READING, INTERPRETING AND DRAFTING TRUST DISTRIBUTION PROVISIONS THAT:

SAY WHAT YOU MEAN AND MEAN WHAT YOU SAY

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READING, INTERPRETING AND DRAFTING TRUST DISTRIBUTION PROVISIONS THAT WORK: SAY WHAT YOU MEAN – MEAN WHAT YOU SAY

It's hard to imagine any professional endeavor where the odds of success are increased by "going it alone". A coach needs a team; a director needs a cast and crew; a leader needs followers. Unfortunately, the business of wealth planning seems to have more than its share of dedicated loners unwilling or unable to collaborate with other professionals. That's unfortunate because families benefit from having a cooperative team of experts who communicate and work together for their best interests.

Some clients find this approach uncomfortable. (Some advisors do too.) Often the wealth was created by a maverick entrepreneur who plunged into a venture never tried before and without any help. Such grit and determination is rarely combined with patience for "action by committee." Instead, the wealth generator is usually reluctant to trust anyone else with control or make time for the "touchy/feely" stuff. There is a difference between the skills required for the generation of wealth and those best suited to the preservation, planning and transfer of wealth. Most importantly, there is a great deal to be gained by taking the time to understand and communicate the culture and values of a client when building a wealth transfer plan.

Surprisingly, collaborative planning and implementation can reduce costs. When the entire team participates, there is less chance of miscommunication, fewer meetings are needed, delegation between advisors is more effective, and there is less chance of protracted and expensive family disputes. The possibility of mistake is reduced by virtue of more than one set of eyes reviewing documents and transactions. And, when a team of dedicated professionals has worked together to craft a plan, the client is more likely to go forward and execute with confidence.

But sometimes, even with a great team effort, something goes wrong. A conscientious trustee gathering the information needed to make an excellent fiduciary decision may be frustrated by an older document containing instructions that are contradictory, vague or even unintelligible. This paper is intended to inspire thought and stimulate discussion regarding how to help your clients consider what provisions should go into a new document and to help a trustee interpret those instructions once a trust is funded. Put another way: How to make documents "say what you mean and mean what you say".

I. A TRUST IS A RELATIONSHIP WITH AN INSTRUCTION MANUAL

In any relationship, a healthy understanding between the parties as to what each expects of the other is critically important. *See* Roy J. Lewicki, *Trust, Trust Development, and Trust Repair*, *in* HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 92, 92–114 (Morton Deutsch et al. eds., 2d ed. 2006). In a trust, the expectations and parameters of the relationship (the instruction manual) *See* GERRY W. BEYER, TEXAS TRUST LAW: CASES AND MATERIALS 2 (2d. ed. 2009) [hereinafter BEYER, TEXAS TRUST LAW], are defined by three primary sources:

(1) The document that creates the relationship;
(2) Statutes that apply such as the Trust Code; and
(3) Common law of fiduciary duty, to the extent it has not been superseded by the document or by a governing statute.

Administrators rely on the same order of priority to make decisions, looking first to the terms of the document. Clear and explicit instructions allow a trustee to implement the precise intent of the grantor. The terms of the document control, unless they are contrary to public policy.[1] Virtually every state's law requires a trustee to administer a trust according to its terms.

But some trusts are difficult to administer because the terms are unclear or demand the impossible. Trust terms may be perfectly clear, impossibly obtuse, complicated or simple, concise or verbose but whatever the virtues or flaws, the trustee must follow the instructions.

1. The best expressions of public policy are the declarations of the legislature, found in the statutes; although, much of our statutory language is well drafted and clear, it is not unheard of for these mandates of public policy themselves to be deliberately vague. But we shall leave that for another paper.

II. DEFINING THE TERMS

In examining a distribution clause, a threshold question is whether the trustee has any discretion at all; many trusts contain mandatory provisions. *See* RESTATEMENT (SECOND) OF TRUSTS § 186 cmt. e (1959); RESTATEMENT (THIRD) OF TRUSTS § 85 cmt. C (1). These may involve certain acts of discretion as to timing or calculation of the amount but when a trust has a mandatory distribution standard, it is not up to the trustee to decide *whether* to distribute. Where the document's standard for distribution gives the trustee discretion, the trustee must first determine is how much discretion is granted and the standard for that exercise. Distribution standards generally fall into three categories: the support trust; the discretionary trust; and the hybrid. However, South Dakota Statutes specifically reject the Restatements and the Uniform Trust Code.[2]

A. The Support Trust

In most jurisdictions, a true support trust directs the trustee to pay for the health, education, maintenance, or support (HEMS) of the beneficiary. In other words, the beneficiary may compel the trustee to make distributions in accordance with a specific standard. The distribution standard of a support trust is generally referred to as an 'ascertainable standard.' Ascertainable means specific enough to be objectively applied. *See,* RESTATEMENT (SECOND) OF TRUSTS § 154; RESTATEMENT (THIRD) OF TRUSTS § 60.

Typically, a support standard will include HEMS, or something similar. In a personal trust, this standard may be embellished by a requirement that the trustee consider the 'standard of living' that the beneficiary enjoys at a prescribed period of time. Such embellishments may be relatively simple or elaborately complicated. An example of a support standard without embellishment is simple and straightforward:

> *Trustee shall provide support and maintenance to my surviving spouse for so long as she lives.*

B. The Discretionary Trust

A true discretionary trust provides that a trustee distribute income and principal in an amount that the trustee, in its sole discretion, sees fit to pay. RESTATEMENT (SECOND) OF TRUSTS § 155. The trustee is authorized to make distributions in its sole discretion and not subject to any objective standard; the beneficiary may not compel a distribution. The distribution standard is 'nonobjective' because it is not specific enough to be objectively applied. Income that the trustee does not elect to distribute to the beneficiary is typically accumulated; and thus, the exercise of discretion may result in it being paid to another class of persons – the remaindermen. An example of a true discretionary standard as commonly used when the surviving spouse is the trustee for the children (and there are no children by any previous relationships) is as follows:

> *Trustee shall have complete and unfettered discretion over income and principal to make or withhold distributions as appropriate until each child reaches age 25.*

The definitions that are supplied in the South Dakota Code are substantially similar but include an extra classification, a mandatory interest, wherein the trustee has no discretion as to amount, whether a distribution is made and the distribution timing must be within a year.[3]

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2 South Dakota Statute specifically rejects the Restatements and the Uniform Trust Code.

55-1-25. Distinction between discretionary trust and support trust--Creditor rights--Judicial review. The common law distinction between a discretionary trust and a support trust and the dual judicial review standards related to this distinction shall be maintained. In the area of creditor rights, the Restatement of Trusts (Third) and the Uniform Trust Code create many new positions of law as well as adopts many minority positions of law. The provisions of §§ 55-1-24 to 55-1-43, inclusive, affirmatively reject many of these positions. Therefore, the Legislature does not intend the courts to consult the Restatement (Third) of the Law of Trusts § 50, § 56, § 58, § 59, or § 60 as approved by the American Law Institute or Uniform Trust Code Article 5 and Section 814(a) as approved by the National Conference of Commissioners on Uniform State Laws in 2004 with respect to subject matters addressed by the provisions of §§ 55-1-24 to 55-1-43, inclusive.

SL 2007, ch 280, § 2; SL 2015, ch 240, § 11.

3 55-1-38. Classification of distribution interest. A distribution interest can be classified in three ways:

(1) As a mandatory interest, which is a distribution interest, in which the timing of any distribution must occur within one year from the date the right to the distribution arises, and the trustee has no discretion in determining whether a distribution shall be made or the amount of such distribution;

(2) As a support interest, which is not a mandatory interest but still contains mandatory language such as "shall make

There is also a provision to accommodate a "combination" of a mandatory support provision. [4]

C. The Hybrid

The most common type of distribution standard found in personal trusts is a ***hybrid*** of discretionary and support standards. *Smith v. Smith*, 517 N.W.2d 394, 398 (Neb. 1994); *see also* Evelyn Ginsberg Abravanel, *Discretionary Support Trusts*, 68 IOWA L. REV. 273 (1983) (discussing hybrid trusts). In a hybrid trust, the trustee has sole discretion over income and principal and can make distributions as the trustee deems appropriate, but in making that determination, the trustee must consider what is reasonable or necessary for the support of the beneficiary given certain parameters. *First Nat'l Bank of Md. v. Dep't of Health & Mental Hygiene,* 399 A.2d 891, 895 (Md. 1979). Again, South Dakota has a variation of this standard that is somewhat unusual. [5]

There is little interpretive assistance for hybrid trusts. *See e.g.,* Abravanel, *supra*. A prudent trustee must review each request to determine if it falls within the scope of the standard of the particular instrument and under the circumstances at the time. HELENE S. SHAPO ET AL., *Discretionary Trusts, in* THE LAW OF TRUSTS AND TRUSTEES §§ 201–30 (3d ed. 2007). Individual circumstances matter! A classic version of a hybrid standard appears in the Texas court trust statute:

> *The trustee may disburse amounts of the trust's principal, income, or both as the trustee in trustee's sole discretion determines to be reasonably necessary for the health, education, support, or maintenance of the beneficiary.*

TEX. PROP. CODE ANN. § 142.005(b)(2) (West 2007).

But many documents contain much more elaborate, detailed, and often creative instructions to the trustee. For example:

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distributions" and is coupled with a standard capable of judicial interpretation; or

(3) As a discretionary interest, which is any interest where a trustee has any discretion to make or withhold a distribution.

A discretionary interest may be evidenced by permissive language such as "may make distributions" or it may be evidenced by mandatory distribution language that is negated by the discretionary language of the trust, such as "the trustee shall make distributions in the trustee's sole and absolute discretion." An interest that includes mandatory distribution language such as "shall" but is subsequently qualified by discretionary distribution language shall be classified as a discretionary interest and not as a support or a mandatory interest. A discretionary interest is any interest that is not a mandatory or a support interest.

SL 2007, ch 280, § 15; SL 2008, ch 257, § 6; SL 2009, ch 252, § 7.

4 55-1-39. Bifurcation of trust. To the extent a trust contains any combination of a mandatory provision, a support provision, the trust shall be bifurcated as follows:

(1) The trust shall be a mandatory interest only to the extent of the mandatory language;

(2) The trust shall be a support interest only to the extent of such support language;

(3) The remaining trust property shall be held as a discretionary interest;

(4) A support interest that includes mandatory language such as "shall" but is subsequently qualified by discretionary language, shall be classified as a discretionary interest and not as a support interest. SL 2007, ch 280, § 16.

5 55-1-40. Language resulting in classification of distribution interest. Although not the exclusive means to create a distribution interest, absent clear and convincing evidence to the contrary, the following language by itself results in the following classification of distribution interest:

* * *

(3) Discretionary interest:

(a) "The trustee, may, in the trustee's sole and absolute discretion make distributions for health, education, maintenance, and support";

(b) "The trustee, in the trustee's sole and absolute discretion, shall make distributions for health, education, maintenance, and support";

(c) "The trustee may make distributions for health, education, maintenance, and support";

(d) "The trustee shall make distributions for health, education, maintenance, and support. The trustees may exclude any of the beneficiaries or may make unequal distributions among them";

(e) "The trustee may make distributions for health, education, maintenance, support, comfort, and general welfare."

SL 2007, ch 280, § 17; SL 2008, ch 257, § 7.

South Dakota uses the term "hybrid" to reflect a trust with a dual purpose such as care of an animal or other lawful non-charitable purposes. See 55-1-22. SL 2006, ch 247, § 3; SL 2018, ch 275, § 14.

The Trustee shall distribute so much of the net income and principal of the trust as the Trustee deems necessary to provide for the Child's reasonable health, maintenance, support, and education. In exercising this discretion, Trustee shall take into account the following factors:

1. *Child's standard of living at creation of the trust;*
2. *That child is the primary beneficiary of the trust.*
3. *Trustee may consider any income or resources known upon reasonable inquiry to be available to Child for these purposes.*
4. *Settlor's intent is to assist or enable Child to pursue vocational, college, graduate, and/or professional education as long as in the Trustee's discretion it is pursued to Child's advantage.*
5. *Settlor's intent is to assist or enable Child to obtain, improve, and furnish a home commensurate with Child's standard of living.*
6. *Settlor's intent is to assist or enable Child to obtain capital to enter a business or profession.*
7. *Settlor's intent is that trust distributions not serve as a disincentive to Child's motivation to provide for his own needs in life, and Settlor instructs Trustee to reduce or terminate distributions if, in the judgment of the trustee, that objective is served by doing so.*

The above provision contains a potpourri of special instructions to provide additional guidance to the Trustee but it is still a hybrid distribution standard.

