

BUT WHAT’S AN ASCERTAINABLE STANDARD? CLARIFYING HEMS DISTRIBUTION STANDARDS AND OTHER FIDUCIARY CONSIDERATIONS FOR TRUSTEES

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I. INTRODUCTION AND BACKGROUND

Many of us who grew up in the 1980's and 1990's spent countless hours watching (and rewatching) the action/science fiction film *Predator*, starring, among others, Arnold Schwarzenegger, Jessie Ventura, and Carl Weathers.¹ In the movie, an alien roams the jungles of Central America, hunting humans for sport.² The technologically advanced alien is equipped with a cloaking device that bends visual light such that the alien is rendered invisible to the human eye . . . almost.³

An abstract legal contrivance, the ascertainable trust distribution standard is much like the Predator's cloaking device.⁴ Although it renders the Predator hard to see clearly, you know he is there because you feel his effect.⁵ Those who work regularly with trusts talk about ascertainable standards all the time, but their dealings with ascertainable standards usually

1. *Predator* (20th Century Fox 1987).

2. *Id.*

3. *Id.*

4. Treas. Reg. § 20.2041-1(c)(2) (2017).

5. *Predator*, *supra* note 1.

end at the theoretical level.⁶ When digging deeper or asking real-world questions, it quickly becomes apparent that most only have a general understanding of how the ascertainable standards actually function in real life.⁷ In day-to-day lives, practitioners tend to skim over the topic, telling their clients that the terms of the trusts include magic words from the tax code which will allow for maximum flexibility without inflicting an adverse tax consequence.⁸ And yet, when the client, now acting as trustee of his or her trust, reaches out to ask if he or she is authorized to make a particular distribution, practitioners scratch their heads, wondering why there is no case law on point.⁹ And as with the Predator, if practitioners fail to give it respect, they will be sorry.¹⁰

So, what is the big deal about ascertainable standards? The very term “ascertainable” implies something that is definitive, quantifiable and discoverable. Meriam-Webster defines the verb “ascertain” as meaning “to make certain, exact, or precise” or “to find out or learn with certainty.”¹¹ And yet, the actual meaning of the most common ascertainable standards in American trust law remain amorphous, undefined, and poorly understood, even by most practitioners.¹²

Originally, this paper was intended to be an examination of relevant case law that would shed light on distribution standards and enable the reader to better understand the limits of their meaning.¹³ It was intended to provide a list of permissible and impermissible distributions from a trust with standard language making it subject to one or more ascertainable standards.¹⁴ Exhaustive research, however, has proved this a futile task for two reasons.¹⁵ First, the economics of American jurisprudence make it unlikely that many such cases will ever be reported.¹⁶ A beneficiary may get upset when his trustee will “only” buy him an economical foreign sedan for his support and maintenance, rather than the expensive SUV he wants.¹⁷ But is the beneficiary really going to sue the trustee to get the more expensive vehicle?

6 Kelso, *infra* note 12.

7 See *infra* Part II.

8 See *infra* Part II.

9 Bogert's Trusts and Trustees (2nd ed. West 2017).

10 Predator, *supra* note 1.

11 Ascertain, MERIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/ascertain> (last visited Nov. 29, 2017). Perma.cc/6438-CWFF

12. Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 43 EST. PLAN. 3 (2015).

13. See generally Chad Maxvan & Dan McClain, *The Limits of Discretion: Trust Distributions for Health, Education, Maintenance and Support*, WEALTH DIRECTOR <https://www.wealthdirector.com/2013/09/the-limits-of-discretion-trust-distributions-for-health-education-maintenance-and-support/perma.cc/V3JG-L2TV> (explaining the meaning of discretion standards).

14. See generally RESTATEMENT (THIRD) OF TRUSTS, § 50 (AM. LAW INST. 2007) (lists examples of permissible distributions under HEMs standard).

15 Kelso, *supra* note 12.

16 Kelso, *supra* note 12.

17 Kelso, *supra* note 12.

Even if the beneficiary wins, his or her trust will likely pay the trustee's legal expenses, which will no doubt be substantially more than the cost of any car.¹⁸ Also, if the beneficiary does complain, is his or her case likely to get to the point where it will become legal precedent? In all likelihood, the parties will settle out of court. Thus, the case will likely go unreported and therefore remain unavailable as legal precedent for future disputes.¹⁹

Second, the high number of variables surrounding any particular trust distribution make every situation as unique as a snowflake.²⁰ Put simply, when a trustee is acting properly, there are so many factors that go into his or her decision to distribute (or not distribute) that no two instances will ever be the same.²¹ Therefore, the few reported cases that do exist can only be illustrative, not determinative, with regard to any future case.²²

In light of these difficulties, the focus of this paper has shifted somewhat from its original intent. Rather than provide definitive lists of what a trustee can and cannot do, it will provide guidelines for trustees (and the people who advise them).²³ Although this may only be a second best option for a trustee who merely seeks a bright line test, it is hoped that this guidance will nonetheless put him or her at ease with regard to some admittedly tough questions.²⁴ In particular, this paper will seek to enlighten individual trustees who may not have the legal resources of their corporate brethren. They, and those who advise them, are encouraged to turn to this resource for guidance, both when establishing a trust and also when considering a particularly tough distribution.

Like Blain in *Predator*, most of us "ain't got time to bleed."²⁵ Whether that means overspending on legal fees, wasting one's own time, or simply avoiding a law suit altogether, I hope the following guidelines will make the trustee's life just a little bit better.

II. GENERAL INFORMATION

Although the information in this section may seem simplistic for some, experience has taught that many trustees, including both lay people and trustees with significant legal training, do not fully grasp the underlying concepts that govern their fiduciary role.²⁶ For a layperson especially, ideas such as splitting equitable and legal title to property can be particularly

18. See *Peoples Nat'l Bank v. Jarvis*, 364 P.2d 435, 440 (Wash. 1961).

19. TEX. R. APP. P. 47.7(b).

20. See *Kelso*, *supra* note 12.

21. See *id.*

22. See *id.*

23. See *id.*

24. See *id.*

25. *Predator*, *supra* note 1.

