trustee

So—You've Been Asked to Serve as Trustee

Now for Some Homework

If You Are New to the Trustscape

Understanding the Technical Side

Almost There

A Final Step

Note

Chapter 10: Creating Preambles

Preambles and Purpose

“But My Trust Was Drafted 20 Years Ago!”

Themes and Schemes

Preambles Created by Trustees and Beneficiaries

Revisit the Preamble

As You Begin to Create Your Preamble

Note

Chapter 11: Action Steps Prior to the First Trustee-Beneficiary Meeting

If You Are a Trustee

If You Are a Beneficiary

Note

Chapter 12: Positive Events, Supportive Responses

Matching Mind-set to Task

Supportive Responses to Positive Events3

Play to Your Strengths

Notes

Chapter 13: Trustee-Beneficiary Meetings

Premeeting Checklists

If This Is the First Meeting

A Sampling of Agenda Items

An “Appreciative” Exercise

Note

Chapter 14: Requests for Distribution

“This Worked because I Knew Susan...”

[The Request Process](#)
[Analysis of a Request](#)
[About Enhancement](#)
[Note](#)

[Chapter 15: Working with Addictions](#)

[Chapter 16: Trusts and Marriage](#)

[Prenuptials](#)

[Within Marriage](#)

[Second Marriages and Beyond](#)

[Notes](#)

[Chapter 17: Transitions](#)

[Solomon's Ring](#)

[This Too Shall Pass](#)

[Changing the Trust](#)

[Changing the Players](#)

[Coming to an End](#)

[Note](#)

[Part Four: A Comprehensive Model for a Humane
Trustscape](#)

[Chapter 18: A Promise and a Challenge for Trust
Creators](#)

[A Trust Creator's Challenge](#)

[First, an Exercise for Trust Creators](#)

[Note](#)

[Chapter 19: The Highest Duty of the Trustee and the
Corresponding Responsibility of the Beneficiary](#)

[I Wrote These Great Docs, but My Clients Won't
Sign...](#)

The Highest Duty of the Trustee and the Corresponding Responsibility of the Beneficiary

Support for the Trustee

Support for the Beneficiary

Chapter 20: The Distribution Committee and the Office of the Beneficiary

Distribution Committee

The Office of the Beneficiary

Conclusion

Chapter 21: The Trustee and the Trust Protector Revisited

Which Cap's on Top?

A Different Approach

Reconsidering the Institutional Trustee

Note

Appendices

Appendix 1: Sample Legacy Letter

Appendix 2: Sample Language Regarding Addiction

Appendix 3: The Distribution Committee

The Core Concept

Committee Members

Drafting Points

Appendix 4: Private Trust Companies

Definitions

PTCs versus Individual Trustees

Governance

Best Practices

Appendix 5: Family Trust Review

Purpose

[Content](#)

[Process](#)

[Why Commission a Family Trust Review?](#)

[Opportunities for Commissioning a Family Trust Review](#)

[Note](#)

[Appendix 6: Reflections on the Often Unexpected Consequences of the Creation of a Perpetual Trust](#)

[Notes](#)

[About the Authors](#)

[Index](#)

[End User License Agreement](#)

List of Illustrations

[Figure 7.1](#)

[Figure 19.1](#)

[Figure 19.2](#)

[Figure 19.3](#)

[Figure 20.1](#)

[Figure 20.2](#)

[Figure 20.3](#)

[Figure 20.4](#)

[Figure 21.1](#)

[Figure 21.2](#)

[Figure 21.3](#)

ADDITIONAL PRAISE FOR *FAMILY TRUSTS*

“In Chap. 1 of *Loring and Rounds: A Trustee's Handbook*, the authors remind its readers that the Anglo-American trust is an ancient principles-based regime that will survive into the 21st century only so long as it is administered by persons of principle. As a practical matter, what does that mean? *Family Trusts* does an admirable job of answering that question, and in prose that will be readily understandable not only to the trust professional but also to the family member new to the ‘trustscape.’”

—Charles E. Rounds, Jr., Professor of Law, Suffolk University Law School

“At long last—a clear and concise guidebook for those who don't understand the complexities of family trusts! The three authors offer practical strategies and sample documents for many trust challenges—why to set up a trust, how to select a good trustee, and how to be a good trustee or beneficiary. Start with the chapter that applies to your case, and you will be compelled to read the other related chapters. And grantors need to read it all, before they sign or revise their estate plans.”

