



In Anticipation of Dysfunction - Planning for the Difficult Beneficiary

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Identifying The “Difficult” Beneficiary

- Characteristics can differ from client to client
- “Difficult” Beneficiary can be any of the following:
 - Hostile personality
 - Spendthrift
 - Addictive personality
 - Special Needs – mental illness or developmental disabilities
 - Unmotivated

Careful Drafting When Include “Difficult” Beneficiary

- Client could eliminate “Difficult” Beneficiary
- But Client often wants to include beneficiary
- Just does not want beneficiary to be able to derail plan

Settlor Intent is Paramount

- Need to include statements of Settlor's Intentions on all aspects of Trust administration
- In Trust Itself
- Letter of Wishes
- Important references to trust purposes and intent in MUTC § § 456.4-410, 456.4-411, 456.4-412, 456.4-414, 456.4-416, 456.4-417

Material Purpose Statements In Trust

- Detailed statements of client's intent and purposes to provide guidance to Trustee
 - What client wants to accomplish with trust
 - What client is concerned about
 - How client wants trust administered
 - Whose interests are more important
 - Whose decisions control
- Should be included in most trust documents

Letter of Wishes

- Separate document prepared by client setting out details of concerns and how client wants Trustee to deal with those concerns
 - Does not eliminate Material Purpose statements in trust
 - More detailed than Material Purpose statements
 - Often precatory in nature
- May need to assist client in preparing letter
 - Need to be careful about others participating in preparation of Letter of Wishes
- Letter of Wishes becomes part of Settlor's expression of intent and can constitute Settlor's direction to Trustees

Terms of Trust Prevail

- MUTC § 1-105.2 – any provision of trust document prevails over any other provision of the MUTC, EXCEPT for certain Mandatory Provisions
 - Only 14 mandatory provisions
 - If not a mandatory provision, consider overriding in trust

Discretionary Trust

- Provide Trustee with discretion to act
- Provide Trustee with detailed directions as to what is intended
 - When to distribute funds
 - What to consider in making decision to distribute funds
 - How to determine how much to distribute

Distribution Standards

- Standards – do not create an interest in property or enforceable right
 - HEMS - Ascertainable Standard
 - Broad Discretion
 - “May” versus “Shall”
- Amount of discretion
 - Simple discretion
 - Sole and Absolute Discretion – use with broad discretion (if use with HEMS, negate MUTC § 456.8-814
 - “Binding and conclusive”
 - “Trustee’s decisions control”
- Negate claims for abuse of discretion or failure to comply with standard for distribution in MUTC § 456.5-504.2?

Incentive Provisions

- Positive Incentivizes – distributions if
 - Student
 - Employed
 - Caregiver
 - Volunteer
- Negative Incentives – distributions reduced if
 - Divorce
 - Addiction
 - Inability to handle finances
- Limitation – can't be against public policy
- If difficult to monitor – guidance for Trustee essential

Selection of Trustee

- Critical to select Trustee who can deal with difficult beneficiary
 - Does client want to negate or limit MUTC § 456.7-706 power of court to remove trustee?
- Siblings or other family members may create discord
- Professional Trustee optimum
 - Understands job requirements and how to exercise discretion
 - Removes emotions from decisions
- Individual co-Trustee – very helpful

Multiple Trustees – Whose Decision Controls

- Individual Trustee controls - benefit of corporate Trustee reduced
- Corporate Trustee acts alone – benefit of individual trustee reduced
- Optimum – Odd number of multiple Trustees acting by majority rule, but corporate Trustee must be part of majority

Standard of Care

- Trustee must act in good faith and in accordance with purposes of trust
- But can relieve Trustee of liability for breach of trust if
 - Not In Bad Faith, or
 - Not in Reckless Indifference to the Purposes of the Trust

Limitation of Liability

- Need Express Limitation of Liability
- Not liable unless acting in bad faith or acting with intentional disregard of purposes of trust

Indemnification

- Does client intend to protect Trustee from out of pocket expense in event of dispute with beneficiary or litigation?
- Can Trustee pay attorneys from trust?
 - Consulting for advice prior to any litigation?
 - During litigation?
 - Only after litigation complete?
 - In all circumstances?
 - MUTC § 456.10-1004 not mandatory
- Confidentiality

Trust Protector

- Third party decision maker acting in non-fiduciary capacity
- With difficult beneficiary, best to give power to remove and replace Trustee to Trust Protector
- Powers of Trust Protector must be expressly provided, which can any desired power that is not against public policy
 - Could make Trust Protector a mediator – can't sue Trustee unless authorized by Trust Protector

Limitation of Liability for Trust Protector

- No minimum standard of care required for Trust Protector
- If Trust Protector empowered to make difficult decisions, needs to be protected from liability
- Not liable unless Trust Protector acts with willful misconduct

Other Express Trust Protector Provisions

- Trust Protector has no duty to monitor the actions of the Trustee
- When and under what circumstances Trust Protector is to act
 - Alerted or requested by Trustee
 - Alerted or requested by beneficiary
- How Trust Protector is to be compensated
 - Hourly when actually determine to act
 - Annual fee
- Not fiduciary, but can't benefit self

Mediation or Arbitration Provision

- Authorized by R.S. Mo. § 456.2-205
- Not valid to require mediation or arbitration in trust contest unless all interested persons consent
- Valid and enforceable for all other disputes between beneficiaries and between beneficiaries and trustees
- If require arbitration, need to include detail as to how this will proceed
- Mediation Provision should always be included

Modifications Authorized or Not?

- Does client want to permit modifications? Can negate some modifications
 - Can preclude modification that is contrary to material purpose, even if all competent beneficiaries consent
 - Can preclude decanting
- Some modification provisions of the MUTC are mandatory
 - Can't preclude court from modifying so long as interests of non-consenting beneficiaries are protected and not contrary to material purpose?
 - Can't limit other court modifications – MUTC § § 456.4-412 through 456.4-416

Consequences for Beneficiary's Disputes?

- Incentive provisions reward behavior
- What disputes, if any, does client want to discourage with consequences?
 - Disputes regarding terms of trust?
 - Disputes regarding trustee's distribution discretion?
 - Disputes regarding trustee's investment decisions?
 - Disputes among beneficiaries?
- What consequences?

Direction Regarding Cost of Litigation

- Allocate cost of litigation to disputing beneficiary
 - Paid by beneficiary, directly or by reducing distributions
 - Paid from beneficiary's share or trust
- Allocate to beneficiary in all circumstances or only if beneficiary loses
- Trustee's costs or costs of all other beneficiaries

No Contest Provision

- Eliminate interest if contest validity
 - Only works if provide substantial interest for anticipated difficult beneficiary
- Eliminate interest if challenge exercise of discretion given to Trustee
- Eliminate interest if try to remove trustee
- Eliminate interest if try to reduce interest of another beneficiary
- Intent must be clearly stated – Strictly construed

Thank you!