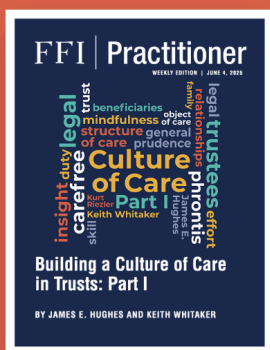


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Building a Culture of Care in Trusts: Part I

WEEKLY EDITION • JUNE 4, 2025





From FFI Practitioner

Thank you to FFI Fellow James E. Hughes, Jr., and Keith Whitaker for this two-part article series, commissioned by the James E. Hughes, Jr. Foundation. In these articles, the authors reflect upon the meaning of “care” and how it is exhibited and can be developed through trusts, using their own experiences and the work of philosopher Kurt Riezler.

Please read on for Part I.

On a number of recent occasions we have spoken or written about the importance of building “a culture of care” in trusts. What do we mean by this culture of care?

First, let’s eliminate some potential misconceptions.

For most of us, any reference to “care”—especially a “culture of care”—likely evokes the image of a therapeutic environment: perhaps a hospital or a doctor’s office, the realm of “healthcare.” This is not what we mean by care. We do not expect trustees to become doctors or psychologists. For us, a culture of care is not primarily therapeutic.

Trusts are legal relationships. But herein lies another possible misconception. Trustees are subject to a host of duties, which have been given shape by case law and statute, and fulfilling these duties involves care. For example, the trustee’s fundamental duty to be “generally prudent” means to act in all aspects of administration of the trust with “reasonable care, skill, and caution.” This duty requires acting personally and, when delegating functions, exercising reasonable care in the selection of agents. Care also finds its way into other fundamental duties: the duty to act requires care in ascertaining the intent of the settlor and the terms of the trust. The duty to be loyal requires not only care in avoiding self-dealing but also, and more importantly, in identifying and furthering “the benefit of the beneficiaries.” The duty to account demands that care be exercised in keeping the trusts’ records and in accounting to the proper beneficiaries at the proper times and in the appropriate ways. Care is a standard of conduct for trustees, as it is for airline pilots or surgeons. But there is no “duty to care” or “duty of care.” “Care” in this legal sense does not get to the heart of what we mean by building a culture of care.¹

“FOR US, A ‘CULTURE OF CARE’ CONNECTS TO WHAT WE SEE AS THE
FUNDAMENTAL PURPOSE OF TRUSTS: TO ENHANCE THE LIVES OF THE
BENEFICIARIES.”

For us, a “culture of care” connects to what we see as the fundamental purpose of trusts: to enhance the lives of the beneficiaries. But this purpose raises more questions: What does “life enhancement” look like? What is the proper role of trustees in “life enhancement”? What preparation do trustees need to do this well? Our suggestion is that thinking seriously about what a culture of care looks like may help us begin to address these and other questions.

How, then, can we get to a deeper understanding of care? At the risk of trying to explain the obscure through the more obscure, we would like to suggest that we spend some time considering the thought of Kurt Riezler on the subject of care.

Born in 1882 into a prominent German family and educated at the premier institutions of his time, Riezler held high positions in the Imperial Chancellery prior to and during the First World War. After the war, he served as a university rector and philosophy professor. He left Germany in 1938 and accepted a professorship at the New School, where he remained until shortly before his death in 1955. Riezler is known for his writings on shame, play, and other topics in political philosophy. He collected his thoughts on this front in his book *Man: Mutable and Immutable: The Fundamental Structure of Social Life*.²

Riezler’s book includes a chapter on care. His approach is phenomenological. That is, he does not ask *why* people care, trying to uncover hidden psychological motives. Rather, he asks repeatedly *what* care is. He seeks to describe what shape it takes in human beings’ social life.

Riezler begins to examine care through the medium of classical poetry (Homer). He finds in it three element: 1) *phrontis*, 2) *epimeleia*, and 3) *merimna*.³

Sidebar



"The Shared Dream Fallacy"

FFI Practitioner
by James E. "Jay" Hughes and Dave Specht

In this 2022 edition of *FFI Practitioner*, which can serve as a conversation starter with clients, Jay Hughes, Jr., and Dave Specht explore the notion that a shared dream for the future may be essential for the multigenerational success of a family enterprise. Jay and Dave approach the topic by providing an overview of the stages of dreams and five common types of people that we interact with regarding our dreams.

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Phrontis is care in the sense of thoughtfulness or mindfulness. It is the intellectual side of care. When it comes to trusts, this part of care is evident. Trustees must pay attention and keep track of things. They must not be reactive or arbitrary; they must think through a process of careful administration. They must educate themselves in the relevant subjects, or wisely choose good counsel. They must try their best to think ahead. All these activities belong to care as *phrontis*.

