

Estate Planning & Elder Law

Trust Planning for Beneficiaries With Addictions

By Wayne Buckwalter

During the course of an interview with estate planning clients, it is becoming more common to determine that a potential beneficiary suffers from a drug, alcohol, gambling or other addiction-related problem. The risk of misuse or abuse of an inheritance may create devastating consequences for such a vulnerable beneficiary and his or her dependents. According to the 2007 National Survey on Drug Use and Health, 23,200,000 people required treatment for drug and alcohol problems. This represents 9.4 percent of the population. The Caron Treatment Centers estimates that 14 percent of the population suffers from the disease of addiction and one-third of the population is affected by the disease in some way. If this subject is not currently on the estate planning attorney's checklist of items to review with the client, it should be added immediately.

When this issue is raised by the client, the client generally states something

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to the effect of: "I don't want him or her to receive anything until the beneficiary is straightened out." It is important to point out to the client that determining whether a person suffering from an addiction is "straightened out" is virtually impossible. No former addict is ever "recovered." They are "in recovery," which is a day-to-day battle. Successfully covering this issue in a trust requires sensitivity to and understanding of the disease of addiction. The first step is to point out to the client that this is a different situation than creating a trust for young beneficiaries or beneficiaries with special needs. A solution is creating a separate trust for the benefit of the addict which is tailored to the specific issues involved in addiction.

Naming a family member or corporate fiduciary is often not the best solution. How would such a trustee determine whether the beneficiary is "straightened out"? Corporate trustees are not addiction therapists and are not equipped to administer drug tests. A family member most likely has already been manipulated by the addict and being named as a trustee would cause more family stress. Addicts are masters of manipulating drug tests as well as people. It is often said that the hardest person for an addict to manipulate is a person in recovery. Why not consider

naming a person in recovery as trustee of a trust created for the benefit of the addicted beneficiary?

The next step is to find a qualified trustee. A starting point is the New Jersey State Bar Association Lawyer Assistance Program (NJLAP). Its purpose is to provide assistance to attorneys, members of the judiciary, law students and law graduates with alcohol, drug, gambling and other personal problems that affect well-being and professional performance. NJLAP works with volunteer attorneys who function under Confidentiality Rule 1:28B-3. Such a volunteer attorney may be in a recovery program him or herself and also know a qualified attorney, accountant or financial professional in a recovery program. Studies show that being in recovery for two years rather than one year results in doubling a person's chance of still being in recovery in five years. Remaining in recovery for five years indicates a greater chance of remaining in recovery thereafter. The professionals in recovery will help the estate planning attorney create a pool of potential trustees.

A starting point is to find available potential trustees with varying professional backgrounds who are in recovery. They should then be personally interviewed. Because any person in recovery has the chance of relapse, a trustee in recovery is not immune to relapse. This issue may be dealt with in several ways. Multiple successor trustees named in the trust may be given the power to remove and replace the

initial trustee in such an event. A corporate co-trustee can be named and given removal power and be required to appoint a successor co-trustee named in the trust. The client may be given the opportunity to meet with a number of potential trustees who are in recovery and determine a comfort level.

A trustee with this background knows that even after treatment, the path to recovery is filled with obstacles. People, places and things may be “triggers” leading to relapse. Knowing that addiction is a disease just like heart disease or cancer is crucial to supporting recovery. Recovering addicts need a strong support system which in most cases consists of groups of other recovering addicts such as Alcoholics or Narcotics Anonymous (AA and NA). A qualified trustee will be in the best position to monitor and foster the support system while making

best use of the trust income and assets.

Once the trustee determination has been made, the next issue is creating the terms of the trust. These may include giving the trustee broad discretion for using trust assets and income for treatment and determining where and when. The trustee obviously cannot require that the beneficiary enter a treatment center. However, the trustee can determine if, how and when assets and income are used for or by the beneficiary. This allows the trustee to monitor the receptiveness of the beneficiary to treatment, the appropriate level of treatment and to what extent the beneficiary is in a position to receive assets or income. Recognizing that financial decision making is also an issue, the trustee can assist the beneficiary with budgeting and planning.

The trust may be structured as a basic

broad discretionary trust or structured to qualify as a special needs trust. The discussion with the client requires sensitivity to the client’s hope for the recovery of the beneficiary. The trustee may also be given discretion to terminate the trust. The hope of the family is that the beneficiary be committed to recovery. A trustee who has made a similar journey is in one of the best positions to make this determination.

This approach provides support and funding for recovery while protecting the beneficiary and family. It avoids family conflict by removing a family member from the affairs of a beneficiary suffering from an addiction. In addition to financial protection, the beneficiary has a trustee who knows the struggles that face the beneficiary and is potentially a vital part of the recovery support network. ■