



Saying “No” to a Beneficiary and Navigating Potentially Improper Directions

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Panel:

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Case Study I:

- ABC Trust Company serves as co-trustee of Susan Vandelay Marital Trust valued at approximately \$18,000,000. The co-trustee, Lloyd Braun, is a long-time family friend of Mrs. Vandelay and her surviving spouse, Arthur Vandelay. Art is entitled to receive the net income from the trust, along with principal in the trustees' sole discretion, for his health, support, and maintenance. In addition, the trustees may, but are not required, to consider Art's outside resources when considering a discretionary principal distribution, without regard that such a distribution could result in the termination of the trust. Upon the death of Art Vandelay, the trust will terminate and the trust principal will be distributed to The Human Fund.
- Art approached the trustees with a request for a \$5,000,000 principal distribution for the purchase of a new property at the Jersey Shore. Art currently resides at his Manhattan apartment and has been trying to sell his Long Island house for over a year, which is listed at \$12,000,000. To document Art's request, ABC requested copies of his personal balance sheet/income statement along with his most recently filed income tax return. The balance sheet showed that Art had \$10,500,000 invested in a brokerage account that included \$7,000,000 in money market reserves.

Case Study I cont.

- ABC Trust Company reached out to Mr. Braun and presented the request with the supporting documentation. ABC relayed to Mr. Braun that in light of the trust's distribution provisions and the level of Art's outside resources, they would recommend denial of his request. Mr. Braun strongly disagreed with this recommendation and stated he fully supported the distribution, noting that it was Susan Vandelay's intention for the trust to make distributions of this nature to Art. He also questioned why ABC was compelling Art to submit personal financial information when the trust agreement doesn't absolutely require it.

Polling Question I

When considering a discretionary distribution and the trust language gives the trustee the option to consider outside resources, does your institution:

- A. Require the beneficiary to provide financial information in all cases
- B. Require the submission of financial information on a case by case basis
- C. Not require the submission of financial information

Case Study 2:

- BEST Trust Company of DE serves as Corporate Trustee of the Richard Dawson 2008 Dynasty Trust with a current market value of approximately \$32,000,000. The trust is one of 9 identically situated trusts created by Richard's father, Arthur, for the benefit of his 9 children and their families, and was funded primarily with a 11.11% interest in a closely held family business, the Dawson Company LP. Arthur is still living, but is not treated as Grantor for tax purposes given the terms of the trust. However, under IRC 678, Richard is treated as Grantor for income tax purposes. The primary intent of the trust is to provide for Richard and his issues during his life, and for his surviving spouse and issue, upon his death. The trust structure also provides for the business continuity of Dawson Company, LP.
- Section 2.02 of the trust provides the Trustee with the sole discretionary authority to distribute income and principal as the Trustee deems *'necessary or advisable for his or her health, support, maintenance and complete education, in the manner to which he or she is accustomed.'*

Case Study 2 cont.

- The trust further provides in Section 2.06 that Richard, as Primary Beneficiary, *'may direct that such amounts necessary or advisable for his or her health, support, education and maintenance be distributed to him or herself; provided, however, that his or her ability to exercise these powers shall be restricted as follows: (a) any exercise is limited so that he or she can receive no greater interest than that necessary or advisable for his or her health, support, education and maintenance; and (b) he or she shall not exercise these powers to discharge any legal obligation which he or she may have.'*
- Richard is considering requesting \$5,000,000 from the trustee for 'support' and asks the assigned Trust Officer what the discretionary process entails. After being informed of the documentation and additional information needed for the trustee to consider the request, Richard sends a direction letter referencing Section 2.06 and directing the distribution.