Epimeleia means care in the sense of practice or applied effort. Again, it's not a surprise that being a trustee requires diligence. The trustee cannot guarantee positive results, but he or she must be able to show that care as thought has transformed itself into care as thoughtful action.

Merimna means grief or worry. Put simply, care worries. Trustees are often worriers. They must think about worrisome things: death, divorce, drugs, for example. Of course, "generative" trustees don't only focus on the dangers. They also try to help people live better. But even in this "positive" work, there is care in the form of worry. Perhaps the most basic worry is, "Did I do no harm?"

Riezler turns quickly from these three elements of care to a deeper exploration of the basic structure of care.

He writes, "Care is care for something. ... Care is never alone, nothing but care."⁴ The point is simple, but it helps us flesh out a "culture of care." Such a culture does not amount to emoting. One cares specifically for this trust, this set of relationships, these beneficiaries.

This insight has practical consequences. For example, a culture of care requires that a trustee be able to answer, at any given time, the question, "How are the beneficiaries under your care doing?" That answer requires knowing how many beneficiaries you have in care, who they are, how they're doing now in the light of who they are, what they're capable of, and what "well" or "poorly" would mean with respect to these specific people.



This point—that care is care for something—also helps explain why it doesn’t sound right to speak about a “duty of care” or to attempt to list care among the duties of a trustee. Duty is for its own sake. For example, a trustee has a duty to exercise general prudence regardless of the outcomes or who is affected. Care is for someone or something. Duty can be exercised with care. But exercising care means more than doing your duty.

Examples abound of trustees going “above and beyond.” One colleague shared with us the story of a trustee educating herself about a beneficiary’s mental health challenges, which allowed the trustee to recognize when the beneficiary was at risk of a relapse. It’s not likely a court would require a trustee to be so proactive. But such thoughtfulness is a fitting part of a culture of care.

Riezler extends this point about the object of care: “All care cares for something alive. Whenever we care for something dead, our care endows it with some kind of life.”⁵ This simple insight helps explain what we mean by a culture of care in trusts. Family members feel dissatisfied with trusts when they believe that the trust is nothing but a dead entanglement borne out of mistrust. To solve this problem, we have encouraged interested parties to “deconstruct” these legal relationships. We have encouraged trust creators to express “the spirit of the gift” in letters of wishes. We have encouraged trustees and beneficiaries to build human relationships with each other through regular assessments and meetings. These efforts reflect that “care” cares for something living, something that, by virtue of being alive, faces the risk of being damaged or dying.

Next, Riezler unfolds this basic structure of care: “Care, dwelling with the thing, weaves a mutual relation between man and thing.”⁶ Again, this is a simple point, with profound consequences. The trustee who cares sees these beneficiaries as “my” beneficiaries. Further, as trustee, I belong to this trust and its associated parties. I am theirs, and they are mine.

“CARE IS A WAY OF BEING IN THIS WORLD, A WAY OF GIVING YOURSELF TO THE WORLD, OR TO SOMEONE IN THE WORLD, AND THEREBY GAINING YOURSELF, “BEING” IN THE FULLEST OR ALMOST FULLEST SENSE. THIS IS THE BASIC STRUCTURE OF CARE.”

Care in this sense is a basis for property. Riezler gives the example of a gardener’s flowers: his care for them makes them his even more than some “right” does. This point has implications for trusts. Our laws tend to equate ownership with the exclusive right to use and enjoy something. Ownership means enjoyment, which most owners equate to freedom from care. This perspective turns ownership into consumption, which has its place; but we know that viewing the world this way also causes many beneficiaries (and wealthy people generally) to feel spiritually empty. They crave deeper “engagement” with others and with their property. A culture of care is a place of belonging.

Care is a way of being in this world, a way of giving yourself to the world, or to someone in the world, and thereby gaining yourself, “being” in the fullest or almost fullest sense. This is the basic structure of care.

In the next installment in this two-part piece, the authors consider what Riezler has to say about the “matters of care” and its application to the world of trusts.

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¹ Charles E. Rounds, Jr., and Charles E. Rounds, III, *Loring and Rounds 2015: A Trustee’s Handbook* (Wolters Kluwer, 2015), section 6.1.5, “The Duty to Account to the Beneficiary,” 531–557. *Restatement of the Law Third, Trusts* (American Law Institute).

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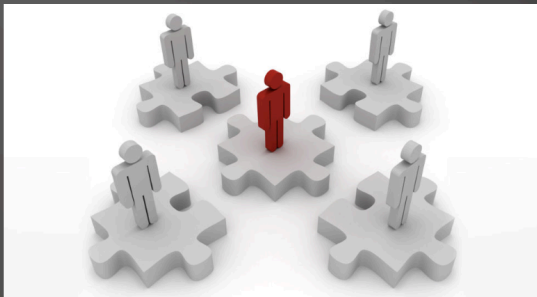


James E. Hughes, FFI Fellow, is the author of *Family Wealth: Keeping It in the Family*, and of *Family: The Compact Among Generations*, as well as co-author of many books in the field of family wealth. Jay was the founder of a law partnership specializing in the representation of private clients. In 2021, The James E. Hughes, Jr. Foundation (www.jehjf.org) was founded in Jay’s honor. He can be reached at contact@JEHJF.org.



