Addicted Beneficiaries, Overwhelmed Trustees

The Pitfalls of Absolute Discretion, Ascertainable Standards and Doing Nothing in the Face of Addiction

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Bill partners with clients facing addiction in family members to find effective treatment and stable recovery for their loved ones. His goal is to improve recovery rates for functional alcoholics and addicts, including beneficiaries. Inspired by highly successful programs for physicians and pilots, Bill developed similar approaches for complex family systems. He writes articles on topics relating to addiction and recovery for families, their advisors and trustees. He is a member of AFHE, FFI and CFF. Bill is a graduate of Yale College, University of Minnesota Law School and the Hazelden School of Addiction Studies.

Introduction and Summary

While many in the probate and trust field continue to rely on discretionary trust clauses as an effective means of assuring proper behavior on the part of beneficiaries, trustee discretion is no longer an effective tool in limiting access to trust income or principal by aggressive or dysfunctional contingent and discretionary beneficiaries. This article will:

- First, provide an overview and summary of my experiences and advice in managing addicted or underperforming beneficiaries.
- Second, discuss the vulnerabilities of discretionary, ascertainable, prohibition and special purpose trustee clauses.
- Third, address the question of trustee liability for distributions to addicted beneficiaries.
- Conclude with a brief overview of the recommended process to more effectively manage these beneficiaries presented in Appendix A, suggested model language to insert in trust, estate and other family governance documents.

Its companion article, *Model Language for Addressing Substance Use Disorders (Addictions) in Trust Documents*, reviews in detail the concept of therapeutic leverage to improve treatment outcomes embodied in the model language and includes a plain English explanation of the language, with operating definitions from the DSM-V.

1. Overview: Discretionary Trusts, Trustee's Discretion and Displeased Beneficiaries

Many trusts are created so that the trustee is not required to pay out the income or principal of the trust but is empowered by the trust document to use his or her discretion in making such decisions. The trustee in such a "discretionary trust" is given the responsibility to distribute income earned and often any principal (assets) of the trust in accordance with the provisions of the trust agreement.[1]

When the trust agreement provides for the trustee to exercise discretion in distributing income and/or principal to beneficiaries (as in the above example), problems can arise between the two parties. As Jay Hughes notes:

> (Trustee's discretion)… *is the issue that provides the greatest possibility for disagreement between the trustee and the beneficiaries. ...*
>
> *... Friction between the trustee and beneficiary often arises when the beneficiary makes a request for a discretionary distribution and the trustee determines that such an exercise of discretion is either not permitted by the terms of the trust or is not in the beneficiary's best interest. Necessarily the beneficiary will be upset when his or her request is turned down.*[2]

Indeed, the refusal by the trustee to make a discretionary distribution can lead to much more than "friction." It can be a source of extreme frustration and anger for the beneficiary.

Historically, however, the absolute discretion provision in a trust document has granted the trustee the right to withhold or distribute income (and principal) as deemed appropriate by the trustee. Such discretion has been an inviolate standard, upheld uniformly in probate court decisions, when litigated by beneficiaries.

- Now beneficiaries are turning to methods other than direct litigation to tap into trust funds.

These methods include group efforts, indirect attacks, and personal pressure, as we describe in detail in:

- Section A, *Storming the Discretionary Gates*
- Section B, *Vulnerabilities of Ascertainable Standards and Defined Purposes, Prohibitions and Special Purpose Trustees.*

Prior to a detailed discussion of these methods, I summarize the primary themes of the article, including recommended solutions.

2. Experience Advising and Counseling Families and Trustees

In my work with clients, I am often called in to advise regarding one or more family members who appear to have problems with drugs, alcohol, over-spending, eating disorders, gambling, Internet or other seemingly addictive behavior. In the course of assessing the problem and making recommendations for treatment and post-treatment follow-up, I also find there are others in the family who are underperforming or non-productive (economically, socially and personally).

These two groups, the dysfunctional and underperforming, are almost always sustained by some form of family money – direct payments, subsidized living, trust distributions or employment in a family business. This article reflects my experience regarding how both groups access discretionary trusts to support their lifestyles and my ideas about how to respond so that problems underlying their dysfunctions and underperformances can be addressed effectively by trustees.[3]

a) The Dysfunctional Beneficiary

Few trustees understand the thinking and emotional drivers of the addictive or dysfunctional beneficiary. These beneficiaries can be very clever at hiding or explaining away negative behavior, often in a cloud of rationalizations or distractions. Because trustees are not experts on addiction, they often wait until the evidence of dependence is overwhelming before taking action. By then it can be too late for the beneficiary to recover. The suggested provisions permit the trustee to initiate a process for evaluating questionable behavior exhibited by a beneficiary through the use of experts. In this way, trustees can take into account circumstantial evidence and assist the beneficiary before problems develop into permanent impairments, with the attendant harm to finances and relationships.

b) The Underperforming Beneficiary

Similarly, trustees are apt to accede to requests rather than keep encouraging the underemployed or non-employed beneficiary to get his or her act together and become a productive member of society. As Dennis Jaffe, Ph.D., and James A. Grubman, Ph.D., point out in their article, *Acquirers' and Inheritors' Dilemma: Discovering Life Purpose and Building Personal Identity in the Presence of Wealth*[4], growing up and living with money can be a disincentive to many beneficiaries to engage in the hard work of learning productive skills. In cases where apparent difficulties do not rise to the level of addiction or severe dysfunction, appointing a professional to assess, advise and coach the beneficiary is a much better option than simply providing support for a do-nothing lifestyle.

c) Beneficiary Challenges to Discretionary Trusts

Beneficiaries facing the seemingly unassailable power of discretionary clauses are countering by seeking out their own sources of power or influence. One common approach is to put the trustee on the defensive by engaging in debates about the merits of discretionary decisions. A second approach is to include the trust as part of an asserted claim involving non-trust family matters. Another is to find allies or advocates among family members or advisors who use their influence to persuade trustees to approve distributions. As explained below in more detail, current trust provisions are inadequate to these challenges. We advocate adopting new provisions that preserve the trustee's historic exercise of discretion and return the decision making power to the trustee (as intended by the grantee).

3. Use Professional Assessments and Recommendations

I view these recommendations in the context of two recent trends in the trust and disability fields:

- First, as embodied in the writings of James (Jay) Hughes Jr., that wealth preservation in families results from shared expectations regarding behavior, is a dynamic process and is dependent on the human and intellectual capital of its members.[5]
- Second, that adverse decisions regarding suspected addictive or non-functional behavior be grounded in the recommendations of qualified experts.[6]

In my view, these two trends now support a more active role of the trustee in addressing dysfunctional and underperforming beneficiaries. Simply saying "no" is not a solution in today's world. Rather, trustees must come up with creative solutions – not solely through their own efforts or devises– but by aligning with professionals with the skill sets to assess and make recommendations so as to identify and address the presenting problems underlying the requests for funds.

The beneficiary may reject these assessment and recommendations, but then the trustee can rely on the advice of a professional expert to support the denial of distributions. One benefit is that in the "court" of family opinion (or, if it comes to it, law), the burden of compliance is on the beneficiary to follow recommendations. A second benefit is that reliance on experts takes the focus off of money as the solution to the problem and puts the focus on the core issues leading to the request for funds. Furthermore, because the expert works for the family, the expert is also a source of ongoing advice and support for the family and advisors.

4. Distinguish Between Dysfunctional and Underperforming Beneficiaries

Keep in mind throughout this article the distinction between beneficiaries who seem to have serious dysfunctions or active addictions of some kind versus those that are underperforming. I help families and their advisors with the former group by performing assessments, making recommendations for treatment, locating good treatment centers and managing the treatment and recovery process. The two articles referenced below discuss how to improve recovery rates for the affluent, wealthy and prominent by following the highly successful models of recovery for physicians and pilots and finding treatment resources that honor and respect the clinical needs of this group:

Solutions for Dealing with Alcohol and Drug Addiction in Affluent Families: What Advisors, Account Mangers and Family Offices Need to Know[7]

and

Practical Advice on Achieving High Recovery Rates for Affluent/Prominent Alcoholics and Addicts: What Every Family and Family Advisor Needs to Know[8]

I mention these articles because trustees will say their previous efforts in encouraging beneficiaries to recover or become productive have failed and they don't know what to do or have given up hope for change and improvement. My proposal at the end of this paper is to set out a process to follow and to rely on professionals. This is based on positive experiences in helping clients find solutions for their dysfunctional and/or addicted family members.

