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TRUST SOLUTIONS

Unitrusts: Perpetual Solutions for Perpetual Care Cemeteries

Maintaining perpetual care property as an attractive and safe environment for generations to come, even after every burial space is occupied, is a financial burden every perpetual care cemetery carries. The question arises: How do perpetual care cemetery owners continue to fund the ongoing maintenance and upkeep of properties like this into the foreseeable and unforeseeable future?

There is a solution — Unitrusts.

Overview

For many years, the answer to that question has been the endowment care trust. In many states, regulations stipulate that distributions from the trust to the cemetery be limited to the net income generated by the trust. This means cemeteries may receive only the interest and dividends yielded by the trust which may be reduced further in some states by expenses such as administration and trustee fees, taxes and other expenses.

Unfortunately, the recent low-interest environment means perpetual care cemeteries are simply not receiving much money from their endowment care trusts. Certainly, they are receiving much less than in previous years. This is a serious impediment to the ability of cemeterians to properly maintain their properties. To complicate the matter, the rising popularity of cremation means that cemeteries are not experiencing the kind of growth that could improve their financial prospects.

While the endowment care trust model has been the norm for years, today financial investing is much more sophisticated and has outpaced the state laws written two, three or more generations ago. Perpetual care cemeteries should demand an update to these laws to take advantage of these new investment models for the benefit of the cemetery and its interment owners.

Unitrusts: A Timely Idea

Most people have probably heard of a charitable remainder trust. While primarily used in estate planning, when applied to perpetual care cemeteries, it is called a unitrust, or total return trust. This type of instrument does not limit distributions to the income generated by the trust. Instead, a percentage of the total market value of the trust, valued annually, is paid each year to the cemetery. This is big news for the industry.

Financial Impact

To get an idea of the financial impact a unitrust can have on a perpetual care cemetery, it helps to see an example and do the math.

Traditional endowment care trusts rely on the income from investments, and income fluctuates as interest rates rise and fall. Ten-year U.S. Treasury notes are currently yielding about 1.87 percent interest, which will likely result in just a 1.1 percent distribution to the cemetery after fees, expenses and taxes. To make matters worse, distributions are inconsistent and are dependent on when the trust funds are scheduled to make those distributions to the cemetery.

In contrast, a unitrust allows the cemetery to take a distribution of a percentage of the total market value of the trust fund, typically at the fiscal accounting year end of the trust. Growth of the fund is derived not only from interest and dividends, but also from the capital gains of stocks that are held in the trust fund's portfolio.

Distributions are generally three to five percent of the trust fund's total market value. Prudent distribution is based on the performance of the trust investments, but is generally in the three to four percent range which provides a reasonable distribution to the cemetery while also helping to assure that the principal of the trust fund will be preserved.

To better understand the financial impact of the unitrust (total return) distribution method compared to an income only approach, let's look at current figures for a FSI care and maintenance trust.

The chart below provides a breakdown of the trust's portfolio market value, and distribution payouts using both the income only distribution method and the unitrust (total return) approach. The trust under the net income approach yields just over a two percent net amount available for distribution while the unitrust method provides a three percent payout. This particular trust will receive over $100,000 more annually under the unitrust method, a significant increase that can support financial sustainability and proper maintenance of the perpetual care grounds.

Income Only				Unitrust (Total Return)	
	Portfolio Market Value	Income	Yield		Portfolio Market Value
				Dec 31, 2013	$12,454,717
Dec 31, 2014	$13,271,938			Dec 31, 2014	$13,271,938
Annual Income		$440,866	3.32%	Dec 31, 2015	$13,371,734
Trust Expenses (Trustee, Servicing Agent, Investment, Taxes & Legal fees)		($155,517)	-1.17%	Trust Expenses are already included in Portfolio Market Value	- 0 -
Net Amount Available for Distrbution		$285,349	2.15%	Must use 3 Prior Years Market Value Average	$13,032,796
				3% Unitrust Payout	$390,984
37% Increase in revenue for care and maintenance					

As you can see in the chart above, the Unitrust (total return) method provides a 37 percent increase in annual revenue for care and maintenance expenses. By electing a three percent payout this cemetery will receive an additional $100,000 more in annual revenue compared to the current income only approach. Perpetual care cemeteries have the opportunity to withdraw a fixed percentage of the fair market value, between three and five percent.

