



# COMMITTEE REPORT: FIDUCIARY PROFESSIONS

By **Niké Anani**, **Todd A. Flubacher**, **Kristin Keffeler** & **Philip J. Hayes**

## Letting Go of the Dead Hand: Part III

There's a better way

**T**his article is the third and last in a series that considers the downsides of dead-hand control in trust planning. The first article explored the challenges and limitations of traditional trust planning.<sup>1</sup> The second addressed the rise of silent trusts or quiet trusts and illustrated how these types of trusts can negatively impact beneficiary growth and well-being.<sup>2</sup> This final installment highlights a new way forward. We'll offer practical tools for planners to help clients consider how trusts can be structured and administered to enhance beneficiary growth and well-being to effectuate the clients' true objectives for their families.

### Taylor's Story

In the first article, we shared the story of 23-year-old Taylor, whose successful entrepreneurial parents wanted to “give their daughter the world,” but those aspirations were overshadowed by their fear of wealth impacting her life. As a result, they avoided engaging in conversations about the money they put into trust, side-stepping all opportunities to share their vision for how the trust resources might be used in her life productively. Taylor felt trapped in

the parent-child dynamic of her youth, as the power over her life choices, like graduate school and the purchase of a home, was governed by her parents and their advisors. She lost confidence in herself as she struggled to navigate the trust landscape with rules she didn't understand and power dynamics she couldn't see. Though designed to protect her financial future, the trust ultimately kept her in an arrested stage of development with little incentive (or opportunity) to learn about her trust resources and little ability to claim agency over her life. Interestingly, in a story that isn't uncommon, the trust Taylor ended up with wasn't the trust structure that was originally designed on her behalf.

Taylor's initial trust, drafted when she was 10, was designed to allow her to learn and build the skills to responsibly engage with the trust resources. Taylor's first trust was written with three major beneficiary growth markers:

- At age 25, Taylor would learn about her trust and, guided by a “beneficiary board of advisors,” she would embark on a 5-year educational journey to learn how to become an active beneficiary;
- At age 30, if Taylor showed responsible decision making and active engagement with her trust over the past five years (attending quarterly meetings with her trustee, learning about how it was invested and demonstrating sound decisions), she could request to become co-trustee;
- At age 40, with the ongoing demonstration of good decision making with her life and financial resources, she had the right to request sole trusteeship.

This initial structure, which reflected a thoughtful approach to beneficiary development, seemed

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appropriate to Taylor's parents, especially given the relatively small sum of money in the trust and Taylor's young age (at the time, 25 years old seemed like a long way off).

As the company grew, the assets in Taylor's trust expanded exponentially, exceeding the amount her parents ever intended to give her. The closer Taylor got to the age of disclosure, the more fearful her parents became of the potentially corrosive effects of her financial resources. Motivated by a drive to protect their daughter, Taylor's parents expressed their fear to a new attorney. Their attorney responded to the expressed fear with a solution—control and silence. Their new attorney recommended that the best way to protect their daughter—and the assets they had put into trust for her—was to remove all options for giving Taylor any control and limiting what they were mandated to share with her about the trust. Taylor's parents spent significant time and money to decant the original trust and design a new one that gave Taylor no control or transparency over the trust's design or its assets. Provided with no map for how to guide Taylor to navigate financial resources of this magnitude, her parents followed their attorney's advice. They attempted to protect her from it by stripping away all control and, consequently, all opportunities to learn and grow.

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This example illustrates one reason why silent trusts have proliferated. Fear is a driving force behind planning techniques such as silent trusts. Like all parents, wealthy parents want what's best for their children. Wealth can feel like a complicating factor to this goal, especially in the

context of the deeply held narrative that wealth is a corruptive force. The belief that wealth is destructive has deep cultural roots and has been perpetuated by both wealth holders and their advisors alike (this is a hallmark of Wealth 2.0, an era in the wealth advising field that emerged in the 1970s and 1980s).<sup>3</sup> This belief has perpetuated advice and planning that's sometimes rooted in fear, resulting more often in trust structures designed to protect beneficiaries from the assets rather than educate and prepare them to engage with those assets meaningfully and productively.

### Precipice of a New Era

In the early part of the 20th century, trust agreements were simple, often giving a series of life income interests with remainder beneficiaries receiving the balance of assets at the expiration of a rule against perpetuities. Drafting evolved as the limitations of these simple structures became more apparent. Today, trust documents are more complex, with discretionary beneficial interests that open up much-needed flexibility and boilerplate language that protects trustees from litigious beneficiaries. Additionally, because today's planning is characterized by historically high tax exemptions, prodigious entrepreneurial wealth-creating opportunities and effective planning techniques, trusts have become vehicles for enormous intergenerational transfers of wealth. Consequently, many trusts transfer life-changing amounts, controlled by complicated documents that maximize flexibility yet attempt to minimize trustee discretion and exposure to fiduciary risk. This has made trust planning and administration centered around beneficiary growth and well-being more difficult.