—Sara Hamilton, Founder and CEO, Family Office Exchange

“A trust is a powerful tool that too often turns beneficiaries into trust-fund babies, creates resentments and rifts among family members, and ultimately deforms many a family's legacy. *Family Trusts* helps wealthy families and their advisors avoid those outcomes by building what they call a ‘comprehensive model for a humane trustscape.’ No grantor should plan their estate, no beneficiary should accept their

next check, and no advisor should meet with their next client without first reading this book.”

—Angelo Robles, Founder & Chairman, Family Office Association

“The authors tell us that 80% of beneficiaries view trusts as a burden, yet over 90% of private wealth is tied-up in some form of trust by the time of the third generation. Hence these trusts become ‘arranged marriages’ between the beneficiaries and the trustees. This insightful guide walks one through how to best prepare for that ‘meteor moment’ by focusing on the creating the best culture for these new arrangements to not only survive, but flourish.”

—Thomas R. Livergood, Founder & CEO, The Family Wealth Alliance

“Jay has outdone himself once again! *Family Trusts* combines his and his co-authors' many years of trust wisdom with a practical and theoretical guide to both creating and administering trusts with an important emphasis on family values. Hartley, Jay, and Keith's eminent qualifications to author such a book are powerfully displayed throughout. The book is a must read for all trust professionals!”

—Al King III, Co-CEO, South Dakota Trust Company LLC

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Family Trusts

A Guide for Beneficiaries, Trustees, Trust Protectors, and Trust Creators

Hartley Goldstone

James E. Hughes Jr.

Keith Whitaker

WILEY

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DEDICATION

To Loyce, Ben, and Jon

— Hartley Goldstone

*To Patricia M. Angus, Richard Bakal, and Joanie Bronfman,
my fellow journeyers for nearly 30 years on the path to
change beneficiaries' views of their trusts from burdens to
blessings, and to Jacqueline Merrill, who put her arm
through mine.*

— James E. Hughes Jr., Esq.

*To my mother, who trusted me, and to my father, who
taught me to be trustworthy.*

— Keith Whitaker

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Our writing has also benefited from our reading of many fine works related to trusts, family wealth, and positive psychology. Those that we quote from or reference directly in this book are noted at the end of each chapter. For readers who would like to delve deeper into these topics, rather than providing a static bibliography here in *Family*

Trusts, we have created a regularly updated bibliography online. To access this bibliography, please visit www.wisecounselresearch.org.

FOREWORD

Jay Hughes

In the 1980s Joanie Bronfman, Richard Bakal, and I began a journey that continues to this day. We sought to try to make the relationships among the creator of a trust, its trustee, and its beneficiary comprehensible to all and humane. We set out to determine and define the rules and responsibilities of these three functions, which together shape each trust's culture and structure—the combination of which my co-author Hartley Goldstone later defined as the “trustscape.” The early results of our efforts appeared in 1997 in my book *Family Wealth: Keeping It in the Family* (Netwrx). Those results have, over the years, been improved upon by many, and they are taken to a much deeper level in this book.

In the late 1980s Peter White, Joanie Bronfman, Anne D'Andrea, and I convened what I believe was the first gathering exclusively of trust beneficiaries. We had found to our surprise in our professional practices that many beneficiaries felt their trusts were burdens, not blessings. We wondered why a trust, which seemed on its face to be such a benefit, seemed so often to turn out to be the opposite. When we decided to host this gathering, we invited 50 or more people expecting that 10 might accept. To our amazement all accepted. We thought, “What have we started?” On the day of the gathering all 50 or more invitees showed up. Early in the meeting we took a poll asking, “Do you feel that the trust or trusts of which you are a beneficiary are more a burden or a blessing?” Eighty percent of the group raised their hands for “burden,” 10 percent for “blessing,” and the remainder could not decide between the two.

Perhaps many of you reading this book who are beneficiaries or trustees would not be surprised that in every poll of beneficiaries I have taken since—and I have taken many—the same percentages have consistently appeared: 80 percent or so feel their trusts are a burden, 10 percent a blessing, and the remainder are unsure. These results have given me a purpose ever since to see if my colleagues and I could change these percentages. This book is the result.