How It Works

Under a unitrust, cemeteries are able to withdraw a fixed-percentage (three to five percent) of the fair market value of their perpetual care trust for cemetery maintenance. This concept changes the investment goals of the trust – from production of income only, to that with a much broader focus of increasing the total value of the trust. The end result: typically, a higher total annual return. This means a greater annual distribution for the care and maintenance of the cemetery, while still growing the total trust at a similar, if not greater rate than before.

This strategy meets the needs of perpetual care cemeteries in today's economic climate while also taking advantage of more advanced financial strategies. It should come as no surprise that nearly every major endowment in the United States incorporates this concept for investment and distribution of funds.

Evolution of the Unitrust

In recent years, industry professionals and regulators have been working together to allow this financial technique to be used for cemetery perpetual care trusts. Cemetery owners, trustees, state legislatures and regulators understand the need to ensure the long-term sustainability of perpetual care cemeteries.

Collaboration between all parties is required to find the proper and most efficient route to implement the unitrust concept within each individual state. Some states used legislation to implement the method while others used administrative rule changes.

Nearly two-thirds of all states have adopted the Uniform Trust Code, a national model designed to standardize trust regulations across states, which includes the unitrust election. Unfortunately, very few of those states have taken advantage of the unitrust election for cemeteries. However, recent progress gives reason to hope this will change.

The Uniform Trust Code, created by the Uniform Law Commissioners in 2000, is the first national codification of the law of trusts. It provides states with precise, comprehensive and easily accessible guidance on trust law questions.

State-by-State Progress

As mentioned above, nearly two-thirds of all states have adopted the Uniform Trust Code. In most of those states, unitrust provisions apply only to the practice of estate planning. Only four states to date have adopted the unitrust in regard to perpetual care cemeteries—Tennessee, Missouri, Iowa and Florida (see accompanying table).

Obviously, adoption of the unitrust for cemeteries is a slow and sometimes painstaking process. It requires a great deal of time and collaboration among industry professionals, regulators and legislators. For example, Cedar Memorial Park Cemetery in Cedar Rapids, Iowa began having discussions with state regulators in 2000. However due to changes in administration, they had to renew collaborations in 2006, 2008 and 2012. Because trusts in general and unitrusts in particular are complex issues, the educational process can be a long one.

It is also an arduous process for cemeteries themselves to adapt to the unitrust model. While owners and operators of cemeteries have a high degree of expertise in their fields, they often have an understandable lack of knowledge about trusts and trust investments. The complexity of unitrusts and their distribution method may deter these organizations from taking full advantage of the new method.

In addition, unitrust adoption may require additional reporting and documentation, as well as approvals by boards and/or courts. The process itself may well be a deterrent to adoption.

Transitioning Your Cemetery

Those interested in adopting a unitrust face slightly different scenarios in each state due to differences in state laws and regulations. Anyone seeking to make the transition should first be familiar with those laws and regulations while also consulting closely with industry regulators.

Laws vary widely from state to state. Florida law, for example, requires specific notification to the Florida Board of Funeral, Cemetery and Consumer Services to make the transition. Tennessee also has a form that is filed with the state's regulatory division.

Cemeteries seeking to make the transition should work toward completing the requirements necessary in their respective states. Information on requirements is available from each state's regulatory agency.

The requirement to adjust the trust's investments could have an effect on approval of the use of a unitrust method. As explained above, under the income distribution method, most trust funds are invested to maximize interest and dividends (income), with little focus on growing the trust itself. When a cemetery seeks to use a unitrust, its investment strategy will change.

