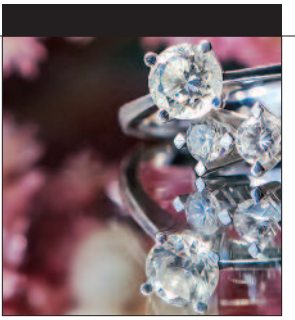

Advising Clients About Addiction Matters

Planners must consider the surprising prevalence of addiction in order to address potential ramifications as needed in estate planning documents.

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Many more clients of estate planners, or their immediate family members, are struggling with an addiction (such as drugs, alcohol, gambling, shopping, spending, sex, etc.) than might be expected. Few clients directly inform their advisers of addiction challenges. Moreover, some planners may incorrectly believe that, because their clients are wealthy and successful, these are not issues that affect them. That may be a costly mistake and a misconception. In fact, in many cases, it is the very wealth that brings clients in for planning that puts them and their children at greater risk for addiction, anxiety, depression and even suicide. The majority of the time, it is these very factors, wealth and success, which contribute to the shame and ambivalence clients have in disclosing their struggles with addiction (whether theirs or another family member's) to their planners.

It is essential to the success of the estate plan, as well as the family's quality of life, to address the fact that many clients, or members of their family, struggle with addictions to drugs, alcohol, gambling, compulsive spending, sex, or other such behaviors. Any of these dependencies may undermine, or even destroy their quality of life, their family, their financial security, and potentially their lives. Asking direct and essential questions may be uncomfortable for the planner, as well as the client; however, making the necessary inquiries might

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enable the adviser to then provide referrals, support them in getting help, and preserve the wealth they've accumulated over their lifetime and provide for the legacy of values they hold dear. These tough questions should be part of the client intake process. If it is "normalized," clients will not feel that they are being singled out. Making these personal questions a routine part of the client intake sends the message that the advisor understands these issues and is open to discussing them. This may give the clients the security to be more open about their family's particular addiction challenges. One means of doing this is modifying intake questionnaires to add questions addressing these matters.

In addition, addressing addiction concerns may also limit the adviser's liability by allowing the counselor to stay in his or her own lane of skills, scope, and expertise. An estate planner should not be perceived as being a therapist or as having the necessary skills to address the medical aspects of addiction issues but only to identify them so that they can be properly addressed in the estate plan, and to help direct the client to obtain the appropriate experts to help with the actual challenges, if the client has not already engaged specialists.

Statistics demonstrate that addiction issues are common

There are myriad statistics about the scope and pervasiveness of addiction issues. The following are only a few to demonstrate to practitioners that it is highly probable that at least a few of their clients are affected by addition:

- According to the National Institute on Drug Abuse, more than 130 people die every day from opioid overdoses. This includes prescription pain pills, heroin, and synthetic opioids like fentanyl.[1]
- The National Survey on Drug Use and Health found that 38% of Americans, aged 12 and older, battled an illicit substance use disorder in 2017.[2]
- The United States Department of Transportation reports almost 30 people a day in the United States die in drunk-driving crashes – that's one person every 48 minutes.[3]
- The Center for Disease Control and Prevention reports more than 1 million drivers were arrested for driving "under the influence" in 2016 – that's only 1% of the 111 million self-reported episodes of alcohol-impaired driving among U.S. adults each year.[4]
- On average, people with addictions who enter rehabilitation facilities spend 30-90 days at a rehab center at a cost of $20,000 - $80,000 per month and return several times before they either die, are incarcerated, or maintain sobriety.

Example: the opioid crisis. Drug addiction is far more prevalent than many realize. The scale of the opioid crisis is an illustration of that.

Several actions are being used (or proposed) to help turn the tide against the opioid crisis.

