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# Do You Tru$t Your Children: A Parent's Final Dilemma

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NOTE

# DO YOU TRU$T YOUR CHILDREN: A PARENT'S FINAL DILEMMA

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## INTRODUCTION

If you knew you would inherit millions of dollars as long as you married someone Jewish, would you scour the Synagogue next Friday night?

This was the situation Daniel Shapira faced. Daniel was a twenty-one-year-old undergraduate at Youngstown State University when his father, Mr. Shapira, died.[1] Mr. Shapira conditioned a portion of his large fortune to Daniel: the document read either be "married at the time of my death to a Jewish girl whose both parents were Jewish . . ." or the inheritance will go to "the State of Israel."[2] In the United States, unlike in other countries, a decedent has almost full control over the distribution of his assets upon death.[3] Mr. Shapira used his power to incentivize his son to adhere to family values and marry within the Jewish faith.

Many parents view the distribution of their assets at death as the final impact they have on their children. Historically, most parents took this opportunity to provide future financial security for their heirs.[4] Today, parents are confronting a recently developed fear of their children inheriting too much.[5] This fear leads to a controlling dynamic between parents' fortunes and their children's lives.[6] Scholars relate the situation to the "carrot and the stick" analogy[7], by which parents incentivize their children—many times adult children—to make wise choices by dangling a "carrot" in front of their children, then string them along like a masterful puppeteer.

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1 *See* Shapira v. Union Nat'l Bank, 315 N.E.2d 825 (Ct. Com. Pl. 1974).

2 *Id.* at 826.

3 RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. e (Am. Law Inst. 2003). "The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please . . . . "

4 Richard I. Kirkland Jr., *Should You Leave It All to the Children?* FORTUNE MAGAZINE, Sept. 29, 1986, http://archive.fortune.com/magazines/fortune/fortune_archive/1986/09/29/68098/index.htm.

5 *Id.*

6 Jon J. Gallo, Use and Abuse of Incentive Trusts: Improvements and Alternatives, ¶ 1100 (2011) (on file with The Madison Group Inc.), http://www.themadisongroup.com/Resources/Use%20and%20Abuse20of%20Incentive%20Trusts% 20%20Gallo.pdf. John Gallo "chairs the Family Wealth Practice Group of Greenberg Glusker Fields Claman & Machtinger, LLP, in Los Angeles." He is also "the author of more than 70 articles on estate planning . . . a Fellow of the American College of Trust and Estate Counsel, an Academician of the International Academy of Estate and Trust Law and certified by the California Board of Legal Specialization as a Specialist in Probate, Estate Planning and Trust Law." *Id.*

7 *Id.*

Courtesy of American inheritance law, children can be disinherited by their parents.[8] The harsh consequences of complete disinheritance have led to the development of conditional bequests—parents will give inheritances to their children so long as their children behave properly.[9] The most prevalent form of a conditioned inheritance is the "incentive trust."[10] An incentive trust allows parents to condition distributions of trust property.[11] These conditions are "as unlimited as our imagination,"[12] so long as they do not contradict public policy or call for beneficiaries to break the law.[13] Theoretically, this solves a "*parent's final dilemma*"—whether to pass wealth on to children and possibly stunt motivation and character,[14] or leave children less inheritance, but instead, helpful principles and inspiration. Incentive trusts allow parents to do both by separating the benefits of bequeathing property to children from the risks of bequeathing too much property. This is done by passing fortunes only after children align their lives with criteria enumerated in the trust.

However, incentive trusts are not a perfect solution and should be used with caution in estate planning. Incentive trust shortcomings are fourfold. First, incentive trusts are inflexible, making them difficult to draft and leaving them exposed to litigation.[15] Second, the law confers a public policy limitation that produces inconsistent enforcement of incentive trusts.[16] Third, incentive trusts promote idolizing money, thus potentially diluting the initial incentivized behavior.[17] Fourth, rewarding children with money often has a negative impact on their motivation.[18]

Part I of this Note discusses both the development of the law regarding inheritance and the growing attraction to incentive trusts. Part II details the four traps of incentive trusts—inflexibility, public policy limitations, unintended consequences, decreased motivation—and opens the door for a new solution to a *parent's final dilemma*. Part III examines four principles for crafting a better solution to the *parent's final dilemma* by looking at those who have successfully inspired children without in-

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8 JESSE DUKEMINIER & ROBERT SITKOFF, WILLS TRUSTS, AND ESTATES 564 (10th ed. 2017). "In all states except Louisiana, a child or other descendant has no statutory protection against intentional disinheritance by a parent."

9 *Id.* at 9.

10 *Id.*

11 *Id.* at 10.

12 AUSTIN W. SCOTT & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 1.1. (5th ed. 2015).

13 RESTATEMENT (THIRD) OF TRUSTS § 29 (Am. Law Inst. 2003).

14 Gallo, *supra* note 6.

15 *Infra* Part III.A.

16 *Infra* Part III.B.

17 *Infra* Part III.C.

18 *Infra* Part III.D.

centive trusts. Part IV proposes the new solution, termed a Hidden Bonus Trust, that avoids the identified traps of incentive trusts and incorporates the lessons from experts.

## I. WHOEVER HAS THE GOLD MAKES THE RULES[19]

There is a lot to consider before death. To some, passing down an inheritance is least of their worries; to others, passing down a legacy is everything. The United States has settled on allowing people to choose what happens to their property when they die.[20] This method lets people provide for beneficiaries from "beyond the grave."[21] Recognizing that unconditional inheritance windfalls can lead beneficiaries down a road of destruction, incentive trusts emerged as a vehicle to both leave a legacy and regulate beneficiaries' behavior.[22]

### A. *Beyond the Grave*

Though passing down family assets through wills has long been a common practice,[23] today it can be a convoluted process of disinheritance, hiding assets, and controlling beneficiaries from beyond the grave.[24] This evolution is unique to American inheritance laws, which dared parents and lawyers to push the boundaries of after-death asset distribution.[25]

Purchase, sale, and gift are all forms of property transfer recognized in a majority of jurisdictions around the world—at least while the transferor is living.[26] Laws governing transfers of property after death are unique in the United States because they extend control of property through death.[27] Whether this is the best way to promote orderly succession is a topic of scholarly debate.[28] Alternative methods include "forced succession" or "confiscation by the state."[29] Under a forced succession scheme, property passes after death by a set of mandatory rules that vary by jurisdiction.[30] Mandatory rules might include primogeniture, in which the property is split between a living spouse and children, other depen-

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19 J. Peder Zane, *Ideas and Trends: The Rise of Incentive Trusts; Six Feet Under and Overbearing*, N.Y. TIMES, Mar. 12, 1985 (calling incentive trusts a "modern version of the Golden Rule").

20 DUKEMINIER & SITKOFF, *supra* note 8, at 3, 19.

21 *Id.* at 2.

22 *See id.* at 9.

23 *See id.* at 4.

24 *See generally id.* at 519–85.

25 SCOTT & ASCHER, *supra* note 12.

26 DUKEMINIER & SITKOFF, *supra* note 8, at 3–4.

27 *Id.*

28 *Id.* at 19.

29 *Id.*

30 *See generally id.* at 65.

dents, or kin.[31] Forced succession is most notably used when someone dies without a will, dying intestate.[32] Confiscation by the state is based on the theory that property rights terminate at death; therefore, property should be recovered by the government.[33]

The United States settled on the theory called "freedom of disposition," sometimes referred to as "dead hand control."[34] There are three main policy reasons behind freedom of disposition.[35] First, it promotes work and savings.[36] Social scientists believe that the right to bequeath property at death leads people to work harder during life and save what they earn.[37] Therefore, if freedom of disposition were eliminated, the subjective value of property would decline because the potential use of giving property away at death "disappeared."[38] Second, freedom of disposition gives the elderly leverage to receive social services from their potential heirs.[39] Potential beneficiaries want to provide care and comfort to their elders in an effort to ensure they are not left out of the estate plan.[40] Finally, people assert that they know more about their families' needs than the legislature or courts do.[41] The American perspective advocates for a parent's right to disinherit children or condition inheritance in any way that promotes the needs of the family.

Upon these principles, dead hand control has become the cornerstone of American inheritance law,[42] but dead hand control is not boundless.[43] There are a few situations where one's estate plan can be disrupted.[44] For instance, if a person dies with creditors, the creditors can settle debt before any property is given to beneficiaries.[45] Also, as codified by some legislatures, disinherited spouses may have rights to their

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31 *Id.* at 19.

32 *Id.* at 65.

33 *Id.* at 19. Confiscation by the state was the method implemented by the Soviet Bolsheviks in an attempt to carry out the teachings of Karl Marx. Within four years, this practice was ended because the Soviet government determined that allowing disposition of property at death encouraged savings and provided an incentive to work. Also, if descendants were not being provided for after a parent's death, the burden then fell on the state.

34 *Id.* at 3.

35 *See generally* Adam J. Hirsh & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 18 (1992).

36 *Id.* at 8.

37 *Id.*

38 Critics contend that the productivity benefits are offset by lazy beneficiaries who inherit, rather than create their own wealth. *Id.*

39 *Id.* at 9–10.

40 *Id.* at 10.

41 Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justification*, 82 FORDHAM L. REV. 1125, 1136–37 (2013).

42 *See* DUKEMINIER & SITKOFF, *supra* note 8, at 386.

43 *Id.* at 519.

44 *Id.* at 3.