For the underperforming or non-productive beneficiary, I suggest the trustee take the lead in changing the expectations around the receipt of disbursements. For a specific reference, Jay Hughes discusses the role of the trustee, the role of the beneficiary and the trustee as "mentor" to the beneficiary in chapters 10, 11 and 19 in his *Family Wealth* book. His summary of the roles and responsibilities of trustees and beneficiaries is included in the Appendix to this article. Some families are now requiring minimum qualifications, job descriptions and training in order to serve on boards or be employed in the family business. Why not use a similar approach for beneficiaries? The "job description" (the conditions for receiving distributions) could be developed by looking at the intent of the grantor in the trust and any related writings.

In concluding this summary, my goal in writing this article is to urge trustees, their advisors and family offices to be more proactive rather than reactive, in relating to beneficiaries – particularly those that are addictive, dysfunctional or underperforming.

A. Storming the Discretionary Gates

This section outlines four different scenarios where distributions occurred either contrary to long-standing policy or to the trustee's initial decision. I'll then discuss how such acquiescence led to future problems, rather than resolving the underlying causes of the initial claims for additional funds.

In theory, absolute discretion is available to trustees as a defense against requests for distributions by contingent beneficiaries. This remains the case if the matter is fully litigated. However, as a practical matter, such discretion is not effective against concerted pressure by next generation family members, particularly when represented by hostile and inventive attorneys. In most cases, families prefer to settle rather than risk the publicity and discovery (the thought of undergoing depositions is particularly horrifying) attendant to litigation. The expense of litigation is also a concern, as family entities bear the entire cost of litigation regardless of who wins at trial.

1. Contingent Beneficiaries Unite

In families where wealth was created some years ago, it is common for the second or third generations to be primary beneficiaries of a trust created by the founder, receiving

income distributions from the trust. The offspring of this generation usually will not receive the income (or principal) until a parent dies and are considered to be contingent beneficiaries of the trust.

For a specific example, let's look at the situation where a parent, now 70 years old, is the primary beneficiary, with children in their forties and grandchildren in high school or beginning college. This parent may have provided for minority or other trusts assets for the children, but as these children become adults and have their own offspring, they perceive themselves as unable to maintain their expected standard of living. This may be because they are underemployed, unemployed or have psychological or other problems that prevent them from earning meaningful incomes. They also may have chosen to follow the lifestyle of their parents, though do not have the means to do so. There can be other pressures as well, such as divorce, poor investments or diminished asset value due to inflation.

Rather than focus on their own inability to generate income, the children can perceive their parent(s), who is living an accustomed lifestyle, as spending money extravagantly – money that these children could use to maintain their own standard of living. Perhaps the parent is donating a significant portion of his or her annual income to favorite charities and the children begin to wonder why they, who carry the founder's genes, are not more worthy recipients. Or if the parent is divorced from the children's biological parent and in a series of subsequent relationships or marriages, resentments build over expenditures related to these new friends or spouses.

On the other hand, the parent may expect his or her children to wait their "turn" to receive the benefits of the trust until the parent passes on, just as the parent waited for the previous generation to die. However, with longer lifespans and the increasing demands of the upper-class lifestyle, the children decide that despite occasional additional gifts for emergencies or tuition, they need more money and they need it now – not when they are senior citizens. These young adult children may band together and put pressure on the parents, trustees or family advisors to distribute funds they are not currently entitled to in order to increase their annual income or for asset purchases.

In my experience, three different types of arguments are pursued:

a) Unanticipated Economic Changes in Circumstances

Although there are several variations, the argument in a nutshell is this: Estate and gifting plans established when the children were born failed to take into account the dramatic increase in the cost of living, particularly on the East and West Coasts. Now the children are unable to meet their living costs, and the trustees must divert funds from the parent to the children in order to rectify the disparity between the economic status of the parents and children. The children will point to what they regard as excessive or unneeded expenditures by their parent to support their argument for additional income or asset distributions.

b) Parenting Failures

Socrates said, "The unexamined life is not worth living," and that is particularly true for the third and fourth generations of wealthy families. Joanie Bronfman, in her outline of her dissertation, "The Experience of Inherited Wealth: A Social-Psychological Perspective," writes in the conclusion:

The concept of psychological injury explains patterns of behavior of the wealthy that previously have been misunderstood.[9]

These injuries, inflicted on children growing up in wealthy families, are well documented in the outline and are examples of the basis for claims by children that defective parenting has prevented them from reaching full employment potential, particularly in our competitive economic environment.

c) Unstable Parental Relationships

While this may fall under the heading of "parenting failures," it deserves a category of its own because the multiple marriages and relationships by a parent creates its own dynamic resulting from disruptive transfers to and from households and the (dis)appearance of adult figures (and their offspring) in the life of the children. This is particularly true if the children view their parent as continually placing his or her interests over those of children when pursuing these relationships.

As mentioned, the arguments discussed above will not be successful if ultimately litigated in court, however, it is the threat of litigation that brings the parents and trustees to the table. There may also be the not-so-subtle warning of cutting off or limiting access to the grandchildren (dropping the bomb) if the grandparents do not agree to or otherwise facilitate access to additional funds from the trust. The children may adopt a good cop–bad cop approach, with one saying to Mom or Dad,

"My brother is so angry he is thinking you shouldn't be seeing his children for the holidays, but I would never do that because I know you are so reasonable."

This kind of conversation only needs to take place once or twice to be effective, particularly for those grandparents who dote on their grandchildren.

2. Indirect Litigation or Collateral Claim

The second area where the trustee's discretion has been successfully overcome is when a family member asserts a claim against the trust as a defendant either directly or on a collateral or related matter in threatened or actual litigation. The family member making the claim may not even be a contingent or current trust beneficiary, and if so, may only have the right to limited distributions of income and the discretionary right to principal. However, under these circumstances, the trust is made a party to the litigation regardless of a colorable legal basis for doing so.

One scenario that illustrates this situation is where the claiming family member is in a family business, partnership or owns family property in common with other family members. He or she may make claims regarding the business or other common economic interests and bring in the trust and the trustees as defendants. It may be apparent that the claims against the trust and trustees are made because the trust is the "deep pocket" and thus a source of payment for the settlement. However, few families are willing to conduct discovery so as to develop the facts sufficiently to support a motion for summary judgment for the trust. Instead, the impetus is to settle the case, rather than spend time, energy and money defending the trust separately from other defendants.

Again, as in the first example, if the matter were tried in court, there would be no legal liability. However, the dynamic here is different from the first section. Instead of the

younger generation uniting against their parents, in this scenario there is usually a rogue, dysfunctional or dissenting family member (or small branch) that feels wronged or disaffected. The primary family group may want the claimant(s) to leave the family or to limit or contain the damage if the rogue element must remain part of the family economic structure.

While there is the same impetus to settle to avoid publicity about the family or the dysfunctional family member, the trust can be seen by the parties as a source of funds to buy out the individual or minority claimants. Distributions can be restructured to take into account (and attempt to limit) dysfunctional lifestyles. In this example, the trustees and senior family members may cooperate to facilitate funding the buy out or place conditions on distributions so as to limit or contain dysfunctional behavior.

The blowback on using trust funds to resolve such claims or litigation is that the other beneficiaries will often ask why they should not be entitled to the same economic or other benefits as the settling or disgruntled family member(s). The simple answer is that these other beneficiaries are different – not dysfunctional or disgruntled – and it is in their long-term economic interests to remain in the trust. In reality, settlements are made at a significantly discounted value because the lawyers representing the claimants know their chances of winning in court are slim. They must negotiate a settlement to be paid their fee and are therefore eager to agree to cash-outs that are much lower than current valuations. Is this a form of "blackmail?" You bet it is! And it takes a cool hand to keep the defendants focused on settlement rather than proving themselves right in court.

3. Pressure on Family Member Trustee

In this scenario, the pressure is personal in nature – the family member requesting additional income or principal is usually the close relative of one of the trustees – perhaps a son, daughter or grandchild. In the first two examples, the beneficiaries or claimants rely on aggressive and inventive attorneys to push the boundaries of law. Usually there are two contradictory depictions by the potential plaintiffs and defendants of family history and current reality.

In this example, the reality is generally shared and lawyers are not involved. Rather, the beneficiary uses personal influence and persistence to persuade one trustee to agree to his or her request for distributions. The beneficiary may be hostile and demanding one day and self-destructive and begging for help the next. As the trustee in question is usually a parent or grandparent, this technique can be successful over time. The trustee is worn down or so worried about the child, s/he gives in to the demands.