These percentages are a problem not only for beneficiaries. Changing these percentages is also critical to families' long-term flourishing. Among professionals it is well-known that by the third generation of a family around 90 percent of its financial wealth will likely be held in trust. Trusts represent, for almost all dynastic families, an overwhelmingly high proportion of ownership of their assets. Necessarily then these families' trust cultures and structures, their "trustscapes," and their beneficiary/trustee relations often determine whether the entropy of the "shirt sleeves to shirt sleeves" proverb overtakes them. Those of us in the field refer to this reality in the families we serve as "the trust wave."

So, 80 percent of trust beneficiaries declare that their trusts are burdens. And 90 percent of a dynastic family's financial wealth is in or will be in trust by the third generation. The combination of these facts underscores how important it will be to a families' flourishing that its trusts be blessings. It also underscores how important it is for us to learn from the small number of beneficiaries who feel that their trust is a blessing. That is what we have tried to do in this book.

Before proceeding, I would like to observe one other important demographic trend. The use of trusts continues to increase, not just for transfer tax planning but also for asset protection, reasons of probate, and, above all, control. This

is true even in families without the wealth typically necessitating the use of trusts for transfer tax purposes (currently at well over \$10 million). Within families with very significant or intergenerational wealth, beneficiaries may find themselves faced with trust distributions in their early 20s or younger. In many other families, as people live longer and longer lives, children or grandchildren may not begin receiving distributions until their middle- or later-middle-age, when their parents or grandparents pass away. However, this delay of the maturity of beneficial interests does not mean that the trusts in question do not exert a powerful force on these future beneficiaries' lives, especially if the trusts contain significant wealth. Nor is it impossible for trusts to enhance (or detract from) the lives of people in their 40s, 50s, or 60s. None of us is born an excellent beneficiary. To achieve this condition requires education and work, no matter how old you are. Indeed, insofar as it is generally harder to adapt to changes in later life, the delay of the maturity of beneficial interests may pose a growing threat to the successful use of trusts. It is a threat that we hope the practices described herein also help trustees and beneficiaries meet and overcome.

My co-authors and I are each committed to the question of human flourishing, especially in families of affinity seeking to practice seven generation thinking, that is, thinking that considers carefully the consequences of present-day actions on the people who will live seven generations later. These families preserve and grow their four qualitative capitals—spiritual, human, intellectual, and social—supported by their single quantitative capital, the financial. Such families often share a common core vision of what their members can be individually. These families' members decide, in their systems of joint decision making—their governance—to give up freedom to help enhance all other family members' journeys of happiness toward each member's own greater

freedom. Such families tend to practice hastening slowly as they know they have to make just a few more seriously good decisions than bad over the next 150 years to succeed. They invest for the long term, with the intention that a later generation will harvest the hard won fruits of their labors. In contrast, we always worry when we see a family who thinks that it possesses only financial capital. Our experience, as well as history, advises that this belief is quite unlikely to lead to flourishing.

What have we learned about trusts and their functioning or failure from the families we advise? Why are so few trusts seen by their beneficiaries as blessings?

First, we have come to understand that our focus must start with the beneficiary, rather than with the trust creator or the trustee. Nearly all the writing in our field begins with planning for the trust creator's concerns over taxes, creditors, and control and then turns to the trustee's concerns over administration and investments. This focus on the trust creator easily follows from the fact that most professionals have the trust creator—and not the beneficiaries—as their paying client. It is the rarest of books and articles that treat the beneficiary side of the relationship and the distributive function. When they do often it is to disparage the beneficiary by discussing dependence, entitlement, bad marriages, addictions, or other failed developmental issues apparently caused by being a beneficiary. Clearly, this is a very disappointing point of view if the question of beneficiaries' flourishing is a critical goal.

In contrast, we came to see that beginning with the beneficiary and his or her responsibilities and goals might open new pathways to his or her flourishing. We first developed this line of thinking in a book that Keith Whitaker, Susan Massenzio, and I wrote called *The Cycle of the Gift*

(Bloomberg, 2013). In that book we described a *gift* or a *transfer* as a meteor entering the atmosphere of the recipient to which he or she had to adapt. We asked, “What did the donor or transferor inspirit the meteor with?” Was it inspirited with love and a desire for the enhancement of the life of the recipient? Worry about the recipient's possible creditors? The transferor's tax concerns? The long-term control of the founder's dream? Was the meteor an Ozymandian monument requiring that the recipient genuflect for his or her beneficence? One can see immediately how much the grantor's intention for the beneficiary matters.