45 *Id.* at 461–62.

dead spouse's estate.[46] In part due to obstacles like these, trust laws developed as a way to protect assets and further customize bequests to the next generation.

Trusts originated as, and in some instances continue to be, a financial vehicle to circumvent the law.[47] Their origins are traced back to the mid-thirteenth century when Franciscan friars migrated to England and were not legally allowed to own land.[48] At that time, benefactors transferred land to friends of the friars to hold for the sole benefit of the friars.[49] People then began using the same mechanism to avoid other laws, such as primogeniture and taxes.[50] Indeed, they were so effective at eluding property laws that King Henry VIII pressured Parliament to pass more laws because of declining tax revenue.[51] Even so, people continued to find loopholes in the new laws, giving birth to the modern-day trust.[52]

Today, trusts are used for a multitude of reasons. Many trusts serve useful purposes in estate planning, businesses, and charitable giving.[53] On the other hand, trusts can be used to hide assets from creditors, spouses, and tax authorities, and to control beneficiaries from beyond the grave.[54]

### B. *Incentive Trusts*

"The rich have—at least in Anglo American history—continually sought ways to secure their wealth to their children and grandchildren against the accidents of fortune, bad management, and irresponsible spending."[55] Nowhere else in the world is self-made wealth so highly sought-after; and consequently, no culture is more suspicious that the "silver spoon contains something vaguely narcotic."[56] As a result, incentive trusts were formed as a tool to leave a meaningful legacy while ensuring beneficiaries do not waste it.[57]

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46 *Id.* at 520.

47 *See id.* at 386.

48 *Id.* at 385.

49 *Id.*

50 *Id.* at 387.

51 *Id.*

52 *Id.* The medieval trust was called a "use." In 1535, British parliament passed the Statute of Uses, which is still enacted in all common law states today. The purpose of this statute was to completely abolish uses; however, the courts eventually held that the statute did not operate if the trustee (medieval "feoffee") was given active duties to perform. For this reason, "passive trusts", wherein the trustee has no duties to perform, are invalid today. *Id.*

53 *Id.* at 385.

54 *Id.*

55 *Id.* at 696.

56 Kirkland, *supra* note 4.

57 *See generally* Gallo, *supra* note 6, ¶ 1100.

Curtis L. Carlson is the founder of the Radisson Hotel Corp. and the TGI Fridays restaurant franchise.[58] Carlson amassed a net worth over $700 million in his career and said, "There's nothing people like me worry about more—how the hell do we keep our money from destroying our kids."[59] This line of thinking stems from quantitative data revealing how quickly family fortunes evaporate.[60] Time Magazine published a study finding that "70% of high net worth families lose their wealth by the second generation, and a stunning 90% by the third."[61] U.S. Trust, a Bank of America subsidiary, recently surveyed individuals whose net worth exceeded $3 million dollars in investable assets.[62] The survey found that "78% feel that the next generation is not financially responsible enough to handle inheritance," citing that with a substantial inheritance, their children will become "lazy and entitled."[63] Due to this fear, a majority of people surveyed said they "disclose little to nothing about their wealth to their children,"[64] an ominous harbinger of risk, discussed *infra*. Further, the study showed that it takes the average recipient of an inheritance "nineteen days until they buy a new car."[65]

In the midst of this mess, estate planning shifted from a tool to pass on wealth and take care of earthly responsibilities to an instrument used to continue parenting. Rather than a gift that is administered at one period in time, trusts create an on-going scheme of property disbursements tailored to the perceived needs of beneficiaries.[66] By setting conditions that must be met before beneficiaries can receive trust disbursements, a settlor provides safety nets for willing beneficiaries, while pushing them towards future achievement.[67] Of course, such a safety net will only exist so long as the beneficiaries are willing to trudge down the path the settlor laid out for them.

Traditional conditions used by incentive trusts can be divided into three categories: conditions that encourage beneficiaries to pursue an ed-

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58 Kirkland, *supra* note 4.

59 *Id*. Curtis Carlson died in 1999 with two adult daughters. His eldest daughter took over as CEO of the family business, and he named his youngest daughter President of the Carlson Family Foundation. Rather than grapple with inheritance dilemmas, Carlson decided to guide his daughters' inheritance mindset by establishing a family charitable mission. *See generally* Kevyn Burger, *The Legacy Continues: Minnesota Legacy Families Maintain Their Dedication to Local Philanthropy*, MINNESOTA BUSINESS, Apr. 22, 2016, http://minnesotabusiness.com/legacy-continues.

60 *See* Chris Taylor, *70% of Rich Families Lose Their Wealth by the Second Generation*, TIME: MONEY, June 17, 2015, http://time.com/money/3925308/rich-families-lose-wealth/.

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 SCOTT & ASCHER, *supra* note 12.

67 See *id.*; a "settlor" is a person who "settles" property in a trust.

ucation; conditions that provide incentives reflecting the settlor's moral, religious, or particular way of life; and conditions designed to motivate beneficiaries to establish productive careers.[68] A fourth category sometimes observed is a condition to discourage certain behaviors perceived as destructive or immoral, like the use of drugs or alcohol.[69] On the surface, incentive trusts appear to be a perfect way to leave a meaningful legacy while simultaneously ensuring that beneficiaries do not become "wastrels or wantons."[70] Yet, the actual effects demonstrate this is not the case.[71] In practice, incentive trusts fail because of inflexibility, public policy limitations, the unintended consequences they promote, and deficient motivation.[72]

## II. THEY CAN'T TAKE IT WITH THEM, BUT THEY WON'T LET IT GO[73]

Incentive trusts have become an integral part of estate planning,[74] but have given rise to many problems[75] and should be used with caution. In theory, the appeal of incentive trusts is to ease parents' fears about wasteful children and offer a chance to implant values from beyond the grave.[76] In practice, these perceived advantages prove illusory and create problems for all parties involved: drafting attorneys, settlors, and beneficiaries.[77] Rather than doing a disservice to settlors who deal with the shortcomings of incentive trusts, there needs to be a different solution to the *parent's final dilemma*. A new solution needs to address the four shortcomings that defect incentive trusts—inflexibility,[78] public policy limitations,[79] unintended consequences,[80] and ineffective motivation.[81]

### A. *Inflexibility*

Flexibility in trust drafting is a perceived strength, but when it comes to incentive trusts, there is limited flexibility in trust administra-

[68] Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 453 (2006).

[69] *See* Ellen Whiting, *Controlling Behavior by Controlling the Inheritance: Considerations in Drafting Incentive Provisions*, REAL PROP. PROB. & TR. J. 6, 8 (SEPT./OCT. 2001).

[70] Kirkland, *supra* note 4.

[71] *See generally* Gallo, *supra* note 6, ¶ 1102.1.

[72] *Id.*

[73] Zane, *supra* note 19.

[74] *Id.*

[75] *See generally* Gallo, *supra* note 6, ¶ 1102.1.

[76] *See* David H. Lenok, *The Dangerous Allure of Incentive Trusts,* WEALTH MANAGEMENT, Sept. 15, 2015, http://www.wealthmanagement.com/estate-planning/dangerous-allure-incentive-trusts.

[77] *See infra* Part III.A, B, C, D.

[78] *See* Gallo, *supra* note 6, ¶ 1103.

[79] RESTATEMENT (THIRD) OF TRUSTS § 29 (Am. Law Inst. 2003).

[80] Zane, *supra* note 19.

[81] Gallo, *supra* note 6, ¶ 1102.

tion.[82] Incentive trusts are designed to imitate the thought process of a living person.[83] Just as a living person might reward a family member for achieving specific milestones, incentive trusts create benchmarks that beneficiaries must achieve before receiving payments.[84] However, while a living person can adjust the distribution scheme to accommodate unforeseen circumstances, the dead cannot.[85] The inflexibility of incentive trusts creates two woeful outcomes for settlors and the attorneys who draft such trusts. First, trusts must be administered by the words written in the trust agreement.[86] Unless settlors and their attorneys can predict the future, changed circumstances or different interpretations can twist the objectives of the trust. Second, an overlooked or unforeseen circumstance can lead to litigation in which beneficiaries seek to hold the drafting attorney liable, thus decreasing the value of the estate.[87]

### 1. Predicting the Future: Specificity vs. Flexibility

When settlors are alive, they can state their intentions clearly and "respond to changes in circumstances or be persuaded to another course of action."[88] However, once they die, administration is strictly governed by what was written in the trust agreement, not the settlor's spoken directions.[89] Predicting all the different circumstances that could affect the trust is near impossible.[90] To be "enforceable, effective and satisfying to the client, the distribution requirements would ideally be drafted with a certain degree of specificity."[91] This creates a catch-22 for attorneys who must reconcile specificity with flexibility. Incentive trusts are administered in accordance with specific metrics, making them inflexible and unlikely to "stand the test of time and remain functional in the face of changing laws and social attitudes. . . ."[92] Given that specificity and flexibility are conflicting ideas, attorneys drafting incentive trusts must favor one over the other. Therefore, staying true to the settlor's intentions often requires trustees to either interpret ambiguous language in the trust agreement or guess how the settlor would have responded to the changing circumstances.[93]

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82 *See* Lenok, *supra* note 76.
83 See Gallo, *supra* note 6, ¶ 1103.
84 See *id.*
85 Zane, *supra* note 19.
86 See Lenok, *supra* note 76.
87 *See Lucas v. Hamm*, 56 Cal. 2d 583 (Ca. 1961); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (Am. Law Inst. 2000).
88 Zane, *supra* note 19.
89 DUKEMINIER & SITKOFF, *supra* note 8, at 591.
90 *See generally* Tate, *supra* note 68.
91 Lenok, *supra* note 76.
92 *Id.*
93 *See generally* Gallo, *supra* note 6, ¶ 1103.