III. DISTRIBUTIONS PER GRANTOR'S INTENT

The duty of a trustee is to reasonably exercise discretion to *accomplish the purposes of the trust according to the settlor's intent*, within the mandates of public policy and subject to judicial review. *State v. Rubion*, 308 S.W.2d 4, 9 (Tex. 1957). A trustee's exercise of discretion is subject to judicial review in most jurisdictions. *Rubion*, 308 S.W.2d at 9 (explaining that avoiding a situation that requires judicial review is best). *See* SDCL 55-13A-105 Judicial control of discretionary power.

Early trust cases were usually brought by a trustee seeking the court's help to construe a will or trust instrument. But today most cases are brought by a beneficiary against a trustee for a breach of duty. And in general, courts do not like to be burdened with the trustee's job regardless of whether the trustee or the beneficiary initiates the action, as stated very succinctly in *Coffee v. William Marsh Rice Univ*., 408 S.W.2d 269, 284 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.). "This Court cannot substitute its discretion for that of the Trustees, and can interfere with their exercise of discretionary powers only in case of fraud, misconduct, or clear abuse of discretion."

It is worth noting, that, in the *Coffee* case, the court ultimately held that the trustees were free to disregard a provision of the trust providing that Rice University was "to benefit the white inhabitants of the City of Houston." The court found that, because conditions had changed significantly since the creation of the trust, the trustees were free to disregard the particular provision applicable to race to accomplish the overall intent of the settlor. *Id*. at 282. This case is an example of a change in public policy that clearly mandated a change in administration. (With hindsight, it might seem that this result was a foregone conclusion; things were not so clear in 1966.)

Many trusts being administered today were drafted in a different era; Grantor intent that was clearly enforceable then may be problematic five decades later. Consider how a court might construe this language today:

In the event that any beneficiary hereunder should be unable to prove (by affidavit or otherwise) to the complete satisfaction of the Trustee that such beneficiary is a member in good standing of a Methodist Church, or is being trained in such Church, such beneficiary shall not receive any payments hereunder and all rights to which such beneficiary would otherwise be entitled shall cease and become null and void as if such beneficiary was then deceased.

Religion is a common focus for grantors attempting to control the lifestyle of beneficiaries. In general, it is an open question as to whether such restrictions would be enforced if brought to court today. Some authorities suggest a settlor who wants to include such restrictive requirements today should couch them in terms of a class of beneficiaries. (This author is skeptical.) Compare the following provisions:

- *If my son does not marry a Jewish girl by age 25, the trustee shall make no further distributions to him.*

- *The trustee may distribute income to all of my sons who are over age of 25 and married to a Jewish girl.*

Despite the general reluctance of courts to substitute their discretion for that of a trustee, a trustee faced with a significant or difficult decision regarding a distribution, particularly one that may impact more than one class of beneficiaries, may still seek a determination of the court. RESTATEMENT (THIRD) OF TRUSTS § 71 (2007). But such action is expensive; far better that the document make the intent of the grantor as clear as possible.

The decision to request an official construction is, in and of itself, an exercise of discretion. *Keisling v. Landrum*, 218 S.W.3d 737, 743–44 (Tex. App.—Fort Worth 2007, pet. denied). Trustees should not assume they have discretion to take any particular action and must read the trust instrument to determine the settlor's intent, and that the settlor has given them the power to make such a decision. *Id.* at 743; citing *Corpus Christi Nat'l Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *Eckels v. Davis*, 111 S.W.3d 687, 694 (Tex. App.—Fort Worth 2003, pet. denied); *Wright v. Greenberg*, 2 S.W.3d 666, 671 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

Here is an example of very specific language regarding intent. It is clear the Grantor intended the Beneficiary be employed full time. If a Beneficiary elects not to work, the Trustee is mandated to withhold distributions until the Beneficiary has returned to work for a full year. This document states that if a beneficiary loses his job, the trustee must eliminate distributions. Then, once the beneficiary finds a new job, he must work at it for a full year before distributions are to be reinstated. Draconian - but the intent of the Grantor is clear.

(a) It is Grantor's overriding intent in establishing this trust to benefit his descendants, supplement their earnings and enhance their standard of living, but only if and to the extent they remain productive members of society and continue to be gainfully employed on a full-time basis. Full-time employment requires, at a minimum, working forty (40) hours per week, whether on a self-employed basis or for a third-party employer. It shall also be considered full-time employment if a Beneficiary is a full-time stay-at-home parent raising minor children who have been born or adopted into a lawful marriage of the Beneficiary, so long as the Beneficiary's spouse has full-time employment outside the home. Trust distributions provided for herein shall be suspended at all times that the Beneficiary is not gainfully employed on a full-time basis, as determined by the Trustee in the Trustee's sole discretion, unless such Beneficiary has a medical condition or disability that makes such employment unrealistic or impossible. Once the Beneficiary regains full-time employment, trust distributions shall not resume until the Beneficiary has maintained such employment for twelve (12) consecutive months. If a child of the Grantor is a single parent as the result of divorce, death of a spouse, or a single parent adoption or use of assisted reproduction techniques, the Trust Committee shall determine whether the employment requirements of this subsection (a) shall be waived to allow such single-parent Beneficiary to be a stay-at-home parent and still receive distributions authorized in Section (b).

(b) For each trust administered under this Article with respect to which the Beneficiary is under the age of fifty (50) years, the Trustee may, if the Trustee in his sole discretion determines it to be in the Beneficiary's best interests, distribute an amount not exceeding the lesser of (i) twice the annual earned income of the Beneficiary, or the Beneficiary's spouse if Beneficiary is a stay-at-home parent as reflected on the Beneficiary's Federal income tax return for the prior year or (ii) the annual annuity amount defined below.

IV. READ THE DOCUMENT

As a drafter constructs a trust, he should expect that a prudent trustee will read the instrument carefully and will apply basic rules of construction. Good administrators make it a practice to review the relevant distribution provisions in the trust document with each request. It is nearly always required to understand a beneficiary's current circumstances. In testamentary trusts containing a standard of living clause, the trustee may need to know the circumstances existing at the time of the settlor's death. *First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d 781, 783–85 (Tex. 1950); *McReary v. Robinson,* 59 S.W. 536, 537 (Tex. 1900). A trustee looks to the trust document for express instructions or a direct

statement of the purpose of the trust. *See Coffee*, 408 S.W.2d at 282–83. If there is no clear statement, a trustee may have to infer purpose from structure of the trust.

Some basic rules of construction have evolved to help in the interpretation of distribution clauses or any part of a trust agreement.

(1) Every trust is different. A well-crafted document will allow a trustee to determine the settlor's goals from its content. *Keisling v. Landrum*, 218 S.W.3d 737, 741 (Tex. App.—Fort Worth 2007, pet. denied).

(2) The cardinal principle to be observed in interpreting a trust is to ascertain the settlor's intent with the view of effectuating it. *Coffee*, 408 S.W.2d at 273. The trustee must determine the settlor's intent from the instrument. *In re Estate of Dillard*, 98 S.W.3d 386, 391 (Tex. App.—Amarillo 2003, pet. denied); *Huffman v. Huffman*, 339 S.W.2d 885, 888–89 (Tex. 1960).

(3) An administrator should clear his mind of what he thinks the document says or what he wants it to say, and read what it actually says. *In re Estate of Dillard*, 98 S.W.3d at 391–93 because a trustee cannot "correct" the work of a testator, a settlor, or the drafting counsel. "The very purpose of requiring a will to be in writing is to enable the testator to place it beyond the power of others ... to change or add to [it,] or to show that he intended something not set out in ... his will." *Huffman*, 339 S.W.2d at 889.

(4) "If possible, the court should construe the instrument to give effect to all provisions so that no provision is rendered meaningless." *Myrick v. Moody*, 802 S.W.2d 735, 738 (Tex. App.—Houston [14th Dist.] 1990, writ denied). But "[i]f the language of a trust is unambiguous and expresses the intent of the settlor, it is unnecessary to construe the instrument because it speaks for itself." *Hurley v. Moody Nat'l Bank of Galveston*, 98 S.W.3d 307, 310 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

(5) This is not math—a trustee cannot add to or subtract from what appears in the document. *Corpus Christi Nat'l Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); citing *Huffman*, 339 S.W.2d at 888. If the instrument is unambiguous, courts do not admit other evidence for the purpose of interpreting the trust. For purposes of administration, however, it will be appropriate to consider outside circumstances. *See Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 269, 283 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.).

(6) However, if the document is truly unclear, courts may consider extrinsic evidence to determine what a settlor or a testator intended by using or including a particular word or phrase. In *Reilly v. Huff*, 335 S.W.2d 275, 279 (Tex. Civ. App.—San Antonio 1960, no writ) the Court accepted evidence the testator was a person of solid business experience and because testator's attorney drafted the instrument, the term "descendant" was construed in its legal sense.

(7) There is no reason to be afraid of the dictionary—use it. *Patrick v. Patrick*, 182 S.W.3d 433, 436 (Tex. App.—Austin 2005, no pet.); *Vinson v. Brown*, 80 S.W.3d 221, 231 (Tex. App.—Austin 2002, no pet.). By way of example, the trust instrument states: "*In connection with the management of said trusts . . . I give Trustee all powers of Trustees set forth in the statutes and to ... make advancements to or for the benefit of said beneficiaries for such purposes as the Trustee may deem desirable or proper . . . and charge against the interest of said beneficiary to whom such advances are made.*" Later, the document stated: "*Except as noted elsewhere herein, the trustee shall not borrow nor lend.*" Trustee consulted Webster's Dictionary regarding the meaning of the term "advance," which includes as follows: (1) to bring or move forward; (2) to accelerate growth or progress of; (3) to raise to a higher rank; and (4) *to supply or furnish in expectation of repayment.* The dictionary is a valuable tool.

(8) An expression of specific intent controls over an expression of general intent; if two expressions of specific intent are in conflict, trustee should choose the expression that least conflicts with the general intent. *Coffee*, 408 S.W.2d at 272–75. A common example: *It is my*

intent that the trustee in its discretion shall make distributions to enable each of my five grandchildren to obtain an education; and I specifically intend that my grandson, Marcus, be afforded every opportunity to attend medical school.

(9) The term "may" means maybe—use discretion. The term "shall" means mandatory—just do it. *Keisling v. Landrum*, 218 S.W.3d 737, 742 n.3 (Tex. App.—Fort Worth 2007, pet. denied); *Roberts v. Squyres*, 4 S.W.3d 485, 489 (Tex. App.—Beaumont 1999, pet. denied). Accordingly, if a grantor intends the trustee to have discretion, do not use the word "shall".

When interpreting a document, certain legal presumptions are useful. *See, e.g.*, 10 GERRY W. BEYER, TEXAS PRACTICE: TEXAS LAW OF WILLS § 47.18 (3d ed. 2002) [hereinafter BEYER, TEXAS PRACTICE].

a. By leaving a will or trust the testator did not intend for property to revert to his estate or pass in intestacy.
b. By leaving a will or trust the testator intended to confer some benefit on the beneficiary.
c. Children are favored over grandchildren, descendants are favored over collateral relatives, who are favored over strangers. *See also* TEX. ESTATES CODE ANN. § 201.001 (West 2014).
d. The testator intended that the estate vest as early as possible.
e. All persons in a given class and all classes of beneficiaries are treated equally.
f. Every word a testator or grantor uses is important; nothing is there for no reason.
g. The testator intended the law in effect at that time should apply.

When interpreting a trust, you must know what rules may apply that do not appear in the document. In many states, exculpatory clauses are limited and a broad limitation of trustee liability may not have any effect at all. *See* TEX. PROP. CODE ANN. § 111.0035 (West 2007). Be certain that you understand what is mandatory under the relevant statute.