1. A broadly sponsored bill, the Comprehensive Addition Resources Emergency (CARE) Act, has been introduced in the House and Senate, although because Senator Elizabeth Warren, a candidate for the office of the President, is a co-sponsor, its fate, at least for now, is uncertain.
2. Thousands of lawsuits against manufacturers and distributors of opioids have been commenced.[5]
3. Some health facilities which dispense (or prescribe opioids) are now acting to curb abuse. See, e.g., the protocol now used at the Hospital for Special Surgery.[6]

While it would be unfair to say these measures are "too little too late," addiction to opioids as well as illicit drugs and other activities (such as gambling) will continue for the foreseeable future and more efforts will be made to turn the tide. This is only one possible addiction clients or their families might be facing.

Role of the estate planner

Every aspect of estate and related planning is affected by addiction. Each of the allied professionals can play a role in collaboratively helping clients with addiction challenges. Consider the following:

- Attorney – Selection of fiduciaries is critical, and must be handled in a manner that addresses the addiction issues. Distribution and other provisions may warrant tailoring to address the particular situa-

1 National Institute on Drug Abuse, *Opioid Overdose Crisis*, https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis (2019).

2 Substance Abuse and Mental Health Services Administration, Key Substance Use and Mental Health Indicators in the United States: Results from the 2017 National Survey on Drug Use and Health (2018).

3 National Highway Traffic Safety Administration, *Traffic Safety Facts 2017 Data*, https:// crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630 (2018).

4 Centers for Disease Control and Prevention, *Impaired Driving: Get the Facts*, https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html

5 German Lopez, *The thousands of lawsuits against opioid companies, explained*, https://www.vox.com/policy-and-politics/2017/6/7/15724054/opioid-epidemic-lawsuits-purdue-oxycontin (2019).

6 https://www.hss.edu/addressing-the-opioid-crisis.asp

tion the client is facing. Who should be agent under the client's durable power of attorney? Who should be successor trustee under the client's revocable trust? How does the impact of addiction affect those decisions? If the client has an addiction, does that affect the client's capacity to sign legal documents. If not, might it affect the client's susceptibility to undue influence? How does it impact the client's agency and independence if he or she is sober for a particular amount of time? What if he or she relapses?

Every aspect of estate and related planning is affected by addiction.

- Trustee – The trust officer may bear the brunt of the challenges of an addicted beneficiary. This could affect not only just distribution decisions but all interactions, such as ensuring the beneficiary is aware of decisions about investments, which may have a direct impact on the income taxes the beneficiary may pay and should plan for. Wealth forecasts may need to reflect the costs of treatment, which for even large trusts may be significant, the cascade affect of lower or lost wages due to addiction requiring greater distributions to provide for lifestyle costs, and more. Does the particular trust company have the resources to address these issues? From a liability perspective, will an institutional trustee accept a trust knowing of a significant current addiction issue? If family (that is lay person) trustees are involved, often they do not have the expertise or objectivity of a professional trustee and they might consider, if the governing instrument permits, resigning in favor of a professional trustee, or bringing on a professional co-trustee.
- CPAs – Budgeting must reflect the realities of all of the direct and indirect costs of addictive behavior. Are there any tax deductions available for the costly treatment programs or necessary medical care? Although the 2017 Tax Cuts and Jobs Act emasculated itemized deductions as opposed to using the enhanced standard deduction, the costs involved for treatment can be so significant that a medical expense deduction might still be available if the taxpayer itemizes.[7] Can planning be done to address this? Should allowable deductions (including medical expenses) be bunched into one year? Can the CPA monitor spending to identify issues? For example, it may be preferable to have the CPA (or trust if one is involved, or some combination) pay bills so that some control and monitoring of expenditures may be implemented.
- Counselor and/or Case Manager – Too few planning teams include a counselor, social worker or case manager as an active participant. This will change as the population continues to age. It must change immediately for families with a significant addiction issue. The team will require objective and professional input on the impact of the addiction, treatment options, and much more. Where will the trajectory of the addiction likely lead? That information could be critical to proper planning now. What might successful treatment do to that otherwise likely trajectory? Should planning reflect that possibility as well? Depending on the nature of the specific addiction, and the magnitude, the affected person might require ongoing support, counseling or in some cases "24/7" monitoring. These questions can be evaluated and the necessary care provided by the appropriate health related professional. It is also important for practitioners to understand the difference between a care manager and case manager. Care management generally focuses on physical care, for example a social worker or registered nurse who may assist clients with physical issues, such as a child with Cerebral Palsy or an elderly client struggling with the issues of aging. That is a different expertise and often a different firm than a mental health counselor or case manager who has the skills and expertise to guide and intervene with clinical care and other support.