26. See *Kelly v. Womack*, 268 S.W.2d 903 (Tex. 1954) (describing generally a trustee's distribution discretion powers).

vexing.²⁷ Also, even in the rare instances where counsel has been given, trustees may not internalize all the salient points.²⁸ There is simply too much for most people to take in at once. Therefore, it is a good idea to go over the basics on a regular basis so that the trustee understands the big picture and how they fit into it.

A. Fiduciary Duty in General

First things first. All trustees must understand that fiduciary duties are the highest duties known to the law.²⁹ The law in Texas holds trustees to a “very high and very strict standard of conduct which equity demands.”³⁰ The very act of accepting the position of Trustee carries with it an acceptance of this high standard.³¹ An intelligible and eloquent summary of a fiduciary’s duty was put forth by Justice Cardozo in the case of *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545–46 (1928) as follows:

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A [fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.³²

The law recognizes other elevated duties which one person might owe to another.³³ Most notably these include the duties a person might owe to a spouse or child; and yet, the highest of all is the fiduciary duty.³⁴ This may seem counterintuitive, but the reality is that a natural compulsion binds us all to our spouses and children, at least most of the time! But there is no similar bond between the trustee and the beneficiary. Further, the temptations facing fiduciaries are generally high because fiduciaries tend to control significant assets which might easily be misappropriated or squandered on risky misadventures.³⁵ For these reasons, and probably also because a fiduciary may be paid for his or her service, the law points a finger at the fiduciary and says, “You better act straight . . . OR ELSE!”³⁶ Those who counsel individual

27. See Kelso, *supra* note 12.

28. See Kelso, *supra* note 12 (explaining a trustee’s discretion trumps legal advice, ultimately it is their decision).

29. Nathan v. Hudson, 376 S.W.2d 856, 860–61 (Tex. App.—Dallas 1964, writ ref’d n.r.e.).

30. Slay v. Burnett’s Trust, 187 S.W.2d 377, 387–88 (Tex. 1945).

31. Johnson v. Peckham, 132 Tex. 148, 120 S.W.2d 786 (Tex. 1938). See also Geeslin v. McElhenney, 788 S.W.2d 683, 685 (Tex. App.—Austin 1990, no writ).

32. Meinhard v. Soaman, 249 N.Y. 458, 164 N.E. 545–46 (1928).

33. See TEX. PROP. CODE ANN. § 116.005(b) (West 2005).

34. *Id.*

35. Austin W. Scott, SCOTT ON TRUSTS § 187.1-3 (2d ed. 1956).

36. *Id.*

trustees are well-advised to make sure their trustee clients keep this notion foremost in their thoughts.

B. Sources of Law

One of the more vexing problems confronting trustees is the plethora of sources from which they might draw conclusions or look to for guidance. Those without legal training might know no better than to go to their favorite internet search engine. Lawyers understand how much damage this might cause, so, in order of their respective authority, the following sources of law are described briefly below.³⁷

1. The Texas Trust Code

The Texas Trust Code (the “TTC” or simply the “Trust Code”) is contained within the Texas Property Code (the “TPC”), specifically, Subtitle B of Title 9 of the TPC (e.g. §§ 111.001 et seq.).³⁸ The Trust Code contains most (but not all) of the relevant statutory provisions relevant to the day-to-day activities of trustees.³⁹ Most of the Trust Code provisions are default provisions that may be overridden in a trust instrument.⁴⁰ In practice, many of the statutory provisions that are designed to be especially conservative, are overridden by standard provisions in trust instruments to more effectively achieve the goals behind the trusts they govern.⁴¹ This makes sense when one considers the practical implications of trust drafting.⁴² A “simple” trust (in the literal sense, and not as that term is generally understood for tax purposes) which fails to consider all the possible contingencies should be construed in such a manner which is most favorable to the beneficiary.⁴³ In contrast, where a trustor makes the effort to think through and document his or her intent with regard to more unlikely scenarios, the law should (and generally does) seek to enforce and fulfill such intent.⁴⁴

But not all of the Trust Code’s provisions are default rules.⁴⁵ No matter what a trustor may intend, some rules may not be contravened.⁴⁶ Often, a trustor may wish to protect a trustee in such a way which the law deems inappropriate.⁴⁷ Thus, to preserve the core duties owed by any trustee, as

37. See *infra* notes 54–83.

38. See, e.g., TEX. PROP. CODE ANN. § 111.001 (West 1984).

39. See, e.g., I.R.C. § 408 (West 2015).

40. TEX. PROP. CODE ANN. § 111.0035(b) (West 2017).

41. *Id.*

42. *Id.*

43. Price v. Johnston, 638 S.W.2d 1, 4 (Tex. App.—Corpus Christi 1982, writ ref’d).

44. TEX. PROP. CODE ANN. § 111.0035(b) (West 2017).

45. E.g., TEX. PROP. CODE ANN. § 111.0035(c) (West 2017).

46. *Id.*

47. *Id.*

fiduciary, certain requirements must remain unalterable.⁴⁸ To this end, TTC § 111.0035 provides as follows:

- (a) Except as provided by the terms of a trust and Subsection (b), this subtitle governs:
 - (1) the duties and powers of a trustee;
 - (2) relations among trustees; and
 - (3) the rights and interests of a beneficiary
- (b) The terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit:
 - (1) the requirements imposed under Section 112.031;
 - (2) the applicability of Section 114.007 to an exculpation term of a trust;
 - (3) the periods of limitation for commencing a judicial proceeding regarding a trust;
 - (4) a trustee's duty:
 - (A) with regard to an irrevocable trust, to respond to a demand for accounting made under Section 113.151 if the demand is from a beneficiary who, at the time of the demand:
 - (i) is entitled or permitted to receive distributions from the trust; or
 - (ii) would receive a distribution from the trust if the trust terminated at the time of the demand; and
 - (B) to act in good faith and in accordance with the purposes of the trust;
 - (5) the power of a court, in the interest of justice, to take action or exercise jurisdiction, including the power to:
 - (A) modify, reform or terminate a trust or take other action under Section 112.054;
 - (B) remove a trustee under Section 113.082;
 - (C) exercise jurisdiction under Section 115.001;
 - (D) require, dispense with, modify, or terminate a trustee's bond; or
 - (E) adjust or deny a trustee's compensation if the trustee commits a breach of trust; or
 - (6) the applicability of Section 112.038.
- (c) The terms of a trust may not limit any common-law duty to keep a beneficiary of an irrevocable trust who is 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