V. MATHEMATICAL CALCULATIONS VS. FIDUCIARY DECISIONS

Some trusts call for distribution by virtue of a specific formula; in these, the trustee does not operate under a traditional discretionary standard. In trusts that require mandatory distribution of income, the trustee must still exercise discretion but it may be in the decision whether to use the adjustment power, rather than traditional trust accounting in making distributions or choosing an alternate valuation date. Treas. Reg. § 1.664-3.

In recent years there has been a trend for documents to be drafted with complicated formulaic distribution provisions. For example:

The following provisions shall apply during the Beneficiary's life:

Trustee shall distribute to Beneficiary an amount up to Sixty Thousand Dollars ($60,000) per year, as adjusted below ("Base Distribution"), for health, education, maintenance and support. Trustee may distribute the Base Distribution in a single lump sum or in installments, in the discretion of the Trustee. The Base Distribution shall be increased by a cost-of-living adjustment calculated from January of 2010 as set forth below.

If separate trusts (such as a GST Exempt Trust and GST Non-Exempt Trust) are established under this Article for the same Beneficiary, the Base Distribution shall be made only once. No Base Distribution shall be made from a GST Exempt Trust unless the GST Non-Exempt Trust is fully exhausted.

For purposes of calculating the cost-of-living adjustment to the Base Distribution, the following definitions and procedures shall apply:

"Average Index" shall mean the aggregate of the Price Index for all the months of the calendar year ("Prior Year") immediately preceding the current calendar year (the "Current Year"), divided by 12.

"Price Index" shall mean the "Consumer Price Index for All Consumers" published by the Bureau of Labor Statistics of the U. S. Department of Labor – U. S. City Average (1967=100) or any renamed index or any other successor or substitute index

appropriately adjusted. If (1) major revisions are made to the Price Index or major changes are made to the Price Index base period rendering the procedure outlined in the following paragraph impossible to implement in a manner that would give effect to the Grantor's intent regarding the cost-of-living adjustment or (2) the Price index is no longer published by the Bureau of Labor Statistics of the U. S. Department of Labor, then the Trustee, in the Trustee's sole discretion, shall select another governmental index the use of which would most closely duplicate the procedures and resulting cost-of-living adjustments described herein and shall use such index in place of the Price Index.

Effective as of January of each calendar year, the cost-of-living adjustment shall be based upon the percentage difference between the Price Index in effect as of January of the Current Year and the Average Index. If the Price Index for January of the Current Year reflects an increase over the Average Index, then the Base Distribution in effect in the Prior Year shall be multiplied by the percentage difference between the Price Index for the January of the Current Year and the Average Index, and the resulting sum added to the Base Distribution (as adjusted and in effect in the Prior Year) effective as of the first day of January of the Current Year, until it is readjusted in the year succeeding the Current Year. Notwithstanding the foregoing, in no event shall the Base Distribution payable during any Current Year be less than the Base Distribution payable in the Prior Year. By way of illustration, the following computation of the cost-of-living adjustment in the Base Distribution illustrates the Grantor's intentions with respect to the adjustment provided for in this paragraph. If one assumes that (1) the Base Distribution is $60,000, (2) the Average Index is 102.0, and (3) the Price Index for January of the Current Year is 105.0, then the Base Distribution for the Current Year would be calculated as follows: $60,000 x 3/102 = $1,765 + $60,000 = $61,765. By further way of example, if a Beneficiary's Descendants Trust is funded upon the First Decedent's death in the year 2020, then the first Base Distribution to that Beneficiary in 2020 should reflect annual adjustments to the Base Distribution beginning as of January 2011 and continuing through January of 2020.

Despite the fact that this provision appears to leave very little in the discretion of the trustee, the first sentence indicates that the *"Trustee shall distribute to the Beneficiary an amount* ***up to*** *Sixty Thousand Dollars ($60,000) per year…"* Thus, apparently requiring the trustee to calculate the current amount that would be due under the formula, determine that the resulting adjusted base amount is truly needed for HEMS and revert back to $60,000 in the event that the calculation or the need exceeded that amount.

Here is an even more complicated example:

The "Required Monthly Distribution" amount shall be as calculated in this section. One of my primary intentions is that at all times during the life of my wife the value of the principal in the trusts created under my Will (including the trust administered pursuant to this Article, the "John Doe Marital Deduction Trust," and the trust administered pursuant to Article VI, the "John Doe Family Trust") not fall below FIVE HUNDRED THOUSAND DOLLARS ($500,000). Accordingly, the "Required Monthly Distribution" shall be as follows:

(a) If the combined value (as of January 1 of a year) of the John Doe Marital Deduction Trust assets and the John Doe Family Trust assets is less than FIVE HUNDRED THOUSAND DOLLARS ($500,000), the "Required Monthly Distribution" for each month of such calendar year shall be zero dollars ($0);

(b) If the combined value (as of January 1 of a year) of the John Doe Marital Deduction Trust assets and the John Doe Family Trust assets is equal to or greater than FIVE HUNDRED THOUSAND DOLLARS ($500,000), but less than ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000), the "Required Monthly Distribution" for each month of such calendar year shall be EIGHT THOUSAND THREE HUNDRED THIRTY THREE DOLLARS ($8,333); provided, however, that the "Required Monthly Distribution" under this subsection shall be increased for inflation, as determined by the Consumer Price Index, using the year of execution of this Will as the base year;

(c) If the combined value (as of January 1 of a year) of the John Doe Marital Deduction Trust assets

and the John Doe Family Trust assets is equal to or greater than ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000), but less than THREE MILLION DOLLARS ($3,000,000), the "Required Monthly Distribution" for each month of such calendar year shall be TEN THOUSAND DOLLARS ($10,000); provided, however, that the "Required Monthly Distribution" under this subsection shall be increased for inflation, as determined by the Consumer Price Index, using the year of execution of this Will as the base year;

(d) If the combined value (as of January 1 of a year) of the John Doe Marital Deduction Trust assets and the John Doe Family Trust assets is equal to or greater than THREE MILLION DOLLARS ($3,000,000), but less than THREE MILLION FIVE HUNDRED THOUSAND DOLLARS ($3,500,000), the "Required Monthly Distribution" for each month of such calendar year shall be TEN THOUSAND FIVE HUNDRED DOLLARS ($10,500); provided, however, that the "Required Monthly Distribution" under this subsection shall be increased for inflation, as determined by the Consumer Price Index, using the year of execution of this Will as the base year;

(e) If the combined value (as of January 1 of a year) of the John Doe Marital Deduction Trust assets and the John Doe Family Trust assets is equal to or greater than THREE MILLION FIVE HUNDRED THOUSAND DOLLARS ($3,500,000), but less than FOUR MILLION FIVE HUNDRED THOUSAND DOLLARS ($4,500,000), the "Required Monthly Distribution" for each month of such calendar year shall be the product of the following formula: four and one-half percent (4.5%) multiplied by the fair market value of such assets as of January 1 of such calendar year, divided by twelve (12); provided, however, that the 4.5% rate shall be increased by the inflation rate for the prior calendar year, as determined by the Consumer Price Index;

(f) If the combined value (as of January 1 of a year) of the John Doe Marital Deduction Trust assets and the John Doe Family Trust assets is equal to or greater than FOUR MILLION FIVE HUNDRED THOUSAND DOLLARS ($4,500,000) and above, the "Required Monthly Distribution" for each month of such calendar year shall be the product of the following formula: four percent (4.0%) multiplied by the fair market value of such assets as of January 1 of such calendar year, divided by twelve (12); provided, however, that the 4.0% rate shall be increased by the inflation rate for the prior calendar year, as determined by the Consumer Price Index.

*(g) Notwithstanding anything herein to the contrary, after the occurrence of a "**Major Terrorism Event**", my Trustee shall distribute (in addition to all income and the Required Monthly Distribution) such amounts of trust principal to my wife as are necessary, when added to the funds reasonably available to my wife from all other sources known to my Trustee, to provide for her health, support and maintenance in order to maintain her, to the extent reasonably possible, in accordance with the standard of living to which my wife is accustomed at the time of my death. For all purposes of this Will, a "Major Terrorism Event" shall be any terrorist act carried out against the United States that, in the sole judgment of my Trustee, has an effect on the ability of my wife to continue the lifestyle to which she is accustomed at the time of my death including reasonable security from future attacks. Additionally, my Trustee shall distribute to my wife (in addition to all net income and the Required Monthly Distribution) such amounts of trust principal as are necessary, when added to funds reasonably available from all other sources known to my Trustee, to provide for any emergency or serious medical needs.*

This cumbersome and complicated set of formulas suggests little confidence in the trustee to exercise appropriate discretion and make prudent decisions regarding the amount of distributions. By imposing this rigid format on the calculation process, the trustee's ability to adapt to changing market conditions, and unexpected changes in circumstances for the beneficiaries, economy, or governing law is severely restricted.

VI. DECLARING THE PURPOSE OF THE TRUST

Individual personal trusts generally have no mandated statutory language; accordingly, the variance between trusts is nearly unlimited. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 (2007). One of the first things a trustee does when reviewing a personal trust for administration is to determine its purpose. While there are a myriad of reasons why a person might establish a discretionary trust, the most common are: for tax planning purposes; to facilitate the orderly transfer of wealth in accordance with specific wishes; to protect the assets of those who are unable to protect themselves; to accommodate for character flaws or parental deficiencies; or to allow someone to exercise control from the grave. *See, e.g.*, BEYER, TEXAS TRUST LAW, *supra*, at 3–5. Intent to control from the grave is not realistic; but occasionally, is a factor in the decision to establish a trust. *Alamo Nat'l Bank of San Antonio v. Daubert*, 467 S.W.2d 555, 560 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.).

When a trust is established for federal tax purposes, it should be drafted to comply with the Internal Revenue Code's "ascertainable standard." *See* Anthony F. Vitiello & Daniel B. Kessler, *The Fully Discretionary Ascertainable Standard*, TRUSTS & ESTATES MAG., Mar. 2010. If an ascertainable standard limits the trustee's power to invade the principal of a trust, then generally that trust is not includable in the beneficiary's federal gross estate. *See id;* but note that the referenced article makes the point that the ascertainable standard alone will likely not provide creditor protection for the beneficiary. To accomplish that that the Trustee must have full discretion. Put another way, the Beneficiary must not have a right to receive property because if a Beneficiary has such a right to compel distribution – so will his creditors. When considering an ascertainable distribution standard, it is helpful to consider some of the language that courts have scrutinized when determining whether a power of appointment is appropriately limited for tax purposes. RESTATEMENT (THIRD) OF TRUSTS § 50 (2003) (containing an extensive discussion of this precedent).

The Treasury Regulations define a general power of appointment by explaining what it is not; specifically, Treasury Regulation § 20.2041-1(c)(2):

> A power to consume, invade, or appropriate income or corpus, or both, for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent is, by reason of [I.R.C. §] 2041(b)(1)(A), ***not*** a general power of appointment.

Treas. Reg. § 20.2041-1(c)(2) (2013) (emphasis added) citing I.R.C. § 2041 (b)(1)(A) (West 2012). Upon this framework, Treasury Regulation § 20.2041-1(c)(2) sets forth a number of powers limited by an ascertainable standard. Such powers include, but are not limited to, the following:

(1) Support in reasonable comfort;
(2) Maintenance in health and reasonable comfort;
(3) Education, including college and professional education, Treas. Reg. § 20.2041-1(c)(2); and
(4) Medical, dental, hospital and nursing expenses and expenses of invalidism.