One might think appointing non-family members or institutions as co-trustees can solve the problem. This is not the case, as the relative who is trustee (mom, dad, grandma) will talk to co-trustees in an attempt to convince them to agree to the request. The non-family trustees will turn to distribution policies, set formulas and precedent as reasons for denying the request for extra funds. However, in our experience, relationships are often stronger than policies. The trustees and their attorneys who are recommending against the request may be viewed by the family trustee as "anti-family" and "unreasonable." This may harm their reputation for getting along well with clients. Additionally, if the trustee making the request is in a powerful position or has other business with the non-

family trustee, often times these two considerations will turn a principled "no" into a practical "yes."

4. Good Beneficiary/Bad Beneficiary[10]

This situation is the reverse of the first three in that it is the *non-distribution* of funds that creates the problem. Let's look at the "good child – bad child" in the context of trusts:

- Good Beneficiary (GB)

  One or more of the beneficiaries are responsible adults. S/he may have a family and need additional money for lifestyle support, particularly as the children get older, housing prices increase and the cost of education at private school or college becomes more and more expensive. The good beneficiary may have done well in school; have an intact marriage; have chosen a positive career path; and be a concerned parent.

- Bad Beneficiary (BB)

  This beneficiary may have struggled in school and had difficulty with relationships, overspending and securing stable employment. S/he may have an addiction issue, a gambling issue or some other significant problem. This BB may also have a history of financial difficulties and making poor investment choices, needing help from parents to avoid claims over debts owed to banks or investors.

In this situation, the trust may provide for discretionary distributions, but the trustee decides to make only limited distributions in order to curtail the BB's spending and decrease the opportunity for unwise investments. In the interest of fairness, each child is treated equally as to amounts paid out.

While it is literally "fair" in that each beneficiary (child) receives equal amounts, the net result is that the GB becomes frustrated and angry by the limited distributions. This child rightly perceives this parsimony as a direct result of his/her sibling's behavior and feels that s/he is being wrongly punished because of the trustees' fear regarding what the BB will do with large sums of money. These bad feelings can result in the GB becoming alienated from those family members who have influence over the trusts, particularly if one of the trustees is a parent or other close relative. This result is likely the very opposite of the one hoped for by the trustees, but they believe "their hands are tied" as distributions must be equitable and, in this instance, limited because of proven concerns regarding the BB.

As in the other three scenarios, the GB cannot expect to successfully litigate a case for additional distributions from the trust. However, the GB can make life very difficult for the trustees and involved relatives. As a competent family member, s/he may be the heir apparent to important family positions and otherwise influence family financial or organizational decisions. The GB may decide to withdraw from family activities and instead concentrate on his or her own career, thereby depriving the larger family of a needed skill set. In some families, many active family members are the BBs, as the GBs are not rewarded for their positive behaviors and have little reason to participate in gatherings with the BBs. The BBs have little to do and enjoy the status of participating in

family committees and related activities. The end result is ineffective leadership and deterioration in common family enterprises and overall family wellbeing.

At some point, family leaders or trustees may realize that a lock-step, one-size-fits-all approach to distributions geared at controlling the BB is rewarding negative activity and punishing positive behavior by the GB. These leaders and trustees may decide to make distributions and access to other family resources based on the individualized situations and needs of each beneficiary. To do so, the trustee- beneficiary relationship will become more personal along the lines advocated for by James Hughes Jr. in *Family Wealth.* Distributions to a beneficiary with behavioral or other problems can be conditioned on the beneficiary following specified protocols or conditions (more on this topic below). In this way, beneficiaries following a positive path will not be punished due to the improper conduct of the BB. Discretionary distributions will indeed be "discreet" in that they are well-judged and fit the needs of each individual beneficiary.

5. Failure to Set Conditions on Distribution

In my experience, in each of first three instances, distributions were made without any effective quid pro quo or expectation as to use of funds. Once the decision was made to give in to the distribution request, the decision makers seemed to lack the energy or will to discuss restrictions on the use of funds. To me, if a beneficiary argued that s/he had insufficient resources or income to live on (or for other needs), the beneficiary might expect that when the request was granted, it would be subject to specific conditions so as to prevent or reduce the need for such requests in the future. However, this was not the case. Once the decision makers acquiesced to additional distributions, money was forthcoming without meaningful restrictions.

As one might expect, simply making additional distributions does not solve the underlying problem of a beneficiary's chronic over spending and under working. Indeed, it is not uncommon for beneficiaries to return several years later and renew demands for additional distributions. They generally provide little evidence as to what they've done with the funds to become more independent, gainfully employed or how they modified their lifestyle. Many are offended when questioned and ask why the trustees don't hold the primary beneficiaries similarly accountable for their use of funds. The scenario that comes to mind are young birds in the nest simply opening up their mouths and requesting to be fed worms from their parents without ever being required to learn how to fly.

a) Place Restrictions on Extraordinary Distributions

I advocate placing restrictions and conditions on extraordinary distributions made under the circumstances described in this paper. This is one area where independent trustees can play an important role in standing firm and opposing "carte blanche" extraordinary distributions. In the fourth scenario, trustees may dole out small amounts of money in fixed payments, say monthly, with the hope that the BB would not too much damage with incremental funding. Again, this type of approach is not a long-term solution and rarely solves the concern regarding the BB. As mentioned, I do encourage restricted or conditional distributions, such as paying bills incurred directly to vendors rather than relying on the beneficiary to do so, and other similar measures.

I also advocate that the trustees hire a professional to assist the beneficiaries in developing a plan to improve their financial situation. The trustees would hire this

professional who would report to them. The beneficiaries would be required to cooperate with this person as a condition of receiving future funding from the trust. In the event more serious underlying problems become evident, such as lack of employable skills or dysfunctional behavior, experts would then be hired by the trustees to advise them as to what to do.

b) Trust Disputes Reflect Underlying Intergenerational Disharmony

For those of you wondering why extraordinary or "pressured" distributions are sent to a current or contingent beneficiary with no conditions, it is often because the relationship between generations has become more negative than positive. Trusts and money reflect this intergenerational disharmony. In one situation where an adult child was clearly addicted to alcohol and drugs, the suggestion that the monthly payment be terminated was met with the response, "We can't do that." Although it was clear that the money was going to support the addiction and related lifestyle, family trustees were unwilling to take action for fear of a negative response by the beneficiary.

If a family has a history of not talking about core life concerns, then requests for extraordinary funds provide the opportunity to do so. The senior generation may prefer to grant the request rather than open up a discussion where their own conduct may be subject to scrutiny or criticism. However, the failure to engage in a meaningful dialogue at the time funds are requested only allows the problems underlying and prompting the request to snowball. The end result is often much worse because money fuels dysfunctional behavior, just as gasoline fuels a fire; the longer it continues, the more likely it is for an unpredictable disaster to occur.

This is another instance where outside advisors and independent trustees must stand firm despite the personal pressure brought to bear on them to accede to such distributions. Rather than simply saying "no," an alternative is to suggest the family seek the advice of a qualified therapist with experience in helping wealthy families discuss these issues and the goal of resolving conflicts.

Sometimes trustees meet with beneficiaries regarding distributions, but these meetings are "pro forma" with little meaningful inquiry made regarding the status of the beneficiary and no follow-up. I am a believer in Jay Hughes' recommendations regarding the trustee- beneficiary relationship and suggest trustees refer beneficiaries to the sections in his book on the topic as a way to let them know the relationship is going to change in the near future.

B. Ascertainable Standards and Defined Purposes, Prohibitions and Special Purpose Trustees

These trust provisions reflect the grantor's desire to direct the trustee in the exercise of discretion and limit the beneficiary's access to distributions under defined conditions.

1. Ascertainable Standards and Defined Purposes

Many grantors specify that distributions are to be made for defined purposes, such as for "health, education, support and maintenance," subject to the trustee's discretion. While words such as "proper health, education and welfare," "unusual or emergency response"

or "purchase a home" seem to be clear on their face, problems arise regarding their implementation in practice.

First, as we discussed under general discretion clauses, such discretion is subject to the same limitations and pressures regardless of whether it is a general discretion or precedes ascertainable standards or defined-purposes language.

Second, prescriptive language opens the door for an additional argument by the beneficiary as to whether s/he is in compliance with the language and therefore entitled to the requested distribution. Trustees and beneficiaries often disagree as to what constitutes adequate funding for "proper health, education and welfare," an "unusual or emergency response" or to "purchase a home." These beneficiaries use such language to leverage arguments as to their entitlement to more money, sometimes buttressed by supporting documents from therapists, financial planners and lawyers.