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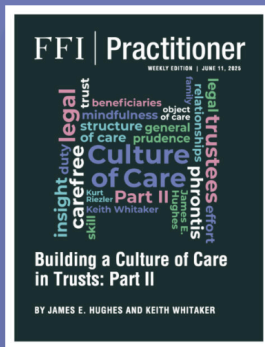
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Building a Culture of Care in Trusts: Part II

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From *FFI Practitioner*

The second part of this two-part series by FFI Fellow James E. Hughes, Jr., and Keith Whitaker, commissioned by the James E. Hughes, Jr. Foundation, picks up where Part I ends. The authors further explore philosopher Kurt Riezler's work for guidance on creating a "culture of care" among trustees and their beneficiaries.

Go [here](#) for Part I, and please read on for Part II.

In the first part of this two-part case, we turned to the thought of Kurt Riezler to help us unpack what building a culture of care in the context of trusts can look like.

Riezler was a trusted advisor to the Emperor and Prime Minister of Germany prior to and during the First World War. He later became a philosophy professor in Germany and at the New School in New York. He collected his thoughts on care in a chapter of his book, *Man Mutable and Immutable: The Fundamental Structure of Social Life*.¹

In Part I of this case, we saw what Riezler calls the main "elements" of care (mindfulness, effort, and concern).² We also explored his analysis of the "basic structure of care." This structure involves care being care for something alive, thereby weaving a mutual relation between the person who cares and the one cared for. This basic structure has immediate application for the role of trustee.

While Riezler wants to speak of the immutable structure of mutable care, for much of the rest of his chapter he focuses on the "matters" of care, great and small.³ It seems characteristic of care that small cares proliferate and cover up great cares. Especially in the context of trusts, since there are so many matters of care, we must regularly remind ourselves to ask, "How can we keep ourselves alive to those matters of the greatest importance?"

"MANY TRUSTEES COMPLAIN ABOUT COMPLIANCE, AND COMPLIANCE FOR ITS OWN SAKE IS WORTH RESISTING. BUT BY SEEING THESE RULES AS HELPING THE TRUSTEE CARE FOR OTHERS BY CARING FOR HIM- OR HERSELF, WE CAN THINK ABOUT COMPLIANCE—AND ITS PROPER LIMITS—IN A MORE HUMAN LIGHT."

For example, among these matters of care, people care for themselves. Riezler wonders whether care for others may antedate our care for ourselves.

Here too is an insight for trustees: Trustees focus a great deal on the basic needs of beneficiaries, such as their health, education, maintenance, and support. But trustees also worry about their own basic needs. Trustees have personal liability. They may face angry beneficiaries, beneficiaries with chemical dependencies, family conflict, and costly administrative mistakes, not to mention unforeseen financial reverses. “What about me?” the trustee pleads. “Could we please have some rules?” The growth of legal rules and compliance springs directly from the cares that beset the trustee for her- or himself. Many trustees complain about compliance, and compliance for its own sake is worth resisting. But by seeing these rules as helping the trustee care for others by caring for him- or herself, we can think about compliance—and its proper limits—in a more human light.

A further matter of care that Riezler explores is the “We,” the community that care creates. As he explains, “The community is a community only in the concern of its members.”⁴

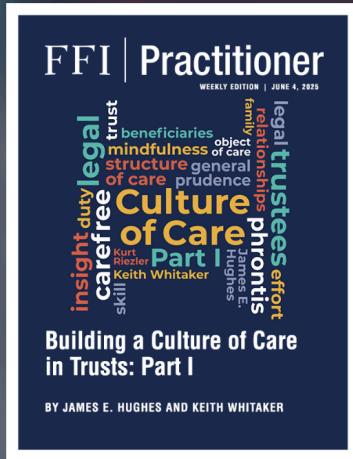


This is a powerful insight for people living with trusts. A trust is a community, most simply, a community among the settlor, the trustee, and the beneficiary. There may be many beneficiaries or even several classes of beneficiaries. In many trusts, this community includes people dead and people as yet unborn. All those who have an “interest” in the trust, hence care about the trust, make this community. The trustee must care for them all: this way, a culture of care underlies and gives meaning to the duty of impartiality. The life enhancement of this beneficiary—and distributions for his or her life enhancement—takes place within the context of this community. This is one of Riezler’s key insights: care makes a world.