From the four main categories of incentive trusts,[94] two in particular often lead to specific provisions that are harmfully inflexible in practice, encouraging education and productive careers. A common incentive provision distributes funds when a beneficiary "graduates college."[95] Yet such a condition may create more questions than it answers. Would this include a trade school or a two-year community college? If not, is it the settlor's intent to disinherit an otherwise hardworking beneficiary?[96] What about an online college program? What if the beneficiary had a learning disability and graduating college was unattainable?

Another common provision incorporates income-matching incentives,[97] where every dollar earned by a beneficiary is matched by a dollar from the trust. Does this penalize beneficiaries who want to take lower paying jobs or complete mission work? What about a beneficiary that chooses to stay home and take care of a family—does the settlor really intend to leave that beneficiary nothing?

Good drafting can reduce the risk of unforeseen circumstances, but it is unrealistic to expect attorneys to defend against *all* unforeseen circumstances. At a certain point, exceptions to incentive conditions create more confusion and dilute the intended purpose of the trust.[98] To draft effective incentive trusts, attorneys are expected to perfectly mesh specificity with flexibility, two seemingly incompatible concepts. Drafting incentive trusts for settlors may leave attorneys exposed to litigation,[99] and even if the drafting attorney is not held liable, litigation is costly, which is to the detriment of the beneficiaries.[100]

### 2. Prepare for Litigation

Trust and estate practice accounts for a large number of attorney ethical violations.[101] Many of the violations are related to attorneys taking advantage of elderly clients,[102] but some violations are due to attorneys breaching a duty owed to beneficiaries.[103] Traditionally, only clients could hold attorneys liable for malpractice because privity of con-

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94 *See infra* Part II.B.

95 Tate, *supra* note 68, at 453.

96 Lenok, *supra* note 76.

97 Tate, *supra* note 68, at 460.

98 Lenok, *supra* note 76.

99 *See* DUKEMINIER & SITKOFF, *supra* note 8, at 418.

100 *Id.* at 19. "Wrangling among a decedent's survivors over succession to the decedent's property entails potentially significant private and social costs . . . . The decedent's property may be consumed by litigation costs and relationships within the family may be irrevocably damaged."

101 *See* ABA, PROFILE OF LEGAL MALPRACTICE CLAIMS: 2012-1205 5 (2012).

102 *See generally* DUKEMINIER & SITKOFF, *supra* note 8, at 263–324.

103 *See Lucas v. Hamm*, 56 Cal. 2d 583 (Ca. 1961).

tract was required.[104] Today, however, privity of contract is no longer a malpractice requirement under Restatement § 51 of the Law Governing Lawyers.[105] The restatement specifically notes a few instances attorneys must exhibit a duty of care to non-clients, including non-clients who an attorney knows should benefit from their services.[106] Beneficiaries to a trust are non-clients who should benefit from attorney's services, which means beneficiaries can now sue their estate planning attorney for malpractice.

The restatement offers the following guideline: attorneys may be held liable to non-clients if they know "that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the non-client."[107] This is the exact zone in which estate planning attorneys operate. When drafting an estate plan, a primary objective of the client is to benefit the beneficiaries.[108] In fact, the first case that recognized this provision of the restatement was a case involving an estate plan. In *Lucas v. Ham*, the Supreme Court of California granted estate beneficiaries standing to sue an attorney for malpractice because he made a drafting error related to the rule against perpetuities.[109] This opened the door to future suits by similarly-situated beneficiaries.[110] Although the attorney was not held liable, his error was not harmless. The client in *Lucas* was disserved because the litigation costs the estate money and cut the beneficiaries' inheritances.[111] Incentive trusts bring problems[112] for attorneys, as they require consideration of unknown circumstances, leading to arbitrary results.

### *B. Public Policy Limitations*

Any trust provision contrary to public policy can be ruled invalid by the courts.[113] When incentive provisions are declared invalid, the property involved is distributed as though the conditions never existed, or as if the conditions were satisfied.[114] This public policy concern poses

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104 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (Am. Law Inst. 2000).
105 *Id.*
106 *Id.*
107 *Id.*
108 DUKEMINIER & SITKOFF, *supra* note 8, at 418.
109 *Lucas,* 56 Cal. 2d 583 (Ca. 1961) (granting standing, but ultimately finding the attorney was not liable for a drafting mistake involving the rule against perpetuities). The rule against perpetuities prevents a property owner from exerting control over property for long after the instrument was written, practically allowing donors to provide for all those in his family whom he personally knew and the first generation after them. *See also* JESSE DUKEMINIER, PROPERTY, 307–35 (8th ed. 2014).
110 *See Lucas,* 56 Cal. 2d 583 (1961).
111 *See id.*
112 *See* DUKEMINIER & SITKOFF, *supra* note 8, at 305.
113 RESTATEMENT (THIRD) OF TRUSTS § 29 (Am. Law Inst. 2003).
114 *Id.*

problems for both the settlors wishing to use incentive trusts and the attorneys drafting them because public policy is a blurred and inconsistent line; therefore, "simple and precise rules of validity or invalidity frequently cannot be stated."[115] Valid provisions in one era may be unacceptable in another.[116] Settlors using trusts for estate planning cannot reconcile an error because they are dead before the provisions are challenged. Unless backup provisions are drafted, property is passed by intestacy, stripping settlors of their freedom of disposition.[117] Even with backup provisions, a challenge to the original provision devalues the estate.

Due to the unpredictable nature of public policy, it is reckless to draft testamentary trust provisions that hinge on a court's interpretation of valid public policy. "Various court interpretations and applications of whether a condition violates public policy have led to conflict and confusion."[118] For instance, "[a] trust condition or other provision in the terms of a trust is ordinarily invalid if it tends to . . . discourage formation or resumption of such a [familial] relationship."[119] In *Shapira v. Union National Bank*, the court upheld a trust provision that limited potential spouses to Jewish women.[120] In *Maddox v. Maddox*, however, the court struck down a provision that required a woman to marry within the Quaker religion, finding the provision was an unreasonable restraint on marriage.[121] Why the discrepancy? The *Shapira* court distinguished its case from *Maddox*, noting that although the provision restricted marriage, it did not "unreasonably" restrict marriage.[122] Whether a provision

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115 RESTATEMENT (THIRD) OF TRUSTS § 29 (Am. Law Inst. 2003). *See also* DUKEMINIER & SITKOFF, *supra* note 8, at 12. A Canadian man left a will instructing most of his estate be given to the Toronto mother who gives birth to the most babies in the ten years following his death. The Supreme Court of Canada upheld this provision as not against public policy and "ten years later, four women, each of whom had given birth to nine children in those ten years, received the equivalent of $2 million each as the winners. . ." *Id.* A Romanian man left his property to his wife under the condition that she smoke five cigarettes a day for the rest of her life. The wife plans to challenge the provision. *See* Restatement (Third) of Trusts § 29 (Am. Law Inst. 2003).

116 *Id. See also,* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that if Bob Jones University wanted to keep their tax-exempt status they could no longer punish interracial couples).

117 *See* RESTATEMENT (THIRD) OF TRUSTS § 29 note c, cmt. (i)–(i)(2) (Am. Law Inst., 2003).

118 *See* Shelly Steiner, *Incentive Conditions: The Validity of Innovative Financial Parenting by Passing Along Wealth and Values*, 40 VAL. U. L. REV. 897, 913 (2006).

119 RESTATEMENT (THIRD) OF TRUSTS § 29 (Am. Law Inst. 2003).

120 Shapira v. Union Nat'l Bank, 315 N.E.2d 825, 832 (Ohio 1974).

121 *See* Maddox v. Maddox, 52 Va. 804 (Va. 1854).

122 *Shapira*, 315 N.E.2d at 825. *See also* DUKEMINIER & SITKOFF, *supra* note 8, at 8 (suggesting that the unreasonable restraint in *Maddox* might be grounded on the fact that the year was 1854, and the petitioner's ability to relocate and find a qualifying spouse was not reasonable in the "horse and buggy days."). In 1974, Daniel Shapira had the benefit of air travel, freeways, and telephone communication to find his Jewish spouse. *Id.*

restricting marriage is valid depends on the court's interpretation of "reasonable" and "unreasonable."[123] Go figure.

Further, in *Lewis v. Searles*,[124] a testamentary gift was conditioned on the petitioner not remarrying, evidently discouraging the formation of a familial relationship—an express violation of public policy.[125] The court decided, however, that the provision did not offend public policy and noted that "[m]uch confusion has developed in attempts to determine whether such a provision, in any given case, is a limitation or a condition."[126] The conflict and confusion surrounding the restraint of marriage is only one segment of public policy, but this segment provides foresight to conflict and confusion in other areas. Whether it be racial equality, gender equality, medical and recreational use of banned substances, or any other segment of public policy, there is not a reliable way for attorneys to predict what does not offend public policy today but will tomorrow.

Recently, perhaps the most radical evolution in public policy has occurred in the context of gay rights. Over a twenty-nine-year period (1986-2015), the Supreme Court changed course from its opinion in *Bowers v. Hardwick* to its opinions in *Lawrence v. Texas* and *Obergefell v. Hodges*.[127] Throughout this public policy evolution, how would an incentive provision that requires a beneficiary to be heterosexual be evaluated?

