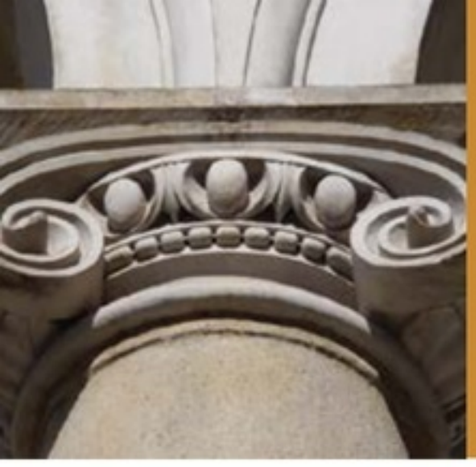

By **William F. Messinger** & **Arden O'Connor**

Rethinking Trustee Responsibility For Addicted Beneficiaries

Take action and minimize liability

Here's a quiz: A trustee's responsibilities include which of the following:

a) Managing a beneficiary's assets
b) Completing all of the necessary financial and tax documentation
c) Distributing assets as prescribed by the trust
d) Identifying signs and symptoms of a substance use disorder (SUD) in a beneficiary and adjusting his oversight in a manner that reflects the beneficiary's clinical needs

Historically, most trustees would assume that answers a, b and c apply. However, in the wake of the opioid crisis, more trustees are expanding fiduciary duty beyond administrative and financial functions to include responsibility for beneficiary health and welfare.

Accordingly, we'll discuss our work with clients in addressing:

1. The proactive trustee's response to a substance abusing beneficiary;
2. How to minimize potential liability by following best practice standards; and
3. Pressure points to encourage reluctant trustees to take action.

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Proactive Trustee Response

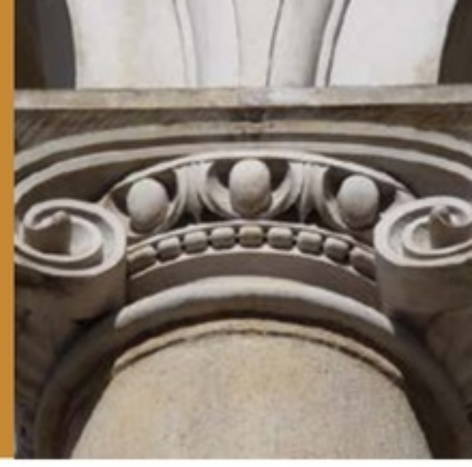
Through a variety of ways, trustees may discover a problem a beneficiary has with substance abuse. They may hear rumors from other family members; they may witness problematic behaviors; or there may be language in the estate-planning documents that suggests a beneficiary has a history of substance abuse.

Example: Familial disclosure of substance abuse issues. George, a 72-year-old worried father, tells his nephew Bill about his son Chris' issues.

George confides, "Bill, I'm so grateful you're willing to serve as Chris' trustee. You may not have known this, but ever since Chris was a teenager, he's struggled with a serious substance use issue. He's been through four treatment centers and hasn't been able to maintain sobriety for more than six months. He's about to turn 21, and I'm worried that when he receives his money, he'll spend it all on drugs and likely kill himself. What can I do?"

Bill responds, "I'm honored to be selected, but I do have some concerns about Chris, and I want to make sure that I'm respecting your wishes with the way I support him. I've spoken with some experts, and they've outlined the following steps:

1. We'll need to hire a distribution advisor. This can be a person or an entity with substance use expertise that can advise me on Chris' current status as it relates to substance use.
   a. I'm not the expert and don't want to make judgments or design a treatment plan.
   b. This person will ideally review Chris' history and make recommendations for a treatment plan.
   c. This same person or entity should oversee the implementation of the relevant services.
2. We'll have to decant the trust assets into a trust with



distribution standards that address Chris' disorder and extend the eligibility date.

3. The distribution advisor will also serve as an intermediary for requests for money, thereby separating the roles of trustee and father.
4. The language in the new trust will reflect best practice standards."

In this example, George and Bill have direct knowledge of Chris' addiction and, given their personal relationship to Chris, are highly motivated to take all necessary action. In contrast, institutional or professional trustees often lack this knowledge and must rely on other methods to establish an evidentiary record of beneficiary behavior. (See "Trustee Information Gathering," this page.)

Minimize Potential Liability

Minimize potential liability by following best practice standards. One consequence of being proactive is blowback from restricted beneficiaries who can no longer fund their habit. To minimize liability, use qualified experts; recite the evidence when adopting distribution standards or decanting; and follow best practices.