For some clients the decision process can be horrific

The choices some clients are forced to make due to addiction are so horrific as to be unimaginable. And those clients in particular may need the support from all of their professionals. Some families may be forced to make a decision as painful as the following: "Do I save this

child's life, using college savings for my other children, or do I let my addicted child struggle and, perhaps die, but pay for the future of my other children?"

Role of a counselor, case manager or similar professional

Input from a licensed mental health counselor may be essential to guide the family in saving and supporting the family member struggling with addiction, even if the circumstances are not immediately life threatening. But often the entire team is necessary to manage the fallout of the decision, both emotionally and financially. The counselor can assist in addressing the inevitable stress on a marriage and the impact on the family at large.

Often a married couple, where one or both are addicted, cannot agree on the next steps because the stakes are so high, they may be operating from emotionally charged places, and neither one likely has the professional expertise and objectivity to examine and know all the available options and potential outcomes of each option. In many instances, there is pressure on one parent to make a decision and then face angst if the decision does not work. Often decisions in dealing with a family member with addiction are not fully successful. In addition to the emotional upheaval to the parents, the other children may feel that the addicted child was chosen over them. Feelings of abandonment are common. While all the attention had to be given to the sibling they view as not doing the right thing, the other children are left to fend, in many aspects of their lives, for themselves. These attitudes can build tremendous resentment. A counselor is essential member of the team so that he or she may assist in navigating these issues.

Addressing the costs of addiction

Family reputation cost. A consideration that is very important for many client families is minimizing the damaging disclosures on social media, the impact of embarrassing and inappropriate behavior of their family member in the community, and for those with family businesses the impact on the business's reputation. Where it may have been possible years ago to keep addiction quite private, that is far more difficult, if not impossible, in an electronic age. For a person who has worked diligently for decades to build a reputation in his or her industry or community, or both, dealing with the issue and potential reputational harm is particularly important. Consider the impact on the career of a money manager, lawyer, physician or CPA who becomes known for addiction to illicit drugs. Privacy is critical and may suggest special steps such as using a revocable trust rather than a will (and the likely court interference and review of expenditures) to try to reduce public knowledge of an addiction.

Emotional costs of addictive behavior to the family. On their wedding day, newlyweds gaze into each other's eyes as they typically imagine the dreams and possibilities of everything that's to come. They picture security, a teammate in life, traveling the world, and building careers and families. When parents hold their child for the first time, they imagine a life filled with happiness and potential. All individuals know there will be struggles ahead but they have every confidence that they can take on the world together. Rarely does someone look his or her potential spouse in the eye, or hold their child for the first time, imagining that the loved one will end up addicted to drugs, alcohol, or gambling. The client has no real idea the horrors that will ensue as one party shoulders all the burdens of keeping life afloat in addition to helping their loved one get appropriate care. Even when a child is the party struggling with the addiction, it is not uncommon for at least one parent to be unable to deal with the emotional realities of the situation. That struggling parent may mentally, emotionally, and physically "checkout" and leave the other spouse to navigate the situation on his or her own.

Whether the individual struggling with the addiction is a parent or a child, the stresses on the family may be detrimental to marriages, siblings, finances, and everybody's emotional wellbeing as the environment is constantly wrought with conflict, stress, and uncertainty.