When *Bowers* was decided in 1986, engaging in homosexual activity was a punishable crime in twenty-four states and the District of Columbia.[128] The issue the Court sought to determine was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[129] Representing the majority, Justice White wrote, "[i]t is obvious to us that neither of these [formulas to determine if a right is fundamentally protected by the Constitution] would extend a funda-

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123 *See Shapira*, 315 N.E.2d; DUKEMINIER & SITKOFF, *supra* note 8, at 8.

124 Lewis v. Searles, 452 S.W.2d 153 (Mo. 1970).

125 *See id.* at 154. The will stated: "I devise to my niece, Hattie L. Lewis, all of my real and personal property of which I may die seized and possessed, so long as she remains single and unmarried. In the event that the said Hattie L. Lewis shall marry, then and in this event, I desire that all of my property, both real and personal be divided equally between my nieces and nephews . . . ."

126 *Id.* at 155. The Court reconciled the discrepancy, finding that the condition was to financially support the petitioner until she remarried, and the burden of support would then fall on her spouse, rather than a condition restricting her from remarrying. Steiner, *supra* note 118, at 917.

127 For a discussion, see *infra* note 128, 131, 134 and accompanying text. *See* Garrett Epps, *The U.S. Supreme Court Fulfills Its Promises on Same-Sex Marriage*, THE ATL.: POLITICS & POLICY (June 26, 2015), https://www.theatlantic.com/politics/archive/2015/06/same-sex-marriage-supreme-court-obergefell/396995/.

128 *See Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986).

129 *See id.* at 189.

mental right to homosexuals to engage in acts of consensual sodomy."[130] Thus, *Bowers* continued the policy that homosexuals had no right to engage in sexual activity.

Based on similar facts, the Court overruled *Bowers* in *Lawrence v. Texas*.[131] The majority opinion was written by Justice Kennedy, who wrote that, "[t]he petitioners are entitled to respect for their private lives."[132] Thus, *Lawrence* rejected the policy accepted in *Bowers,* and instead created the policy that homosexual activity would be tolerated, if conducted in privacy.

The recognition of the right for same-sex people to engage in sexual activity was preliminary to deciding if same-sex couples have a right to marry—the judicial question of this millennium.[133] In *Obergefell v. Hodges*, the right to marry was conferred as a constitutional right.[134] Justice Kennedy again wrote for the Court, "[b]ut while Lawrence confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[135] Kennedy added, "[t]he ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time."[136] Thirty-years before the *Obergefell* decision, it would have been hard to predict that the policy would change so drastically and so quickly. But, as the Court observed, even something as fundamental as marriage can "evolve[ ] over time."[137]

The question relative to our inquiry—how would an incentive provision that requires a beneficiary to be heterosexual be evaluated—was asked in *In re Mandelbaum*,[138] but left unanswered.[139] Mystery surrounding this question adds to the conflict and confusion of drafting incentive trusts to align with public policy.[140] Frank Mandelbaum amassed a fortune as the founder of the ID-verification firm Intellicheck.[141] Frank

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130 *Id.* at 193–94.

131 *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

132 *Id.*

133 *See* Epps, *supra* note 127.

134 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

135 *Id.* at 2600.

136 *Id.* at 2595.

137 *See id.*

138 *See* In re Mandelbaum, No. 2007-2181, 2013 WL 3929822, at *1 (N.Y. Sur. Ct. July 31, 2013).

139 *See id.*

140 *See* Steiner, *supra* note 118.

141 *See* Alyssa Newcomb, *Gay Man Told to Marry Woman or Son Would Lose inheritance*, ABC NEWS: US (Aug. 20, 2012), http://abcnews.go.com/US/gay-man-mary-woman-son-lose-inheritance/story?id=17043550.

left a will with a trust to provide money for any future grandchildren.[142] Frank died in 2007, leaving behind a son Robert.[143] A provision in the trust indicated that a future biological child of Robert would only be included if Robert married the child's *mother* within six months of the child's birth.[144] To complicate the matter, Robert was gay and his father knew it.[145] In 2011, Robert and his partner, John O'Donnell, became parents to a son who was born via surrogate.[146] The two married later in 2011 after gay marriage became legal in New York.[147] Robert challenged the trust provision on the basis that it was contrary to public policy.[148] The parties did not litigate the case to its conclusion, but rather settled in 2013 on undisclosed terms.[149]

The above examples, and many others, demonstrate that the only certain feature of public policy is that it is always changing. Creating a valid testamentary plan for a client that hinges on evolving public policy considerations, such as incentive trusts do, is a disservice to clients and an unwise practice.

### *C. Unintended Consequences*

Incentive trusts skew beneficiaries' views of money.[150] When money becomes a child's sole objective, there is a "risk of turning our children into a kind of money junkie who has no true enthusiasms for anything except more money."[151] Settlors must ask themselves, what value systems are really being promoted by paying beneficiaries to have certain goals and live a certain way?[152] The unintended consequences of incentive trusts are not well documented in estate planning literature,[153] but can be observed in many circumstances. The most common out-

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142 *See id.*

143 *See id.*

144 *See id.*

145 *See id.*

146 *See id.* (noting that neither of the men knew who Cooper's biological father was).

147 N.Y. DOM. REL. Law § 10-a (McKinney 2011).

148 Newcomb, *supra* note 141.

149 DUKEMINIER & SITKOFF, *supra* note 8, at 13.

150 Eileen Gallo, *Money and Soul: A Psychotherapist Looks at Incentive Trusts,* J. OF FIN. PLAN. (Dec. 2004), http://archive.li/3LsLF. Author Eileen Gallo is married to Jon Gallo, author of *supra* note 6.

151 *Id.*

152 Zane, *supra* note 19.

153 For two reasons: first, trust documents are not public record; therefore, evidence of unethical behavior is based primarily on what trustees and estate planners have seen and heard. Second, most unethical behavior is based off social and moral principles and is not illegal, requiring documentation.

comes are: money cravings altering personalities[154] and beneficiaries cheating the trust to receive payments.[155]

1. The Hedonic Treadmill[156]

The pursuit of money is a never-ending game that has a mental effect on people.[157] The maxim, "money changes people," is used almost exclusively to describe undesirable changes in a person's attitude or behavior. When money is "our motivating factor, we can never get ahead of our material wants."[158] Social psychologists call the pursuit of material gain the hedonic treadmill.[159] Incentive trusts invite beneficiaries to jump on the hedonic treadmill, exposing them to values different from those the trust settlor intended.[160]

Like him or not, President Donald Trump is a rich man. President Trump was not the beneficiary of an incentive trust, but he was a beneficiary of exceptional material resources.[161] Such resources propelled his career,[162] but also subjected him to the risks of the hedonic treadmill. Frederick Trump gave his son Donald a "small loan" to help start his real estate career.[163] The initial loan is said to be around one million dollars, with subsequent loans and business connections that allowed the future president to break into the New York City real estate market.[164] By leveraging his position to accumulate more wealth, and eventually becoming the only billionaire president in United States history,[165] President Trump is a material success story. But, at what cost? Whether President Trump's quest for wealth forfeited principles of virtuous behavior is left to public debate. Might he be out for a jog on the hedonic treadmill?[166]

Ultimately, incentive trusts make money a central concern in many personal decisions.[167] The Restatement (Third) of Trusts suggests that no trust provisions should be valid if they "are unreasonably intrusive in

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154 *See* Eileen Gallo, *supra* note 150.

155 *See* Gallo, *supra* note 6, ¶ 1102.4.

156 Eileen Gallo, *supra* note 150.

157 *See id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 DUKEMINIER & SITKOFF, *supra* note 8, at 20.

162 *See Donald Trump*, FORBES, https://www.forbes.com/profile/donald-trump/ (last visited Jan. 18, 2018).

163 DUKEMINIER & SITKOFF, *supra* note 8, at 20.

164 *See id.*

165 Trump, *supra* note 162.

166 Eileen Gallo, *supra* note 150.

167 *See Shapira*, 315 N.E.2d 825 (Ohio C.P. 1974); *See also* RESTATEMENT (THIRD) OF TRUSTS § 29 cmt. Commentary on clause (c) (Am. Law Inst., 2003).

significant personal decisions."[168] For example, in *Shapira,* Daniel Shapira was concerned about how his inheritance was affecting his very personal decisions about if and whom he should marry.[169] Most incentive trust provisions invade one's "significant personal decisions" and make money the primary influence.[170] The effects of the hedonic treadmill—money motivating the decision-making process—contradict the reason incentive trusts were created: to mold reckless beneficiaries into people who could make their own responsible decisions.

2. Bait and Switch

Beneficiaries incentivized by money are also incentivized to cheat the rules outlined in the trust. Estate planning attorneys tell stories of beneficiaries presenting "altered copies of state and federal income tax returns" and fake college transcripts that "reflect non-existent school enrollment," to obtain trust disbursements.[171] Others take advantage of ambiguous language in the trust instrument, to obtain a benefit far from what the settlor intended. A notorious example is the story of Tommy Manville.[172] Tommy's grandfather, Charles B. Manville, was an American entrepreneur who died in 1927, leaving behind an estate worth $150 million (over $2 billion in today's dollars).[173] Charles' financial legacy is a product of keen business decisions and one bad—very bad—estate planning oversight.