48. *Id.*

- (2) would receive a distribution from the trust if the trust were terminated.⁴⁹

2. Common Law

Where the Trust Code is silent (and therefore by implication, where a given trust instrument is also silent), the next source of authority is the common law. Trust Code § 113.051 provides in part that “[i]n the absence of any contrary terms in the trust instrument or contrary provisions of [the TTC], in administering the trust, the trustee shall perform all of the duties imposed on trustees by the common law.”⁵⁰

Attorneys will, of course, be familiar with the rules governing the authoritative value of the common law of various jurisdictions, but they should remember that the lay people they counsel may not.⁵¹ Also, given the small number of cases on point, practitioners may be forced to look to extra-jurisdictional authority when seeking guidance for taking a given position, or, God forbid, defending one in hindsight.⁵² Furthermore, practitioners in Texas should note the wide variation in rules adopted by the various jurisdictions.⁵³ Where they wish to rely on (or distinguish) extra-jurisdictional precedent, they would be well-advised to examine the other rules applicable in such jurisdiction and compare them to those applicable in Texas.⁵⁴ In other words, if you think a certain rule should be adopted in Texas, you are more likely to win your argument if the rule comes from a state with other rules that are similar to Texas and not from one with a long list of very different rules.⁵⁵

3. Federal Law

While federal law supersedes state law, it is less important to the present purposes because property law is generally considered the purview of the individual states and this paper generally concerns itself with property law.⁵⁶

49. TEX. PROP. CODE ANN. § 111.0035 (West 2017).

50. TEX. PROP. CODE ANN. § 113.051 (West 2006).

51. Laurel Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research, and Writing* 26–27 (4th ed. 2006).

52. *Id.*

53. *Compare* LA. STAT. ANN. § 9:1755 (West 2017) (allows for acceptance of a trust through writing only), *with* TEX. PROP. CODE ANN. § 112.009 (West 2006) (allowing for acceptance through writing and actions).

54. *Compare* LA. STAT. ANN. § 9:1755 (West 2017) (allows for acceptance of a trust through writing only), *with* TEX. PROP. CODE ANN. § 112.009 (West 2006) (allowing for acceptance through writing and actions).

55. *Cf. Mauzy v. Legis. Redistricting Bd.*, 471 S.W.2d 570, 573 (Tex. 1971) (stating that other jurisdictional materials are only persuasive but are acceptable if the contents are logically related or similar to Texas law).

56. *See* U.S. CONST. art. VI, cl. 2; *see* U.S. CONST. amend. X.

That said, certain federal law concepts and principles, particularly as contained within the Internal Revenue Code of 1986 (the “IRC”), as amended, are nonetheless important.⁵⁷ For example (and as will be described in more detail below), the ascertainable standard is itself a federal tax law concept.⁵⁸

4. Secondary Sources

Although not precedential, an array of secondary sources are both available and frequently relied on by practitioners.⁵⁹ While there are many treatises, hornbooks, supplements, outlines, websites, and other sources available, the most important secondary sources are the Restatements of Trusts and the Uniform Trust Code.⁶⁰

The ALI promulgated the Restatement (Third) of Trusts in 2003 as the successor to the Restatement (Second) of Trusts, which dates to 1959.⁶¹ Texas has not adopted either of these Restatements, but they are nonetheless valuable to practitioners here.⁶² Importantly, many portions of the Restatements are in direct conflict with the Trust Code, so practitioners should be cautious when relying on the terms of either.⁶³ Where a conflict does exist, the statutory provision controls; TTC § 112.035 (regarding spendthrift trusts) is one example of such a conflict.⁶⁴

That said, Texas courts have cited the Restatement (Second) of Trusts numerous times but, according to at least one study, citations of the more recent iteration are far fewer in number.⁶⁵

Similarly, Texas has not adopted the Uniform Trust Code (the “UTC”) and legislative history indicates that the legislature specifically rejected certain of its provisions in the TTC.⁶⁶ Again, however, where there is no conflict with authoritative law, the UTC can be very helpful.⁶⁷

57. See *infra* note 107.

58. See, e.g., 26 U.S.C. § 2041 (West 1962); see also 26 U.S.C. § 2514 (West 1954).

59. E.g., RESTATEMENT (THIRD) OF TRUSTS § 10 (AM. LAW INST. 2003).

60. *Id.*; e.g., UNIF. TRUST CODE § 105 (UNIF. LAW COMM’N 2000).

61. RESTATEMENT (THIRD) OF TRUSTS Forward (AM. LAW INST. 2003); RESTATEMENT (SECOND) OF TRUSTS Forward (AM. LAW INST. 1959).

62. See, e.g., *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex. 2002).

63. See *id.*

64. Compare TEX. PROP. CODE ANN. § 112.035 (West 2017) (allowing a settlor to also be a beneficiary of a spendthrift trust, but allows the settlor’s creditors to reach the trust), with RESTATEMENT (THIRD) OF TRUSTS § 58 (AM. LAW INST. 2003) (invalidating any spendthrift trust clause that makes the settlor also a beneficiary).

65. Mary Burdette, *What Every Trustee Should Know*, TEXASBARCLE.COM, 2 (2014), <http://www.texasbarcle.com/Materials/Events/13284/167803.pdf>. Perma.cc/E35K-DWDX

66. Kara Blanco, *The Best of Both Worlds: Incorporating Provisions of the Uniform Trust Code into Texas Law*, 38 TEX. TECH L. REV. 1105, 1108 (2006).