See also, Estate of Vissering v. Comm'r, 990 F.2d 578, 581–82 (10th Cir. 1993) explaining that the term "comfort" does not make the standard unascertainable, so long as the beneficiary already leads a lifestyle that is at least reasonably comfortable. (This seems to circle back to a previous standard of living.) It is important to note, however, that "[a] power to use property for the comfort, welfare, or happiness of the holder" is deemed to be outside of the ascertainable standard.[6]

While tax cases provide some guidance for a prudent trustee, better guidance is the common law of personal trust. In a trust, when the testator has not specifically stated his or her intent, the distribution standard may be a clue to the purpose of the trust. If beneficiaries have the power, as either a co-trustee or otherwise, to make distributions to themselves or for their benefit but such power is limited by an ascertainable standard, then, for tax purposes, the trust property usually will not be includable in the beneficiary's gross estate—the settlor's primary purpose in establishing the trust may be safely

6 That "happiness" is "unascertainable" may be a topic for an entirely different type of seminar.

assumed to include tax planning purposes. *See* Vitiello & Kessler, *supra.* However, if the power is too broad to be considered ascertainable, such as the right to distribute money for happiness, then the assets fall back into the beneficiary's taxable estate, and the trustee can assume that the settlor simply wished to provide for the beneficiary. *See id.* Many states have a statutory Discretionary Powers and/or Tax Savings clause. For example, TEX. PROP. CODE ANN. § 113.029 (West 2007). It is better, however, if the testator makes his purpose clear. Consider the following clear statement of purpose:

> *I intend by establishment of this trust to provide for the care, comfort, support, maintenance, health, enjoyment and education of my daughter.*

VII. STANDARD OF LIVING CLAUSES

There is more precedent on standard of living than nearly any other aspect of discretion. Treas. Reg. § 20.2041-1(c)(2) (2013) lists "support in [the holder's] accustomed manner of living" as one of the ascertainable standards limiting the general power of appointment and there are many cases interpreting this language. This is probably because so many testamentary trusts incorporate the desire of the testator to provide support to a loved one "*in the manner to which [the loved one] has been accustomed immediately prior to my death*." *Old Va. Brick Co. v. Comm'r,* 367 F.2d 276, 278 (4th Cir. 1966); *Independence Bank Waukesha v. United States*, 761 F.2d 442, 444 (7th Cir. 1985). The "appropriate" standard of living may be important even in trusts where the beneficiary's previous standard of living is not an issue. *See* John G. Steinkamp, *Estate and Gift Taxation of Powers of Appointment Limited by Certain Ascertainable Standards*, 79 MARQ. L. REV. 195, 246–49 (1995).

A trustee, unless specifically relieved from the responsibility by the terms of the document, should investigate and document the beneficiary's standard of living. This might include visiting the beneficiary and following up on major expenses, vacations, and education. Or it might include research to determine what the grantor's standard of living was more than a generation ago. Courts have long held the following to be relevant in various circumstances: type and size of dwellings; type and expense of educational institutions attended; wardrobe; domestic help employed; number and price of automobiles; membership in recreational facilities; vacations; and everyday activities. *In re Golodetz' Will*, 118 N.Y.S.2d 707, 712–13 (N.Y. Sur. Ct. 1952). The trustee should monitor, record, and consider these and other beneficiary circumstances to "determine the amount … sufficient for the 'suitable' support and maintenance of the trust beneficiary." *In re Rockefeller*, 260 N.Y.S.2d 111, 115 (N.Y. Sur. 1965). Despite the broad interpretation of state courts in considering what is appropriate to distribute under an "accustomed standard of living" trust, the prudent personal trustee should also be aware of the tax ramifications of such a standard. "[T]he power to invade corpus . . . to continue an accustomed standard of living" without further limitation has been held to be outside the ascertainable standard, even if limited somewhat. Steinkamp, *supra*. Rev. Rul. 77-60, 1977-1 C.B. 282. In a personal trust, the issue is not how the trustee spends the money but how the trustee *could* spend the money. *See id.* Revenue Rule 77-60 states:

> A power to use property to enable the donee to continue an accustomed mode of living, without further limitation, although predictable and measurable on the basis of past expenditures, does not come within the ascertainable standard prescribed in [§] 2041(b)(1)(A) of the Code since the standard of living may include customary travel, entertainment, luxury items, or other expenditure not required for meeting the donee's need for health, education or support.

Consider this unique example of a testator who undertook to define exactly the standard of living he had in mind:

> *I have always encouraged my children to build useful and fulfilling lives. I have provided the means to allow them to choose a career, business or profession about which they may be passionate and to pursue whatever education is required to excel in their chosen field. It is my intent that my trustee, in his discretion, will use these funds to provide health, education, maintenance and support as reasonable and necessary to continue to encourage them to pursue these goals and support them in these endeavors as I have done up until the time of my death. Accordingly, to the extent that funds are available and the trustee, in his discretion deems it prudent, I encourage my trustee to consider requests for the purchase of a residence, to*

> *facilitate the start of a business or enter a profession, to obtain additional education or for travel in a manner that expands the knowledge, creativity and sophistication of my children in order that they may continue to do meaningful work for profit or charity.*

Often the standard of living clause is blended with other instructions to the trustee. Here is an example of an instruction directing the trustee to consider other sources of income, family life and lifestyle.

> *In an effort to provide the Trustee with guidance in making distributions under the standards provided above, the Trustee may consider those circumstances the Trustee believes are relevant, including but not limited to: (a) other income and assets known to the Trustee to be available to the beneficiary, (b) the tax consequences of any distribution, (c) the character and habits of the beneficiary, including the diligence, progress and aptitude of the beneficiary in acquiring an education and advancing his career goals, (d) the ability of the beneficiary to handle money usefully and prudently, and assume the responsibilities of adult life and self-support, (e) the extent to which any distribution could contribute to the development of negative attitudes in the beneficiary, such as entitlement, complacency or narcissism, (f) external factors and circumstances which may threaten the beneficiary's financial security or progress toward financial maturity and independence, and (g) the beneficiary's cultivation of a life plan and goals which are both challenging and realistic in terms of intellectual prowess, emotional maturity, and career and/or family development*.

VIII. CONSIDER OTHER SOURCES OF SUPPORT

There is precedent to guide trustees with regard to the obligation to consider a beneficiary's other sources of income when making support decisions. Cases arising from instruments that do not address whether the trustee should consider the beneficiary's outside resources are largely testamentary and vary in outcome. Compare *In re Ferrall's Estate*, 258 P.2d 1009, 1012 (Cal. 1953), with *In re Flyer's W*ill, 245 N.E.2d 718, 720 (N.Y. 1969). From state to state, the default approach falls into three broad categories:

- The testator intended that the trust be an absolute gift of support, and the trustee should not look outside the trust to determine the beneficiary's other means;
- The trustee must consider other means, but the beneficiary is not required to exhaust them; and
- The beneficiary must rely completely on his own resources for support, unless such resources prove inadequate.

See generally Jonathan M. Purver, Annotation, *Propriety of Considering Beneficiary's Other Means Under Trust Provision Authorizing Invasion of Principal for Beneficiary's Support*, 41 A.L.R.3d 255 (1972) (discussing each of the different categories where the default rule fails). Often, a settlor specifies what the trustee should consider regarding outside support. *Keisling v. Landrum*, 218 S.W.3d 737, 743–45 (Tex. App.—Fort Worth 2007, pet. denied). When it is not specified in the instrument, most states follow the moderate path of assuming the beneficiary's other means of support should be considered, but do not require a beneficiary to exhaust such outside resources. This is not the prevailing view everywhere. *In re Demitz' Estate*, 208 A.2d 280, 282 (Pa. 1965); *see also* Purver, *supra* at 266 and cases cited therein (noting cases from a variety of jurisdictions where the beneficiary is required to exhaust outside resources in whole or in part). However, in the majority of states, the view is that there are no reasonable grounds to exclude information regarding other means of support. *See,* Sarah Patel Pacheco, *What Did You Mean By That? Trust Language and Application by Trustees*, ST. B. TEX., ANNUAL ADVANCED ESTATE PLANNING AND PROBATE COURSE [hereinafter Pacheco]. In these jurisdictions, the most important factor considered has long been the ultimate intent of the settlor or the testator—generally presumed to be to provide support, as necessary. *See* R.T. Kimbrough, Annotation, *Admissibility of Extrinsic Evidence to Aid Interpretation of Will*, 94 A.L.R. 26 (1935) discussing the importance of the maker's intent.

The rationale is that to determine what amount of support is *necessary*, the trustee must consider the beneficiary's circumstances and determine *need*. *First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d 781, 786 (Tex. 1950). In *Howard*, the Texas court held that the requirement that the trustee consider income from any

source included the family. It held that the trustee must "consider all income enjoyed by the beneficiaries from any and all sources, all income enjoyed by their husbands from whatever source so long as it is available for support of the beneficiaries" and included income received by their sons.

In the event the grantor wants the trustee to consider something specific, the document should say so.

> *In providing for payment of income to my son, together with the discretionary payments to be made by the Trustee, I have done so out of a desire to protect him against the misfortune of having more spendable income than he is able to use advantageously for himself and any persons dependent upon him. I have in mind that Charles now has a vested remainder in one-half of a substantial trust created under the will of his grandfather, George, which should produce an income, if conservatively invested, of approximately Ten Thousand Dollars ($10,000) per annum. If Charles leads a useful, respectable and reasonably provident life, it is my desire that he have as much or all of the additional income from his trust as the Trustee believes he can use wisely and providently for the benefit of himself and those dependent upon him and any charitable and like interests which he has. In determining what discretionary payments of income shall be made to Charles, the Trustee shall consider that other income and assets, as well as the general circumstances of his occupation, family responsibilities, and manner of living.*

This provision highlights the previous admonition that a trustee should consult a dictionary. "Provident" means (1) making provision for the future, (2) prudent, or (3) frugal. Substituting the word "frugal" for "provident" in the above distribution standard yields a very different meaning than if you substitute the word "provident". Only the settlor could know whether she meant that Charles should be prudent or frugal. The last sentence is, however, clearer. The trustee is required to look at income, assets, his occupation, dependents and lifestyle.

Some instruments are much more concise regarding this type of instructions. For example:

> *Trustee may consider disparity of benefits received from any person, others relying upon the beneficiary for support, illness, education expense or other special talents, special needs or circumstances.*

The Third Restatement of Trusts provides a check list of items to consider and could be adopted in whole or in part in the distribution provisions of an instrument. It provides that a trustee should consider:

1) The beneficiary's independent income;
2) Annuity payments;
3) Court ordered support payments;
4) Income payments from the trust; and
5) The principal of the beneficiary's estate.

Restatement (Third) of Trusts § 50 cmt.e(2) (2003). The section goes on to suggest it may be appropriate to consider non-income assets available to the beneficiary depending upon:

1) Liquidity of the assets;
2) Terms and extent of the discretionary power;
3) Purposes of the trust such as tax planning; and
4) Relationship of the Settlor with the beneficiaries and his objectives.

In cases of doubt, some courts suggest the trustee should err on the side of the "primary" beneficiary. *Munsey v. Laconia Home for the Aged*, 164 A.2d 557, 559–60 (N.H. 1960). This, of course, presumes that one class of beneficiary is of primary importance. In those cases where one is specified, it is usually the life beneficiary that takes primary importance but most trusts do not have a primary beneficiary. In fact, in most cases the fiduciary has exactly the same duty to all classes of beneficiary. This may create a conflict between the needs of the current income beneficiary and the needs of the future income, principal, or remainder beneficiaries. As discussed below, this conflict is what led to the creation of the Power to Adjust.

IX. THE DUTY OF LOYALTY (IF IT'S EASY, YOU AREN'T DOING IT RIGHT)

The duty of loyalty may be the most important aspect of the fiduciary relationship and demands a trustee put aside the most human of instincts—self-interest. The trustee must put the interests of the beneficiaries above the interests of all others, including (and especially) the

trustee's own interests. And, as spelled out in unmistakable terms in nearly every state statute, a trustee must manage the trust . . . solely in the interest of *all* the beneficiaries. Managing a trust impartially is difficult. *See* Pacheco, *supra*. Impartiality may be less troublesome for a professional trustee than for a member of the family or close friend. However, beware of any trustee who claims that this part of the job is easy.

Managing objectively is particularly hard when the trustee has a duty of "perfect loyalty" to two or more beneficiaries with competing interests.

X. DOES THE DOCUMENT REFLECT A PREFERENCE FOR A CLASS OF BENEFICIARY?

Unless a document specifically directs the trustee to favor one class of beneficiary over another, it is challenging to accommodate competing interests within the bounds of the duty of loyalty. If the trust instrument provides a standard for unequal treatment between classes and the terms of the instrument are followed, the trustee can be comfortable with disparate treatment. Drafters should remember that if the grantor wants to favor one class over another, the document must say so.