Polling Question 2

If directed by Richard to distribute \$5,000,000.00 for his 'support' without any other details being provided should the trustee:

- A. Distribute the funds as directed
- B. Request more information about the need for the funds to ensure the restrictions of 2.06 are being adhered to
- C. Treat the direction in the same exact manner as if it were a discretionary request being made of the trustee

Case Study 3

- The JEO Trust Company of Delaware ("JEO Trust") serves as successor trustee of the Alex Trebek Family Trust (the "Trust"). Mr. Trebek was a prominent real estate developer in California. In 1980, he established an irrevocable non-grantor trust for his only daughter, Sarah Trebek and her descendants, with a longtime family friend and lawyer, Harry Friedman, as original trustee. The Trust required accumulation of income until Sarah turns 18 years old, at which time all income is distributed to Sarah. The Trust requires principal distributions "...in such proportions and amounts as the Trustee, in the Trustee's sole discretion, may determine to be reasonable or necessary for her health, maintenance, education, support and comfort." The terms of the Trust required age attainment principal distributions of 1/3 at 25, 1/2 at 30 and the remainder outright at 35. The Trust also gave the Trustee discretion to terminate the age attainment distributions and retain in trust for Sarah's benefit in case of changed circumstances.
- Mr. Trebek died unexpectedly in a car accident when Sarah was 22 years old. After Mr. Trebek's death, Sarah began exhibiting signs of mental instability, which was evident to Sarah's family and the original trustee. Subsequently, Sarah was diagnosed with bi-polar disorder and schizophrenia and underwent significant treatment for her disorder. Due to this changed circumstance, the original trustee exercised his discretion to terminate the age attainment distributions and retained the assets in trust for the benefit of Sarah. The Trust was decanted into a Delaware trust with JEO Trust as successor trustee when Sarah was 30 years old. At the time of the decanting, the trust was valued at over \$50,000,000.

Case Study 3 cont.

- For several years, Sarah received mandatory income distributions and principal distributions of 2% from the Trust. Sarah had a good relationship with the Trustee and showed no signs of mental instability for many years. However, JEO Trust began to receive calls from Sarah's family regarding Sarah's unstable behavior and that they suspected Sarah stopped taking her medication. The family also mentioned that they were concerned that Sarah was being taken advantage of financially by several people. The interaction between JEO Trust and Sarah became more contentious as Sarah's behavior became more erratic. Also, JEO Trust noticed that Sarah's spending habits changed dramatically in that she routinely wrote large checks to individuals and withdrew large amounts of cash. The Trust does not provide any instruction regarding incapacitated beneficiaries.
- Sarah called JEO Trust Company of Delaware and demanded a \$200,000 distribution for an elevator in her home. Shortly thereafter, Sarah's family informed JEO Trust that the contractor involved with the elevator is a person they suspect is exploiting Sarah financially.

Polling Question 3

What are the responsibilities of JEO Trust when suspects that Sarah is currently mentally incapacitated and/or is being exploited financially?

- A. No investigation. Distribute out mandatory income and principal as requested as long as meet the discretionary distribution requirements.
- B. Investigate and document, but distribute out mandatory income and principal as requested
- C. Make no distributions as the beneficiary is unstable and can't handle her funds
- D. Make income distributions only. Work with family to procure a conservator of the estate.

12 Del. Code Section 3325-Specific Powers of Trustee

(21) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

- a. Paying it to the beneficiary's guardian;
- b. Paying it to the beneficiary's custodian under the Uniform Transfers to Minors Act [Chapter 45 of this title], and for such purpose, to create a custodianship;
- c. If there is no custodian paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;
- d. Depositing it in a regulated financial services institution in an interest bearing account or certificate in the sole name of the beneficiary and by giving notice of the deposit to the beneficiary; or
- e. The trustee managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.

Case Study 4

- Grantor established an Asset Protection Trust in 2006. “During the Grantor’s lifetime, Trustee may distribute, in its sole discretion, to or for the benefit of Grantor, Grantor’s spouse,” or Grantor’s lineal descendants “...such portions of income and principal as the Trustee determines appropriate under the circumstances at the time of the distribution.”
- The Trust is currently worth \$5 million but it contains \$4 million in carryover losses from investments previously liquidated.
- Grantor (through his attorney) is requesting that Trustee terminate the trust so that Grantor can achieve the following objectives:
 - Utilize the \$4 million loss carryover to offset \$4 million in capital gains the Grantor incurred in his personal assets.
 - Utilize the assets to “further some of his estate planning goals in light of the recent increase in the available gift/GST tax exemptions.”
- Grantor does have other assets and acknowledges that creditor protection will be lost.
- Trust Protector is required and willing to consent to the termination.

Polling Question

How would you proceed in this case?

- A. Distribute all funds and terminate the trust.
- B. Only distribute the amount needed to cover the tax liability.
- C. Deny the request.