67. See, e.g., *Bank of America, N.A. v. Stanley*, 728 F. Supp. 2d 883, 893 (S.D. Tex. 2010).

C. Defining the Problem (The Distribution Standard Spectrum)

Another over-arching concept which is germane to the principle topic at hand is what one might think of as a spectrum of available distribution standards.⁶⁸ Just as light exists on a spectrum ranging from infrared to ultra violet, with visible light making up only a small section in-between, so too may we view the distribution standards from which a grantor might choose for (or which the law might impose on) a given trustee.⁶⁹ Thus, even if practitioners cannot quantify the particular standard mandated by a given trust instrument, they can at least ordinate the standards such that we know what each is not.⁷⁰

The spectrum of trust distributions standards necessarily must stretch “from the level of uncontrolled or unfettered distributions to the level of required or mandatory distributions.”⁷¹ In other words, outside of certain unwaivable constraints a given trustee’s power must fit into one of three categories: (1) complete discretion, (2) no discretion, or (3) something in-between.⁷²

Ascertainable standards lie in-between the mandatory and unfettered standards.⁷³ Typically, they permit “distributions for a beneficiary’s health, education, maintenance, or support (“HEMS”).”⁷⁴ The beneficiary of a trust with an ascertainable standard could force the trustee to make distributions for that standard and stop distributions that do not fall within that standard.⁷⁵ This is a profound notion, in theory.⁷⁶ But in practice, it is not particularly easy to implement.⁷⁷

Also, trusts can contain, “unascertainable distribution standards.”⁷⁸ “Unascertainable distribution standards” are treated the same as trusts that have no distribution standards and complete discretion, as courts cannot adequately interpret these standards.⁷⁹ In practice, the rulings on “unascertainable distribution standards” might unfold differently, but that is the theory.⁸⁰ This reasoning is sound, “because the function of an ascertainable standard is to provide a beneficiary, whether present or contingent, with a legally enforceable interest in trust property that a court

68. Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 42 EST. PLAN. 3, 3 (2015).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

can determine, and on which it might ultimately rule.”⁸¹ Additionally, “the standard must also provide the trustee with enough discretion so that he or she can evaluate future facts and circumstances that are unknown at the time the trust instrument is created, but which must be addressed in order to achieve the goals of the trust’s grantor.”⁸²

D. Meaning and Purpose

If a trustee is also a beneficiary of the same trust, and can make distributions to themselves at any time and for any reason, the IRC will treat the trust’s assets as included in the trustee/beneficiary’s estate.⁸³ Conversely, the principal purpose of many trusts is to keep the assets out of people’s estates.⁸⁴ Consequently, the IRC created ascertainable standards as a method of keeping a trust’s assets out of their trustee/beneficiary’s estates for transfer tax purposes.⁸⁵ As stated in Treas. Reg. § 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 [IRC §] 2041(b)(1)(A), not a general power of appointment.⁸⁶

Several courts have ruled that if a trust beneficiary is also a trustee and the trustee is subject to an ascertainable standard of the HEMS type, the beneficiary’s estate will not include the trust corpus.⁸⁷

In addition, Treas. Reg. § 20.2041-1(c)(2) sets forth a number of different powers that are 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 [; and]
- (4) Medical, dental, hospital and nursing expenses and expenses of invalidism.⁸⁸

81. *Id.*

82. *Id.*; 6 C.F.R. § 20.2041-1(c)(2) (1961).

83. Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 42 EST. PLAN. 3, 4 (2015).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*; e.g., *Estate of Frew v. Comm’r of Internal Revenue*, 8 T.C. 1240, 1245 (1947).

88. 26 C.F.R. § 20.2041-1(c)(2) (1961); *Estate of Vissering v. Comm’r of Internal Revenue*, 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, of course, appears to circle back to a previous standard of living).

Moreover, the exercise or other release of a power limited by this type of ascertainable standard by the beneficiary that held the power is not a taxable gift for federal tax purposes.⁸⁹

Similarly, where a trust beneficiary holds a fiduciary power during his or her lifetime to make distributions to, or for the benefit of, another beneficiary of the same trust, and the power is limited by an ascertainable standard relating to the other beneficiary's health, education, support, or maintenance, he or she will not be deemed to have made a taxable gift for federal gift tax purposes upon exercising (or failing to exercise) such power.⁹⁰ However, this same regulation states that "if a trust instrument provides that the determination of the trustee shall be conclusive with respect to the exercise or non-exercise of a power," then the power is not considered to be limited by the requisite standard.⁹¹

Even if such a power is subject to an ascertainable standard, property distributable to a person for whom the beneficiary/trustee has a legal obligation to support could be included in the beneficiary/trustee's gross estate for federal estate tax purposes.⁹² Unless the trustee is prohibited from making any distributions to a beneficiary that would satisfy the trustee's individual legal obligation to support such beneficiary.⁹³ In other words, if an attorney sets up a trust for a minor beneficiary and that beneficiary's parent is named as trustee of that trust (i.e. as a grandparent might do), then special language is required to prevent the parent/child from spending trust funds to fulfill his or her legal duty as parent of the beneficiary for the benefit of the beneficiary/grandchild.⁹⁴

In response to the widespread use of HEMs standards, states have begun to draft legislation for local, non-tax purposes.⁹⁵ For instance, "if a beneficiary of a trust, as trustee or otherwise, holds a power to make distributions to himself (or for his benefit), an issue can arise regarding the ability of the beneficiary's creditors to satisfy claims against the beneficiary from the beneficiary's interest in the trust."⁹⁶ "When, however, the trust has a spendthrift provision and the beneficiary's power is limited by an ascertainable standard relating to the beneficiary's health, education, support, and/or maintenance, a creditor in Texas generally cannot attach the beneficiary's interest on the basis that the beneficiary holds a distribution right or power."⁹⁷ Also, TTC § 113.029(b) provides:

89. Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 42 EST. PLAN. 3, 4 (2015); see also 26 U.S.C. § 2514(c)(1) (West 1954); see also 26 C.F.R. § 25.2514-1(c)(2) (1981).

90. 26 C.F.R. § 25.2511(g)(2).

91. *Id.*

92. 26 C.F.R. § 20.2041-1(c)(1).