There may be a clear expression of preference between current and future beneficiaries but if there is not, the trustee will be bound by the default statutes of the jurisdiction – generally requiring that all beneficiaries be treated equally.[7] An example of an effective statement of preference would be:

> *Trustee from time to time may distribute such amounts or none of the net income and principal to the Beneficiary and his descendants in such manner as the trustee determines to be advisable to provide for health, education, maintenance or support. Such amounts may be distributed or applied without regard to equality of distribution and notwithstanding that one or more of the beneficiaries and his or her descendants may receive no benefit.*
>
> *Further, trustee shall consider the Beneficiary to be a preferred beneficiary of this trust. Subject to the restrictions set forth herein, the trustee may make distributions to any non-preferred beneficiary; however, the trustee (a) shall resolve uncertainties concerning income and principal in favor of the preferred Beneficiary to the exclusion of other present or future beneficiaries, and (b) shall consider the interests of the preferred Beneficiary as primary and the interests of all other beneficiaries of such trust as secondary.*

The above is an example of a trust document that presents a preference for a first-generation beneficiary. Here is another even clearer mandate:

> *Trustee shall distribute income and principal as necessary for the health, support, maintenance and comfort of my spouse, without regard for the rights of the remainder beneficiaries, even to the complete dissipation of the trust assets.*

Unfortunately, in some cases, the articulated standard is not clear. The Testator creates an even greater challenge for the Trustee by a misdirected attempt to clarify:

> *The issue of the Grantors in the same generation should be treated with substantial equality unless the Trustee determines that unequal treatment is advisable*.

As noted above, when the document does not provide guidance, a trustee must administer a trust with the same regard for the interests of all beneficiaries. The Uniform Principal and Income Act and Uniform Prudent Investor Act mandate consideration of the total investment strategy, stressing short-term results for the current income beneficiaries and long-term results for the future classes of beneficiaries - simultaneously.

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7. The provisions of the statute in most states do not distinguish between classes of beneficiaries. For example, the TEX. PROP. CODE ANN. § 111.004(2) defines a "'beneficiary' [as] a person for whose benefit property is held in trust, regardless of the nature of the interest." "The term "interest" is defined separately; it includes "any interest, whether legal or equitable or both, present or future, vested or contingent, defeasible or indefeasible." TEX. PROP. CODE ANN. § 116.002(2) specifies that the term beneficiary in a trust "includes . . . an income beneficiary and a remainder beneficiary." Neither statute suggests favoring one class of beneficiary over another.

XI. WHEN THE DOCUMENT SAYS TO DISTRIBUTE ALL INCOME

When the document says to distribute all income, the trustee may be in a position to equalize the tension between classes of beneficiary by using the adjustment power. In determining when to use the adjustment power, the trustee looks for three things: (1) the trustee invests and manages trust assets as a prudent investor; (2) the terms of the trust describe the amount that may or must be distributed by referring to the trust's income; and (3) the trustee determines that making an adjustment is the only way to be fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. [8]

In simple terms, if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee, the trustee may make an adjustment between principal and income to achieve fairness for the beneficiaries. When the distribution standard states "distribute all income," what was previously a matter of discretion only as it related to investment decisions can now require fiduciary discretion in determining the amount of that distribution.

Whether a trustee may use the adjustment power to calculate the income distribution requires a two-part test. First, the trustee determines whether the Uniform Principal and Income Act is the governing law of the trust. Second, the trustee must be sure the document does not specifically prohibit use of the adjustment power. Even if the UPIA applies to the trust, the document may contain specific language prohibiting its application; if so, that specific language will govern the trust. The trust may have special circumstances that prohibit the trustee from using the adjustment power. For example, the adjustment power will not be available if any of the following set out in 55-13A-104C is true:

- Language in the document prohibits the trustee from investing assets as a prudent investor. Example: *I prohibit the Trustee from investing in equities*; *trustee shall only invest in those instruments backed by the full faith and credit of the United States government; or trustee may not sell the interest in [insert large concentration of stock].* [9]
- The trust describes the amount that shall be distributed by referring to a specific amount, and does not refer to the income of the trust. Example: *Distribute $1,500 per month to each beneficiary* or *Distribute 3% of the market value on March 1st*.
- If a trust's distribution provision is a single discretionary standard that applies to both income and principal, the adjustment power does not apply, but it is important that the standards be identical. *See* S. Alan Medlin, *Limitations on the Trustee's Power to Adjust*, 42 REAL PROP. PROB. & TR. J. 717, 726–47 (2008). Beneficiaries with access to both principal and income, but under different circumstances, may be eligible for adjustment. Example: *Distribute all income and principal only in the event of an emergency*.
- A non-independent co-trustee is required by the document to participate in the adjustment power decision. Because no related party, subordinate party, or beneficiary may make the decision, if such a co-trustee is required to participate, the adjustment power is precluded. But if the co-trustee's participation is not mandatory, then in some jurisdictions, the non-independent co-trustee can decline to participate in the decision to exercise and the power to adjust can be applied to the trust.
- A trust with charitable and non-charitable beneficiaries is taking a charitable set aside for capital gains. [10]

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8. South Dakota's version found at 55-13A-104 is typical:

55-13A-104. Trustee's power to adjust. (a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in § 55-13A-103(a), that the trustee is unable to comply with § 55-13A-103(b).

9. In Texas, this is often ExxonMobil (XOM). Arkansas is often Walmart (WMT). In South Dakota, perhaps HF Financial Corp (HFFC).

10. This category of trusts, which have charitable remaindermen, are nonqualified trusts created prior to the 1969 tax law, which created qualified charitable remainder trusts. *See* BORIS I BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 82.1 (3d. 1999). These pre-1969 split-interest trusts have both individual and charitable interests, with the net income being remitted to the income beneficiaries or sometimes shared with a non-profit

If a settlor wants to preclude the use of the adjustment power, use of any of the above provisions will accomplish that. However, the uniform statute was designed to allow trustees to employ the prudent investor rule without being constrained by traditional principal and income rules and to apply to trusts already in place, whose terms describe the amount to be distributed by referring to the trust's income - even those that may have included provisions prohibiting invasion of principal or equitable adjustments. Accordingly, given the broad language of the enabling statute, if a settlor truly wishes to forbid the use of the adjustment power, the document should say so explicitly. Here is an example:

> *I specifically preclude my trustee from making any adjustments between traditional trust accounting income and principal under the provisions of [insert relevant state statute number] entitled Power to Adjust, or in the event the situs or governing law of this trust should be changed, under the provisions of any similar statute or provision of law. Further, any requirement found in this document or the relevant statute that mandates that the beneficiaries of the various trusts created herein be treated equitably shall not be construed to allow such an adjustment.*

If the UPIA is the governing law of a trust and under current circumstances and language of the trust, the adjustment power is available, then the trustee must determine whether to make an adjustment. Even in a case where the adjustment power is available, many factors, such as the circumstances and liquidity needs of the income beneficiary, the circumstances of the remainder beneficiaries, the size of the trust, the current asset allocation, and the income being produced now will influence the trustee's decision as to whether to exercise the power. And of course, the intent of the settlor as set forth in the document regarding what the trustee should consider must be followed. The application of the Prudent Investor Rule is fundamental to the adjustment power. *See* Richard W. Nenno, *The Power to Adjust and Total-Return Unitrust Statutes: State Developments and Tax Considerations*, 42 REAL PROP. PROB. & TR. J. 657, 669 (2008).

organization. The power of adjustment does not apply to trusts where a charitable set-aside deduction for capital gains is being taken.

XII. THE SPENDTHRIFT CLAUSE

The interaction of the spendthrift clause and the distribution standard in a trust can be an issue for the trustee. Most states have little precedent on this but there are some cases worth mentioning. In Texas, the reasons for creating a spendthrift trust need not be included in the document. *Adams v. Williams*, 248 S.W. 673, 679 (Tex. 1923), "While trusts by the terms of which the property belonging thereto is put beyond the control of the beneficiary and exempt from seizure for his debts are commonly called 'spend-thrift trusts,' it is not necessary that the instrument creating same shall assign any reasons for such provisions, nor is it necessary that the beneficiary shall be in fact improvident, incapable, or a spendthrift." Trustees should consider *Nations Bank of Virginia v. Grandy*, where the court held that, despite unfettered discretion to do so, trustees properly refused to invade principal to pay a beneficiary's debts when she had substantial assets outside the trust sufficient to pay. *Nations Bank of Va. v. Grandy*, 450 S.E.2d 140, 143–44 (Va. 1994). Contrast that with an Iowa case, *In re Family Trust of Windus*, in which the court held that an invasion of principal to pay credit card debt in excess of $60,000 was permissible under the support standard. *In re Family Trust of Windus*, No. 07-2006, 2008 WL 3916438, at *2 (Iowa App. Aug. 27, 2008). *But see, In re Estate of Morgridge*, No. G036463, 2007 WL 1874332, at *5–7 (Cal. App. 4th Dist. June 29, 2007) (holding that invasion of principal to pay a $71,000 credit card debt was not within the "support standard").

In these cases, the court was asked to determine if a beneficiary with assets outside of trust could refuse to use those and instead rely on trust principal to the detriment of the remainder interests. In each case, the court examined the language of the distribution provisions to determine whether the intent of the grantor was to create a support trust or "discretionary support trust" – a hybrid. The courts reached opposite conclusions based on subtle nuances in the language of the provisions. How you say it matters.

Trustees must know the relevant state law regarding when a spendthrift trust is created and that the spendthrift protection terminates with the trust. *Faulkner v. Bost*, 137 S.W.3d 254, 260–61 (Tex.

App.—Tyler 2004, no pet.). Once in the hands of the beneficiary, funds are fair game for creditors. In nearly every state, there are exceptions to the spendthrift rule for child support. *First City Nat'l Bank of Beaumont v. Phelan*, 718 S.W.2d 402, 406 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.). In most states, this is statutory. E.g. TEX. FAM. CODE ANN. §151.001 (West 2008).

XIII. COMMUNICATE WITH THE BENEFICIARY

A trustee has a duty to be informed and should communicate with beneficiaries about individual circumstances and the general administration of the trust. *See* RESTATEMENT (THIRD) OF TRUSTS §111 cmt d (2003). Discretionary decisions regarding taxes, distributions, and investments are key issues; communication with the beneficiaries on these should be accurate, complete, timely, and in writing. If a settlor asks to limit disclosure to the beneficiaries about the trust, the drafter must review the relevant state mandatory statutes carefully to determine the age at which a beneficiary is entitled to information, which beneficiaries are included and what must be disclosed. As an example, current Texas statute reads as follows:

> *(c) The terms of a trust may not limit any common-law duty to keep a beneficiary of an irrevocable trust who is twenty-five (25) years of age or older informed at any time during which the beneficiary: (1) is entitled or permitted to receive distributions from the trust; or (2) would receive a distribution from the trust if terminated.*

TEX. PROP. CODE ANN. § 111.0035(c). This language leaves some room for interpretation regarding what is necessary to keep a beneficiary "informed" and clearly precludes a grantor from mandating non-disclosure for a beneficiary twenty-five or older. But there are some states that allow trustees to administer a trust in secrecy. (Just because you can, doesn't mean you should.)

XIV. WHAT TO PAY?

Initially, the issue of what to distribute in a trust seems easy. Health, education, maintenance, and support are words with common, ordinary meanings; however, circumstances matter. A trustee must determine if the primary purpose of a trust is to support now, to conserve assets for the future, or both. The variety of requests seems infinite; there is little guidance in case law because a lawsuit is rarely instituted to force or protest a distribution for a single item. And many requests can be classified in more than one way.

A. Health

The term "health" typically includes items that would also be permissible under a support standard alone. *See* RESTATEMENT (THIRD) OF TRUSTS §50, cmt d (2003). A Texas court trust statute specifies that a "trustee may conclusively presume that medicine or treatments approved by a licensed physician are appropriate for the health of the beneficiary." TEX. PROP. CODE ANN. § 142.005(b)(2) (West 2007). The legislature added this section because trustees administering court created trusts found the variety of health-related requests to be daunting. *See* Tex. H.B. 564, 80th Leg., R.S. (2007) .