Appoint experts to advise the trustee. Assuming there's credible direct or circumstantial evidence of a beneficiary's behavioral health disorder, the next step is to appoint an expert to assess the information and advise the trustee. The Uniform Trust Code explicitly authorizes appointment of experts, but to avoid liability, trustees must hire qualified experts:

> A trustee may delegate the duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances.[1]

Because SUDs and other behavioral health disorders are medical conditions defined by the American Psychiatric Association in the *Diagnostic and Statistical Manual of Mental Disorders* and outside the scope of a trustee's expertise, trustees must appoint qualified experts to meet this prudent standard. At least half of addicts have co-occurring disorders, such as abuse or depression, and unlicensed help often leads to unfortunate outcomes and liability exposure. Plus, in the event of litigation, the unlicensed helper doesn't qualify as an expert witness.

Important qualifications to consider for an expert:

- Graduated from a credentialed, recognized educational institution.
- Holds a state-approved license.
- Documented experience in addressing the presenting problem.

While some trustees like to handle beneficiaries with behavioral health problems on their own, few trustees meet these qualifications. Trustees may also find that

Trustee Information Gathering

Don't take a passive approach

While many trustees are content to let problems come to them, a passive approach only allows problems to fester. Annually asking staff, "Do you have any concerns about X's behavior as it relates to possible use of alcohol, drugs or mental health concerns?" seems prudent, given the significant risk of substance dependence in beneficiaries.

Other potential sources of information that raise red flags are:

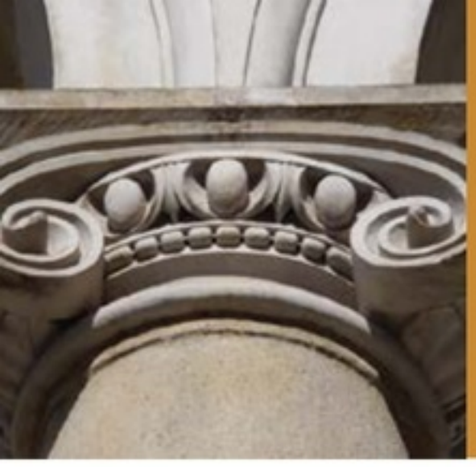
- Personal observation and interactions with the beneficiary.[1]
- Incidents that come to the trustee's attention from others, such as a DWI, accident, ill-mannered or unsafe behavior in social or family activities, etc. (cell phone videos for irrefutable proof).
- Conversations documented by relationship managers interacting with the beneficiary in a family or trust office.
- Requests for invasions of principal or other discretionary distributions that may reflect underlying dysfunctions.

If these reports appear credible, the suggested response is to find an expert to assess the beneficiary to see if a behavioral health disorder is present. These incidents are opportunities to seek help and shouldn't be minimized or made to disappear using lawyers or payoffs.

Endnote

1. *See* signs and symptons in William F. Messinger and Arden O'Connor, "When Addiction Surfaces in Beneficiaries and Client Offspring," *Trusts & Estates* (August 2015), at p. 45.

— William F. Messinger & Arden O'Connor



offering help isn't received well by the beneficiary, which jeopardizes their relationship going forward.

There are several options to find experts with appropriate credentials, including:

- American Society of Addiction Medicine (*www.asam.org*)
- Contact the organization in your state administering the program for physicians, discussed below (Federation of State Physician Health Programs (PHP), *www.fsphp.org/state-programs*). Some PHPs take outside clients or are good resources for names of competent professionals.

We also have extensive lists of experts on staff or working as independent contractors. For extended engagements, perform a credit check to assure that the expert isn't under undue financial pressure that might influence her advice and course of action.

A fiduciary duty obligates a trustee to exercise the highest standard of care.

Consider justifications for decanting. Professional trustees may find Bill's choice to decant extreme, with the change in distribution date likely jeopardizing tax benefits from the annual exclusion and perhaps exceeding authority under some decanting statutes. From Bill's perspective, tax savings are trivial in comparison to saving Chris' life. George, the grantor, is alive and able to express his intent to support healthy behavior, not fund excessive substance use. In this situation, simply appointing an expert and adding distribution guidelines weren't sufficient protection.

Regarding his decanting, consider this comment from the Uniform Trust Decanting Act:

> These statutes represent one of several recent innovations in trust law that seek to make trusts more flexible so that the settlor's material purposes can best be carried out under current circumstances.[2]

Money fuels the fires of addiction; helps those struggling avoid the consequences of their use; and promotes relapse. Decanting is vital in encouraging beneficiaries to seek help.