93. *Id.*

94. *Id.*

95. Kelso, *supra* note 12, at 31.

96. Kelso, *supra* note 12, at 31.

97. See TEX. PROP. CODE ANN. § 112.035 (West 2017).

Subject to Subsection (d), and unless the terms of the trust expressly indicate that a requirement provided by this subsection does not apply:

- (1) a person, other than a settlor, who is a beneficiary and trustee, trustee affiliate, or discretionary power holder of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's, the trustee affiliate's, or the discretionary power holder's personal benefit may exercise the power only in accordance with an ascertainable standard relating to the trustee's, the trustee affiliate's, or the discretionary power holder's individual health, education, support, or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1), Internal Revenue Code of 1986; and
- (2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.⁹⁸

Note, however, that TTC § 113.029(b) does not apply to:

- (1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined by Section 2056(b)(5) or 2523(e), Internal Revenue Code of 1986, was previously allowed;
- (2) any trust during any period that the trust may be revoked or amended by its settlor; or
- (3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c), Internal Revenue Code of 1986.⁹⁹

Also, TTC § 112.035(d) was added to confirm that a settlor will not be considered a beneficiary solely because the trustee of an intentionally defective grantor trust can pay or reimburse income taxes.¹⁰⁰

III. INTENT: THE PRIME DIRECTIVE

The terms of a trust, as set forth in the governing instrument, generally govern its administration.¹⁰¹

98. TEX. PROP. CODE ANN. § 113.029(b) (West 2017).

99. *Id.*

100. H.B. 564, 80th Leg., R.S. (Tex. 2007).

101. Kelso, *supra* note 12, at 31.

A. Grantor May Generally Set Out Trust Provisions

It is well settled in Texas that the first principle of trust construction is to honor the intent of the grantor.¹⁰² To determine the intent of the grantor, a court looks primarily to the text of the written instrument establishing the trust.¹⁰³

Every trust is different, however, and a well-crafted instrument will allow the trustee to determine the settlor's goals from the content of the trust document.¹⁰⁴ Note that, "this underscores the notion that there is no bright-line test when it comes to the properness of any single distribution."¹⁰⁵ The Trust Code also sets out this same rule in numerous provisions: TTC § 111.002; TTC § 113.001; TTC § 113.051; TTC § 113.059(a).¹⁰⁶

B. Non-waivable Provisions

Notwithstanding the foregoing, it is worth noting that the Trust Code does set out certain provisions which may not be waived.¹⁰⁷ Public policy supports maintaining these provisions, which trump the general belief that a grantor may impose whatever provisions he or she wants on whoever is willing to accept a given trusteeship.¹⁰⁸ For example, a grantor may not

102. See generally *Beaty v. Bates*, 677 S.W.2d 283, 286 (Tex. App.—San Antonio 1984) (stating "the trust is entitled to that instruction which the maker intended").

103. *Nowlin v. First National Bank*, 908 S.W.2d 283, 286 (Tex. App.—Houston 1995). See also *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984) ("... the trustee's powers are conferred by the instrument and neither the court nor the trustee can add or take away such power. The trust is entitled to that construction which the maker intended."); *Stewart v. Selder*, 473 S.W.2d 3 (Tex. 1971) (a court interprets a trust in order to determine the settlor's intent); *Bleiden v. Greenspan*, 742 S.W.2d 93, 96 (Tex. Ct. App.—Beaumont 1987) (citations omitted), *rev'd on other grounds*, 751 S.W.2d 858 (1988) ("[I]t is well settled and elementary that the supreme goal of construing a trust instrument or a testamentary instrument, is to determine the intent of the [trustor, testator, or settlor].").

104. *Keisling v. Landrum*, 218 S.W.3d 737, 741 (Tex. App.—Fort Worth 2007, pet. denied); *Coffee v. William Marsh Rice University*, 408 S.W.2d at 273 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.) ("The cardinal principle to be observed in construing a trust instrument is to ascertain the settlor's intent with the view of effectuating it.").

105. Kelso, *supra* note 12, at 31.

106. TEX. PROP. CODE ANN. § 111.002 ("If the terms of this subtitle and the terms of a trust conflict, the terms of the trust control . . ."); TEX. PROP. CODE ANN. § 113.001 ("A power given to a trustee [under the Trust Code] does not apply to a trust to the extent that the instrument creating the trust . . . conflicts with or limits the power."); TEX. PROP. CODE ANN. § 113.051 ("The trustee shall administer the trust according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust, the trustee shall perform all of the duties imposed on trustees by the common law."); TEX. PROP. CODE ANN. § 113.059(a) ("[A] Settlor by provision in an instrument creating, modifying, amending, or revoking the trust may relieve the trustee from a duty, liability, or restriction imposed by this subtitle.").

107. See TEX. PROP. CODE ANN. § 112.035 (West 2017).

108. TEX. PROP. CODE ANN. § 112.031 (West 2017).

compel a trustee to commit an illegal act.¹⁰⁹ Nor may a trust instrument relieve a trustee from certain breaches of trust.¹¹⁰

The reach of these provisions limiting a grantor's freedom should not be given short shrift.¹¹¹ Many grantors would limit their trustees' liability.¹¹² This is most obvious in instances where a grantor intends to be trustee of a given trust.¹¹³ If the client wants to establish a trust, for example to benefit a child or grandchild, and also act as trustee, the client needs to understand that he or she will be beholden to that child or grandchild in a fiduciary capacity.¹¹⁴

On the other hand, the non-waivable provisions are also included to prevent large, corporate trust companies from exerting their will on individual grantors.¹¹⁵ Imagine, for example, what would happen if trust companies, simply and as a matter of course, refused to accept trusteeships unless all fiduciary liability was waived.¹¹⁶ Needless to say, this would be disastrous because it would completely destroy the entire trust relationship between grantor, beneficiary, and trustee.¹¹⁷

With these circumstances in mind, it is easy to understand the need to balance the interests of grantors, trustees, and beneficiaries.¹¹⁸ While the grantor's intent is given the greatest deference, certain circumstances warrant deference to the beneficiary.¹¹⁹

IV. SPECIFIC DISTRIBUTION STANDARDS AND THEIR MEANING

While the possibilities are endless, there are a handful of distribution standards that estate planners use regularly.¹²⁰ Such standards "fit neatly across the distribution standard spectrum described above and will be addressed below in order of increasing restriction."¹²¹

A. Absolute, Uncontrolled or Unfettered Trustee Discretion

There are many instances where a trustee may properly be given authority to administer trust assets and make distributions with complete

109. *Id.*

110. *Id.* § 114.007.