For children, these situations can be especially stressful as they sometimes struggle to meet even their basic needs when a parent is absent or intoxicated. In 2017, in a national survey on drug use and health, the Substance Abuse and Mental Health Services Administration released a report stating about 1 in 8 children (17 years old or younger), between 2009 and 2014, lived in households where at least one parent had a substance use disorder.[8] The impact of an alcoholic family member can have an enormous impact on the other family members. Studies show that parents who struggle with alcohol and drug addiction create negative outcomes such as poor self-image, guilt, anxiety, feeling helpless, chronic

[7] See Section 213.

[8] Rachel N. Lipari and Struther L. Van Horn, *Children Living With Parents Who Have a Substance Abuse Disorder*, https://www.samhsa.gov/data/sites/default/files/report_3223/ShortReport-3223.html (2017).

depression, fear of abandonment, and loneliness in their children.[9] These children are also four times more likely to become alcoholics themselves, marry alcoholic or abusive partners later in life, and have difficulty managing stress when compared to children raised by parents who did not struggle with alcoholism.[10] According to the Bureau of Justice Statistics, approximately 80 percent of child abuse cases involved alcohol or drug use.[11]

Rarely does someone look his or her potential spouse in the eye, or hold their child for the first time, imagining that the loved one will end up addicted to drugs, alcohol, or gambling.

For spouses, divorce rates are four times higher for individuals with addictions than with the general population.[12] Consider what this means to estate planning. How might knowledge of addiction within a client family affect the planner's determination as to whether he or she can or should represent a couple if the divorce rate is four times higher? Might that change the disclosures made to one spouse or other steps the planner might consider taking if there is going to be joint representation? If the family requests or needs estate tax minimization planning because of the magnitude of their wealth, how might the elevated divorce rate where at least one spouse suffers from an addiction affect a conversation about using a "floating spouse" clause that is, defining the spouse not by name but a description such as the person to whom the grantor is married at the time in question, a so-called "spousal lifetime access trust," or other planning tool. Perhaps, before evaluating those issues, some consideration may be given to what a successful "intervention" may accomplish, resulting from the estate planner referring such a client to the appropriate mental health counselor.

The Bureau of Justice Statistics also reports more than half of the defendants accused of murdering their spouses had been drinking alcohol at the time of the incident.

Planners have the ability not only to help persons in active addiction get the help they need, they can help spouses and family members in difficult situations secure the legal, physical and financial security they need to stay safe, create stability for themselves and other family members, and build a future.

Again, planners should not make the mistaken assumption that wealth, education or success (by whatever other measure) insulates their clients from the traumatic addiction statistics. It does not. In fact, wealth may be the means to facilitate the addiction, and to insulate, albeit for a limited time, the consequences of the addiction. However, wealth alone can generally only provide cover for a limited time.

Financial costs of addictive behavior. The consequences of addiction, whether excessive spending, the costs of drugs, lost wages and others, can have adverse or even devastating impact on the family finances. It is not uncommon for families of moderate wealth to reduce retirement savings to fund these costs. In more extreme situations, which are not at all rare, families may have to resort to tapping funds already set aside for retirement, or college savings for other children, to fund treatment costs. Planners are well aware of the negative income tax consequences of early withdrawals from pension plans and individual retirement accounts (IRAs), which only illustrates the incredible challenge many of these client families face.[13] Worse, for some families, is the loss of creditor protection when premature withdrawals are taken from these or IRAs.[14]

How do financial ramifications affect the rest of the team? The selection of trustees perhaps should avoid family members that might harbor significant resentment toward an addicted child. With the power dynamics created by naming one sibling trustee over another, even in the healthiest of sibling relationships, this decision can create strain and have a negative impact on family relations. Yet many clients will suggest that the siblings be named in fiduciary capacities. The trustee will have to decide how the financial impact of treatment and other costs might be mitigated. What other aspects of the family budget can be tightened? How should investment allocations be modified to both fund future care costs for the addicted family member and sustain a reasonable possibility of paying for college, future retirement and other needs the team identifies? If these decisions are left

9 AAETS, *Effects of Parental Substance Abuse on Children and Families*, https://www.aaets.org/article230.htm

10 Addiction.com, *Alcohol Abuse Linked to Higher Divorce Rate*, https://www.addiction.com/3003/will-alcohol-abuse-lead-divorce/ (2014).