Also, by carefully playing parents or other influential family members, beneficiaries often find allies to support their requests to trustees. As in our discussion about the exercise of a general discretionary power, trustees like to be seen as "cooperative" and "reasonable." They can be persuaded to make distributions or other financial arrangements against their judgment if asked to by senior family members, particularly when the issue concerns the meaning of an ascertainable standard, such as a house.

The undereducated, non-working or dysfunctional beneficiary exhibits an amazingly sophisticated level of ingenuity and persistence in formulating requests for distributions based on specific trust language. Again, we reiterate our advice that the trustees hire a professional to assist the beneficiaries in developing a plan to improve their financial situation or identify and address dysfunctional behavior.

2. Prohibited Behavior

In many families with a history of addiction or other dysfunctional behavior, trusts and similar family control documents often contain provisions prohibiting distributions of assets and principles to beneficiaries engaging in specific behavior identified in the document.

a) Four Examples

The first example describes a long list of behaviors allowing the trustee to exercise discretion in withholding income and principle:

> *…. physical, emotional or mental disability (or for any other reason, including, without limitation, involvement in major litigation, matrimonial difficulties, bankruptcy, or destructive financial improvidence).*

The second example addresses only alcohol and drug dependency:

> *Notwithstanding the foregoing, the manager, in his/her sole discretion, shall withhold distributions of assets, income or other withdrawals from any member who has an active drug and or alcohol dependency. Such assets, income or withdrawals shall be retained and held by the manager until such time as the manager determines, in his or her sole discretion, that the member is in recovery from such drug and or alcohol dependency.*

The third example is of a more general clause addressing financial mismanagement, moral conduct and criminal behavior:

> *If at any time a Beneficiary eligible to receive net income or principal distributions, in the sole judgment of the Trustees, is deemed to be incapable of properly managing his or her financial affairs, or should the Trustees become reasonably concerned regarding the moral conduct or affairs of any Beneficiary hereunder to such a degree as to be concerned for such Beneficiary's health or welfare, or should any Beneficiary be convicted of a crime, or be the subject of a criminal investigation.*

The final clause focuses on physical and mental condition and best interests:

> *It is my wish that my Independent Trustees consider (my child's) mental and physical condition and (my child's) best interests before making such distribution.*

As the examples demonstrate, families chose a wide variety of approaches to address concerns about beneficiaries receiving distributions when engaging in behavior that may be harmful or wasteful to self, family and community. Similar language is often inserted in limited liability corporations, family partnerships or other legal documents regarding shared family assets or other estate planning.

b) Discussion Among Family Members/Beneficiaries

When working with families who are creating documents with prohibitions, I often suggest that the family members themselves define the behaviors that would limit or prohibit distributions. Such discussions result in a good understanding of what the family's expectations are regarding appropriate conduct and behaviors among the family members.

In the situation where trust documents omit such language, an opportune time to engage in this conversation is when a family member is about to turn 18 or 21 and receive a distribution. Many times these recipients will be considering reinvesting funds in a grantor trust (revocable or not) or a family LLC. Most young adults who do not have a problem with alcohol or drugs see the wisdom in restricting future distributions if they are abusing or dependent on alcohol or drugs. Their experience in seeing friends and acquaintances waste money usually creates sufficient awareness so they are willing to put such clauses into their trust documents.

c) Vulnerabilities of Prohibitions

Despite the language in each of the four examples defining behavior that results in the withholding of the income or principle, beneficiaries are still able to access funds. Those of you who are unfortunate enough to have a personal relationship with an alcoholic, addict or underperformer know that cutting off their funds often leads to nasty and debilitating arguments. When there is a trust provision interpretation that gets in the way of funding, several common themes emerge:

Fact Dispute

> The beneficiary argues that s/he is actually not engaging in the prohibitive behavior. For example, if there is a concern that beneficiary has a physical, emotional or mental disability or an alcohol or drug addiction, the beneficiary will argue that s/he is not disabled or not actually addicted to alcohol or drugs. Beneficiaries, like any

dysfunctional person, have an unlimited number of defenses or excuses to explain away questionable behavior.

"Look At Me Now"

A common tactic is for a beneficiary to meet with the trustees or family or attend meetings and look perfectly fine. Such appearances are then used to prove that the beneficiary has no problems whatsoever.

Hiding Out

Family members engaging in the prohibitive behaviors will simply refuse to show up at meetings or otherwise participate meaningfully in family activities. Their communication with trustees may be through financial advisors or account managers. These managers and advisors are protective of their clients and are usually extremely reluctant to inform trustees or important family members as to any concerns about the beneficiaries for fear of losing their job.

Hire Experts and Lawyers

The dysfunctional family member will hire experts to testify or write letters on his or her behalf asserting that the family member is not addicted or dysfunctional, or if so, is in full recovery. Treatment centers, psychiatrists and a whole range of other "addiction experts" who believe addiction is not a disease; moderate use is permissible; or benzodiazepines are non-addictive are available (for a price). Lawyers can also be employed to deny or discount facts or argue that their client is entitled to be funded.

Control of Information

Privacy laws permit the beneficiary to limit or prohibit communication to trustees and their advisors. I have seen many instances in which the dysfunctional family member is able to control information sent to advisors, lawyers and senior family members. In doing so, significant negative facts and recommendations are often withheld so as to make the beneficiary appear to be successfully completing treatment and ready to return home.

"I'm Cured"

Another approach is for the dysfunctional family member to assert that s/he is now cured and is no longer a problem. In this scenario a family member may go to treatment or engage in other activities to address the behavior of concern. The time frame may be one to three months or even longer. When this time is over, the beneficiary will assert that s/he is cured and should be restored to full access to trust distributions and other family resources. "I've done my time, give me my dime."

"I Have Suffered Enough"

Another version of this "I'm cured" argument is for the beneficiary to make the case that s/he has suffered enough; has been working really hard; deserves a lot of credit; is being discounted; and is not appreciated for all the treatment time and the difficulty of abstaining. In other words, badgering key decision makers within the family, including trustees and their advisors, into agreeing with the beneficiary that the beneficiary deserves the money as a reward for effort expended and the emotional pain endured.

"They're Too Hard On Me – Those Meanies"

This argument centers on the complaint that the professionals involved are being too hard on the beneficiary; they are asking too much and being unreasonable. "I've done everything they have asked, and they still won't let me go!" This effort to split the family and the professionals may be transparent to the outsider. However, within the family the emotional ties between the key family member and the addict are often stronger than the relationship between the professional and this family member. Parents are very susceptible to this argument, particularly when their loved one is signing limited releases to withhold key information to the parent and professionals about the need for further treatment or the severity of addiction.

Beneficiaries mix and match these tactics as dictated by the situation they are in and the stances of the trustees, family members and experts regarding the beneficiaries' behavior and requested corrective actions.

d) Lack of Evaluation Process

The problem with all prohibited language is that it does not occur in the context of an evaluative process that provides meaning to the language. In addition, standalone wording is no longer sufficient as an effective tool because the clever beneficiary and his/her advocates too easily manipulate such wording. It used to be that a trustee, exercising discretion, was the sole interpreter of language in the trust document as to meaning and compliance. As mentioned throughout this article, practical experience demonstrates that is no longer the case. A new approach is now needed in order to achieve the goals of prohibitive trust provisions.

3. Special Purpose Trustees

Another way families deal with disabilities, particularly addiction, is to name a special purpose trustee who has the power to negate or approve trust distributions. This trustee may be an expert who knows the beneficiary and is an expert in the particular condition that the family is concerned about. The following is an example of a special purpose trustee clause:

Power to Pay Income and Principal

... my Trustees may make payments of such income and principal to (my child), as my Independent Trustees determine with the consent of the Special Purpose Trust, if a Special Purpose Trustee is acting.

Special Purpose Trustee

Whenever my Trustees would be making a distribution (whether of income or principal) to child, my Trustees shall notify the Special Purpose Trustee. Notwithstanding anything contained in the Agreement to the contrary, the Special Purpose Trustee will have thirty (30) days in which to veto the proposed distribution. In making the determination as to whether to veto the proposed distribution, it is my wish that the Special Purpose Trustee consider (my child's) mental and physical condition and (my child's) best interests at that time. The determination of the Special Purpose Trustee shall be final and not subject to review by any other Trustee or beneficiary.

Designation of Trustee

I designate XXX, therapist and long-time family advisor, as Special Purpose Trustee.

I have encountered at least four major problems with special purpose trustee trust provisions when a specific individual is name as the trustee.

First, this language is susceptible to the same vulnerabilities as discussed in previous sections, namely that the beneficiary can contest the meaning of "mental or physical condition," compliance and employ end-run tactics around the special purpose trustee.