Charles began his career operating a photography studio in Neenah, Wisconsin.[174] In the mid-1870's, he quit his job to search for gold during the Black Hills gold rush.[175] However, he failed to find a fortune and returned to Wisconsin.[176] In 1885, he founded his own building and supply company.[177] Motivated by harsh Wisconsin winters, the Manville Covering Company specialized in manufacturing a material to effectively

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168 Restatement (Third) of Trusts § 29 (2003); *See* Druker v. C.I.R., 697 F.2d 46 (2d Cir. 1982). Legislators drafting tax law determined that taxes should not influence the decision of marrying. The history of tax law shows that congress saw using money to incentivize marriage through the tax code as bad public policy. Why is it not the same for inheritance?

169 *Shapira*, 315 N.E.2d 825 (Ohio C.P. 1974).

170 Gallo, *supra* note 6, ¶ 1102.4.

171 *Id.*

172 *See* DUKEMINIER & SITKOFF, *supra* note 8, at 10.

173 *C.B. Manville*, NEENAH HISTORICAL SOCIETY, (last visited JAN. 18, 2018), http://www.neenahhistoricalsociety.com/c-b-manville/.

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.*

insulate heat bearing pipes.[178] The secret ingredient was asbestos.[179] Over the next fifteen years, business grew exponentially.[180] Charles retired and handed the family business to his three sons.[181]

Charles' eldest son, Thomas F. Manville, was not fazed by his father's wealth and oversaw further growth of the family business.[182] In 1901, Thomas artfully coordinated the consolidation of the business with the Johns Manufacturing Company, thus creating Johns-Manville Incorporated.[183] This move diversified the company and expanded its offerings to the construction, aerospace, and automotive industries, among others.[184]

Thomas F. Manville had two children of his own, a son, Tommy Jr., and a daughter, Lorraine.[185] In his life, Tommy Jr. became a notorious national celebrity, similar to that of a Kardashian. It was a guilty pleasure of national pop culture to stay tuned to what Tommy Manville was doing, and Tommy kept everyone entertained.[186]

Tommy was a rambunctious child who ran away from home when he was thirteen and was always involved in mischief.[187] According to reports, Tommy's grandfather Charles saw the warning signs and devised a trust for Tommy that incentivized him to settle down.[188] The terms of the trust stipulated that Tommy was to be paid between $250,000 and

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178 *Id.*; *See* Trainer v. Manville, No. 427, 138, 147–50 (N.Y. App. Div.), *appeal docketed*, (1st Dep't May 23, 1929), https://books.google.com/books?id=m9xIeiHV5noC&printsec=frontcover#v=onepage&q=Manville&f=false.

179 Matt Mauney, *Johns Manville History*, https://www.asbestos.com/companies/johns-manville.php.

180 *Trainer*, No. 427, at 147.

181 *Id.* at 148.

182 *Id.* at 149.

183 *Id.* at 148.

184 *Company History*, JOHNS-MANVILLE, https://www.jm.com/en/our-company/history-heritage-berkshire-hathaway/company-history (last visited Jan. 18, 2015). There were lawsuits filed against Johns-Manville for asbestos related deaths as early as 1929. Asbestosis is a nonmalignant scarring of the lungs caused solely by exposure to asbestos. Johns-Manville divested itself of its interests in all asbestos-related businesses and created the Johns-Manville Personal Injury Trust to settle claims brought by asbestos workers throughout the late 1900's and early 2000's. Johns-Manville significantly restructured in the 1990's and was acquired by Berkshire Hathaway Inc. in 2001.

185 *See* Madelaine Wilson, *What Became of Tommy Manville? Must Wait 6 Years for Wife 11*, NORTH WEST CHESTER TIMES, NEW CASTLE TRIBUNE, Oct. 8, 1959, at 19.

186 *See generally* ANITA MANVILLE, THE LIVES AND WIVES OF TOMMY MANVILLE (1972). Anita was the sixth wife of Tommy Manville and wrote this book about her experience. "Tommy Manville was a Manhattan socialite and heir to the Johns-Manville asbestos fortune. He was a celebrity in the mid 20th Century [sic], by virtue of his large financial inheritance, and his 13 marriages to 11 women. This feat won him an entry in the Guinness Book of World Records and made him the subject of much gossip."

187 *See* Wilson, *supra* note 185.

188 *See* Zane, *supra* note 19.

$1,000,000 when he married.[189] Charles saw marriage as an event that would encourage Tommy's maturity, but it also coincided with his own moral principles.[190]

Financial interests motivated Tommy to eventually marry thirteen times.[191] Due to ambiguous language in the trust instrument, Tommy was paid each time he was married, not just the first time.[192] Tommy paid the women a portion of his trust disbursement, pocketed the rest, and then, "when he needed more money, he'd get married again."[193] At age sixty-five, Tommy reminisced about his passion for auto mechanics, discerning that it was the career he would have chosen without the "handicap of inherited millions."[194] During a 1959 newspaper interview, Tommy calculated he could not "afford any more alimony for six years" and was feeling "a little bit lonely."[195] Do you think Grandpa Charles would have been proud?

Many incentive trusts are drafted with good intentions.[196] However, dangling money in front of reckless beneficiaries is unlikely to significantly change their worldview.[197] More often, the beneficiaries will either find themselves on the hedonic treadmill or manipulate the trust to receive their payments, or both.[198]

### *D. Motivation*

Incentive trusts misidentify how money affects behavior.[199] Money is not an effective incentive if the behavior being incentivized involves cognitive skills such as judgement and reasoning.[200] The cognitive skills coveted by incentive trusts are best achieved when motivation is intrinsic, not extrinsic.[201] Therefore, settlors should seek to inspire beneficiaries from within, rather than reward them for completing tasks. When beneficiaries are forced to avoid doing something they want to do, they

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189 *See id.*; *see also* David Krumboltz, *Me and My Car: '54 Rolls Convertible's First Owner had a Unique Career*, MERCURY NEWS, July 17, 2016. Trust accounts are not public record, which explains the uncertainty of the exact terms of the trust Charles B. Manville created for his grandson Tommy.

190 *See* Krumboltz, *supra* note 189.

191 *See id.*

192 *See* Zane, *supra* note 19.

193 *Id.*

194 Wilson, *supra* note 185. On top of the trust fund Tommy received from his grandfather, Tommy also inherited 10 million dollars from his father, Tommy F. Manville Sr., in 1925 following Tommy Sr.'s death.

195 *Id.*

196 *See* DUKEMINIER & SITKOFF, *supra* note 8, at 9.

197 *See infra* Part III.D.

198 *See supra* Part III.C.

199 *See* Gallo, *supra* note 6, ¶ 1102.1.

200 *See id.*

201 *See id.*

will likely "overvalue the action that was unfairly restricted," and rebel against their deceased parents' wishes.[202]

Of the main types of incentive provisions,[203]–obtaining a certain level of education, developing a particular moral framework, engaging in a productive career, and restraining destructive behaviors—all are "cognitively complex, self-motivated, and intrinsic to the individual."[204] Human psychology and sociology suggest that attempts to incentivize cognitively-complex, intrinsically-driven behaviors are counter-productive and are more likely to produce a child with poor self-motivation, self-confidence, and life skills.[205] This is an undesirable result because clients interested in incentive trusts "are almost exclusively parents who complain about their children's lack of self-motivation and self-efficacy."[206]

A main purpose of incentive trusts is to develop self-efficacy in beneficiaries.[207] Self-efficacy is "the belief in one's ability to succeed in life," overcome challenges, and maintain a strong commitment to goals.[208] "Mastery experiences," are the most effective ways to develop self-efficacy.[209] Mastery experiences are defined as opportunities to succeed; such opportunities should start small, giving the subject an "opportunity to build on each successive success."[210] People who are convinced that they can be successful are more likely to "persevere in the face of adversity and quickly rebound from setbacks."[211] People who have developed a high degree of self-efficacy demonstrate what social psychologists call autotelic behavior. Autotelic behavior is a state of mind that makes the main goal of any activity the experience itself.[212] For example, a beneficiary demonstrating autotelic traits would graduate college for the importance of education and the maturation experience, not because he or she would receive a reward for doing so.[213] That is to say, "autotelic behavior is behavior we engage in because we enjoy it."[214] Unfortu-

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[202] Tate, *supra* note 68, at 490.

[203] *See supra* Part II.B.

[204] Gallo, *supra* note 6, ¶ 1102.1.

[205] *See id.*

[206] Gallo, *supra* note 6, ¶ 1102.3.

[207] *See id.*

[208] *Id.*

[209] Albert Bandura, *Self-efficacy*, 4 ENCYCLOPEDIA OF HUMAN BEHAV. 1, 71–81 (V.S. Ramachaudran ed., New York Academic Press 1994), *reprinted in* ENCYCLOPEDIA OF MENTAL HEALTH (H. Friedman ed., 1998).

[210] *Id.*; Gallo, *supra* note 6, ¶ 1102.3.

[211] Gallo, *supra* note 6, ¶ 1102.3.

[212] *See id.*

[213] *See id.*

[214] *Id.*

nately, research shows that using external motivators, like money in an incentive trust, does not develop self-efficacy and autotelic behavior.[215]

Over a hundred studies since 1970 have revealed that monetary incentives decrease personal growth and self-motivated behaviors sought by settlors.[216] The principle derived from these studies is known as the Tom Sawyer effect. "Paying someone to do what they initially viewed as intrinsically interesting turns the activity into 'work' that is less interesting."[217] One of these studies sought to determine the effect of external rewards on intrinsic motivation.[218] The experiment gave groups of students cash rewards to complete projects in an allotted amount of time; then, researchers tracked if the students would use designated break times to work on their projects.[219] Students who were paid substantially reduced the time they spent working on the project during their breaks compared to the control group of students who were never paid.[220] Based on the results, the researchers concluded that when money is used as an extrinsic motivator, subjects lose intrinsic motivation to complete activities because the activity becomes work, rather than an interest.[221] "Although rewards can control people's behavior—indeed, that is why they are so widely advocated—the primary negative effect of rewards is that they tend to forestall self-regulation, as demonstrated by this experiment."[222] Thus, the development of self-efficacy is inhibited.