11 Bureau of Justice Statistics, *Violence between Intimates: Domestic Violence*, https://www.bjs.gov/content/pub/pdf/vbi.pdf (1994).

12 https://www.highnetworthdivorces.com/addiction-divorce-america/

13 See https://www.irs.gov/newsroom/what-if-i-withdraw-money-from-my-ira

14 See Richard A. Naegele, Mark P. Altieri, and Donald W. McFall Jr., *Protection from Creditors for Retirement Plan Assets*, https://www.thetaxadviser.com/issues/2014/jan/naegele-jan2014.html (2013).

15 Richard Eisenberg, *The Wrenching Financial Costs of Addiction*, https://www.nextavenue.org/financial-costs-addiction/ (2018).

to a family member, emotions and conflict of interests no doubt will arise.

Although all forms of addiction will entail a financial, emotional, and relationship cost, the financial cost of addiction will vary according to the addictive behavior (drugs, alcohol, gambling, sex, and compulsive spending). Someone who is a compulsive gambler, spender, or sex addict may be able to maintain a normal work schedule and not lose days of employment. However, that person may be spending significant money on hotels, clothes, prostitutes, casinos, bets, etc. Someone addicted to drugs or alcohol may miss days of work, or make detrimental decisions impacting his or her company. Consider this in the context of a client family business that has continued to employ the family member struggling with addiction issues and the financial impact on that business. Of course, they may also overdose or die from activities seeking drugs (e.g., getting beaten, driving while intoxicated, etc.) and there is no way to "dollarize" the value of human life.

Case study: A mother, a successful financial advisor, divorced due to her son's struggle with a heavy addiction to heroin. Now on her own, with minimal emotional support from the father and in a drastically changed financial situation, she would frequently get calls late at night from the police or an emergency room doctor telling her that her son was in the intensive care unit after being beaten almost to death. When she would ask him what happened, it would always come back to him going to parts of town where he was seeking his next fix. She would get calls from the police station informing her that her son was arrested on drug charges. The hospital bills, lawyer fees, and court fees added up quickly. Each time he was released, she would send him to a treatment center costing $28,000 for each 30 day stay. After residential treatment, he would go to a sober living house (another $2,000/month) and engage in an out-patient program. Insurance covered the first few days of treatment but after the standard for "medical necessity" was no longer established, she would be forced to pay out of pocket. She and her son continued on this devastating merry-go-round ten times before her son was finally able to maintain sobriety. Today, she is still paying off bills from his addiction. He, of course, is lucky to be alive. The mother will be lucky if she can retire by the time she's 70, if at all, due to the financial devastation caused by her son's addiction.

Note: According to a study from True Link Financial, 82% of loved ones experienced deleterious financial effects due to a family member's substance use. The study goes further in breaking down the financial impact by reporting 65% of people struggling with addiction borrowed and/or asked for money from a family member, 48% of family members depleted their savings to help, and 11% ended up filing for bankruptcy.[15]

An individual addicted to heroin or cocaine may can spend over $10,000 a month to support the addiction habit, and a rehabilitation facility may cost $30,000 a month.[16] A big question: How may a planner help clients to budget for treatment without sacrificing their own financial well-being?

Addiction and trusts

For families dealing with addiction, including drug or alcohol testing provisions in trust documents may be warranted. Who is designated as a trustee may be an extremely important decision. For example, will a family member really be able to rationally address the challenges of a child/trust beneficiary? Will that trustee be able to refuse distributions or have the fortitude to insist on enrollment in a treatment program before making distributions? Is the family member too enmeshed in the relationship to hold boundaries with the beneficiary? Is the family trustee too bitter from the trauma of the addicted person to make objective decisions that will benefit that person's care? What combination of trustees may be able to withstand these challenges? If an institutional trustee is to be named, does it have the willingness and experience to handle the situation? Or, perhaps, the skill set of the institution being considered is really investment management and not involvement in the personal matters that this particular trusteeship will require. Will the trustee have an incentive to merely make distributions, regardless of the harm to the addicted beneficiary, to avoid complications and time draining interactions even though those distributions are only serving to fund the addictive behavior?