(As an aside, creating a “world” or the community of the “we” does not mean that all personal differences or conflicts disappear. To take one example that a colleague shared with us, not only is it not uncommon for beneficiaries and grantors to disagree, grantors often disagree with themselves at different points in their lives, requiring the trustee to balance the grantor’s new desires, the grantor’s wishes as expressed in the trust, and the needs and interests of the beneficiaries. Ultimately, the trustee or court must help this community find its way, even if that way does not please every member of the community equally.)

Riezler discusses many other “matters of care,” including tools, machines, merchandise, money, jobs, even the earth and one’s homeland.⁵ Each of these is worth thinking about, in itself and in the context of trusts.

Sidebar



“Building a Culture of Care in Trusts: Part I”

FFI Practitioner
by James E. Hughes, Jr. and Keith Whitaker

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But we’ll take up only the last “matter of care” he discusses: “holy things.” These are the matters of care that provide a “horizon” to our “world.”⁶ They are what matters most or what’s beyond price, things that can’t be traded or exchanged, things that we look up to with reverence and treat with respect. Some families catalogue these “holy things” as what we have called “spiritual capital.”

In the context of trusts, these matters of care include the very duties of the trustee and the laws governing trusts. They may also include the wishes of the trust creators, such as expressed in the trust document (itself a sort of “holy writ”), or a written “letter of wishes.” They include the personal values of the beneficiaries, as well as the beneficiaries’ lives, the lives of their children, and that nebulous but powerful force we call “family.” To feel the power of these holy things, imagine asking a grantor to think about his trustee as he does his health care proxy. “If I were your health care proxy,” a trustee might say to a grantor, “I would want to know what you would want me to do, in a crisis, when you are not available to direct your own care. Your directions would depend upon what you consider most important. Likewise, with a trust for your descendants, if you are not present or competent to direct me, what considerations should guide how I care for your children?” These are just a few of the “holy things” that a culture of care must account for.

The somber topic of death or disability brings us to one last insight from Riezler’s rich article on care that is worth considering in the context of trusts.

“BUILDING A CULTURE OF CARE, THEN, INVOLVES HELPING BENEFICIARIES PERCEIVE AND REACH A STATE OF CAREFREENESS, AT LEAST TO THE DEGREE THAT THEY CAN.”

As we have seen, for Riezler, care is not an end. It is not for its own sake. It is for the sake of someone or something else.

But for what, in relation to this someone or something else? For its “good”? But good for whom? Or for what? Care may save something. Or protect something. Maybe it heals someone, or helps someone heal him- or herself. Health is a clear goal, as is learning. But many times even health and learning are for other things rather than ends in themselves. Does life amount to care upon care, endless care?

No, for as Riezler points out, care points to two other possibilities. One of course is carelessness.⁷ This state characterizes much of our modern relationship to the earth, machines, and even other people. What Riezler wrote about care is meant to militate against this pervasive carelessness.

The other possibility is carefreeness.⁸ This is not the same as being careless: quite the opposite. Carefreeness is the delight, the joy, the sense of freedom, that rises above our care-ridden life.

Many people imagine that trust beneficiaries are carefree. In fact, most of them (like most of us in general) are fairly careless. Money pretends to trade away our cares and exchange them for relief. But this relief is not freedom. Insofar as a serious life involves some care, it is spiritual emptiness.



Building a culture of care, then, involves helping beneficiaries perceive and reach a state of carefreeness, at least to the degree that they can. Carefreeness resembles the state of “flow”:⁹ it belongs to activities in which one feels one has engaged one’s true strengths, in something meaningful to oneself and others, losing the sense of time in the enjoyment. It also means enjoying such activities in the knowledge that much of life is care, and that carefreeness is earned. It is an enlightened beneficiary that can view his or her material resources as a means to enjoying carefree moments and can know what that means. This realization is part of true life enhancement.

To help a beneficiary see this possibility, the trustee must first see it for her- or himself. (If the trustee has not yet realized this experience personally, this is where his or her “moral imagination” can be illuminated by reading, such as through the works of Emerson or Thoreau.) Perhaps this is the fundamental lesson when it comes to considering the preparation of trustees for the work of building a culture of care. Such trustees must know and love the “holy things” of the trust relationship. They must be diligent in the work of building this culture, recognizing that it is always for the sake of these others, while in mutual relation to the trustee. But, as diligent and careful as trustees must be, they must also have tasted what it means to be carefree, to be able to point the ready beneficiary beyond the horizon of care.

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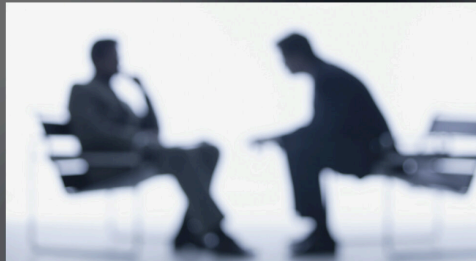


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