111. *See supra* Part III.

112. *See infra* Appendix.

113. *See infra* Appendix.

114. *See infra* Appendix.

115. *See infra* Appendix.

116. *See infra* Appendix.

117. *See infra* Appendix.

118. *See supra* Section III.B.

119. *See* *Beaty v. Bates*, 677 S.W.2d 283, 286 (Tex. App.—San Antonio 1984).

120. *Kelso, supra* note 12, at 31.

121. *Id.*

discretion.¹²² This may be styled in terms of “absolute,” “uncontrolled,” “sole” or “unfettered,” discretion, but for purposes of this paper, all such terms shall be considered synonymous.¹²³ Broad discretion is appropriate where the trustee of a given trust is not also its beneficiary, where flexibility is at a premium, and tax concerns are low.¹²⁴ As mentioned in the article previously written by this author:

“On its face, allowing a trustee to make distributions in his or her absolute discretion seems simple. Such a trustee should be authorized to properly make distributions whenever and however he or she deems appropriate. But all is not as it seems. A fundamental and non-waivable aspect of every trust is that the trustee must be trusted to manage, use, and distribute the trust’s assets for the benefit of the trust’s beneficiaries. Thus, at some point, a court must be able to step in and declare the actions of a trustee as being improper.”¹²⁵

This imperative applies even when the grantor intends to confer uncontrolled discretion on the trustee.¹²⁶ Thus, where a grantor truly wishes to remove restrictions, he or she should consider an outright gift.¹²⁷

All trustees must make discretionary decisions, including decisions regarding distributions, investments, principal and income allocations, and expenditures, just to name a few.¹²⁸ A trustee must exercise a discretionary power “reasonably” and in the best interests of the beneficiaries.¹²⁹ This includes the trustee making informed decisions based primarily on the terms of the trust and in a manner that carries out the grantor’s intent.¹³⁰ Unless the trust instrument is ambiguous, the grantor’s intent must be determined solely by its terms.¹³¹

Under TTC § 113.051, “[t]he trustee shall administer the trust in good faith according to its terms and this subtitle.”¹³² Similarly, TTC § 111.0035(b)(4)(B) states that “[t]he terms of a trust prevail over any provision of this subtitle, except that the terms of a trust may not limit . . . a trustee’s duty . . . to act in good faith and in accordance with the purpose of the trust.”¹³³ The difference in these two provisions is subtle but profound,

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *Id.*

129. *See Sassen v. Tanglegrove Townhouse Condo. Assoc.*, 877 S.W.2d 489 (Tex. App.—Texarkana 1994, writ denied).

130. *See id.*

131. *See id.*

132. *See* TEX. PROP. CODE ANN. § 113.051 (West 2017).

133. *See Id.*; TEX. PROP. CODE ANN. § 111.0035(b)(4)(B).

so trustees are well-advised to pay close attention to their specific meaning.¹³⁴ The first, which is theoretically waivable, references good faith according to the trust instrument's terms.¹³⁵ On the other hand, the latter, non-waivable statute references good faith in accordance with the purpose of the trust.¹³⁶ Standard rules of statutory construction mandate a presumption that this distinction is both purposeful and meaningful.¹³⁷ In drafting § 111.0035, the legislature could have simply referenced § 113.051 as it did with several other non-waivable provisions.¹³⁸ Instead, § 111.0035 adopts language which is more onerous on trustees.¹³⁹ In other words, the legislative intent clearly indicates that trustees are actually supposed to act in a fiduciary capacity.¹⁴⁰ One cannot hold and benefit from the title of trustee and at the same time be free of the burdens and responsibilities that go along with a fiduciary position.¹⁴¹

The above rules beg the question: When does a trustee act (or fail to act) in good faith?¹⁴² Fortunately for trustees, this particular standard is not especially high.¹⁴³ Fiduciaries act in good faith when they believe their defense is viable and reasonable in light of existing law.¹⁴⁴ Note that this rule does not require the trustee to believe his or her defense to be absolute or even likely to win.¹⁴⁵ The defense merely has to be viable and reasonable.¹⁴⁶ In contrast, bad faith is "acting knowingly or intentionally adverse to the interest of the trust[s] beneficiaries."¹⁴⁷ A key aspect of American jurisprudence is that good faith and bad faith are both mutually exclusive and comprehensive.¹⁴⁸ There are no actions that are taken in neither good faith nor bad faith, and there are no actions that are taken in both good faith and bad faith.¹⁴⁹

The fact that trustees are subject to non-waivable duties means that there is no "absolute discretion."¹⁵⁰ Regardless of the language used in a trust instrument, a trustee's exercise of discretion in the performance of his or her duties is always subject to review by Texas courts under an "abuse of

134. *Id.* § 113.051.

135. *Id.* § 111.0035(b)(4)(B).

136. *See* S.E.C v. McCarthy, 322 F.3d 650, 646 (9th. Cir. 2006).

137. *See* TEX. PROP. CODE ANN. § 113.051; TEX. PROP. CODE ANN. § 111.0035(b)(4)(B).

138. TEX. PROP. CODE ANN. § 111.0035(b)(4)(B).

139. *Id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *Lee v. Lee*, 47 S.W.3d 767, 795 (Tex. App.—Houston 2001, pet. denied).

144. *Id.*

145. *See id.*

146. *See id.*

147. *Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 897 (Tex. App.—Texarkana 1987, no writ).

148. *See* QBE Ins. Corp. v. Chalfont Condominium Apartment Ass'n, Inc., 94 So.3d 541 (Fla. 2012).