One might ask, are incentive trusts not a reflection of real life, where pay for performance is commonplace. The previous experiment shows that reward structures can motivate workers to complete routine tasks by commissioning workers to habitually participate for a cash reward; but, cash rewards will not challenge workers to engage in their work and work harder.[223] This payment model is useful in settings that care more about completing objectives than inspiring their participants. Money can help accomplish tasks, but it will not transform peoples' impressions of why they are working and their attitudes towards the

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215 *See id.*

216 *See id.* ¶ 1102.2.

217 *Id.*

218 *See* Edward Deci, *Effects of Externally Mediated Rewards on Intrinsic Motivation*, 18 J. PERSONALITY & SOC. PSYCHOL. 105, 108–09 (1971) (analyzing 128 studies in which the "Tom Sawyer" effect was replicated time and time again in carefully-controlled experiments). Gallo, *supra* note 6, ¶ 1102.2.

219 *See* Deci, *supra* note 218, at 108–09.

220 *See id.* at 109–12.

221 *See id.* at 114.

222 Edward Deci, *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCHOL. BULL. 627, 659 (1999). Deci and two colleagues published an analysis of 128 studies where the "Tom Sawyer" effect was replicated time and time again in carefully controlled experiments. Gallo, *supra* note 6, ¶ 1102.2.

223 *See* Deci, *supra* note 218.

work.[224] People who lack intrinsic motivation but are commissioned to complete tasks for money will simply complete the task for their money and be done, not experiencing any available collateral benefits. For example, if a beneficiary is "paid to graduate from college, the beneficiary may finish school but lose lifelong intellectual curiosity."[225]

This concept is validated in another experiment that sought to explain why there are fewer cabs available on a rainy afternoon in Manhattan.[226] The study found that most cab drivers set a daily monetary goal and go home once they meet that goal.[227] Because more people want rides when it rains, cab drivers meet their goals earlier in the day and go home. Although they could earn more money by continuing to work, their intrinsic drive is depressed once they reach their monetary goal, thus restricting their ability to take advantage of the benefits a rainy day provides.[228]

Like the students completing projects and the Manhattan cab drivers, beneficiaries to incentive trusts risk having their intrinsic motivation stripped and self-efficacy blocked. Deprived of intrinsic motivation and self-efficacy, beneficiaries will either monotonously collect their rewards with no desire to benefit from the activities, or not participate in the incentive scheme at all.[229] Using money to motivate creates external motivation rather than relying on personal enthusiasm or passion.[230] Therefore, if settlors' goals are to inspire beneficiaries' self-motivation and moral framework, incentive trusts will not have such an effect. Incentive trusts that condition disbursements on achieving certain tasks might provoke beneficiaries to monotonously complete the tasks; however, incentive trusts will not stimulate behaviors that the settlors intended— thus subjecting beneficiaries to the hedonic treadmill,[231] tempting them to be unethical,[232] and undercutting the purpose of the incentive trust with unintended consequences.

## III. WHAT WOULD YOU DO WITH MILLIONS OF DOLLARS?

Incentive trusts originated in estate planning to solve a legitimate dilemma.[233] On the one hand, wealthy people want to leave a meaningful

224 *See id.* at 105.
225 Tate, *supra* note 68, at 490.
226 *See* Colin Camerer et al., *Labor Supply of New York City Cabdrivers: One Day at a Time*, 112 THE Q. J. ECON., 341, 408 (1997).
227 *See id.* at 416.
228 *See id.*
229 *See* Gallo, *supra* note 6, ¶ 1102.2.
230 *See id.* ¶ 1102.3; Eileen Gallo, *supra* note 150.
231 *See supra* Part II.C.1.
232 *See supra* Part II.C.2.
233 *See supra* Introduction.

legacy; on the other hand, they want to protect their descendants from becoming "wastrels or wantons."[234] In theory, incentive trusts are a mechanism for addressing both concerns, but as noted above, they ineffectively alleviate the concerns they were designed to mitigate.[235] Responsible attorneys should be honest with their clients about the futility of incentive trusts to avoid the false reassurances that incentive trusts provide.[236]

Quashing incentive trusts does not mean that a *parent's final dilemma* is unsolvable; it means that it is time for a new solution. A new solution should build on the shortcomings of incentive trusts and incorporate new principles to effectively carry out the settlor's intent. To extract such principles, one need only look to past success stories offered by some of America's wealthiest people. Through their stories, effective tactics have emerged to help donors leave positive legacies, teach beneficiaries to be responsible, and motivate beneficiaries to carve their own paths:[237] first, worry most about parenting—not leaving an inheritance; second, give inheritances to beneficiaries later in life rather than earlier; third, be open in discussing family expectations; finally, incorporate charitable giving into estate planning.[238]

First, child rearing should come before estate planning.[239] If beneficiaries possess self-efficacy and a "can do attitude," the purpose of conditional bequests become unnecessary.[240] Roy Grinker Jr., a psychoanalyst who spends his career working with children of the wealthy, said, "Rather than give rich parents money advice, I would give them child-rearing advice."[241] He finds, far too often, that parents pay little attention to their children's upbringing and are more concerned about developing a strategic estate plan.[242] "It is not the money that destroys our children, but the parents who earn the money but neglect to instill values in their offspring."[243] A proper upbringing is the "ultimate safeguard" against beneficiaries being irresponsible with their inheritance.[244] If children are taught the right principles then their parents need not be concerned with how an inheritance will negatively affect their offspring.

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234 Kirkland, *supra* note 4.

235 *See supra* Part II.

236 *See generally* Part I, II.

237 *See generally* Kirkland, *supra* note 4.

238 *See id.*

239 *See id.*

240 *See* Gallo, *supra* note 6, ¶ 1102.3.

241 Kirkland, *supra* note 4.

242 *See id.*

243 Gallo, *supra* note 6, ¶ 1100 (citing Gallo, J. & Gallo, E., *Estate Planning for the Postponed Generation*, 3 PROB. & PROP. 6, 8–9 (1989)).

244 Kirkland, *supra* note 4.

There are multiple ways to instill these values in potential beneficiaries.[245] H. Ross Perot became a billionaire after selling his electronic data system company to General Motors.[246] He said, "If your kids grow up living in fairyland thinking that they're princes and princesses, you're going to curse their lives."[247] Some parents opt for a subtler approach. Warren Buffet added, "Love is the greatest advantage a parent can give."[248] Eugene Lang, who made his fortune as a tech developer, paid for his children's education, gave them a nominal sum, and since then has "given them nothing but encouragement."[249] Lang defended his technique by saying, "I want to give my kids the tremendous satisfaction of making it on their own."[250] As adults, Lang's children have become a lawyer, an actor, and an investment analyst.[251] The bottom line is that teaching productive behaviors has to be done during the parents' lifetimes. When parents are ineffective at teaching these behaviors while they are alive, it is unlikely that such behavior can be taught by an estate plan.[252]

Second, it is better to give inheritances to beneficiaries later in life, rather than earlier. John Train, a Harvard graduate, decorated financial advisor, and author, warns that windfalls handed to children who have yet to accomplish anything will "inevitably tend to corrupt them."[253] Most estate advisors have agreed that twenty-one is "too early for most children to reap a windfall."[254] Giving a significant inheritance to young beneficiaries is more likely to thwart development than if a donor waits until the beneficiary has already matured.[255] Beneficiaries who receive inheritances later in life are more likely to be responsible and benefit from the sense of accomplishment for what they achieved prior to receiving an inheritance.[256]

Third, it is important to let beneficiaries know where they stand.[257] Keeping family expectations secret and surprising beneficiaries with conditioned inheritances is one of the main warnings that foreshadow litigation.[258] John Train recommends that "talks about money, like those about

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245 *See generally id.*
246 *See id.*
247 *Id.*
248 *Id.*
249 Kirkland, *supra* note 4.
250 *Id.*
251 *See id.*
252 *See id.*
253 *Id.*
254 *Id.*
255 *See supra* Part II.C.2.
256 *See id.*
257 *See* DUKEMINIER & SITKOFF, *supra* note 8, at 305.
258 *See id.*

sex, begin as early as possible."[259] This way, beneficiaries are not left in the dark and are more likely to be on-board with the overall plan.[260] Parents might intend to motivate children through a testamentary scheme that leaves a small or conditional inheritance, but many children view it as a personal rejection when a parent "disinherits, disfavors, or discourages a child."[261] In *Nelson v. Daniels*,[262] a disinherited son contested his mother's will saying, "You're not going to make me believe that my mother hated me the day she died."[263] Invoking bitterness in beneficiaries can lead to further rebellion[264]—contradicting the purpose of the testamentary scheme.