Many trustees may be reluctant to consider decanting due to traditional attitudes that no longer reflect current law. In a recent decision, the Massachusetts Supreme Court declared that:

> …the trustee could exercise his or her powers and obligations under the 1983 trust, including the duty to decant if the trustee deemed decanting to be in the beneficiary's best interest.[3]

In this case, there was no explicit language authorizing decanting, nor statutory language permitting decantation, yet the court specifically refers to amending an "unamendable trust."

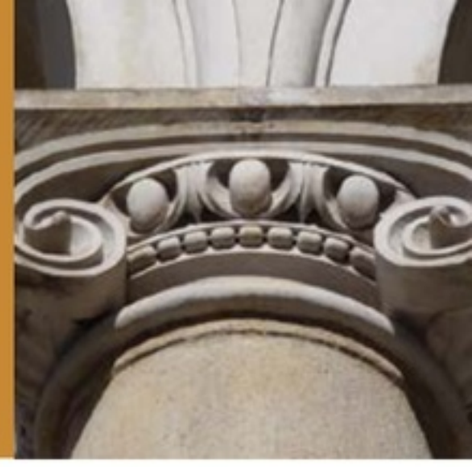
While state statutes vary, consider this example from the Trust Decanting Statute[4] in Minnesota:

> An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances.[5]

A fiduciary duty obligates a trustee to exercise the highest standard of care. Continuing to fund an active, self-destructive addict certainly isn't in the addict's best interest, especially when decanting is readily available.

Statutory language similar to the above grants trustees sufficient authority to avoid liability from a litigious beneficiary and, if deemed advisable, successfully seek court approval for decanting. For trusts domiciled in states with more restricted decanting laws, we advise moving the trust to states with more receptive laws.

Follow best practice standards in seeking SUD treatment. The final discussion point in avoiding liability is adhering to a best practice standard regarding treatment. Fiduciary obligations require trustees to follow best practice standards in SUD treatment. Unfortunately, high quality, effective programs are difficult to discern, as claims of success and treatment modalities aren't



regulated by the Federal Trade Commission or the U.S. Food and Drug Administration. Treatment is a "buyer beware" industry, in which the most common outcome is relapse.

The good news is that programs run by medical boards for physicians meet best practice standards, as recovering doctors have very high, proven, long-term success rates (74 percent continuous abstinence at five years). We adapted their model for our work with trustees and families over 20 years ago, as we described in our prior article.[6]

We also developed model language for trustees to insert in trusts that provides a comprehensive approach for addicted beneficiaries, including appointment of experts and recovery management over many months, accompanied by drug testing.[7] This article includes references to research validating the incentive-based approach underlying the model language.

In our experience, once the storm is weathered, most beneficiaries comply, as they recognize they can't survive without their distributions. Those who do hire lawyers usually are unable to successfully sustain their claims due to relapse. Of course, armed with a best practice standard and a qualified expert, going to court for approval is always an option.

Pressure Points

Having discussed how the proactive trustee can address SUDs in beneficiaries, let's look at the ways concerned family members might be able to pressure pro-status quo trustees into action.

Nadia poses the following question to her family's attorney:

> Michael serves as my brother Rob's trustee. Rob has had a history of abusing drugs and alcohol, and Michael continues to make distributions to him. Rob has almost died several times; how can we get Michael to understand that he's hurting Rob, not helping him?

Armed with well-documented addictive behavior that clearly demonstrates danger to the beneficiary, the first step is to present this information to the trustee, and if necessary, his superiors or associates.

Family Argument 1: Affirmative duty of care. George and Bill were especially receptive to decanting after hearing the following passage read at a wealth management advisory group meeting:

> The duty of care: A trust is not a safe and a trustee is not a guard, watching over the trust property with no purpose. The trust exists to benefit some beneficiary, and the trustee must take care to understand the beneficiary's true needs and act accordingly.[8]

They believe that the beneficial relationship entails an affirmative duty by trustees to encourage addicted beneficiaries to seek help.