We're at the precipice of a new era in wealth advising, Wealth 3.0. Trustors are raising more concerns about the impact of inheriting sizable wealth (whether related to planning new trusts or re-evaluating the impact of existing trusts, as was highlighted in Taylor's story above). As a result, there's a growing need for planners to learn how to speak to their clients about how they'd like the trust to impact their descendants. It's an important skill for planners to integrate into their practice so they



can counsel their clients and address their concerns to support the client's priorities and goals rather than just respond to their fears.<sup>4</sup> As we enter what we believe is a new era in the wealth advising field, families and advisors alike are being challenged to consider letting go of fear-based planning in favor of a new way. This fresh perspective recognizes that wealth in and of itself doesn't corrupt, and many beneficiaries have been supported to engage with their assets, living thriving lives as they have learned to effectively integrate wealth well into their lives.<sup>5</sup>

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### The Advisor's Role

According to James Grubman, Dennis Jaffe and Kristin Keffeler:

Wealth 3.0 revives and refocuses the central role of *personal and skill development* as a central goal of the family with wealth. Rather than a helpless or overly controlling response to the power of wealth, advisors and families are reminded that wealth can and must be a vehicle for learning. Wealth 3.0 redefines the benchmark of success from a focus on creating and preserving wealth to an emphasis on creating conditions to thrive with wealth. It's concerned with the quality of the family's development and well-being rather than the amount of wealth in their lives.<sup>6</sup> (Emphasis in original.)

Through this lens, advisors and families alike are encouraged to consider how the design of trusts can support—rather than inhibit—beneficiary engagement, education and, ultimately, their thriving.

Rooted in research-based fields such as positive psychology and organizational development, and based on advances in the studies of cognitive and behavioral science, Wealth 3.0 focuses advisors and families on strengths, purpose and collaboration.<sup>7</sup>

It advocates for motivating through positive, empowering means rather than through fear and for providing guidance for advisors grounded in rigorous science and data. Wealth 3.0 imparts a new mindset and a broader set of tools for wealth-owning and enterprising families.<sup>8</sup>

Planners have a unique opportunity to guide clients towards a more holistic and empowering approach to legacy planning—one that focuses on possibility over protection, transparency over secrecy and communication over control. Planners taking a Wealth 3.0 approach could pivot a conversation from validating a client's fears to highlighting the strength and potential already present in their family and opening the possibilities of broader solutions. However, it's understandable that lawyers and financial advisors aren't trained in psychology and are rarely comfortable with having conversations that veer beyond their areas of expertise in tax planning, asset protection and wealth management. If advisors are to become equipped with new tools and approaches to make beneficiary well-being a prominent component of the planning discussions, they must be practical and usable or else they won't ultimately be useful to advisors who don't have a foundation in psychology.

### Changing the Conversation

Advisors are uniquely positioned to encourage clients to initiate meaningful conversations with their families, exploring their values, sharing their stories and deepening connections. By encouraging clients to have open dialogue, advisors can help bridge the



gap among generations and empower beneficiaries to take an active role in their financial futures. At a minimum, advisors should level up how they engage with their clients to explore how the trust will impact the beneficiaries' lives and how the clients would like to meet their goals for the beneficiaries without exclusively focusing on tax planning. This may result in a trust design that encourages beneficiary growth and education and, potentially, even includes clauses that foster beneficiary well-being. But at a minimum, the advisor should endeavor to learn more about the beneficiary(ies) the client is planning for and the client's desired impact the trust could have in those beneficiaries' lives. For instance, when a client expresses concern over the trust doing harm to the beneficiaries and causing them to become unproductive, planners could shift the conversation with questions like these:

- Tell me about a time when you've seen your daughter thriving.
- When you see your daughter most in her element, what is she doing?
- In your highest ideal, how could the financial resources you have be best used to support your beloved daughter to experience more of this type of personal flourishing?
- What's your vision for the positive impact you wish wealth to have in your daughter's life?
- What skills, education or support do you think she'll need to achieve that vision?