Finally, charitable giving can be a better option than passing inheritances to descendants.[265] Investment guru, Warren Buffet said that the "perfect legacy" for one's children is "enough money so they would feel they can do anything, but not so much that they could do nothing."[266] Instead of planning to leave his full fortune to his children, Buffet pledged $31 billion dollars to the Gates Foundation in 2006.[267] Buffet explained that he wants his kids to "carve out their own place" in the world, and the best way to do that might be through donating his fortune to charitable foundations.[268]

Many wealthy people choose to start their own charitable foundations.[269] Then, they allow their descendants to take active roles in the foundation to learn responsibility and attain gratification. Eugene Lang, who died April 8, 2017, did not plan to pass on any wealth to his children through his estate.[270] Instead, he made his children trustees of his private foundation.[271] Lang cheerfully explained, "In a way they're spending their inheritance with me . . . and getting a lot of satisfaction and joy from it."[272] Planning for "lifetime participation in the mission and goal of the family through judicious use of family partnerships, charitable

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259 Kirkland, *supra* note 4.

260 *See generally id.*

261 Gallo, *supra* note 6, ¶ 1100.

262 *See* No. 94CA29, 1995 WL 535200 at *3 (Ohio Ct. App. Sept. 5, 1995).

263 *Id.*

264 *See* DUKEMINIER & SITKOFF, *supra* note 8, at 306 (citing McCullen, *Keeping Peace in the Family While You are Resting in Peace: Making Sense of and Presenting Will Contests,* 8 MARQ. ELDER'S ADVISOR, 87 (2006)).

265 *See id.*

266 Kirkland, *supra* note 4.

267 *See* Robert Smith*, Buffett Gift Sends $31 Billion to Gates Foundation,* NPR, Washington D.C. 26 June 2006, *available at* https://www.npr.org/templates/story/story.php?storyId=5512893.

268 Kirkland, *supra* note 4.

269 *See* Burger, *supra* note 59 and accompanying text.

270 *See* Kirkland, *supra* note 4.

271 *See id.*

272 *Id.*

lead trusts, and foundations can alleviate the need for stringent restrictions on behavior later."[273]

## IV. THE ANSWER: HBT

Until now, a *parent's final dilemma* was unsolved. Hereafter, incentive trusts should be thought of as provisional treatments, only acceptable for beneficiaries who need a slight nudge. "Most of the time and for most people, incentive trusts do not produce" desired results.[274] A new solution should cure the shortcomings of incentive trusts and incorporate the lessons learned from wealthy authorities. The solution shall be called Hidden Bonus Trusts (HBTs) which will be useful estate planning tools for settlors, beneficiaries, and drafting attorneys.

### *A. Structure and Drafting*

HBTs are an improved alternative and a new suggestion. Built on the four identified shortcomings of incentive trusts and incorporating successful methods already used by America's most wealthy, HBTs are testamentary tools designed to leave proud legacies, motivate reckless beneficiaries, and remain legally effective in lieu of changing circumstances. The theory behind HBTs is to make beneficiaries decide for themselves what behaviors uphold the settlor's expectations. The choice is induced by communicating the general HBT arrangement to beneficiaries but keeping the specific provisions hidden.[275] Letting beneficiaries make life choices without cash dangling in their faces avoids public policy restrictions, stimulates intrinsic motivation, and develops what settlors covet: self-efficacy.[276] There is a five step framework to creating HBTs: first, select the parties; second, make the purpose statement; third, have a meeting of the fiduciaries; fourth, define the bonus structure; fifth, choose a charitable backup.

*Step one*: select the parties. Each HBT needs a settlor, attorney, trustee, beneficiary, and trust director. It is suitable and sometimes preferable that one individual holds multiple positions. The settlor gives away property by means of a trust and hopes to influence the behavior of the bene-

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273 Whiting, *supra* note 69, at 12.

274 Gallo et al., *Not Your Typical Incentive Trust: The ROTE and FST, Part I*, J. FIN. PLAN. (2011), https://www.onefpa.org/journal/Pages/Not%20Your%20Typical%20Incentive%20Trust%20The%20ROTE%20and%20FST%20Part%201.aspx.

275 *See* Unif. Trust Code § 105(b)(8)–(9) (UNIF. LAW COMM'N 2010). The Uniform Trust Code (UTC) originally allowed preventing "a beneficiary from learning of a trust's existence, but only until the beneficiary reached age 25." Many states that enacted the UTC did not accept this provision; instead, states permitted that a beneficiary could be kept uninformed until a later age or, indefinitely—if there is a third party who has standing to bring suit against the trustee for breach of trust. DUKEMINIER & SITKOFF, *supra* note 8, at 681.

276 *Supra* Part III.

ficiaries. The attorney advises the settlor, drafts the trust document, and oversees the lawful administration of the trust. The trustee maintains the trust property, manages investments, communicates with beneficiaries and distributes trust property when beneficiaries' behaviors align with the settlor's expectations. It is important to carefully select a trustee who is dedicated to the beneficiaries' well-being and who understands the settlor's values[277] because the trustee determines whether the beneficiaries qualify for trust disbursements. The beneficiaries collect trust property in accordance with the trust instrument. The trust director is the only position not used in all other trusts and is vital to HBTs. The director has standing to sue the trustee for breach of duty on behalf of the beneficiaries because HBT beneficiaries do not know the details of the trust.[278] Examples of a trustee breaching fiduciary duties include not administering trust property when a beneficiary qualifies and breaking confidentiality. The trust director must be familiar with, and proficient at, evaluating the administration of the trust; the drafting attorney is a good option to fill this role.

*Step two*: make the purpose statement. Once the parties are designated, the settlor must create the purpose statement which explains the settlor's expectations and the bonus structure. The purpose statement is drafted by the settlor and the attorney and then explained, clarified, and justified to the beneficiaries, trustee, and trust director ("interested parties"). Purpose statements should assert the settlor's expectations for beneficiaries and explain that the settlor created a hidden bonus structure to emphasize such expectations. It is paramount that the settlor is candid with the interested parties and fully embodies the spirit of the testamentary scheme. The settlor's expectations can incorporate education, career, and morality, similar to incentive trusts;[279] but, the expectations do not include specific benchmarks. Rather, HBTs make beneficiaries decide for themselves what behaviors align with the settlor's expectations, using the purpose statement for guidance.

*Step three*: a meeting of the fiduciaries. After the beneficiaries understand the HBT concept, the settlor, attorney, trustee, and trust director should formulate the finer details. The fiduciary meeting is led by the attorney and focuses on ensuring that the settlor, trustee, and trust director are on the same page. HBTs operate as discretionary trusts to pre-

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277 A family member is more likely to take an interest in the well-being of the beneficiaries. Beneficiaries could include immediate family members, such as mothers and fathers, but also extended family, such as aunts, uncles, or grandparents—even a mature sibling of the beneficiaries involved in the bonus trust could be a dependable trustee.

278 For context, see Dukeminier, *supra* note 275 on third party standing and accompanying text.

279 *See supra* Part II.B.

serve flexibility over time.[280] This gives the trustee power to "determine when, to whom, and what amount to make distributions,"[281] in accordance with the purpose statement and finer details outlined at the fiduciary meeting. The trustee is not bound by strict enforcement requirements. For example, if a trust expectation is for a beneficiary to become financially independent, the trustee might pay a bonus when a beneficiary creates an income savings plan, or begins weekly meal preparation rather than eating out, or any other activity that the trustee determines to reinforce the trust's expectations. HBT trustees are highly involved; therefore, settlors must choose them wisely. It is also important that the trust director, as the enforcer, grasps how to properly administer the trust. Most often there are not specific benchmarks that indicate when bonuses should be paid, which differs from incentive trusts. The HBT concept is that the trustee, trust director, and attorney understand how the settlor would approach the circumstances and act accordingly.

At the fiduciary meeting the settlor retains the ability to give more detailed direction to the trustee and trust director. Here, the settlor can outline specific circumstances, beyond the trustee's discretion, where the beneficiaries get bonuses. For example, the settlor could stipulate that the beneficiaries should receive bonuses each time they get a promotion, have a child, earn a secondary degree, attend Easter church service, etc. The enumerated criteria are not made known to the beneficiaries. Therefore, if a beneficiary gets promoted at work, she will experience the joy, sense of achievement, and self-satisfaction to the full extent because she decided on her own to accomplish this goal, rather than having her goals outlined beforehand by monetary incentives.

*Step four*: define the bonus structure. The bonus structure should be finalized at the fiduciary meeting. The bonus structure is gradual. Each beneficiary is entitled to a certain share of the trust, decided by the settlor. Each share is pooled together to form the trust principal; however, the trustee administers bonuses to each beneficiary from their allotted share. Each allotted share is divided into as many phases as the settlor stipulates. A phase is a period of time that the beneficiary has to collect bonuses. Each phase is designated a bonus amount available to the beneficiary for that phase. Residual bonuses are subject to the charitable giving provision. The trustee should distribute smaller bonuses for preliminary habit-forming behaviors (meal prepping, *supra*) and larger bonuses for milestone achievements aligned with the purpose statement (becoming financially independent, *supra*). This bonus system utilizes

280 *See* DUKEMINIER & SITKOFF, *supra* note 8, at 696.
281 *Id.*

"mastery experiences,"[282] which allow beneficiaries to savor their achievement and build on each success.

*Step five*: choose a charitable back up. Each HBT should be backed up and accompanied by a charitable giving provision. The charitable giving provision serves two main purposes. First, it protects the settlor's legacy if beneficiaries choose not to meet the expectations discussed in the purpose statement. Residual bonuses not paid to beneficiaries will be paid to the charitable organizations the settlor selects. This way, the settlor's fortune is still administered to a cause the settlor deemed worthy. This also forms a built-in opportunity to include beneficiaries in charitable giving. The trustee makes residual bonus donations in the names of the settlor and beneficiary.[283] Second, the charitable provision serves as a no contest clause. If a beneficiary challenges the HBT in court, the trustee is directed to immediately pay any share designated for the challenging beneficiary to the enumerated charities.