Next we looked at the question of the beneficiary's journey to individuation, which Keith and Susan and I discussed in our book *The Voice of the Rising Generation* (Bloomberg, 2014). And we reread Hartley Goldstone and Kathy Wiseman's book *TrustWorthy* (Trustscape LLC, 2012) with its wonderful stories of positive beneficiary/trustee relationships. We realized that a trust that has a deeply developed distributive function (and the distributive function is truly the key)—grounded in aiding the beneficiary's individuation, resilience, adaptability to meet life's ups and downs and capacity to bring his or her dreams to life—is the antidote against dependence, entitlement, cynicism, and addiction—addiction to alcohol or drugs as well as addiction to trust distributions.

We saw that one must begin with the recipient and work back through the system toward developing a highly functioning distributive methodology. From there one must work back to the quality of the trust creator's gift of love, seeking to enhance the life of the beneficiary and thus positively inspiriting that function. If one does so, then the likelihood of the beneficiary's declaring the trust a blessing is fundamentally improved. In turn, a beneficiary who counts his or her trust a blessing will likely want to assure that all

family members with trusts are in similar positive situations now and for future generations. Such a person will likely add to family governance and flourishing as he or she seeks to give back to the family positive stories and share positive practices.

From this vantage point we were able to move toward the question of the nature of a trustee who would be committed to making the trust relationship with the beneficiary one that was mentoring, purposeful (thank you, John A. Warnick), generative, and fulfilling the high calling of regency (thank you, Patricia M. Angus). We recognized that nearly all beneficiary/trustee relationships are arranged marriages, even those in which the beneficiary has a voice in selecting the trustee. This is because the trustee is a part of a legal structure that requires him or her to obey the duty of impartiality, the duty of prudence, and to carry out multiple functions, very few of which are directly related to the well-being of the beneficiary, rather than to the protection of the trust and the trust creator's wishes. Essentially the trustee is married to the trust.

With this awareness it became clear to us that all too often the trustee is more concerned with the trust as a *structure* than with the *culture* that the trust creates. A culture that will succeed for the beneficiary begins with the trust creator's question: am I intending to make a gift of love and a gift that will enhance the beneficiaries' lives? Or am I seeking to make a transfer that solves my tax concerns, that keeps the beneficiaries' creditors from getting my money, and perhaps even creates a memorial to my dream, now embodied in an enterprise that I consider my true child and over which I seek through this trust to perpetuate my control? All these purposes are valid; but which ones lead and which ones follow will determine whether the trust is a blessing or a burden.

Often, a trustee cannot affirm for the beneficiary a set of positive goals and grow a positive trust culture. Instead, the beneficiary must live in a structure of relationships conditioned by a founder's goals that essentially disparage or ignore the beneficiary. For the beneficiary this is a negative culture, since the beneficiary's concerns will disappear in the endless details of the management of the structure. My thanks to Matthew Wesley for this insight, contained in his brilliant article, "Culture Eats Structure for Breakfast" (Wesley Group, 2015).

From all these sources and reflections we learned that a good way to diagnose whether the trust was growing a positive, dynamic culture or caught in the negative entropy of a static, suffocating structure was to ask this question: is the trust (guided by the trustee) making dynamic distributions that promote the beneficiary's growth and individuation, or is it making sterile, annuity-type payments that breed beneficiary dependence? The distributive function should really be the focus of mindful trustees and trust creators. Yet in most trusts it is stillborn; it is assumed that it will eventually become an annuity.

Looking at the generic trustscape today from the vantage point of the beneficiary we realized that most trusts aren't set up to grow excellent beneficiaries. Their cultures do everything but.

In contrast, we require new cultures and structures and systems that support them, if trusts are to be blessings and help long-term family flourishing. We need trust cultures that seek to grow excellent beneficiaries and structures and systems that support that happening. We need excellent beneficiaries who can in turn assure that their relationships with their trustees are excellent. We need trustees who grow the culture of trusts as gifts from trust creators rather than transfers. We need trust creators who are seriously

counseled about what a trust can do and its consequences for another human being for whom it will always be a meteor. If the fundamental responsibility of each of us, when we touch another, is to do no harm—and it is—then how truly sad it is that 80 percent of trust beneficiaries count their trusts as burdens rather than blessings, especially when 90 percent of a family's financial capital will likely end up in trust. Clearly, the risk of harm is great.