Second, an even greater problem is that if the special trustee is a mental health or chemical dependency specialist or professional, his/her view of addiction, professional standing, ethics and attitudes toward the wealthy may be detrimental to the beneficiary or may change over time. For example, the appointed person may come to believe alcoholism is not a disease or that an addict can be prescribed addictive antianxiety medications.

Third, many therapists and chemical dependency practitioners are not healthy people themselves. Many also harbor resentments towards those with money. Designating a specific person to be special purpose trustee is too risky and has led to many bad outcomes, including sexual and economic exploitation. It is far better to provide for the appointment of a professional expert (or experts) by the trustees who can be replaced or whose status can be reviewed from time to time.

Fourth, generally speaking, I believe trustees, special purpose or otherwise, should be subject to provisions for removal. Abuse of power and self-seeking by trustees is far too common a problem. I have seen instances where trustees, rather than supporting recovery efforts by family members and advisors, have helped beneficiaries avoid treatment and continue in their addictions. This article is not the place to discuss such replacement provisions, such as trust protectors, but grantors are encouraged to set forth mechanisms to replace trustees in their trust documents.

C. Potential Trustee Liability for Distributions to Dysfunctional Beneficiaries

An increasingly thorny predicament for trustees and their counsel concerns primary beneficiaries engaging in significant dysfunctional behavior such as repeated treatments for alcoholism and drug addiction and other addiction related behavior. This issue arises in two contexts:

The first context is where the trustees become concerned about a beneficiary's behavior. In this instance, the trustees often believe they are mandated to distribute funds or it is not their role to pass judgment on the lifestyle of the beneficiary. While this view is common among trustees, it reflects an outmoded approach to trust administration. Contemporary commentators (Hughes, Jaffe & Grubman) advocate for a more interactive and evaluative role by the trustee regarding beneficiary behavior. However, in my experience, lawyers commonly question the basis for withholding distributions and are generally unwilling to

support activist trustees. Is there a counterargument to be made by trustees who do want to act?

The second context is where family members alarmed about the behavior of a beneficiary contact the trustee and request that distributions be withheld. Assuming these family members have standing as contingent beneficiaries or remaindermen, could the trustee be forced through litigation to withhold distributions to a dysfunctional beneficiary? As mentioned below, the beneficiary of concern may have minor children who are negatively affected by the behaviors of their dysfunctional parent(s), increasing the stress and stakes for both family and trustees.

Several theories have been propounded to support such a claim:

1. For Waste or Dissipation of Trust Assets Contrary to the Intention of the Grantor

If the grantor's intention in establishing the trust can be determined from the language of the trust, such as "for the benefit of" or "health, education, support and welfare," one could argue that distributions to an active alcoholic or addict are inconsistent and contrary to the grantor's intent. The claim would then be for waste of trust assets or income:

> *Although there are authorities holding that a beneficiary cannot maintain a suit against a trustee where his interest is dependent upon a remote contingency – one which is unlikely ever to occur – we believe it to be the better rule that such a beneficiary may upon reasonable cause apply to the court to have his interest properly secured. This rule has substantial support in the authorities. Although a contingent remainderman can have no action for damages for waste, he may, under the rule as borne out by the great weight of authority, have equitable relief to prevent waste or dissipation of the trust estate or to prevent a disposition of the property contrary to the intention of the trustor.*[11]

Under this argument, it is literally a "waste" to distribute money to a chronic alcoholic or addict who is living a life of "dissipation" eventually leading to death.

2. Contradiction Between Standards for Support and Addictive Behavior

A related argument is that the standards "for the benefit of" or "health, education, support and welfare" refer to positive behaviors, not negative behaviors, such as alcoholism. In this context, "health" and "welfare" are terms that by definition could not incorporate "alcoholic, addict, eating disorder, gambling, et al." In short, it is a contradiction in terms to say that a distribution is for the benefit or health of a beneficiary when that beneficiary has a chronic drinking problem. Therefore distributions can be halted because the trust language does not authorize them.

3. Harm to Contingent Beneficiaries

In instances where the alcoholic/addicted primary beneficiary has minor children who are also remaindermen or contingent beneficiaries, can a claim be asserted that the trustees must take action to prevent harm to these children? A relative could say, "Our grandfather, the grantor, never intended that his money be used in ways that would hurt his minor offspring. Therefore, cut off the funds to the addicted parent." This position

has compelling merit, particularly given all the stories from third and fourth family members about the damage done by alcoholic and addicted parents.

Fact Development

As an advocate for a proactive stance by trustees regarding addicted beneficiaries who are also parents of minor children, I urge trustees to consider the harm done by allowing the status quo to be the norm in trust administration. Being active in the recovery community, I know of situations where friends and family members have urged trustees to take action to cut off support to beneficiaries who are in the final phases of their disease. The trustees refused to do so and the beneficiaries subsequently died. They sometimes left children who, wounded by inadequate parenting and now the recipients of the parents' funds, began their own addictive downward path.

Needless to say, these relatives who asked the trustees to take action, now deeply regret failing to be more assertive in their requests. Again, this is a situation where both family members and the trustees would benefit from the help of an addiction professional to assess the situation; educate the trustees (if need be); and advance the discussion to a more successful resolution. Trustees and lawyers can be persuaded by factual information and expert opinion, as marshaled by a professional, working together with concerned family members.

D. Language For Alcoholism, Drug Addiction, Other Addictions, and Mental Health Concerns in a Beneficiary

1. Reasons to Favor Detailed Language

Current practice commonly addresses addiction and/or mental health concerns with a general clause permitting the trustee to withhold distributions in the event the beneficiary suffers from addiction. I find this type of language too broad and easily manipulated or avoided by beneficiaries. I prefer that trust agreements address dysfunctions by granting trustees detailed authority to identify and manage the chronic diseases of addiction and mental illness over the long term, as provided for in the Model Language in Appendix A.

A summary of the reasons granting trusteed detailed authority are the following:

- The trustee is unlikely to know much about addiction or mental health and thus requires the direction and the assistance of professionals.
- Qualified, licensed professionals plan and manage the recovery process on behalf of the trustee (and family) over the time needed to achieve stable recovery – at least six months and many times longer.
- Detailed provisions help the beneficiary understand what s/he needs to do to resume receiving funds from the trust and the standards regarding non-use of alcohol and drugs.
- The language regarding recovery or recovery-related activities is directed at avoiding the dry drunk syndrome – where the alcoholic or addict has stopped using but still exhibits all the emotions and behaviors as if actively using – as well as to prevent relapse.

A similar approach can also be used for family businesses and other family-related economic, philanthropic, recreational ventures, etc.

a) Recovery Takes Much More Than Twenty-Eight Days

Many people view addiction as episodic and resolvable in 28-day inpatient treatment programs. That is not the case. A an article in one professional addiction journal discusses the developmental approach to recovery and the six stages to achieving stable remission[12]:

- Transition *Recognition of Addiction*
- Stabilization *Recuperation*
- Early Recovery *Changing Addictive Thoughts, Feelings and Behaviors*
- Middle Recovery *Lifestyle Balance*
- Late Recovery *Family of Origin Issues*
- Maintenance *Growth and Development*

Lawyers and others advising families or serving as trustees do not have the time or skills to oversee these stages. Nor do family members, no matter how dedicated or devoted to their addicted loved one. In working with clients and reviewing circumstances leading to relapse, failure to recognize these limitations is often a major contributor to post-treatment failures.

b) Stabilization

Treatment can be a mystery to outsiders, but there are recognized tasks to be accomplished in a 28-day program and the weeks following. The referenced article discusses Stage Two – Stabilization – as including five tasks[13]:

- Recovery From Withdrawal
- Interrupting Active Preoccupation
- Short-Term Social Stabilization
- Learning Non-Chemical Stress Management
- Developing Hope and Motivation

It is no wonder that inpatient treatment is insufficient to assure abstention from use because the stabilization process – Stage Two – takes much longer than 28 days. For some drugs, it takes two to three weeks just complete active withdrawal. Learning new ways of socializing and healthy responses to stress takes months for most people.

This information is included in the hope that the reader better understands the value of collaborating with addiction professionals in managing beneficiaries with what is a chronic disease.

- The services provided by this hired professional are time intensive and require much more availability than a weekly office visit.

For a more extensive discussion of this program, look for the articles *Achieving High Recovery Rates for the Affluent and Prominent* and *Dual Track Family Case Management and Monitoring,* at www.billmessinger.com. Also see Appendix C to this article for an example of the specific services that constitute "case management" on behalf of the family and "support services" for patients after completing inpatient treatment.