149. *Id.*

150. *See* TEX. PROP. CODE ANN. § 111.0035(b)(4)(B) (West 2017).

discretion” standard.¹⁵¹ For purposes of this paper, however, future references to a trustee’s absolute discretion shall be understood to include the caveat that such power is slightly less than absolute.¹⁵²

On the other hand, saddling trustees with certain non-waivable duties does not necessarily empower a beneficiary of a discretionary trust to compel the trustee to make trust distributions.¹⁵³ Rather, such a beneficiary must show that the trustee failed to act properly.¹⁵⁴ Given the right facts and circumstances, a beneficiary may be able to convince a court that a trustee’s refusal to exercise a pure discretionary distribution power is so unreasonable as to constitute a breach of trust or justify removal.¹⁵⁵ On the other hand, courts do not like to be burdened with the trustee’s job.¹⁵⁶

Section 116.006 of the Texas Uniform Principal and Income Act (“UPIA”) provides that a court may not question a trustee’s exercise or non-exercise of the power to adjust between principle and income unless the court determines that the decision was an abuse of the trustee’s discretion.¹⁵⁷ The Texas Property Code states that “if a court determines that a trustee has abused its discretion, the court may place the income and remainder beneficiaries in the positions that they would have occupied if the discretion had not been abused.”¹⁵⁸ If the trustee reasonably believes a beneficiary will object to the exercise of a discretionary power, he or she may petition the court to determine whether the proposed discretionary act will result in abuse of his or her discretion.¹⁵⁹

B. Unascertainable Standards

A grantor may use unascertainable standards for distribution.¹⁶⁰ A distribution standard will usually be considered unascertainable without an objective manner to determine whether a distribution fits within the instrument’s distribution standard.¹⁶¹

151. *Corpus Christi Bank and Trust v. Roberts*, 597 S.W.2d 752, 754 (Tex. 1980).

152. *See* TEX. PROP. CODE ANN. § 111.0035(b)(4)(B).

153. *See Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317 (Tex. App.—Dallas, 1997, writ denied); *Bogert on Trusts* § 228. *See also Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App.—Corpus Christi 1997, writ denied).

154. *See 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.”).

155. *Nations v. Ulmer*, 122 S.W.2d 700, 703 (Tex. Civ. App.—El Paso 1938).

156. *Id.*

157. TEX. PROP. CODE ANN. § 116.006.

158. TEX. PROP. CODE ANN. § 116.006(c).

159. TEX. PROP. CODE ANN. § 116.006(d).

160. Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 42 EST. PLAN. 3, 6 (2015).

161. *Id.*

Unascertainable standards might be used when the settlor wants to have more flexibility in making distributions.¹⁶² While their specific efficacy may be difficult or impossible for a court to determine per se, they nonetheless provide guidance in the form of expressing grantor intent.¹⁶³ Consider, for example, a hypothetical situation where a trust instrument directs a trustee to make distributions for the beneficiary's "comfort" and the trustee denies the beneficiary's requests for a given distribution.¹⁶⁴ In theory, a court should not be able to compel the distribution under these facts alone.¹⁶⁵ However, if the beneficiary produces an email wherein the trustee states his intent to make the beneficiary uncomfortable (for example, to encourage certain behavior), then the trustee is acting in bad faith and contrary to the intent of the trust, which he may not do.¹⁶⁶

Settlors may also employ unascertainable distributions standards to achieve certain tax consequences.¹⁶⁷ In particular, where it is beneficial to include a trust's corpus in a beneficiary's estate, for example, to achieve a step up in basis, this may be an option.¹⁶⁸ Similarly, certain trusts, such as revocable living trusts, are not designed to provide tax benefits or creditor protection, so the limitations associated with ascertainable distribution standards bring no benefit to the beneficiary.¹⁶⁹ But extreme caution is recommended before including such language in a trust instrument.¹⁷⁰ Not only may there be unintended consequences to using such language, but different provisions may also achieve the positive tax result without harmful side effects.¹⁷¹ Due to the potential tax and creditor protection implications, these unascertainable standards should be used with caution and only with the advice of a well-versed attorney.¹⁷²

There is no clear definition of an unascertainable standard.¹⁷³ Nor is there an exclusive list of terms to create one.¹⁷⁴ Certain terms, however, are generally understood to be so indefinite that they do imply an unascertainable

162. *Id.*

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. *See generally* Blair v. Commissioner of Internal Revenue, 300 U.S. 5 (1937) (describing how a trust was used to shift tax burdens to others).

168. *Id.*

169. *Tax Consequences of a Living Trust*, ROCKET LAWYER, <https://www.rocketlawyer.com/article/tax-consequences-of-a-living-trust.rl> (last visited Oct. 1, 2017). perma.cc/E5XP-V4RH.

170. *See infra* notes 195–196.

171. *See infra* notes 189.

172. *See infra* notes 195–196.

173. Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 42 EST. PLAN. 3, 6 (2015)

174. *See infra* note 198.

distribution standard.¹⁷⁵ These include terms like “comfort,” “happiness,” “benefit” and “welfare.”¹⁷⁶

This is one of the most frustrating aspects of trust law in the United States.¹⁷⁷ What difference is there (at least in practice) between having a trustee distribute for the beneficiaries’ “welfare and benefit” compared to their “maintenance and support?”¹⁷⁸ Why is the former unascertainable compared to the latter?¹⁷⁹ Stated another way, are “maintenance and support” really that much more ascertainable than “welfare and benefit?”¹⁸⁰

1. *Comfort*

A distribution standard that includes “comfort” as a basis has generally been held to create an unascertainable standard.¹⁸¹ In Texas, comfort is not limited by state law in a manner that would allow it to be considered an ascertainable standard.¹⁸² In *Lehman*, the court considered a Texas Will providing that the wife could “in the exercise of her own discretion, . . . consume for her own use, benefit, comfort, support, and maintenance, all or any part of the corpus of [the testator’s] estate or proceeds thereof whenever she, in her own discretion, deems the income, rents, and revenues thereof insufficient for her support, maintenance, comfort, and welfare.”¹⁸³ In that case the Fifth Circuit noted that “the critical fact is that, regardless of the name attached to it, [the wife’s] interest was obviously coupled with plenary authority to convey, encumber or consume the property, and Texas courts have consistently accorded full force and effect to similar testamentary

175. See *infra* note 198.

176. See Treas. Reg. § 20.2041-1(c)(2) (2017) (“A power to use property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite standard.”). See also Treas. Reg. § 1.674(b)-1(b)(5)(i) (2017) (stating that a power to distribute corpus for pleasure, desire, or happiness of beneficiary is not limited by a reasonably definite standard).

177. Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 42 EST. PLAN. 3, 6 (2015).