Questions like these can start a dialogue with the client about the possibilities for designing the trust document. That dialogue can give advisors a better understanding of how to use the different trust planning options in the advisor's toolbox to accomplish the client's goals. Many planners include traditional planning, such as powers of appointment, fiduciary removal and replacement powers, standards for distributions, accounting provisions, powers to borrow or use trust assets, investment control or whether the trustee is required to assess outside income and assets, without any discussion about how they will impact the beneficiary's actual life. The client may not appreciate these provisions' real-world impact on the beneficiaries. Yet many of

these provisions could be the difference between a beneficiary feeling empowered or like they live under the trustor's "dead hand." Conversations with the client about their vision and objectives for the needs of the beneficiaries could draw from the advisor's many years of experience. The conversation should give weight to the real-life experiences of beneficiaries and trustors the advisor has encountered, in which certain types of provisions or administrative approaches have caused positive or negative outcomes or even hostility and litigation. Such a conversation can result in solutions that are tailored to the concerns of a fully informed client.

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While it's easy to get to the end of the planning process by simply leaning on expertise about tax minimization, the experienced advisor can offer a more value-added approach by serving as a counselor with a more holistic approach.

### Beneficiary Growth/Engagement

Similar to the story from earlier in this article of Taylor's first trust, financial resources can provide tools and learning opportunities to descendants to ensure the continuation of family values, family history, philanthropy, productivity, personal accountability and well-being. If trust structures could themselves offer opportunities for financial education and hands-on experiences and educate beneficiaries on their family's legacy and family dynamics, wouldn't that enhance beneficiary motivation and empowerment and fulfill a useful purpose for the trust? Consider the ideas employed in Taylor's first trust: (1) creating a Beneficiary Board of Advisors to guide a beneficiary's learning and development; (2) instituting "earned independence," where, at each designated stage,



if a beneficiary can demonstrate an increased responsibility, they earn increased autonomy; and (3) using a trust that's designed to intentionally foster communication and connection, rather than silence and isolation.

### Beneficiary Well-being

Planners can begin including a basic trustee power that expressly authorizes the trustee to provide, or hire others to provide, beneficiary well-being programs and expressly make any such costs an authorized trust expense in the ordinary course of trust administration. Among the long list of trustee powers in the document, include a power to retain and compensate qualified professionals to provide seminars, programs, workshops, counselors and personal coaches and facilitate and host meetings that provide financial planning, education about wealth management, budgeting and estate planning and

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awareness of philanthropy. Such a provision could also grant the trustee the power to host and organize family meetings and reunions to share family dynamics, governance and legacy. Each resource can provide beneficiaries with the tools they may need to navigate their inheritance with confidence, responsibility and knowledge. The trustee doesn't have to exercise this power, but it's there if the trustee decides to exercise its discretion to help the beneficiary with those tools. This concept is entirely different from helping or protecting a beneficiary by controlling distribution schemes and silencing the flow of information. It leaves open the possibility and flexibility for the trustee to administer to the beneficiary's needs. Ultimately, this could result in a

better, collaborative relationship between the trustee and the beneficiary and reduce the risk of having an unhappy beneficiary.

### It's Worth the Effort

We've advocated for a new way of designing and administering trusts that considers the *people* on the receiving end of both the benefits—and the difficulty—of trusts they didn't design and often don't understand. One of the greatest criticisms of this approach is that it's hard to change the conversations with clients. It's hard to ask clients about what's working well in their families when they're presenting their fear of money ruining those they love. It's hard to draft and administer trusts that turn theory into practice while tending to all the important issues—human, legal and tax—and do it well. We agree that it's hard. But we think it's worth the work to figure this out. Developing better skills to help clients consider the beneficiaries' lived experiences they wish to create with a trust by leaning into those discussions with the clients, and perhaps their families, in the planning phase; designing trusts that help beneficiaries to engage, learn and grow; and giving trustees powers to provide tools and opportunities that will enhance beneficiary well-being, are three tangible steps planners can begin taking on the path toward offering a more value-added approach as the client's counsel. 🌐

### Endnotes

1. Niké Anani, Todd A. Flubacher, Kristin Keffeler and Philip J. Hayes, "Letting Go of the Dead Hand," *Trusts & Estates* (December 2023).
2. Niké Anani, Todd A. Flubacher, Kristin Keffeler and Philip J. Hayes, "Letting Go of the Dead Hand: Part II," *Trusts & Estates* (March 2024).
3. James Grubman, Dennis Jaffe and Kristin Keffeler, "Wealth 3.0: From Fear to Engagement for Families," *Trusts & Estates* (February 2022).
4. James Grubman, Dennis Jaffe and Kristin Keffeler, "Wealth 3.0 In Practice," *Trusts & Estates* (February 2023).
5. James Grubman, Dennis Jaffe and Kristin Keffeler, *Wealth 3.0: The Future of Family Wealth Advising* (2023).
6. *Supra* note 4.
7. Kristin Keffeler, *The Myth of the Silver Spoon: Navigating Family Wealth & Creating an Impactful Life* (John Wiley & Sons 2022).
8. *Ibid.*, at p.190.

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