2. Summary of Model Language

Along with this revised edition, we also prepared a second edition (2017) of

- *Model Language for Addressing Substance Use Disorders (Addiction) in Trust Documents: Best Practices for Treating Substance and Other Behavioral Disorders*

My co-author, Arden O'Connor, and I revised *Model Language* because we found readers wanted a more detailed summary describing the suggested trust provisions in plain English.

- Rather than duplicate the plain English section here, we refer the reader to the *Model Language* article.

The companion article also includes current information regarding substance use and behavioral health disorders, as well as research references supporting the recovery theory underlying the model language. It available as a PDF download at Amazon or for specified audiences at www.billmessinger.com.

CONCLUSION

Through my professional, recovery and personal life, I've known many beneficiaries who struggle(d) to abstain and find meaningful lives without alcohol and drugs. You, as trustee, have the power to collaborate with professionals and insist your beneficiaries start down the path to recovery. You can make a difference; I have seen it happen.

Appendix A

Model Language for Family Governance Documents For Substance Use Disorders and/or Mental Health Concerns

Suggested Language Restricting Access To Principal And Income When A Beneficiary Or Family Member May Have Problems With Alcohol, Drugs, Other Behaviors and Activities Or Mental Health Concerns.

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Sample Statement of Purpose

It is my intention that any beneficiary who may have or does have a substance use disorder, behavioral health disorder or other mental health concern be governed by the processes and procedures set forth in this Appendix A. To beneficiaries who have achieved stable recovery, congratulations! It can be a difficult journey and I hope you will experience the benefits of living in sobriety with a good understanding as to how money can support a healthy lifestyle.

To those of you still challenged by substance use or other behavioral disorders, Appendix A is based on the highly successful program for pilots and doctors. These are the only programs with proven, drug-tested outcomes and so while you may not like having access to distributions dependent on adhering to Appendix A, it offers the best path to sobriety. Therefore, in the event the Trustee does not implement these provisions or otherwise fulfill their intent, the Trust Protector is authorized, as specified in the Trust Protector section below, to replace the Trustee.

In my view, giving money to someone with an active disorder only perpetuates the problem. I do not want my gift to be used to support negative behavior, particularly when other family members or spouses are impacted. Therefore, I direct my Trustee to fully implement the provisions of this Appendix, including using trust funds to support these relatives when the Beneficiary is active in his/her disorder. Therefore there is a section in this Appendix that allows the Trustee to bypass the Beneficiary and preserve or distribute funds to the secondary beneficiaries.

I understand that dealing with any such disorder or concern is often time intensive, requiring the advice and assistance of professionals and costs for treatment. I authorize such expenditures, as recommended by the expert or experts advising the Trustee and approved by the Trustee, with such expenditures fully paid for by the trust. I realize that such expenditures will likely diminish trust assets as well as use up trust income. However, it is more important that the Beneficiary attain recovery, as defined herein, than trust assets be preserved.

Of course, the Beneficiary always has the option of choosing to recover, if s/he is worried about asset depletion. The process, as I envision, is that once the Beneficiary is in remission, as defined herein, the Trustee and expert will assume an oversight/monitoring role, which will reduce costs significantly. For example, simply receiving reports on drug testing or from counselors on a periodic basis.

Because the disorders covered by this section are chronic, it is my intention that the principal be retained in the trust for the lifetime of the Beneficiary, with Trustee discretion to disburse principal to the Beneficiary for specific requests or needs, assuming that the Beneficiary is in stable remission.

People with active substance use disorders sometimes engage in litigation to obtain funds from trusts. In the event of beneficiary litigation, I include language in Appendix A as follows:

1. That the Trustee, experts, professional or other resources assisting the Trustee be indemnified out of trust assets and that they be held harmless in connection with any and all acts or omissions undertaken in good faith.
2. That the Trustee's attorney's fees and associated expenses incurred in defending Beneficiary-initiated litigation against the Trustee shall be fully paid from trust property.
3. That the Beneficiary's attorney's fees and expenses incurred in bringing and prosecuting an action against the Trustee shall not be paid to any extent from trust property.

While this may seem harsh, I fully intend that the Trustee and anyone assisting the Trustee be completely protected from claims by the Beneficiary and that the Beneficiary expenses and fees to pursue such claims never be paid by trust assets.

In regards to medication-assisted treatment (MAT), such as suboxone, methadone or other mood-altering medications, it is my specific intention that beneficiaries using such medications do *not* meet the definition of recovery as set forth in the section on recovery (Section 6, in this document). I am not opposed to the use of such substances for detoxing purposes under the supervision of a qualified professional as part of a recovery program, but of course this would mean that time for recovery would not commence until such use ended.

In addition, I want to emphasize that the two-year time period does not begin until there is remission of all behavioral health disorders, including any co-occurring conditions for substance users.

Finally for the Beneficiary who continues to be non-compliant with this addendum, I have authorized the Trustee to provide minimal levels of support (Section 6-D) in the Trustee's sole discretion. I suggest in this situation that Trustee's expert would hire someone to stay in contact with the Beneficiary to encourage him/her to seek help or otherwise check on or oversee his/her safety.

Trustee Authority Regarding Substance Use Disorders, Other Disorders and Mental Health Concerns in a Beneficiary

1. **Sole Discretion of Trustee to Withhold Income or Principal, Notwithstanding Any Other Provision of this Trust Agreement**
   a. Notwithstanding the foregoing as to distributions of income and principal, the Trustee in his/her sole discretion, shall withhold distributions of principal, income or other withdrawals from any Beneficiary who has or may have: substance use disorder(s), (addiction), other disorders, compulsive or destructive behaviors, mental health conditions or concerns or any combination of the foregoing (described hereafter as behavioral health disorders) as defined in Section 9, below.

   b. Such principal, income or specified withdrawals shall be retained and held by the Trustee until such time as the Trustee determines, in his or her sole discretion, that the Beneficiary is in recovery (as defined below in Section 6) from substance use disorders (addictions) and behavioral health disorders, as defined in Section 9, below. Any amounts so withheld and accumulated may be retained in the Trust rather than distributed, at the Trustee's sole discretion. However, the Trustee is authorized to expend income and principal for the purposes set forth in this Appendix A.

   c. If the Beneficiary dies before mandatory distributions or rights of withdrawal are resumed, the remaining balance of the mandatory distributions that were suspended will be distributed to the alternate beneficiaries of the Beneficiary's share as provided herein.

   d. While mandatory distributions are suspended, the Trust will be administered as a discretionary trust to provide for the Beneficiary according to the provisions of the Trust providing for discretionary distributions in the Trustee's sole and absolute discretion and as mandated by the Appendix.

2. **Authorization to Hire and Rely on Professional Expertise to Implement this Appendix**
   a. The Trustee is authorized to employ and retain experts on: substance use disorders, behavioral health disorders and resultant family conflict or any combination of the foregoing, as defined in Section 9, below, to advise him/her regarding any matters, issues

or determinations in this Appendix A. The Trustee may designate such experts to receive information or perform tasks on his/her behalf in order to implement Appendix A. Further, the Trustee may employ experts to recommend comprehensive treatment and post-treatment recovery programs (meeting the standards in subsections b and c, below) and to oversee and implement such programs.
The Trustee is also authorized to use the recovery programs for addicted pilots and physicians as part of an oversight program for the Beneficiary (or similar programs in the event the pilot or physician program is unavailable). In addition, the Trustee is authorized to employ and be advised by experts regarding entering into and preparing agreements (Recovery Contracts) between the Beneficiary and Trustee specifying recovery activities by the Beneficiary, including such activities funded directly or indirectly by the Trust.

b. The Trustee is further authorized to utilize and rely on the professional judgment of a reputable treatment center, utilizing an abstinence-based chemical dependency treatment model and recognized by the Joint Commission on Accreditation of Health Care Organizations, for evaluations, recommendations and treatment regarding the Beneficiary's suspected or actual substance use disorders (alcohol/drug dependence and abuse). The Trustee is similarly authorized regarding any other disorders, compulsive or destructive behaviors, mental health conditions or concerns or any combination of the foregoing, as defined in Section 9, below.

c. The Trustee has sole discretion regarding the employ and use of any such treatment centers or other resources such as supervised living facilities, halfway houses, sober homes and wilderness programs as needed; however, all such resources shall be licensed or credentialed as per applicable state guidelines and standards described in the preceding section. Any experts utilized by the Trustee shall be licensed and credentialed as per applicable state standards and guidelines, with any professional authorized to prescribe medications certified by ASAM (Society of Addiction Medicine) or under the direct supervision and direction of an ASAM-certified professional.