### *B. HBTs in Action*

The subtle difference between HBTs and incentive trusts solves a *parent's final dilemma.* HBTs allow parents to leave meaningful legacies and protect their descendants from becoming "wastrels or wantons."[284] HBTs build on the four identified shortcomings of incentive trusts:[285] (1) inflexibility, (2) public policy, (3) unintended consequences, and (4) motivation; HBTs also incorporate the successful methods already used by America's most wealthy:[286] (5) parenting first, (6) giving later rather than sooner, (7) discussing family expectations, and (8) charitable giving.

#### 1. Flexibility

HBTs avoid pinning specificity against flexibility.[287] The "hidden" arrangement in HBTs produces a testamentary tool that encompasses both specificity and flexibility. The settlor is specific with his expectations and outlines them in the purpose statement. Then, beneficiaries are given autonomy to live in a way they believe meets the settlor's expectations, and the trustee administers bonuses when beneficiaries engage in conduct that the settlor would celebrate. This flexible system is authenti-

[282] *Supra* Part III.D.

[283] Tax implications need to be determined separately; however, beneficiaries likely will not qualify for a charitable tax deduction under I.R.C. § 172 because they will never exercise dominion over unclaimed portions of the trust. *See* Haverly v. United States, 513 F.2d 224, 226–27. (7th Cir. 1975).

[284] Kirkland, *supra* note 4.

[285] *Supra* Part II.

[286] *Supra* Part IV.

[287] *Supra* Part II.A.

cated by the trust director and safeguarded from litigation by the charitable no contest clause.

For example, in the purpose statement, a settlor might discuss the importance of continuing education. The settlor could further instruct the trustee during the fiduciary meeting to give a bonus to any beneficiary who graduates from college. The trustee must give bonuses to beneficiaries who graduate from college, but the trustee still has discretion to give bonuses to beneficiaries who continue their education in other ways. Continuing education is not limited to a college degree, but rather could encompass trade school, online accounting course, pleasure reading, etc.

### 2. Public Policy

The "hidden" aspect of HBTs also make them durable amidst changing public policy. Incentive trusts are susceptible to void on public policy grounds because they pay beneficiaries to act towards announced benchmarks.[288] HBTs do not require beneficiaries to act any specific way, only in concert with the settlor's expectations. Therefore, there is no concrete position that could be voided on public policy grounds. This arrangement eliminates the risk that a settlor's testamentary scheme will be disrupted based on evolving public policy.

For example, imagine an incentive trust provision that payed beneficiaries to continue a family dog kennel business. In five years, a shift in public policy determines that housing dogs without access to a wading pool constitutes animal cruelty. If beneficiaries do not wish to make accommodations to continue the family kennel, they can sue to invalidate the trust on the grounds it violates public policy. If the settlor used an HBT to encourage beneficiaries to continue the family business and the same policy change happened, the trust could not be voided because it would not explicitly state that the beneficiaries must run a dog kennel to qualify for payments. Rather, the "hidden" part of the HBT might direct the trustee to pay the beneficiaries if they remain in the kennel business, but the settlor's purpose statement would allow more general fulfilment such as an active role in dog services.

### 3. Unintended Consequences

HBTs do not dangle dollar signs in front of beneficiaries, but rather, focus on resulting behavior. The problem with the hedonic treadmill[289] is that once beneficiaries reach a monetary incentive, it is unsatisfying. Beneficiaries find their satisfaction can only be quenched by achieving more milestones and earning more money. Beneficiaries to HBTs are not

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288 *See supra* Part II.B.
289 *See supra* Part II.C.1.

aware of monetary rewards for any specific behavior. In this way, beneficiaries' choices are based on an intrinsic motivation rather than an extrinsic motivation. Change induced by intrinsic motivation endures.

One concern raised by HBTs is what if the hidden bonuses consume the beneficiaries. Any conditional bequest is meant for beneficiaries who lack "self-motivation and self-efficacy."[290] Therefore, if an HBT does not motivate beneficiaries to try and meet the expectations outlined in the purpose statement, beneficiaries are in no worse position than before the trust was created. Beneficiaries can either keep trying to figure out the bonus provisions by behaving how they believe the settlor would want (which is the purpose of the HBT to begin with), or the share of the trust available to the unparticipating beneficiaries will be donated to charity.

### 4. Motivation

HBTs build self-efficacy and encourage autotelic behavior by drawing on the beneficiaries' intrinsic motivation.[291] Incentive trusts give beneficiaries a "to-do list," while HBTs seek to inspire beneficiaries from within. HBTs empower beneficiaries to determine on their own which behaviors best carry out the guidelines set forth in the purpose statement; therefore, HBTs are more likely to stimulate lasting change. Allowing beneficiaries to choose their actions creates the cognitive stepping stones towards "mastery experiences."[292] When beneficiaries, rather than the settlors, are choosing their behaviors, the behaviors will likely become autotelic.[293]

For example, compare an HBT expectation of living a healthy lifestyle against an incentive trust benchmark of "quit smoking for cash." A beneficiary to the HBT will have to decide what promotes health, which rudimentarily would involve not smoking. The process of internalizing this decision and acting upon it promotes self-efficacy. The same beneficiary facing the incentive trust provision is primarily externally motivated, which in most cases is not enough to break the habit or addiction.

### 5. Parenting First

The purpose statement of a HBT serves as a pseudo parenting session. It allows settlors to explain to beneficiaries the reasons behind the HBT and why the expectations are valuable and reasonable. This goes a long way to ensure beneficiaries do not feel slighted, but rather feel cared for.

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290 Gallo, supra note 6, ¶ 1102.3.
291 *See supra* Part II.D.
292 *Id.*
293 *Id.*

For example, when settlors deliver the purpose statement, they will confront the beneficiaries. This meeting allows settlors to engage in a teaching moment and explain the reasoning behind the HBT to the beneficiaries, rather than leaving the teaching moments for the trust document alone. In all circumstances, it will be better if the beneficiaries have been taught these values throughout their lives.

6. Later Rather Than Sooner

Beneficiaries are more likely to be mature enough to handle an inheritance when they are older.[294] HBTs pay bonuses when it is apparent to the trustee that beneficiaries are making decisions in line with the purpose statement. Therefore, HBT beneficiaries receive bonuses when they demonstrate older levels of maturity, not older age. This differentiates HBTs from incentive trusts. The external motivation that incentive trusts rely on will not develop the skills beneficiaries need to handle significant inheritances.

For example, incentive trusts designed to pay beneficiaries when they attain levels of financial security commonly disburse payments based on the beneficiaries' tax returns.[295] Rather than focusing solely on the end result, HBTs distribute bonuses to encourage steps towards that end result: buying life insurance, disability insurance, opening an IRA or contributing to a 401K. By using HBTs, settlors will know that beneficiaries reached the desired maturity before receiving their inheritances.

7. Discuss Family Expectations

If settlors have not previously discussed family expectations with their beneficiaries, the purpose statement provides the platform to do so. As discussed above, being clear with expectations and reasons for using a conditional estate planning tool helps to ensure beneficiaries do not feel slighted, but cared for.

For example, an incentive trust provision that provides a trust payment only after a beneficiary graduates from an Ivy League law school could lead that beneficiary to feel undeserving and deficient to the settlor. In HBTs, the settlor explains the reasons for his expectations in the purpose statement, which are more likely because of the experience the settlor had at such an institution, not as a metric to define the beneficiary's self-worth. To avoid the situation seen in *Nelson*,[296] where a beneficiary believed his mother hated him when she died, HBTs empower settlors to explain the reasons behind the testamentary plan they chose.

294 *See supra* Part III.
295 *See* Gallo, *supra* note 6, ¶ 1105.2.
296 *See* Nelson v. Daniels, No. 94CA29, 1995 WL 535200, at *3 (Ohio Ct. App. Sept. 5, 1995).

### 8. Charitable Giving

Charitable giving is a core element of HBTs.[297] Charitable giving protects the trust's assets and ensures that if the beneficiaries do not meet the settlor's expectations, the settlor's fortune still goes to an admirable cause. Charitable giving is also a tool used to give beneficiaries a sense of achievement, responsibility, and self-satisfaction that fulfills civic opportunities.

For example, if an HBT provides a ten-year phase that a beneficiary is eligible to receive $100,000 of bonuses and the beneficiary collects $53,000 of the eligible bonuses, the remaining $47,000 will be donated to the charity the settlor designated. Also, if unhappy beneficiaries sue the settlor's estate claiming misconduct, the trustee is instructed to pay the beneficiaries' whole share to the designated charity. These backup charitable giving provisions ensure that the settlor's legacy will be protected.

## CONCLUSION

Incentive trusts address a *parent's final dilemma*, but do not fix it. Incentive trusts developed out of unique American inheritance laws and have become a regarded estate planning tool. Policy, observation, and research suggest that they are inadequate, although still uncritically used. A Hidden Bonus Trust is an improved solution that builds on the short-comings of incentive trusts. Hidden Bonus Trusts quench parents' desires to leave legacies and motivate troubled beneficiaries. If Mr. Shapira used a Hidden Bonus Trust to inspire Daniel to marry a Jewish woman, the story might have ended with "Mazel Tov," rather than Daniel diminishing his father's fortune in legal battles.

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297 *See supra* Part IV.A.