A beneficiary who takes seriously his or her responsibilities will naturally function more effectively within the relationships the trust creates, as he or she comprehends and masters his or her role in the relationship rather than feeling burdened by it. Such beneficiaries are most likely to declare their trusts blessings. Those beneficiaries are also more likely to feel gratitude toward their trust creators and to say, "Not only was I not harmed, I was loved, and you blessed me." Those beneficiaries are more likely to say to their trustees, "Not only was I not harmed, my life was deeply enhanced by my relationship with you."

My colleagues Peter White, Joanie Bronfman, Richard Bakal, Anne D'Andrea, Susan Massenzio, Patricia M. Angus, John A. Warnick, Timothy Belber, Peter Karoff, Michael J. A. Smith, Sara Hamilton, Gail Cohen, Dennis Jaffe, Ellen Perry, Don Kozusko, Davidson Gordon, John Duncan, Christopher Armstrong, Joseph A. Field, Kathy Wiseman, Christian Stewart, Barbara Hauser, Charlotte Beyer, Gregory Curtis, Paul Cameron, Rick Fogg, Ken Polk, Ulrich Burkhard, George Harris, Stephen Hoch, Tim Brown, Rob Kaufold, Miles Padgett, Peter Evans, Robert Pritchard, Scott Peppet, Rob Kaufold, Juan Meyer, and many other pioneers in this work are beginning to unwrap this fraught question of the positive trustscape and the duties and responsibilities it engenders. For too long the "trust wave" has been leading families into entropy and the failed lives of beneficiaries that follow.

My co-authors, Keith and Hartley, and I are committed to bringing light into this area of unnecessary suffering so that no new beneficiary will ever have to wonder how he or she would answer the poll, and so that current beneficiaries may change their votes—all so the family systems of which they are members will flourish as they do.

As I have in my previous books I now ask each of you to pick up your staff, put on your round hats, drape your scallop shells around your necks and walk with Keith and Hartley and me through the chapters to come of this guide. Then, if it offers a way forward, walk with me on the journey to growing excellent beneficiaries so all trustscapes may flourish.

Bon Camino!

Namaste

James (Jay) E. Hughes Jr.

PREFACE

Hartley Goldstone

Somewhere this week—and likely on Twitter—some version of this headline will appear: *“Fallout from Settlement of Grandfather’s Estate Splinters Family.”*

In my case, it's also a haunting memory, affixed to a lively image: My grandfather Nathan is looking down from the hereafter. Tears are in his eyes. He slowly shakes his weary head in disbelief: “I never intended for this to happen.”

The authors' hope, embodied in this book, is that your family will avoid the heartbreak of an estate plan gone very, very wrong.

What Can This Guide Do for You?

Until *Family Trusts*, no single book has offered families and their advisers field-tested ways to communicate about trusts; clarify intentions; develop excellent beneficiaries; and find, prepare, and transition excellent trustees.

This guide is for the family member who is serving or thinking of serving as trustee. Likewise, it can prove useful if you're an employee of a commercial trust company, private trust company, or family office, or a partner in a professional firm who is responsible for speaking with beneficiaries about qualitative rather than solely quantitative issues.

More broadly, this guide aims to help anyone else involved with family trusts, including (most importantly) beneficiaries as well as trust creators, trust protectors, trust committee members, and legal counsel.

We assume that you already have access to some degree of technical information along with excellent technical advisers. We won't be spending much time on taxes, the latest regulations, jurisdictional issues, and the whole host of other specialized topics that change from year to year.

What remains is the focus of the guide: the enduring work of boosting the quality of the relationships among those connected by trusts.

From Positive Stories to Action Steps

Years ago, I left the practice of law to accept a senior trust officer position. It was great to be thrust into the midst of families, especially trust creators and beneficiaries, wrestling with a kaleidoscope of dilemmas and opportunities. And what a change: suddenly I was administering trusts similar to those that I had formerly taken part in creating.