For example, stocks have a strong history of outperforming bonds and other types of interest-bearing investments. Investing in stocks also means taking on volatility and higher risks. Because the time horizon for a perpetual care trust is extremely long—as the word perpetual implies—this volatility and risk is reduced. Yet it remains important for the trust to adopt a prudent asset allocation that will minimize losses while assuring care and maintenance withdrawals outpace the eroding effects of inflation while still growing the trust as a whole.

Getting the Help You Need Going Forward

It probably goes without saying that most cemeterians will need some help in transitioning to the unitrust model. While trustees should be familiar with most kinds of trusts, including unitrusts, some may not have a great deal of experience with them. They need to understand how the concept applies to cemeteries and how to comply with regulatory criteria.

In any event, in those states where the unitrust has been adopted, state regulatory bodies can provide information on the requirements to convert to a unitrust. Most trustees can help with the reallocation of investments that a unitrust will require. It is imperative that the cemetery and trustee communicate well and understand each other's needs.

In short, cemeterians should look to their trustees for financial guidance and counsel in this process. If they do not have a trustee that is familiar with the unitrust model, this may be the time to look to an outside source. The prospect of a more secure—and more lucrative—stream of care and maintenance income is certainly worth the trouble when you consider the long-term prospects of success into perpetuity.

Benefits to the Public

What's good for the perpetual care cemetery is also good for the public. That's because cemeteries that are not properly maintained become a liability for the general population. If cemeteries fall into disrepair, taxpayer funds may be required to keep them safe and prevent them from becoming an eyesore. States that adopt the unitrust for cemeteries are not just benefitting the cemetery; they may also benefit public coffers and safety.

> "The general assembly recognizes that the operation of a cemetery is a public purpose and further recognizes that the proper maintenance of a cemetery or burial grounds, whether private or public, is in the interest of the public health and safety serving a valid public purpose."
> (Tennessee 2010 Code, 46-7-101a)

The use of the unitrust distribution method serves both the cemetery and the public by providing the financial sustainability needed to maintain a safe and well-maintained final resting place. Adoption of this method will help cemeterians be better stewards of their business's finances while fulfilling the duties of the sacred trust and responsibility to their community.

State-by-State Comparison

State	Date Enacted	How It Was Enacted	Implementation Method	Additional Details
FLORIDA	2016	Legislative change	Cemeteries licensed under Florida rule must choose total return approach and must comply with reporting criteria as outlined on specific reports designed and approved by the Florida Funeral and Cemetery Consumer Advocacy board.	Florida House Bill 473: Funeral, Cemetery, and Consumer Services
IOWA	2010	Administrative Rule Change	Change Pursuant to Iowa Code section 523I.811(2), a trustee or, in the event of multiple trustees, a majority of the trustees, may, in the trustee's or trustees' sole discretion and without approval of the court, adopt a total return distribution method, subject to the terms and conditions of this rule. Cemeteries must file a notice of intent to the division within 90 days of implementation with the trust governing instrument and written election. Cemetery must comply with all regulatory reporting requirements as detailed by the division.	Iowa Code chapter 523I, the "Iowa cemetery Act"; rule falls under the Insurance division.
MISSOURI	2009	Statutory Language Change	A unitrust election made in accordance with the provisions of chapter 469 shall be made by the cemetery operator in the terms of the endowed care trust fund agreement itself, not by the trustee. Missouri provision states that you have to have realized gains to make withdrawals from capital appreciations.	Chapter 214: Cemeteries, Section 214.330.1
TENNESSEE	2010	Legislative change:	A 'disinterested' trustee or appointed person must determine the unitrust percentage and which assets are to be excluded in determining the unitrust amount. Written notice of proposed change must be sent to all qualified beneficiaries of the trust, with 30 days for objection.	Section 21 of Public Chapter No. 725 of the Tennessee Public Acts of 2010 authorizes a trustee of a trust to convert a trust to a total return unitrust.

About FSI

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