3. Authorization Regarding the Expenditure of Funds for Intervention, Treatment and Recovery Activities

The Trustee has full authority and discretion to expend funds for advice regarding implementation of this Appendix to develop plans for intervention in the event the Beneficiary may have a substance use disorder (dependent on or abusing alcohol or drugs) or may be actively using alcohol or drugs after treatment (relapse). Such authority includes expending funds for evaluations; treatment and all related costs; post-treatment recovery programs; and any and all related matters deemed appropriate by the Trustee in his/her sole discretion.

This section (3) is fully applicable to behavioral health disorders, including non-compliant behavior with treatment plans and behavioral relapses. The Trustee is similarly authorized to expend funds to provide such services for family members of the Beneficiary.

4. Authorization to Receive Reports/Beneficiary's Consent to Release Information

a. In making determinations as to whether the Beneficiary is participating in, has successfully completed an approved and applicable treatment program and/or is engaged in an active recovery program, the Trustee (and/or her/his designee) is authorized to receive reports from counselors and staff from treatment programs of any kind, sponsors and all health care professionals or others providing assistance to the Beneficiary.

b. In addition, the Beneficiary must fully comply with all recommendations of treatment programs and health care professionals, as approved by the Trustee (and/or his/her designee. The Beneficiary must sign consents for full release of information to the Trustee (and/or his/her designee) in order to be in compliance with this section (4). Failure to sign all requested authorizations means the Beneficiary is not in "recovery" as that term is used in Section 6, below.

5. Alcohol and Drug Testing

a. The Trustee (and/or her/his designee) shall utilize the services of a reliable and licensed drug testing company to randomly drug test the Beneficiary during the first two years of recovery (as defined in Section 6, below), and/or if the Beneficiary may be disputing whether s/he is using alcohol or drugs. The Trustee (and her/his designee) is authorized to require continued drug testing for so long as the Trustee deems such testing to be advisable, regardless of any other provision in this Appendix. Full disclosure of results from such tests shall be made in a timely manner to the Trustee (and/or her/his designee).

b. Such tests must be conducted under the observation of personnel from the drug testing service or their designee, and may include but not be limited to laboratory tests of hair, tissue or bodily fluids. The physician in charge of the Physician's Health Program is the preferred resource for such testing.

c. The Trustee, in the exercise of sole and absolute discretion, may totally or partially suspend all distributions otherwise required or permitted to be made to the Beneficiary until the Beneficiary consents to the examination and complies with full disclosure of the results to the Trustee.

6. Definition of Recovery – Two-Year Minimum

a. **Recovery**, as used herein, is defined as no less than a minimum of two years of continuous sobriety (including abstention from narcotic prescription medicine, drugs, alcohol or other addictive or compulsive behaviors or behavioral health disorders) and/or two years of continuous adherence to treatment plans in the case of mental health conditions. Only medications prescribed and approved by ASAM-certified prescribers and consistent with the Beneficiary's **Recovery Program** will be considered as meeting the foregoing definition.

The definition of **Recovery** also includes, but is not limited to, ongoing participation in a **Recovery Program**, as determined by the Trustee or his designee: Activities addressing issues relating to substance use disorders (addiction) and behavioral health disorders, as defined in Section 9, below. (Examples: attending 12-step or other self-help groups, therapy, case management meetings, avoiding high-risk relapse environments and adhering to recovery plans, recommendations or agreements.)

b. The two-year minimum shall be extended if the Beneficiary has a history of relapse, is not compliant with treatment plans or fails to actively engaged in a **Recovery Program**, with such time extension(s) determined at the sole discretion of the Trustee.

c. In the event the Beneficiary has not completed the two-year minimum of recovery or extensions thereof, the Trustee has the discretion to disburse income and/or principal on behalf of the Beneficiary in amounts to support the Beneficiary's recovery program. Conversely, the Trustee shall not disburse funds for activities that might lead to relapse.

The Trustee is authorized to rely on the advice of experts in implementing this Section 6 and otherwise exercising discretion as permitted in this Appendix.

d. In the event the Beneficiary is non-compliant (continues to use, unwilling to follow treatment recommendations or otherwise follow the requirements herein), the Trustee may choose to expend funds to minimally support the Beneficiary's basic needs, in the Trustee's sole and absolute discretion. However, this provision creates no duty or obligation to make such distributions.

7. Date When Recovery Begins

The commencement of any time period of recovery begins after the Beneficiary has successfully completed chemical dependency inpatient primary treatment (or other addiction or mental health related treatment) and any subsequent long-term, halfway, sober house or wilderness program. (Such time does not commence upon entering treatment, but when successfully completing outpatient treatment or leaving a supervised or otherwise restrictive environment.)

Successful completion of any such program is determined by the treatment provider and as approved by the Trustee, who may rely on the advice and opinion of experts independent of any treatment center.

8. Distribution to Spouse, Children, or Other Family Members

In the event of withholding of or restriction on distributions to the Beneficiary, the Trustee is authorized to make distributions for the benefit of the Beneficiary, including those owed a duty of support by the Beneficiary, such as the Beneficiary's spouse, ex-spouse, children or other family members.

The Trustee is authorized to make arrangements for the support of such individuals through distributions by alternative means, as the Trustee determines in his/her sole discretion, with the intent to maintain such individuals' lifestyle, including paying support staff and third-party vendors.

In the event any such individual meets the definition in Section 9, and/or in the event any such individuals are in need of therapy, treatment or other forms of assistance due to the conduct of a Beneficiary meeting the definition in Section 9, the Trustee is authorized to provide services paid for from trust assets, as set forth in this Appendix.

9. Definition of Substance Use Disorder or Abuse and Other Addictions/Disorders

The phrase, "Beneficiary who has or may have a ***substance use disorder*** **(**formerly dependent on and/or abusing drugs or alcohol), other disorders, compulsive or destructive behaviors, mental health conditions or concerns (including mental illness and mental disorders) or any combination of the foregoing, including any behavioral disorder shall have meaning as defined in the DSM-V-TR (Diagnostic and Statistical Manual of Mental Disorders. The DSM-V criteria for "Alcohol Use Disorder" are at the end of this Appendix A.) These definitions may be revised to reflect new medical information and/or credible research by recognized professionals, as defined in Section 2. (Examples: gambling, internet gaming, internet addiction, compulsive shopping, compulsive sex, food addiction and kleptomania.)

10. Indemnifications, Exoneration Provision, Dual Capacity and Compensation

a. The Trustee (and any professional, advisor, assistant, or other person including their business entities, hired and/or retained by the Trustees) will be indemnified from the Trust Estate for any liability or claim of liability in exercising the Trustee's judgment and authority in this Appendix A, including any failure to request a Beneficiary to submit to medical examination and including a decision to distribute suspended amounts to a Beneficiary. This indemnification clause includes any allegations of any kind brought by the Beneficiary, or on behalf of the Beneficiary, directly or indirectly against the Trustee and those hired and/or retained by the Trustee. If such allegations occur, the respondent has the option of requesting the Trust to provide the defense or asking the Trust to pay to the respondent funds for his/her defense.

b. It is not the Grantor's intention to make the Trustee (or any professional, advisor, assistant or other person including their business entities, hired and/or retained by the Trustees) responsible or liable to anyone for a Beneficiary's actions or welfare.

c. The Trustee has no duty to inquire whether a Beneficiary uses drugs or other substance but is expected to initiate the process specified in this Appendix if circumstantial or direct evidence comes to the Trustee's attention that the Beneficiary is engaging in conduct specified in Section 1, to wit: the Beneficiary has a substance use disorder or behavioral health disorder, as defined above in Section 9.

d. A Trustee acting in the dual capacity as Trustee and family member is authorized to discuss with the Beneficiary and the Beneficiary's relatives information the family member obtains in his capacity as Trustee, for the purpose of furthering the welfare of the Beneficiary.

e. When the Beneficiary is subject to the provisions of this Appendix A, the Trustee has the option to be compensated from the Trust at an hourly rate commensurate with standard rates in his/her profession. Any disputes concerning Trustee compensation shall be referred to the Trust Protector for resolution.

11. Other Prohibitions During Withholding of Distributions

a. If distributions to a Beneficiary are suspended or withheld as provided above in this Appendix, then the Beneficiary shall automatically be disqualified from serving and, if applicable, shall immediately cease serving as a Trustee, Trust Protector or in any other capacity in which the Beneficiary would serve as, or participate in, the removal or appointment of any Trustee or Trust Protector hereunder.

b. The withholding or suspension of benefits to the Beneficiary is sufficient evidence to suspend or terminate the Beneficiary's role in other family positions or activities. If the Beneficiary contests such suspension or termination, the Trustee is authorized to release information relating to the Beneficiary's substance use disorders, behavioral health disorders or other disorders described in Section 9 to the appropriate family governing body or authority.