Imagine my surprise to see the reality of "bulletproof" plans being undone by the day-to-day actuality of family members interacting with me and with one another.

It was a daily effort to square the language of trust instruments with the life situation of beneficiaries. Legal skills obviously came in handy. But I was also glad for the time spent—this was before law school—on the staff of a social services agency, where I had helped people sort through challenges, some of which were full-blown crises.

Most of the correspondence I received was from beneficiaries requesting funds. The lively conversations that ensued often provided an opening for us to deepen our relationship. These distribution-related conversations were where opportunities for mentoring and thoughtful give-and-take about broader issues arose. I might ask something along the lines of: "What do you hope to accomplish by your

request?" and then "Why is that important to you?" If it looked like I'd have to decline the request, we'd examine the goal and brainstorm alternate ways of achieving a good result without assistance from the trust.

Over time, my enthusiasm for trust administration faded. This change was not sudden, and no one event, family drama or internal policy shift caused me to lose hope; it was more a case of constant slippage. During a decade of administering trusts, and a second decade advising clients of a multifamily office, I saw my profession transform.

Local trust companies were swallowed up by ever-larger financial institutions. Centralized authority, standardized procedures, and short-term risk avoidance—important considerations, of course—chipped away at the traditional personal approach.

This way of administering trusts felt less and less effective and less and less satisfying. I left the institutional trust world to establish a consulting practice in 2009. If I ever doubted it, it was now emphatically clear that, because they are basic to family flourishing, successful trust relationships can't be handled like conventional "assets." One has to zero in on the qualitative work with wholehearted purpose. Through writing, keynotes, workshops, and taking on related projects, I began translating what I had learned (and continue to learn) about flourishing trust relationships.

Over the years, I had played a part in many life-affirming stories where trusts made a lasting positive difference. These stories—counterpoints to all the nightmarish tales—stuck in my mind. In 2010, I launched the Beneficiary and Trustee Positive Story Project. At Jay's excellent suggestion, Kathy Wiseman joined the endeavor. We went to the source—beneficiaries, trustees, and their advisers—asking them for positive stories about moments in time when

relationships between trustees and beneficiaries worked well.

Relationships have their ups and downs. But what interested us were stories about the up times, even when they began with a down development—stories that showed strengths and evolution, perhaps a story about overcoming a challenge.

The project led to the October 2012 publication of a collection of the positive stories in *TrustWorthy—New Angles on Trusts from Beneficiaries and Trustees*.¹

People loved the stories, because stories allow readers to get a feel for “how other families are handling it.” Still, it’s one thing to paint a picture of positive outcomes; it’s quite another to help people achieve that type of outcome for themselves.

Our aim in *Family Trusts* is to help readers amplify their useful stories and reframe unhelpful ones. The method is to bring ideas to life through proven exercises for readers to try, questions carefully designed to stimulate new thinking, and illustrative stories that can help readers adapt this material to their own lives and practices. Together we will transform that relationship.

Everyone working with trusts recognizes the core challenge: the fear shared by parents and grandparents, *How can we help our children and grandchildren flourish rather than create “trust fund babies”?* This fear leads to delaying communication, secrets, and missed opportunities, and therefore fulfills itself: poorly prepared beneficiaries perform poorly.

In the face of this fear, a good trustee, an enlightened adviser, or a determined beneficiary can make all the difference.

We've seen lives transformed when both trustee and beneficiary stop viewing the trust that binds them together as a burden—and begin to view that very same trust as a resource to support the beneficiary's life purpose.

I'm a storyteller. So the best way I know to make this point is not to describe it, but to "show it" with a fable, with which I'll close this preface:

A Fable of Family Trusts

Part One

Grandma and Grandpa have accumulated financial wealth. So they make an appointment with a lawyer to create an estate plan.

In the days leading up to the appointment, nights are sleepless for Grandma and Grandpa. They are worried that their wealth will create “trust fund babies.”

The day of the appointment arrives.

When Grandma and Grandpa enter the lawyer's office, a transformation happens.

Grandma and Grandpa are no longer “Grandma and Grandpa.” They have been transformed into “clients.”

The clients leave the lawyer's office with a bulletproof estate plan that protects against taxes, creditors, spendthrifts, and bad marriages.

On the way home, they reemerge as Grandma and Grandpa. They are still worried about creating trust fund babies.