Illustrative trust provision with comments and annotations. It is certain that whenever there is the possibility of intended beneficiaries or their family members being affected by addiction, trusts must be considered. Legal counsel will have to craft trusts to address the potential for future unknown addictive behaviors. Many trusts include standard clauses to address these challenges. Some advisers and trustees might prefer, in contrast, a fully discretionary trust so that they can take whatever action they deem appropriate in the circumstances. But if a client has an existing family member with a specific addictive behavior, it at least warrants discussion

of what specific provision or steps might be taken with respect to that known addiction challenge, in contrast to a generic unknown future addictive challenge. The following illustrative trust provisions are adapted from Interactive Legal Systems and annotated with comments that may be useful not only for drafting considerations, but implementation and maintenance of the trust with an addicted beneficiary.

Substance abuse. *The following provisions apply to all trusts created under this Trust Agreement, except as expressly provided to the contrary in this Article entitled "Substance Abuse:"*

Dependence. "*If the Trustee reasonably believes that: (1) a beneficiary of any trust created under this Trust Agreement (i) routinely or frequently uses or consumes any illegal drugs or other illegal chemical substance so as to be physically or psychologically dependent upon that drug or substance, or (ii) is clinically dependent upon the use or consumption of alcohol or any other legal drug or chemical substance that is not prescribed by a licensed medical doctor or psychiatrist in a current program of treatment supervised by that doctor or psychiatrist; and (2) as a result of such use or consumption, the beneficiary is incapable of caring for himself or herself, or is likely to dissipate the beneficiary's financial resources; then the Trustee must follow the procedures set forth below. No trustee shall be held liable for holding such a belief, if made in good faith, even if it is determined that the belief is not reasonable.*" It would seem that it is imperative that trustees meet in person with beneficiaries periodically so that they can have sufficient interactions to identify facts that might provide relevant information. With the trend of trusts in trust friendly jurisdictions, a child in New York with an addiction issue might have a trust that for legal, tax or other reasons, was created in Delaware, or at further distance such as Alaska. Does the trustee have the wherewithal to physically meet? Will web meetings suffice? The trustee needs to identify through personal experience, as well as collateral interviews with family members, typical patterns of behavior and communication. A change in these behaviors is a red flag which, at a minimum, should illicit a conversation to occur in person or via web meeting if an in-person meeting is not possible. If the person has a history of addiction, the trustee needs to be aware of typical patterns which indicate the person is moving toward, or in the middle of, a relapse. The trustee should get a release of information signed in order to collaborate with the treatment team, including the mental health counselor, psychiatrist, treatment center, etc. so they can act as a support. Without knowing the intimate details of each conversation, this will allow the trustee to get information on whether a beneficiary may be using or is acting in an unusual manner, as well as a list of prescribed medications so that if and when drug testing occurs, the trustee is aware of which substances were not legally prescribed. The trustee may also retain a local (to the addicted beneficiary) case manager or other specialized professional to meet the beneficiary regularly, e.g. quarterly, and issue a report to the trustee.

Testing. "*The Trustee will request the beneficiary to submit to one or more examinations (including laboratory tests of hair, tissue, or bodily fluids) determined to be appropriate by a licensed medical doctor (whether or not a psychiatrist) selected by the Trustee. The Trustee will request the beneficiary to consent to full disclosure by the examining doctor or facility to the Trustee of the results of all the examinations. The Trustee shall maintain strict confidentiality of those results and will not, without the beneficiary's written permission, disclose those results to any person other than the beneficiary. The Trustee may totally or partially suspend all distributions otherwise required or permitted to be made to that beneficiary until the beneficiary consents to the examination and disclosure to the Trustee.*" Some institutional trustees might request, or require, that these issues be addressed by an individual trustee. The trustee should be aware that different tests will produce different results. For example, a hair follicle test will provide information on the last 90 days of substance use. These results may be more accurate than a urinalysis which will typically vary according to how quickly the substance is metabolized, a mouth swab test which will only indicate drug use in the past few hours to two days, and a blood test which tests for current levels of intoxication.[17] Understanding the test types will help with understanding the results. A beneficiary may still be actively using substances but timing their use, or using other tricks like substituting urine, in order to avoid getting caught.