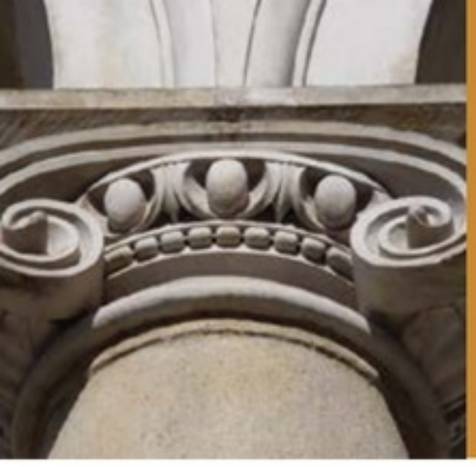
Family Argument 2: Affirmative duty to decant. Case law may mandate a duty to decant—to amend an "unamendable trust"—as the Massachusetts Supreme Court stated in the decision referenced earlier. Or, when the power is authorized by statute, the trustee has a fiduciary duty to exercise the power in the best interests of the beneficiary as any prudent person would under prevailing circumstances, to paraphrase the Minnesota statute.

> Trustees aren't licensed counselors, and failure to appoint an expert is likely to be a per se violation of fiduciary duty and the prudent trustee standard.

Family Argument 3: Reckless indifference to interests of beneficiary. The *Restatement (Third) of Trusts,* in reference to exculpatory clauses, states that such a clause is unenforceable to the extent it:

> …relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.[9]

If a trustee can't act with reckless indifference to the interest of the beneficiary on financial matters, why



is it any different when the beneficiary is substance-dependent?

Family Argument 4: Petition to remove trustee. In some states, the settlor, a co-trustee or a beneficiary can petition the court to remove a trustee for persistent failure of the trustee to administer the trust effectively or if there's been a substantial change of circumstances, and removal serves the best interests of all the beneficiaries.

Family Argument 5: Trustee fails to hire expert. Trustees aren't licensed counselors, and failure to appoint an expert is likely to be a per se violation of fiduciary duty and the prudent trustee standard.

Lawyers are subject to professional complaints for acting outside their scope of expertise or failing to take protective action for a client with diminished capacity.

Overcoming Standing

Most trustees believe they're immune from oversight by relatives because the relatives lack standing to bring a claim against the trustee. To the contrary, we've found several ways resourceful family members can work around the issue of standing with the goal of removing the trustee or seeking injunctive or declaratory relief.

Assert an interest in the trust. One way to overcome standing is to assert an interest as a beneficiary—a person with a present or future beneficial interest in a trust, vested or contingent. This includes: siblings who are beneficiaries under a master trust; siblings of a childless beneficiary; adult child (if co- or secondary beneficiaries); and minor children (future beneficiaries) via a guardian ad litem. The grantor, if living, also has standing.

Assert a collateral claim naming the trustee. Absent standing under trust doctrine, relatives must pursue other plausible claims. While an extensive discussion is beyond the scope of this article, potential pressure points are:

Vulnerable adult statutes. These vary from state to state, but some include fiduciaries or other professionals.

Child protection. Even well-off parents face child protection charges when interacting with school and medical personnel while under the influence. Concerned relatives can then petition for custody, and trustees may be brought into these proceedings for failing to protect the interests of the children as contingent or secondary beneficiaries or to pay for care of children in the custody of the relative.

Tort claims. When family members have experienced the near death of a loved one due to overdose or other addiction-related perils, there may be a claim for damages or injunctive relief, when the trustee: (1) created the peril by knowingly funding a clearly self-destructive addict; (2) tried to help but botched the job due to lack of expertise; or (3) has a duty to rescue the beneficiary due to their special relationship.

Repercussions for lawyers acting as trustees. Lawyers are subject to professional complaints for acting outside their scope of expertise or failing to take protective action for a client with diminished capacity (Model Rules of Professional Conduct Rule 1.14).

The goal for the family is to present a colorable claim regarding standing or a collateral issue. Due to experience with treatment and drug courts, family members are likely to find a sympathetic judicial forum if trustees fail to take action regarding an at-risk beneficiary.

Endnotes

1. Uniform Trust Code (UTC) Section 807(a).
2. Uniform Trust Decanting Act (2015).
3. *Ferri v. Powell-Ferri*, 476 Mass. 651, 663 (2017).
4. MS 502.851, Trust Decanting.
5. *Ibid.*, Subd. 9 Fiduciary Duty.
6. *Supra* note 1.
7. "Model Language for Addressing Substance Use Disorders (Addiction) in Trust Documents: Best Practices for Treating Substance Disorders," *www.billmessinger.com/resources.html.*
8. Hartley Goldstone, James E. Hughes Jr. and Keith Whitaker, *Family Trusts*, at pp. 53-54.
9. *Restatement (Third) of Trusts* Section 96(1) (2012)—The *Restatement* section is similar, although not identical, to UTC Section 1008.