12. Prohibition on Payment of Beneficiary's Litigation Expenses

The Beneficiary's attorney's fees and expenses incurred in bringing and prosecuting an action against the Trustee shall not be paid to any extent from trust property.

13. Trust Protector Provision

I designate _____ as Trust Protector. The Trust Protector has the power to:

1. Resolve disputes regarding compensation of the Trustee.
2. Replace the Trustee and Expert, after consultation to resolve any disputes or concerns, for failure to implement the provisions of this Appendix and the intent of the Grantor.
3. In conjunction with the Trustee, decide to bypass the Beneficiary due to the Beneficiary's persistent non-compliance with this Appendix, thereby making contingent or secondary beneficiaries primary beneficiaries.

The Trust Protector shall be advised by the following members of my family: _____ and may be replaced by a majority vote of such family members or as otherwise provided in MS 501C.0704, in the event there is vacancy. I hereby direct that the successor Trust Protector be _____ or _____.

(The language in Appendix A can be modified for use in business, succession, management, real estate ownership, family office and philanthropy governing documents.)

(End of Appendix A)

Appendix B

Family Wealth – Keeping It in the Family (James E. Hughes, Jr.)[14]

1. Roles and Responsibilities of Beneficiaries (page 108)

Each beneficiary has an obligation to educate himself or herself about the duties of a beneficiary, as well as the duties of the family trustees. Here are specific responsibilities of beneficiaries:

- To gain a clear comprehension of each trust in which the beneficiary has an interest and a specific understanding of he mission statement for each trust as prepared by the trustee
- To educate himself or herself about all trustee responsibilities
- To understand the trustee's responsibility to maintain the purchasing power of the trust's capital while maintaining a reasonable distribution rate for the income beneficiaries
- To have a general understanding of modern portfolio theory and the formation and process of asset allocation
- To recognize and look for proof that each trustee represents all beneficiaries
- To meet with each trustee once each year to discuss his or her personal financial circumstances and personal goals and to advise the trustee of his or her assessment of the trustee's performance of the trustee roles and responsibilities to the trust, to the beneficiary, and to the family governance
- To become knowledgeable about the functions and importance of each element of the family's trust governance structure
- To attend the annual family business meeting and to accept responsible roles within the family governance structure, base on his or her qualifications for such roles
- To develop a general capacity to understand fiduciary accounting
- To demonstrate a willingness to participate in educational sessions and to become financially literate (through family seminars and family-funded educational programs)
- To know how and in what amount trustees and other professionals are compensated and to obtain a general understanding of the budgets for the trust and investment entities in which the trust will be invested

2. Roles and Responsibilities of Trustees (page 134)

Each trustee has an obligation to educate himself or herself on the duties of a trustee, as well as on the duties of the trust beneficiaries. The trustee's specific duties are as follows:

- To be fully aware of the grantor's original purposes in creating the trust and the current purposes of the trust, if these have changed over time
- To guide his or her decisions by these purposes
- To act so that the actual operation of the trust is empowering to the beneficiaries, within the provisions of the trust
- To put mechanisms in place to increase the level of financial awareness of the beneficiaries, and to see that such financial education of the beneficiaries is carried out effectively
- To meet at least annually with each beneficiary in order to renew the beneficiary's understanding of the trust, as well as to obtain from each beneficiary full information, financial and otherwise, about his or her personal situation
- To educate himself or herself about all beneficiary responsibilities
- To evaluate and advise each beneficiary on how well he or she is meeting the roles and responsibilities of a beneficiary
- To implement effectively the trust's general policies and procedures as they relate to:
    1) The trust's investment goals and acceptable risks
    2) The selection and/or provision of investment advice and management to accomplish such investment goals within the given risks
    3) The trust's tax position and the selection of tax services
    4) The trust's legal position and the selection of legal services

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(End of Appendix B)

Appendix C

Case Management and Personal Recovery Support Services

1. Case management services

Case Management services are provided on behalf of the family by an addiction professional who oversees the post-treatment recovery program of the addicted family member. The professional works for the family and not the addict (avoiding conflict of interest and confidentiality problems). However, the professional does meet with the addict, checking on progress and helping communication with the family on various topics that may be hurdles and challenges of early recovery.

These Services Include:

- Coordination of ongoing care
- Communication with providers
- Weekly progress meetings
- Aid in returning to work and family
- Ongoing program monitoring
- Referral as needed
- Monitoring/Observed Drug Testing
- Advice to client
- Family meetings

These services are modeled after successful programs, which emphasize the importance of following post-treatment recommendations and addressing secondary problems. The goal is to help families heal, communicate more effectively and make the most of their new recovery journey.

2. Personal counseling and recovery support

This service is for the individual in early recovery. It is also called "mentoring" or "coaching," but it is much more than those activities because it involves the skills set of licensed alcohol and drug counselors and similarly trained licensed professionals.
Learning new skills to handle emotions and relationships takes time and encouragement.
The counselor may interact with the family, but does so on behalf of the addict in early recovery, as the addict is the client. These services include:

- Post-Treatment Counseling and Support Services
- Individual Counseling and Mentoring: *Promoting positive change and healthier relationships within appropriate boundaries.*
- Family Meetings: *Improving interpersonal relationships, communication, and family dynamics, particularly affected by the addicts drug or alcohol use.*
- Life Management Skills: *Smoothing transitions to home, work or school.*
- Relapse Prevention: *Sound relapse prevention plans and skills.*
- Clinical Transportation: *Supervised by trained addictions counselors.*

These services are coordinated with post-treatment and continuing care recommendations.

(End of Appendix C)

Endnotes

[1] The authors assume the reader is familiar with trusts. Therefore we have omitted discussions and examples of specific trust language. A longer version of this article with such language will be available on our website.

[2] James E Hughes, J. (2004). *Family Wealth Keeping It in the Family.* New York: Bloomberg Press. p 119

[3] However many of the same principles we discuss here apply to other types of family support both direct, such as gifting or employment in a family business, or indirect, such as living off of family resources.

[4] Dennis Jaffe, P., & James A. Grubman, P. (2007). Acquirers' and Inheritors' Dilemma: Discovering Life Purpose and Building Personal Identity in the Presence of Wealth. *Journal of Wealth Management*.

[5] James E Hughes, Jr (2004). *Family Wealth Keeping It in the Family* New York: Bloomberg Pr.. P 14-23

[6] Kozisek v County of Seward, 07-3692 (Eight Circuit Court 08 27, 2008). In this Eight Circuit case the Court upheld the firing of county worker who claimed a disability due to alcoholism but refused inpatient treatment, stating:

> *The fact remains that the county based it decision about Kozisek's "restriction" – complete impatient treatment before returning to his important public job of assisting veterans – upon the recommendation of a professional substance abuse counselor.*

It is the recommendation of the professional counselor that persuaded the Court to uphold the dismissal of the worker by the County. (Kozisek v County of Seward, 8th Cir., 8/27/08). Note that in the Chemical Dependency field many people offering help to families neither hold degrees from accredited institutions nor are licensed by State or local agencies. These "helpers" would not qualify as expert witnesses in Court and are vulnerable to attack by opposing counsel. Also, some therapists do not believe addiction is a disease and do not believe in abstinence from mood altering chemicals.

[7] See the Family Office Exchange website or our website for a copy of this article.

[8] See my website, www.billmessinger.com for a copy of this article.

[9] Bronfman, J. (1987). The Experience of Inherited Wealth: As Social-Psychological Perspective. *UMI Dissertation Services* , 353. p. 20

[10] The terms "Good Beneficiary" and "Bad Beneficiary" are used because that is the way family members often perceive and talk about these two groups. One of our goals as counselors is to suggest ways of reframing perceptions and past experiences to moderate "all or nothing" views of these beneficiaries. Beneficiaries struggling or engaging in negative behavior are often wounded or addicted and they can make major positive changes if trustees and family leaders follow the suggestions in this article.

[11] *See In Re Trust Under Will of Albert Schultz*, 9 N.W.2d 313 (Minn. 1943, citations omitted).

[12] Recovery From Addiction, A Developmental Model, Part One, *It's All in the Journey,* Sept. 2008, p 8.

[13] Ibid, p 12

[14] James E, Hughes, Jr. Family Wealth – Keeping It in the Family www.bloombergbooks.com