Distribution requests related to health may include alternative treatments, such as acupuncture or homeopathic remedies, as well as elective medical procedures such as plastic surgery, laser eye surgery, cosmetic dentistry, non-diagnostic full body scans, over the counter lab tests (such as tests for sexually transmitted diseases), tattoo removal, and concierge medicine. Some of the obvious, and more traditional, requests that fall under the category of health are:

- Medical, dental and long-term care insurance premiums;
- Uninsured doctor, hospital, and lab costs;
- Physical or occupational therapy; home health care;
- Mental health services or psychological treatment;
- Dental and orthodontia expenses;
- Medical supplies, equipment and pharmaceuticals;
- Prescribed therapeutic items such as whirlpools, horses, pools; or specialized cleaning to eliminate allergens;
- Eye care, eyeglasses, and contact lenses;
- Special accommodations for the disabled including ramps, wheelchair transport vans or lift equipment, adaptation of doors, installation of handrails or other safety equipment

In drafting a health distribution provisions, consider *In re Stonecipher*, 849 N.E.2d 1191, 1197 (Ind. Ct. App. 2006), where the court found it was not an abuse of discretion to refuse to invade trust principal for in-home nursing care for the current beneficiary after considering her income from other sources, her extensive gifting some of which was made from personal funds, and the remainder

beneficiary. *See, generally* RESTATEMENT (THIRD) OF TRUSTS §50 cmt d discussing various health-related topics.

It is unusual for a settlor to preclude specific distributions related to healthcare in the terms of a document but there are some interesting examples. One Grantor's desire to exercise control and micromanage appropriate distributions for "health" is interesting. This testator attempted to restrict the Trustee from distributing for health care expenses which he felt were "self-inflicted":

> *Trustee shall NOT distribute income or principal to my son for his emergency or serious medical needs if he has employer medical benefits or if such needs arise from his participating in risky or irresponsible activity, as determined in the sole discretion of my Trustee, which shall be binding on all parties. "Risky or irresponsible activity" shall include but shall not be limited to drunken driving, illicit drug use, unprotected sex, and any illegal actions.*

B. Education

Absent more specific language in the document, education is usually considered to include living expenses, tuition, fees, books, and other costs of higher education or technical training. However, there are cases demonstrating ambivalence by courts. Common requests classified as "education" include, but are not limited to, the following:

- Tuition including private school, college, graduate school, trade school or vocational training, study skills classes, tutors, speech or reading therapy;
- Room and board and/or travel to and from school;
- After-school or summer classes, extended day care;
- Sports activities, music lessons and instrument rental/purchase or repair;
- Computer purchase, maintenance, and repair;
- Graduation costs, books and supplies, and uniforms

See RESTATEMENT (THIRD) OF TRUSTS §50 cmt d, discussing the different education-related topics. Although the restatement appears to include all these categories as "education" there are some contrary decisions for review. *S. Bank & Trust Co. v. Brown*, 246 S.E.2d 598, 603 (S.C. 1978), finding that education did not include post-graduate studies but was limited to education up to and including a bachelor's degree. *See also*, *Lanston v. Children's Hosp.*, 148 F.2d 689 (2d Cir. 1945), finding that it was within a trustee's discretion to refuse to fund the further education of a beneficiary who was forty-two years old, well-educated and had a "large income"; *Steeves v. Berit*, 832 N.E.2d 1146, 1152 (Mass. App. Ct. 2005), *abrogated by Halpern v. Rabb*, 914 N.E.2d 110 (2007), adopting a similar definition of "college" in the context of a divorce case; and *Epstein v. Kuvin*, 95 A.2d 753, 754 (N.J. Super. Ct. App. Div. 1953), holding that the term "college education" did not include medical school.

A relatively straight forward definition of "education" is:

> *"Education" includes, but is not limited to, education and maintenance while attending pre-school, elementary, secondary, undergraduate, graduate, post-graduate and vocational schools.*

But consider the discretion vested in this trustee:

> *"Education" as used herein shall include the best education a beneficiary is capable of absorbing, such as study at private schools and colleges, and graduate studies, if such beneficiary desires to pursue such studies.*

C. Maintenance and Support

The terms "maintenance" and "support" are now considered synonymous and may be deemed an expression of purpose, as much as a distribution standard. In many sources, the term "support" has been interpreted very broadly. The RESTATEMENT (THIRD) OF TRUSTS provides a nonexclusive list of examples including "regular mortgage payments, property taxes, suitable health insurance or care, existing programs of life and property insurance, and continuation of accustomed patterns of vacation and of charitable and family giving". Courts have held that "[t]he needs of a married man include not only needs personal to him, but also the needs of his family living with him and entitled to his support." *Robison v. Elston Bank & Trust Co.*, 48 N.E.2d 181, 189 (Ind. App. 1943). The terms maintenance and support have become so broad, that when the distribution standard includes these terms, a trustee's discretion may no longer be considered "unbridled." *See First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d 781, 785 (Tex. 1950); *In re Estate of Dillard*, 98 S.W.3d 386, 395 (Tex. App.—Amarillo 2003, pet. denied). Generally, support refers to the following type of expenses:

- Rent or mortgage payments, utilities, groceries and other routine living expenses;
- Property taxes, insurance, maintenance, and repairs (on property held outside the trust);
- Auto purchase, repair, and insurance;
- Childcare services;
- Professional fees for estate and tax planning, tax preparation, tax and accounting advice, divorce, adoption or criminal defense;
- Requests for "one-offs" and emergencies.

See RESTATEMENT (THIRD) OF TRUSTS §50 cmt d (discussing the different maintenance and support related topics); and see, Matthew A. Levitsky, *What Does Maintenance and Support Really Mean in Trust?* EST. PLAN. & WEALTH PRESERVATION BLOG FOR TRUSTED ADVISORS (Sept. 17, 2013). Real estate held inside the trust will require that taxes, insurance and maintenance be included as expenses of the trust rather than discretionary distributions. *See* Levitsky, *supra*. The examples above in all three categories are not meant to be exhaustive. Some items may seem frivolous for small trusts, providing further support for the rule that individual circumstances must be considered; however, under all circumstances, support probably means more than bare necessities. *Hartford-Conn. Trust Co. v. Eaton,* 36 F.2d 710 (2d Cir. 1929). Some settlors are, however, very specific:

> *My Trustee shall distribute such amounts of income or principal as necessary, to provide for emergency or serious medical needs; provided, however, that my Trustee shall not distribute to my son for his emergency or serious medical needs if he has employer medical benefits. Additionally, after the occurrence of a Major Terrorism Event, Trustee shall distribute such amounts of trust income or principal as are necessary, when added to the funds reasonably available to my son from all other sources known to my Trustee, to provide for his health, support and maintenance in order to maintain him, to the extent reasonably possible, in accordance with the standard of living to which he is accustomed at the time of my death.*

Consider whether this specific provision regarding the distribution of health, education, maintenance and support leaves any discretion to the trustee at all:

With regard to each trust herein of which the Grantor's son is the Beneficiary, the Trustee shall distribute the amounts directed under the following subsections:

(a) If Ferris is employed on a full-time basis (35 or more hours per week), the Trustee shall distribute monthly (for each month that he is employed on a full-time basis) an amount equal to ten percent (10%) of his annual compensation from the previous calendar year (as determined by reference to the Form W-2, Form 1099-Misc or similar form received by Ferris for such year); provided, however, that the 10% distribution rate shall be increased by the inflation rate for the calendar year immediately preceding the year in which such distributions are to be made, as determined by the Consumer Price Index;

(b) If Ferris is not working at all (as an employee or independent contractor), the Trustee shall distribute to him seventy-five dollars ($75) per day for a period lasting no longer than six (6) consecutive months; provided, however, that such distributions shall not begin until the unemployment benefits to which he is entitled expire; provided, further, that the $75 per day distribution rate shall be increased for inflation, as determined by the Consumer Price Index, using the year of execution of this Will as the base year;

(c) If Ferris is below the age of sixty-five (65) years, Trustee shall pay on his behalf the premiums on a disability insurance policy with Ferris named as the insured/beneficiary and with the maximum benefit level available elected;

(d) The Trustee shall also pay the premiums on an insurance policy covering his personal items, including expensive computers and electronics, that are kept inside his apartment, home or other domicile, to protect against damage/loss due to theft, fire and similar hazards; provided, however, to allow the Trustee to purchase the appropriate amount of insurance coverage, Ferris must provide a complete inventory of his possessions each year, supported by pictures; provided, further, that if Ferris fails to provide the required inventory and supporting pictures, the Trustee shall not purchase such insurance;

(e) If Ferris owns his own home, the Trustee shall pay on his behalf premiums on a homeowner's insurance policy with terms and coverage standard at that time;

(f) If Ferris and his spouse are both unemployed or if neither the employer of Ferris nor the employer of Ferris' spouse pays for his health insurance premiums, then the Trustee shall pay on behalf of Ferris the premiums on a secondary health insurance policy (with a $5,000 deductible, indexed for inflation) with terms and coverage standard at that time; provided, however, that Ferris shall be responsible for premium payments on any primary health insurance policy;

(g) The Trustee shall pay medical expenses incurred by Ferris that are not covered by his health insurance policy, Medicare, Medicaid, social security or other benefit plans only after he has attained the age of sixty (60) years;

(h) If Ferris has biological or adopted children, the Trustee shall purchase and pay the premiums on a term life policy insuring his life with the trust named as beneficiary; provided, however, that the Trustee, with the assistance of a professional financial advisor, shall determine the appropriate amount of life insurance to cover the future health, support, maintenance and education of such children;

(i) The Trustee shall pay on behalf of or reimburse Ferris for educational expenses only if the expenses relate to his current occupation, and then Trustee shall cover such expenses only if his employer refuses to cover such expenses; or, if the expenses are unrelated to the current occupation of Ferris, then the Trustee shall reimburse Ferris for such expenses only after Ferris provides proof of a passing grade, graduation or a certificate of passing.

XV. CONSIDER OTHERS OBLIGATED TO SUPPORT

The existence of a trust generally does not abrogate the duty of any other person obligated to support the beneficiary. *See* RESTATEMENT (THIRD) OF TRUSTS §50 cmt e(3). This principle may be applied to the beneficiary himself. In a situation where maintenance and support may deplete the corpus of the trust and the settlor has not favored the current beneficiary over the remaindermen, the trustee for an able-bodied but lazy beneficiary may have to encourage that beneficiary to help himself. There are numerous factors for the trustee to consider in situations where others may be obligated to support a beneficiary. These are raised most often in court-created trusts; although, they certainly may be an issue in any type of personal trust. Such considerations include the following: (1) ability of a parents, to support a beneficiary with a disability, educate the beneficiary, meet emergencies, or provide necessary training for life; (2) the age, mental and physical condition of the beneficiary, and if incapacitated, the likely duration of the incapacity; and (3) beneficiary's likelihood of having continued medical needs or beneficiary's ability to obtain insurance and to support himself. All states also have laws regarding duty of support between spouses.

When a trustee asks about a third-party obligation, beneficiaries may find such questions intrusive; others may refuse to respond. But the information is necessary because in most cases, the trustee has a duty to be informed as to what needs exist and who is satisfying those. *See* BOGERT *supra* § 811. Most people would rather answer specific questions or prepare financial statements than provide tax returns and returns often fail to provide a clear picture of financial resources. Notwithstanding their limited value, some corporate trustees require beneficiaries to provide tax returns. Nancy S. Freeman, *Trust Me: Practical Advice for Drafting Florida Trusts*, 83 FLA. B.J. 20, 22 n.9 (May 2009). Drafting attorneys may want to inform their clients about this practice and solicit their intent regarding the trustee's duty/necessity to inquire. And a drafter should inform a client that in many cases, a court ordered child support obligation will trump a trust containing a spendthrift clause. In most states, a court may order the trustees of a spendthrift or other trust to make disbursements for the support of a child to the extent the trustees are required to make payments to a beneficiary who is required to make child support payments. For examples, in Texas, if disbursement is discretionary, the court may order child support payments from the income of the trust but not from the principal. TEX. FAM. CODE ANN. § 154.005 (West 2008).

While it is an unfortunate fact in modern society that substance abuse is found at every level of affluence, substance abuse is only occasionally addressed in trust documents. A standard of living clause may force a trustee to maintain a beneficiary's comfortable lifestyle

while he or she spends the trust assets on drugs or alcohol. This problem became so prevalent that the American College of Trust and Estate Counsel (ACTEC) asked its fellows to suggest language to address it in trust documents. *See* William A. Morse, *Unique and Infrequent But Recurring Drafting Problems and Possible Solutions,* AM. C. TR. & EST. COUNSEL, at 14–18 (Oct. 1–3, 2004). The recommendation included a provision for drug screening of all beneficiaries, regardless of whether the trustee suspected drug use providing some protection for the trustee against claims of abuse of discretion; this presents additional problems and expense. The suggestions included adding a statement that by making distributions to a beneficiary contingent on passing a drug test, the settlor intended to promote the health and well-being of the beneficiary. ACTEC's recommendation also suggested the instrument specify the frequency and timing of such tests and address consent as a requirement. *See id.* Despite the resources expended on this project, the language was not widely adopted and the author is not aware of any courts having been asked to interpret such a clause.