A trustee should also be aware of tools such as Soberlink[18], a breathalyzer which verifies the user by photograph and sends the test results to the people indicated on the platform. Rather than going to a lab, this allows testing to be done several times a day if needed and provides immediate results. This also helps clients struggling with alcohol to have increased accountability and the opportunity for immediate intervention if needed.

16 Id.

17 Drug and Alcohol Testing Industry Association, http://www.datia.org/datia-resources/27-cr%20edentialing/cpc-and-cpct/931-workplace-dru%20g-testing.html

Treatment. *"If, in the opinion of the examining doctor, the examination indicates current or recent use of a drug or substance as described above, the beneficiary must consult with the examining doctor to determine an appropriate method of treatment for the beneficiary. Treatment may include counseling or treatment on an in-patient basis in a rehabilitation facility. If the beneficiary consents to the treatment, the Trustee may pay the costs of treatment directly to the provider of those services from the income or principal otherwise authorized or required to be distributed to the beneficiary, if the Trustee otherwise determines that the funds are available to do so and it is in the best interests of the beneficiary to do so."* Although the examining physician (e.g., psychiatrist) may be familiar with a limited number of resources, he or she may not be aware of all the options available to an individual struggling with an addiction. For example, there are in-patient units, residential programs, partial hospitalization programs, intensive out-patient programs, sober living houses, Alcoholics Anonymous, in-home programs which work with the client, family, and team, and each one of these has a variety of specializations, solutions, and people who make up the milieu at any given time. It is not uncommon for a client to go to treatment more than one time and it is important to have someone who understands the treatment world to help identify what went wrong during these previous attempts, and to help identify and create a solution which has a higher likelihood of working for this client in the present. These are the moments that a case manager will be able to interview all parties and identify, manage, and coordinate care for the client. The care manager is also familiar with the options available and can pick a treatment center which provides reputable care to the clients they serve. The trustee needs to secure the right to hire parties on the beneficiary's behalf who can consult for these purposes.

Mandatory distributions suspended. *"If the examination indicates current or recent use of a drug or substance as described above, all mandatory distributions and all withdrawal rights from the trust estate with respect to the beneficiary during the beneficiary's lifetime (including distributions upon termination of the trust for reasons other than the death of the beneficiary) will be suspended until:*

1. *in the case of use or consumption of an illegal drug or illegal substance, examinations indicate no such use; and*
2. *in all cases of dependence, until the Trustee, in the Trustee's judgment, determines that the beneficiary is fully capable of caring for himself or herself and is no longer likely to dissipate his or her financial resources."*

How may planners help clients to budget for treatment without sacrificing their own financial well-being?

Discretionary distributions. *"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 discretion (other than an Interested Trustee) and those provisions of the trust relating to distributions for the beneficiary's health, education, maintenance or support."* Although this language may suffice for the trust document, more will be necessary in implementation. The trustee should take the time to identify with the beneficiary what these elements of "caring for himself or herself" include. They should do this in coordination with the beneficiary's counselor so that there is a witness to these guidelines and they can be processed in therapy at a later date. This provides the beneficiary with direct goals to work toward and decreases the frustration of guessing the standards, underestimating the standards, or going by the beneficiary's own standards of what it means to care for himself or herself.

