



THE OPIOID CHALLENGE FOR FIDUCIARIES



2019 Trust Advisors Forum

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* Materials prepared and adapted from “Epidemic of Opioid Abuse and Other Addictions,”
Trusts & Estates, December 2017”, Kevin L. Johns

ADDICTION

- Addiction has become a frequent news headline due to alarming increase in opioid abuse and heroin use
- Addiction manifests itself in many forms
- Behavior based
 - Gambling
 - Video Games
 - Internet
 - Compulsive Shopping
 - Binge Eating

ADDICTION (cont.)

- Substance based
 - Alcohol
 - Opioids
 - Other drug addictions
- Irrespective of its form, addiction has devastating effects on clients and their families

EPIDEMIC OF ADDICTION

- Approximately 142 Americans die every day from a drug overdose, loss of life equivalent to September 11 terrorist attacks every three weeks
- Forecast by STAT concluded that as many as 650,000 people will die over next 10 years from opioid overdoses
- Desensitized Society

ISSUES ASSOCIATED WITH ADDICTIONS

- Failure
- Guilt
- Embarrassment
- Shame
- No identifiable causes of addiction (aside from substance abuse)

ISSUES ASSOCIATED WITH ADDICTIONS (cont.)

- No way to predict who will become an addict
 - Most heroin users began their use of opioids with a lawful prescription
 - Prescription opiates whose refills have run out are often gateway for heroin
 - Heroin is cheap, easy to obtain, and highly addictive
 - No longer limited to urban poor, rather opioid and heroin addicts are found in suburbs and were raised in “good families”

ESTATE PLANNING FOR ADDICTION

- Tax planning has been focus for decades, but dramatic rise in estate tax exemptions and permanence of portability, has eliminated significant tax exposure

ESTATE PLANNING FOR ADDICTION (cont.)

- Need for sophisticated estate plans will persist due to non-tax issues
 - Second marriages
 - Children outside marriage
 - Divorce
 - Business succession planning
 - Spendthrift planning
 - Asset protection planning
 - Elder care planning
 - Special needs planning
 - Addiction

ESTATE PLANNING FOR ADDICTION (cont.)

- An addict places tremendous emotional and financial strain on a family
 - Unpredictable and sometimes violent behavior
 - Constant conflict over addict
 - Division on how deal with addiction and behavior
 - Stress in marriage
 - Divorce and further dysfunction in family
 - Addict's siblings often lack sympathy and have resentment against addict and their parents for financing situation

ESTATE PLANNING OPTIONS FOR ADDICTED BENEFICIARY

■ DISINHERITANCE

- Common consideration
- Do not want legacy to fund destructive, and possibly deadly behavior
- CAUTION:
 - Could leave addict destitute and unable to seek treatment
 - Addict could contest estate plan
 - further alienation from family
 - wasting estate assets on needless litigation

ESTATE PLANNING OPTIONS FOR ADDICTED BENEFICIARY

■ OUTRIGHT BEQUEST

- Throw up hands in frustration
- Now addict has financial means to challenge estate plan
- Expensive litigation
- unconstrained funding for addiction

ESTATE PLANNING OPTIONS FOR ADDICTED BENEFICIARY

■ DISTRIBUTION TO SIBLINGS FOR BENEFIT OF ADDICT

- “understanding” that sibling will expend such assets for addict’s benefit
- RISKS:
 - Loss of assets to sibling’s creditors
 - Mismanagement of funds
 - Refusal to uphold parents’ wishes
 - Bankruptcy
 - Divorce
 - Death of sibling,
 - Strain on relationship between siblings

ESTATE PLANNING OPTIONS FOR ADDICTED BENEFICIARY

■ TRUST PLANNING

■ Discretionary Trusts

- Health, education, maintenance and support (“HEMS”)
 - Not defined in Internal Revenue Code
 - subjective in their interpretation by both trustee and beneficiary
- Use a purely discretionary trust
 - Sole and absolute discretion to make (or suspend) distributions
 - Diminish addict’s challenges to trustee’s action

ESTATE PLANNING OPTIONS FOR ADDICTED BENEFICIARY

- **TRUST PLANNING (cont.)**
 - **Include Drug Testing Procedures and Suspension of Discretionary Distributions**
 - Require addict to voluntarily submit to a random drug test if requested by trustee (or its designee)
 - Power to suspend discretionary distributions for positive test result for presence of an illegal drug (and possibly alcohol), or a drug for which beneficiary does not have a prescription

ESTATE PLANNING OPTIONS **FOR ADDICTED BENEFICIARY**

■ **TRUST PLANNING (cont.)**

- Authority to suspend discretionary distributions for refusal to submit to a random drug test
- Provide for distributions directly to third parties on addict's behalf, until such time as trustee determines addict is in recovery
- Specifically provide trustee will not be deemed to have breached fiduciary duty if it decides to either not exercise its discretion to request a random drug test, or only does so irregularly
- Give trustee express authority to use trust assets to defend itself in action involving exercise (or non-exercise) of discretion regarding payment (or suspension) of discretionary distributions for addict and for requiring (or failing to require) drug testing
- Include indemnity clause to protect trustee from claims and costs which may arise in administration of a wholly discretionary trust

RECOVERY FROM ADDICTION

- “Recovery” should be specifically defined
- For example: “X” years of continuous sobriety (“X” being a number selected by settlor), and determined to commence after addict has successfully completed a treatment program
- Trustee could also be given sole discretion to extend time-frame required to achieve recovery
- Recovery could be defined to require addict’s continuing participation in therapy or support groups, and to refrain from associating with individuals that may create an atmosphere conducive to drug and alcohol abuse
- Provide Trustee discretion to suspend payments if addict stops attending treatment program, or participating in therapy