More recently, ACTEC has presented materials to its members suggesting that substance abuse and addiction should be treated as disease. An interesting approach is to provide the trustee with the power to create a new trust in which to segregate the funds that might otherwise have been distributed to the beneficiary with the substance abuse problem. Essentially, this provision empowers the trustee to decant an interest into a trust or sub-trust with drug testing and other provisions that allow the trustee further discretion to address the problem.

> *If Trustee reasonably believes the beneficiary is abusing drugs or alcohol and that the resources of the Trust, if distributed, would facilitate continued abuse, Trustee may establish a discretionary trust with all or any portion of the share which would otherwise be distributed to that beneficiary. For the purposes of this section, the term "drugs" would include legal and illegal substances, whether or not prescribed by a physician, upon which the beneficiary has become dependent and/or uses regularly to his/her detriment. In establishing such discretionary trust, Trustee may select a trustee, co-trustee and/or successor trustees, and shall include provisions determined to be reasonable and necessary after consultation with a qualified attorney. It is my intent that any discretionary trust established pursuant to this provision be drafted and managed to (1) prevent Trust resources from being used to purchase drugs or alcohol in situations where the purchase of same would work a detriment to the beneficiary, (2) provide a platform from which the trustee could implement treatment for the beneficiary, and (3) prevent the resources in the Trust from enabling a beneficiary to continue a self-destructive lifestyle as a result of drug/alcohol use and/or dependency. Trustees of the trust established under this Article may demand, that a beneficiary participate in testing to determine if drug/alcohol use is occurring, require a beneficiary to participate in drug/alcohol counseling or rehabilitation, and charge the beneficiary's share for all costs incurred in testing and treatment. Remainder beneficiaries of any discretionary trust established for this purpose shall be the descendants of the lifetime beneficiary.*

Practitioners may also try to draft specific rehabilitation requirements into a document or restrict distributions until certain milestones are achieved in the progress toward sobriety. Consider this very specific instruction:

> *Dean Martin Trust. This gift shall constitute the initial trust estate for the benefit of Dean, subject to the following conditions.*
>
> *Distributions. No distributions shall be made to or on behalf of Dean, other than payment for the treatment described below, unless and until (i) Dean has attended "Survivors' Week" at the Meadows in Wickenburg, Arizona, or its successor institution or organization; provided however, if either Survivors' Week or the Meadows is not then in existence, the trustee, in its discretion, may require Dean to attend a similar program or institution as a condition precedent to the termination of this trust; and (ii) Dean has received two hundred fifty (250) hours of psychotherapy from a therapist licensed and trained in compulsive and addictive disorders and specializing in childhood trauma, and abuse recovery. The Survivors' Week and psychotherapy requirements shall be collectively referred to herein as the "Treatment." The trustee shall pay for the Treatment by making payments directly to the*

psychotherapist or the Meadows or the alternative institution as allowed above providing the Treatment. No distributions shall be made directly to Dean during the term of this trust.

Termination. The trust shall terminate upon the first to occur of (i) Dean's completion of the Treatment; (ii) Dean's failure to complete the Treatment within six (6) years from the date of my death, or (iii) Dean's death. Upon termination as a result of Dean's completing the Treatment, the remaining trust estate shall be distributed to Dean, subject to the Contingent Trust provisions. Upon termination as a result of Dean's failure to complete the Treatment within six (6) years of my date of death, or as a result of Dean's death prior to the date which is six (6) years after my date of death, the trust estate shall be distributed for benefit of my grandchildren to the trustee of the Descendants Trusts created herein. If none of my grandchildren or their descendants are then living, to the University of Nevada at Las Vegas.

Statement of Trust Purposes. My primary concern in establishing this trust is for the health and benefit of Dean. This trust shall be managed accordingly.

Some Grantors are specific in their intent that the Beneficiary participate in their own support and make it clear that the Trustee is not to "enable" dysfunction in a beneficiary. For example:

In making discretionary distributions from any trust hereunder, trustee shall have discretion to consider all relevant facts and circumstances, including the size of the trust corpus, tax aspects, the maturity of the descendant, and the particular situation of each descendant in his personal life. In exercising this discretion, trustee shall encourage each descendant to develop his talents and abilities through personal effort and to become financially responsible, support a constructive life of good character and responsibility, and reach his potential to lead a productive and self-sufficient life.

Here is another example of an "incentive clause"; this one from a document drafted in the1950s:

No payment of income to such child shall be made if in the judgment of the Trustee the ambition or incentive of such child to provide for such child's own support would be retarded or destroyed thereby; provided, however, that the fact that a beneficiary has become successful by such beneficiary's own endeavors, shall not cause the Trustee to withhold payment.

Finally, here is an example remarkable for its focus on enforcing the values of the Grantor.

***Distribution Guidelines:** In making discretionary distributions, the trustee has discretion to consider all circumstances, including the nature and size of the trust estate, the implications of tax planning, the maturity of each beneficiary and the particular situation of his or her personal life. In exercising this discretion, the trustee shall also consider our desires that (a) every beneficiary develop his or her talents and abilities through personal effort (b) that each beneficiary become financially responsible (c) that our descendants comport themselves in such a manner as to be a credit to our family and to the community; (d) that the trust estate be used to support a constructive and responsible life of good character; and (e) that the existence of this trust not be used as an excuse or reason for any descendant not to reach his or her full potential and lead a productive life. Trustee shall have full discretion regarding these distributions, including discretion not to make a distribution to any beneficiary.*

Without limiting discretion, we encourage the trustee not to distribute if any of the following holdback conditions exist:

(a) Beneficiary regularly and consistently leads an extravagant or heedless lifestyle, including substance abuse or gambling, to the detriment of such beneficiary and/or his or her descendants.

(b) Beneficiary is in the process of being divorced or separated with the expectation of divorce.

(c) Beneficiary is involved in or under threat of litigation such that assets distributed to such beneficiary might be subject to forfeiture or seizure by a judgment creditor.

(d) Beneficiary is a debtor in bankruptcy proceedings or likely to become bankrupt.

(e) Beneficiary has been adjudged incompetent or is patently incompetent.

(f) Beneficiary has been kidnapped, is in jail, is missing or is in custody of a foreign government or hostile group and may not be able to utilize or enjoy a distribution from such trust.

(g) Beneficiary is having a severe bout with drugs or alcohol; provided, however, if such beneficiary is in a treatment facility or program for such problem, a holdback condition shall not exist with respect to distributions directly to the provider of such services.

(h) Beneficiary is involved with a cult or similar organization.

(i) Beneficiary could qualify for state or federal medical or nursing home assistance but for the receipt of a distribution from such trust.

(j) Any situation similar to any one or more of the foregoing, but not specifically addressed.

The trustee may develop a motivational plan for the beneficiary that may include incentives and milestones based on the beneficiary's age, character, abilities, productivity and achievements. Distributions would be made only to the extent the beneficiary is meeting the goals and obligations outlined in such plan, and conducting himself in a manner consistent with these guidelines.

Interestingly, after providing specific instructions clearly requiring the Trustee to investigate various aspects of the beneficiaries' standard of living with extreme diligence this document includes the following:

No Duty to Inquire:
In exercising its powers and discretion, the trustee shall have no duty to inquire as to any beneficiary's assets and sources of income other than any interests such beneficiary may have in the trust;

This provision seems to directly contradict the terms for distribution stating the trustee is supposed to consider the particular situation of the descendant in his or her personal life and the provisions requiring a holdback if the beneficiary might be subject to forfeiture or seizure by a judgment creditor, could qualify for state or federal assistance, or is "likely to become bankrupt". Perhaps the distinction is that the trustee should consider but does not have to specifically ask about assets. Or perhaps not.

XVI. WHO TO PAY

It is axiomatic that trustees must make distributions to or for the benefit of the beneficiary. *See* Pacheco, *supra.* Usually, it is relatively easy to determine the identity of the beneficiaries. In interpreting a testamentary instrument, a question may arise as to whether the term "issue" refers to all descendants of the settlor/testator or just children. Drafters use a variety of terms and state statutes do not adequately define most of them.[11] Some

11. *See* TEX. PROP. CODE ANN. § 111.004(13) (West 2007). Many states define some terms specifically; for example, **Pennsylvania** statute defines the terms "heirs" and "next of kin": A devise or bequest of real or personal estate, whether directly or in trust, to the testator's or another designated person's "heirs" or "next of kin" or "relatives" or "family" or to "the persons thereunto entitled under the intestate laws" or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if the testator or other designated person were to die intestate at the time when such class is to be ascertained, a resident of the Commonwealth, and owning the estate so devised or bequeathed: Provided, however, That the share of a spouse, other than the spouse of the testator, shall not include the allowance under the intestate laws. The time when such class is to be ascertained shall be the time when the devise or bequest is to take effect in enjoyment. 20 PA. CONS. STAT. ANN. § 2514(4) (West 2005). **Michigan** has a statutory will form mandating the use of the term "descendants" and then defines the term as follows: (b) "'Descendants' means your children, grandchildren, and their descendants." MICH. COMP. LAWS § 700.2519 (2014). Under **Florida** law, "'lineal descendant' or 'descendant' . . . is defined to mean a person in any generational level down the applicable individual's descending line; it includes children, grandchildren, or more remote descendants but excludes collateral heirs." FLA. STAT. ANN. § 731.201 n.9 (West Supp. 2014). The **California** statute states the following: "'Descendants' mean children, grandchildren, and their lineal descendants of all generations, with the relationship of parent and child at each generation being determined as provided in Section 21115. A reference to 'descendants' in the plural includes a single descendant where the context so requires." CAL. PROB. CODE § 6205 (West 2009). The **Missouri** statute states as follows: (2) "Child" includes an adopted child and a child born out of wedlock, but does not include a grandchild or other more remote descendants; (14) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on his death intestate; (16) "Issue" of a person, when used to refer to persons who take by intestate succession, includes adopted children and all lawful lineal descendants, except those who

courts have construed the terms "issue" and "children" interchangeably. *Guilliams v. Koonsman*, 279 S.W.2d 579, 583 (Tex. 1955). Texas case law holds that the word "issue" includes all descendants, unless there is something specific in the instrument to suggest a narrower interpretation. *Atkinson v. Kettler*, 372 S.W.2d 704, 711–12 (Tex. Civ. App.—Dallas 1963, writ granted), *rev'd on other grounds*, 383 S.W.2d 557 (Tex. 1964). An example of a clause to clarify who the Grantor intended in using the term "descendants" is:

> *Grantors have a daughter, MARY, and two grandchildren, JOE and TOM. All references to "Grantors' grandchildren" shall mean and include such grandchildren and any children subsequently born to or adopted by the Grantors' daughter; and all references to a "grandchild of the Grantors" shall mean and include such grandchildren and any subsequently born or adopted grandchildren, individually. All references in this trust instrument to "descendants of the Grantors", "the Grantors' descendants" or "a descendant of the Grantors" shall include the Grantors' grandchildren and their respective descendants. For all purposes in this trust instrument, the Grantors' daughter shall NOT be treated as a descendant of the Grantors*.

In our advanced technological society, some definitions are much more specific than in past generations. For example, this definition of the word "child":

> *"**Child**," "**children**," "**issue**," or similar terms used in this trust agreement, shall include all the Donors' children and their issue (including children and issue born after the date hereof), provided that such terms shall include only a child born in lawful wedlock (or who, if born out of wedlock are acknowledged in writing by the father or are the issue of a female descendant of Donor or have been legitimated thereafter by the marriage of the parents), and any child adopted prior to the age of twenty-one (21) but not thereafter, which adopted child and the issue thereof shall be entitled to share hereunder in the same manner as if born in lawful wedlock to the adopting parent or parents, provided always that the birth of a child conceived during marriage by any of the Donor's issue (or the spouse of any of the Donor's issue) as a result of artificial insemination, in vitro fertilization, or other medical technique shall be equivalent in all respects to a birth in lawful wedlock. Whenever the term "living child" or "living issue" or similar terms are used in this trust agreement, such term shall include a child or issue of Donor which is conceived and then survives for ninety (90) days after being born*.