Resumption of mandatory distributions and withdrawals. *"When mandatory distributions to and withdrawals by the beneficiary are resumed, the remaining balance, if any, of the mandatory distributions that were suspended shall be distributed to the beneficiary at that time and the balance of any rights of withdrawal by the beneficiary shall be immediately exercisable by the beneficiary. If the beneficiary dies before mandatory distributions or rights of withdrawal are resumed, the remaining balance of the mandatory distributions that were suspended shall be distributed to the alternate beneficiaries of the beneficiary's share as provided herein."* There is a significant judgment call to inclusion of this provision. If the beneficiary was receiving distributions of $5,000/month, but only $3,000/month was used for treatment, that beneficiary might, in the trustee's discretion and interpretation of the above provision, receive the additional $2,000/month in addition to the beneficiary's regular distribution of

$5,000/month. Such an interpretation and approach might be a setup for failure. People in early recovery are learning how to manage many elements of life in sobriety, this includes managing money. People with addictions often have high anxiety, low impulse control, and poor decision-making skills. These are skills they build in recovery and they frequently need support and assistance from those around them. Rather than giving a larger than typical distribution (which someone may use to go out and buy drugs or alcohol), one thing to consider is providing support through tools like True Link[19], a credit card which allows a trustee to put limits of what and when the card can be used. Access to cash, especially during hours of typical substance use, provide too much temptation and increase the risk of relapse. As trust and skills are built, the trustee and treatment team members may conclude that more freedom can be given, and less monitoring is needed. The first year in recovery usually is the hardest and requires the most guidelines, support, and safeguards.

Other prohibitions during mandatory suspension of benefits. *"If mandatory distributions to a beneficiary are suspended as provided above in this Article, then as of such suspension, 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."* This approach is important because the addicted beneficiary is unable to make decisions for his or her own, or anyone else's, well-being. But this will also require a proactive and involved trustee.

Exoneration provision. *"It is not the Grantor's intention to make the Trustee (or any physician retained by the Trustee) responsible or liable to anyone for a beneficiary's actions or welfare. The Trustee has no duty to inquire whether a beneficiary uses drugs or other substances. The Trustee (and any physician retained by the Trustee) will be indemnified from the trust estate for any liability in exercising the Trustee's judgment and authority under this Article, including any failure to request a beneficiary to submit to medical examination and a decision to distribute suspended amounts to a beneficiary."* One of the biggest concerns planners have in assisting a family with an addicted beneficiary is the fear that they will be held liable. To the extent that fear or discomfort can be reduced or eliminated, the advisor and trustee may be able to better act in the beneficiary's best interest. The fiduciary, especially if the beneficiary has a history of addiction, may be obligated and bound by their fiduciary duty to inquire whether a beneficiary is using drugs or other substances. The trustee might inquire, and upon receipt of information, or upon suspicion that a beneficiary was using drugs or abusing alcohol (or struggling with another addiction), know he or she acted, to the best of his or her ability, in the beneficiary's best interest. Some trustees know a beneficiary is having issues with addiction but would rather not get involved because it's too uncomfortable, worry about being fired as a trustee, or to not want to deal with the fallout of starting a conversation on this topic. What this means is that he or she becomes the funder and enabler of the beneficiary remaining in the addiction. Having the trust retain an appropriate professional with expertise in these matters to interview the beneficiary and issue a report, even if that means conditioning future distributions on the beneficiary's cooperation, may be a better approach.

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Tax savings provisions. *"Notwithstanding the provisions of the preceding subparagraphs or any other provision of this Trust Agreement, the Trustee shall not suspend any mandatory distributions required for a trust to qualify, in whole or in part, for any Federal or state marital deduction or charitable deduction or as a qualified subchapter S trust. Additionally, nothing herein shall prevent or suspend any distribution of Retirement Benefits mandated by the provisions of any trust created hereunder to which Retirement Benefits are payable. Finally, nothing herein shall prevent a distribution mandated by the provisions hereof relating to the Maximum Duration of Trusts."*

Conclusion

Addictions of all types are more common than many anticipate. Proactively assisting these clients who have these problems, their families, trustees and others, is vital to the client's protection and planning success. ■

18 https://www.soberlink.com/
19 https://www.truelinkfinancial.com/