ADDICTION ADVISORS AND AUTHORIZATION TO ENGAGE PROFESSIONALS

- Consider naming an “addiction advisor”
 - Provide directions to trustee for matters pertaining to beneficiary’s addiction
 - Family member
 - Friend
 - Paid professional
- Authorize Trustee to employ “addiction experts”
 - Advise trustee and addiction advisor
 - Recommend and oversee treatment and recovery programs
 - Broadly define to include (but not limited to) physicians, counselors, probation officers, and other professionals engaged to evaluate and treat addict

ADDICTED BENEFICIARY'S CONSENT TO TRUST TERMS

- Require addict to sign a consent evidencing agreement to trust terms
- Legal counsel or ample opportunity to engage legal counsel or refuse to have legal counsel
- Refusal to sign consent
 - Provide trust would not be funded
 - Distribute assets as otherwise directed in trust

ADDICT'S RELEASE OF PROTECTED HEALTH CARE INFORMATION

- Require addict to sign a consent authorizing release of information to trustee (or trustee's designee), waiving privacy requirements of Health Insurance Portability and Accountability Act of 1996 ("HIPAA")
- Allow Trustee (or designee) to receive drug test results, medical reports, information from treatment centers and addiction experts, and all other relevant information pertaining to addiction
- Provide that addict's refusal to sign consent means addict is not in "recovery", thereby triggering suspension of trust distributions

DEFINITIONS FOR ALCOHOL AND DRUG ABUSE AND OTHER ADDICTIONS

- Define what constitutes alcohol abuse, drug abuse and other addictions
- Model definitions for alcohol and drug abuse and other addictions after criteria provided in Diagnostic and Statistical Manual of Mental Disorders

INCLUDE OTHER “INCENTIVE” PROVISIONS?

- Designed to Motivate Positive Behavior with Financial Rewards
 - Encourage Education
 - Require Employment
 - Refrain From Risky Behavior
 - Promote Healthy Lifestyle
 - Inspire Philanthropy
- Risks:
 - Resentment
 - Unrealistic Goals and Expectations
 - “Control From the Grave”
 - Overlooking Other Needs and Desires

NO CONTEST CLAUSES

- Include a no contest clause, also known as an “in terrorem clause”

- Example:

Any beneficiary who contests any of the provisions of this trust, or elects to take a statutory share of the settlor’s estate, will be deemed to have predeceased the settlor for purposes of the trust.

- American College of Trust and Estate Counsel (ACTEC) has posted a summary tracking state law treatment of no-contest (in terrorem) clauses on its public website

See www.actec.org/resources/state-surveys

CHOICE OF TRUSTEE

- Options
 - Family Member
 - Burden
 - Conflicts of interest
 - Corporate Trustee
 - Independence
 - Lack of compassion
 - Fees
 - Reluctancy to serve

TRUST ADVISORS AND TRUST PROTECTORS

- Unable to predict future events that may impact trust administration
- “Trust advisor”
 - Power to advise regarding administration of trust
 - Power to advise regarding investments
- “Trust protector”
 - Power to veto or direct discretionary trust distributions
 - Amend trust’s administrative provisions
 - Power to appoint assets of an existing trust to a new trust which may have expanded provisions to deal with a beneficiary’s addiction

TRUST ADVISORS AND TRUST PROTECTORS (cont.)

- Give trust advisor, trust protector or trustee authority to appoint an addition advisor if one is not named initially to direct trustee as to exercise of discretion regarding all matters pertaining to addition

MODIFICATION OPTIONS FOR EXISTING TRUSTS

- What remedies available when dealing with an existing irrevocable trust for a beneficiary who subsequently develops an addiction?

- **UNIFORM TRUST CODE**

- **DECANTING**

MODIFICATION OPTIONS FOR EXISTING TRUSTS (cont.)

■ UNIFORM TRUST CODE

- Adopted in 31 states and District of Columbia
- Contains two different modification provisions that may allow amendment of an otherwise irrevocable trust for benefit of an addicted beneficiary
 - **Modification by Consent**
 - Section 411 provides that a “noncharitable irrevocable trust may be modified or terminated upon consent of settlor and all beneficiaries, even if modification or termination is inconsistent with a material purpose of trust”
 - **Court Modification**
 - Section 412 states that that a “court may modify administrative or dispositive terms of a trust or terminate trust if, because of circumstances not anticipated by settlor, modification or termination will further purposes of trust. To extent practicable, modification must be made in accordance with settlor’s probable intention”

MODIFICATION OPTIONS FOR EXISTING TRUSTS (cont.)

■ DECANTING

- Assets of an existing trust transferred to a new trust with provisions that are better suited to current situation
- A few states have enacted Uniform Trust Decanting Act (UTDA) which permits decanting for appropriate purposes
- Every state allows decanting in some form, but only some states have statutes governing decanting
- ACTEC has posted a summary of state decanting statutes on its public website See www.actec.org/resources/state-surveys
- CAUTION: Be aware of various complex income, gift, estate and generation-skipping transfer tax implications associated with decanting which are beyond scope of this presentation and these materials

CONCLUSION

- Inevitably we will be drawn into a family's crises due to an addiction
- Provide compassionate, candid and competent counsel
- Develop estate plans to promote recovery and future stability
- Secure peace of mind for clients

QUESTIONS?

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