Once a trustee determines the identity of a beneficiary, circumstances may require a trustee to make payments for the benefit of, rather than directly to, that beneficiary. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e(3) (2003). Many trusts contain a facility of payment clause; many state statutes specifically allow payments for the benefit of the beneficiary, instead of directly to the beneficiary. The Texas statutes for court trusts provide excellent examples:

> *A management trustee may make "distributions for the benefit of the ward without the intervention of*

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are the lineal descendants of living lineal descendants of the intestate. MO. REV. STAT. § 472.010(2), (14), (16) (2013). In **Oklahoma**, "'[r]elative' means a spouse, ancestor, descendant, brother, or sister, by blood or adoption." OKLA. STAT. ANN. tit. 60, § 175.3 (West Supp. 2014). The **Texas** Property Code contains a definition of "relative," which includes "a spouse or, whether by blood or adoption, an ancestor, descendant, brother, sister, or spouse of any of them." TEX. PROP. CODE ANN. § 111.004(13) (West Supp. 2013); *see also In re Ellison Grandchildren Trust*, 261 S.W.3d 111, 120–26 (Tex. App.—San Antonio 2008, pet. denied) (considering the use of the word "descendants" in a Texas trust and discussing the history of trust, estate statutes, and the Texas family law). In **South Dakota** 29A-1-201 (6) "Child" includes an individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant. Any child of a deceased parent who is born after the decedent's death is considered a child in being at the decedent's death, if the child was conceived prior to the decedent's death, was born within ten months of the decedent's death, and survived one hundred twenty hours or more after birth. (10)"Descendant" of an individual means the individual's descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this code. 29A-2-711. Interest in "heirs" and like. If an applicable statute or a governing instrument calls for a present or future distribution to or creates a present or future interest in a designated individual's "heirs," "heirs at law," "next of kin," "relatives," or "family," or language of similar import, the property passes to those persons, including the state, and in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the disposition is to take effect in possession or enjoyment. If the designated individual's surviving spouse is living but is remarried at the time the disposition is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

> *the following individuals: (1) the guardian; (2) a person possessing physical custody of the beneficiary; (3) another person who has a legal obligation to support the beneficiary; or (4) a service provider to the beneficiary or to the beneficiary's legal obligation."* TEX. ESTATES CODE ANN. §1301.102(a)(2) (West 2014).

> *[The trustee may] make a distribution, payment, use, or application of trust funds for the health, education, maintenance, or support of the person for whom the trust is created or of another person whom the person for whom the trust is created is legally obligated to support: (1) as necessary and without the intervention of a guardian or other representative of the ward or a representative of the incapacitated person; and (2) to the ward's guardian; a person who has physical custody of the person for whom the trust is created or of another person whom the person for whom the trust is created is legally obligated to support; or a person providing a good or service to the person for whom the trust is created or to another person whom the person for whom the trust is created is legally obligated to support.* TEX. PROP. CODE ANN. §142.005(c)(2).

Statutory language clearly allows distributions to a parent, guardian, or caregiver:

> *A trustee may make a distribution … to any beneficiary in any of the following ways when the beneficiary is a minor or a person who in the judgment of the trustee is incapacitated by reason of legal incapacity or physical or mental illness or infirmity: (1) to the beneficiary directly; (2) to the guardian of the beneficiary's person or estate; (3) by utilizing the distribution, without the interposition of a guardian, for the health, support, maintenance, or education of the beneficiary; (4) to a custodian for the minor beneficiary under the Texas Uniform Transfers to Minors Act or a uniform gifts or transfers to minors act of another state; (5) by reimbursing the person who is actually taking care of the beneficiary, even though the person is not the legal guardian, for expenditures made by the person for the benefit of the beneficiary; or (6) by managing the distribution as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.* TEX. PROP. CODE ANN. § 113.021.

The prudent trustee may prefer to make distributions directly to providers to avoid casting a guardian or a caregiver in the role of a financial fiduciary.

XVII. WHEN TO PAY?

The trustee should pay the beneficiary promptly! A trustee may not unreasonably delay the exercise of discretion. Because the distribution standard in a personal trust often includes a requirement of *necessity*, delay is particularly difficult to justify. After all, if the trustee has made a determination that need exists to support the distribution in the first place it is a reasonable assumption that the beneficiary "needs" the money now. Trusts often mandate that income distributions be made monthly, quarterly, or annually. If timing matters, it should be made clear in the document.

Other considerations affect the timing of distributions. In some cases, a trustee may reinvest income not distributed. But a trustee should consider carefully before commingling principal and income investments – particularly in community property states. Many settlors intend by the establishment of the trust to preserve the assets as the separate property of their child. Consider this interesting language from the will of Samuel L. Clemens (Mark Twain):

> *To invest and reinvest, one of such two (2) equal parts and to pay the income therefrom on the fifteenth days of January, April, July and October of each year to my said daughter Clara Langdon Clemens for the term of her natural life, to and for her sole and separate use, and behoof without power of anticipation, and free from any control or interference on the part of any husband she may have.*

Even trusts that incorporate the needs of a spouse may restrict distributions to cases where the spouse remains the spouse:

> *Each trust in the name of an un-remarried qualified surviving spouse of a deceased descendant shall be identical to those of the original beneficiary except the surviving spouse shall receive one-half of the*

income of that trust, at least annually, until the spouse's death or remarriage.

Or another example:

If the Grantor's spouse survives the Grantor, and if the Grantor and the Grantor's spouse are married and living together as husband and wife at the time of the Grantor's death, the net income deriving from this Trust shall be distributed to or for the benefit of the surviving spouse under these provisions.

Where the distribution of income is solely within the discretion of the trustee, some courts have held that the beneficiary does not acquire the property; the trust is not subject to division on divorce. A trustee may elect to pay out undistributed income to avoid commingling. Generally, in Texas, if the beneficiary receives discretionary income distributions from the trust during the marriage, those funds become community property. *Ridgell v. Ridgell*, 960 S.W.2d 144, 148 (Tex. App.—Corpus Christi 1997, no pet.).

In most community property states, undistributed income from a self-settled trust established prior to marriage remains separate property. *Lemke v. Lemke*, 929 S.W.2d 662, 664 (Tex. App.—Fort Worth 1996, writ denied). After a marriage, absent any fraud on the community, a spouse may create a trust with separate property, and if income remains undistributed with no right to compel distribution, the spouse could not have acquired the income during marriage and it remains separate property. *Lipsey v. Lipsey*, 983 S.W.2d 345, 351 (Tex. App.—Fort Worth 1998, no pet.). This makes a trust an effective planning tool for protection of separate property and is another example of why the precise wording of the distribution standard is important.

XVIII. TERMINATING DISTRIBUTIONS

Disputes may arise between beneficiaries and the trustee on termination of the trust. Terminating events may be a birthday; the death of a beneficiary or an individual who was a measuring life; the depletion of the trust assets to an uneconomic size; or the completion of the purpose of the trust, such as graduation from college. An example of a typical age-related distribution:

The trust shall terminate upon the later to occur of (1) the death of Jane and (2) neither Jack or Susan being younger than fifty (50) years of age.

A graduated distribution based on age:

When the beneficiary attains age forty (40), Trustee shall distribute one-third of the principal of the trust then held for her benefit. When the beneficiary attains age forty-five (45), Trustee shall distribute one-half of the principal of the trust then held for her benefit. This trust shall terminate and all remaining principal shall be distributed when the beneficiary attains age fifty (50).

Almost all family or "pot" trusts provide for termination to all remaining descendants per stirpes. But an unusual example contains the following provision:

*On the death of the last survivor of the issue of JOHN and MARY SMITH in being on the date of execution of this instrument plus an additional period of twenty-one (21) years, all of the trusts created hereunder shall terminate immediately and the assets thereof be distributed; delivered and paid over to the then living issue of JOHN and MARY SMITH in equal parts, **per capita**, whether or not they then be immediate income beneficiaries of the trusts. If there be no living issue of JOHN and MARY SMITH, the remaining funds shall be paid to the SMITH Foundation.*

This provision has the consequence (likely intended) of providing more than the usual incentive for subsequent generations to keep all of the family trusts together under the management of a single trustee. An additional consequence (possibly unintended) was an incentive to produce a greater number of offspring.

XIX. GUIDANCE OUTSIDE THE TERMS OF THE TRUST

The trend in drafting today is to move toward broad discretion and maximum flexibility. There are good reasons to do so. A trust drafted today, even in a jurisdiction with a traditional rule against perpetuities may last 100 years during which time the circumstances of the beneficiaries, the laws of the jurisdiction and the economics of the market place will likely change dramatically. Many settlors are anxious to create a tax efficient and flexible trust but would also like a

mechanism to share their values and express their intent in a separate document. There is an increasing trend for drafters to include as part of a complete and thorough estate plan, a family value statement, wealth transfer policy statement or "letter of wishes" to provide insight into the intent of the grantor without inserting such language into the mandatory and eventually irrevocable provisions of a trust or will. The practice is hotly debated among drafting attorneys and professional trustees with proponents and detractors to be found on both sides.

This is not a new idea; in other countries they have been widely used for many years. And terms like "health, support, maintenance and education" certainly do not convey individual values and concerns. A separate statement of intent can provide explanation and insight without being part of the legalese found in the trust itself. They may be crafted (with an advisor's help to avoid contradicting the terms of the trust) when the plan is being drafted or added many years later. They can provide insight into a grantor's values regarding family unity, entrepreneurship, work ethic, or philanthropy and a host of other issues.

To be clear, such a document generally is not enforceable or even required to be considered except in a situation where a trust document is vague or unclear to such an extent as to require the use of extrinsic evidence. In most cases, a trust will have multiple trustees over its lifetime. The initial trustee will receive a copy of such a document but after several different individual trustees, it may be lost, destroyed or simply overlooked in the increasingly old and voluminous records of the trust. Even a professional trustee may not have a policy for preservation of a document that is not a part of the original trust but merely correspondence directed to the trustee at the inception of the trust. (A solution to this problem may be to make the document an asset of the trust.)

Some practitioners worry that such a document will encourage a grantor to exercise impermissible control over the trust assets because a statement of intent can be changed. But a trustee who follows the trust document parameters in a reasonable way and relies on the statement of intent only for additional guidance and color in the decision-making process, need not worry.

A family considering using this tool should also consider carefully who will see the document and draft accordingly. The text should be general and positive; never used to make specifically negative comments about an individual or a generation. And, keep it simple! Never include language designed to impact a trustee's duty of impartiality; beneficiaries must be treated equitably even when the document allows them to be treated unequally. No language that is derogatory, might offend a beneficiary, or language that might suggest a lack of capacity or some malice in the writer. Again, make certain a professional advisor has reviewed the statement very carefully.

Such a document intended to be merely advisory may be lengthy and contractual in language or short and chatty; it may be formal or casual. It may take the form of a letter, a memo, or simply a list of things the settlor wants the trustee to know. Whatever the form or format, because they are often requested by clients today, we must develop appropriate procedures to incorporate them into a plan.

XX. CONCLUSION

Consulting on the creation of a trust? Talk to the client. Ask what they want, encourage them to choose a trustee they trust and give as much discretion and flexibility as possible. Many trusts today divide responsibilities and the appointment of a tax advisor is very common. Talk to the trustee who will eventually administer the trust. Ask everyone with duties to read it before it is signed. A professional trustee will be happy to and will work hard to be faithful to the instructions. Thinking is the theme here because despite occasionally wacky results, each drafter whose work appears in these materials departed from the form books to try to craft language responsive to the intent of their client. Kudos to them.

The distribution provisions associated with personal trusts are more art than science. Experience and judgment matter; and often, as the adage goes, the most valuable experiences arise out of an exercise of bad judgment. A mistake can result in a very painful lesson for a trustee and the beneficiaries. To draft a good trust requires the same skills required to be a good trustee: education, attention to detail, the ability to plan carefully and execute meticulously, patience, judgment, and a little luck.