178. *Id.*

179. *Id.*

180. See *id.*

181. Treas. Reg. § 20.2041-1(c)(2); *First Virginia Bank v. United States*, 490 F.2d 532 (4th Cir. 1974) (“In the absence of [state] law limiting [a beneficiary’s] power to consume the proceeds from the sale of the stock to an ascertainable standard relating to her health, support, or maintenance, the value of the stock must be included in her gross estate. While the power to consume need not be limited to the bare necessities of life, the Regulations specifically state: A power to use the property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite standard.”); *but see* *Estate of Strauss*, T.C. Memo 1995-248 (holding under Illinois law, “comfort” is ascertainable standard); *Pyle v. United States*, 766 F.2d 1141 (7th Cir. 1985) (arguing comfort ascertainable under state law); *Rock Island Bank & Trust Co. v. Rhoads*, 187 N.E. 139 (Ill. 1933) (holding comfort ascertainable under Illinois law as it refers to maintaining someone in station of life to which that person is accustomed and because station in life is known, standard is measured and hence ascertainable).

182. See *Lehman v. United States*, 448 F.2d 1318 (5th Cir. 1971).

183. *Id.*

provisions.”¹⁸⁴ Therefore, based on Texas law, the inclusion of the word comfort resulted in the wife possessing an “unrestricted and discretionary right—at least in the absence of evidence of action fraud—to consume the property, governed only by her own personal assessment of her own personal need.”¹⁸⁵

2. *Welfare*

A distribution standard that includes “welfare” has also been found to create an unascertainable standard.¹⁸⁶

3. *Happiness, Benefit, Best Interest*

While Treas. Reg. § 20.2041-1(c)(2) describes “happiness” and “benefit” as unascertainable standards, the Restatement (Third) of Trusts provides greater insight:

Although one effect of authorizing distributions for the “benefit,” “best interests,” or “welfare” of a beneficiary is to suggest a support standard, these terms tend also to authorize discretionary expenditures that fall beyond the usual scope of a purely support-related standard. For example, a “benefit” standard might make it reasonable for a trustee to make substantial distributions to provide a beneficiary with capital needed to start a business. . . . [t]erms of this type, however, lack the objective quality of a term such as “support.” Thus, they may not facilitate a beneficiary’s efforts to obtain judicial intervention to compel distributions by the trustee. On the other hand, the presence of less objective terminology in a discretionary standard may diminish the relevance of the beneficiary’s other resources, except a parent’s obligation to support a minor beneficiary[. . .].

The terms of a discretionary standard occasionally include stronger language, such as the word “happiness.” Such language suggests an intention that the trustee’s judgment be exercised generously and without relatively objective limitation. Although “happiness” alone expresses no objective minimum of entitlements (which to some extent may nevertheless be readily implied), the primary effect of such a term is to immunize from challenge by remainder beneficiaries almost any reasonably affordable

184. *Id.* (citing *Messer v. Johnson*, 422 S.W.2d 908, 912 (Tex. 1968); *Commercial Bank, Unincorporated of Mason v. Satterwhite*, 413 S.W.2d 905, 909 (Tex. 1967); *Murphy v. Slaton*, 273 S.W.2d 588 (Tex. 1954); *Nye v. Bradford*, 193 S.W.2d 165, 167 (Tex. 1946), *Edds v. Mitchell*, 184 S.W.2d 823, 825 (Tex. 1945); *McMurray v. Stanley*, 6 S.W. 412, 415 (Tex. 1887)).

185. *See id.*

186. *See* Treas. Reg. § 20.2041-1(c)(2) (2017); *First Virginia Bank v. United States*, 490 F.2d 532 (4th Cir. 1974) (“In the absence of [state] law limiting [a beneficiary’s] power to consume the proceeds from the sale of the stock to an ascertainable standard relating to her health, support, or maintenance, the value of the stock must be included in her gross estate. While the power to consume need not be limited to the bare necessities of life, the Regulations specifically state: ‘A power to use property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite standard.’”).

distributions. This, however, does not mean that the trustee cannot properly resist any reasonable request by the beneficiary, because the decision remains one within the fiduciary discretion of the trustee.¹⁸⁷

C. Ascertainable Standards

HEMS standards are not the only ascertainable standards.¹⁸⁸ Any standard that a court can interpret sufficiently to compel a distribution will qualify for tax purposes.¹⁸⁹ HEMS standards are typically viewed as delineating the outer boundary of permissible discretion. Therefore any language that further limits a trustee's discretion will only serve to make a given standard "more ascertainable."¹⁹⁰ Sometimes, HEMS language is specifically reigned in, for example when a trust provides for medical care only in emergency situations.¹⁹¹ Other times, completely different language might be used.¹⁹² For example, consider a trust in which the trustee is exclusively directed to provide all the money or other assets reasonably necessary to fund the beneficiary's hobby of collecting hand-carved, Mesoamerican backscratchers.¹⁹³ This standard is clearly ascertainable because, if a distribution is made for another purpose, then the trustee is liable to any remainder beneficiary for abuse of discretion.¹⁹⁴

Nonetheless, HEMS standards remain customary, and practitioners are advised against deviating from this language without special consideration.¹⁹⁵ Where circumstances warrant extra language, unintended legal conclusions may be avoided by explicitly stating that any such additional language is intended as a further limitation and not as a separate standard of distribution which may later be deemed unascertainable.¹⁹⁶

1. Support & Maintenance

The terms "support" and "maintenance" are considered to be similar and are considered synonymous under the Restatement.¹⁹⁷ A distribution standard featuring the terms support and maintenance, does not afford

187. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. d (3) (AM. LAW INST. 2003).

188. Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 42 EST. PLAN. 3, 7–8 (2015).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 8.

195. *Id.*

196. *Id.*

197. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. d (AM. LAW INST. 2003).

trustees unbridled discretion.¹⁹⁸ Rather, the trustee's discretion must be "reasonably exercised to accomplish the purposes of the trust according to the settlor's intention and his exercise thereof is subject to judicial review and control."¹⁹⁹

The Restatement provides a nonexclusive list of example expenditures that fall within the support and maintenance standard.²⁰⁰ Examples include, "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."²⁰¹ Courts have additionally 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."²⁰²

See Appendix "A" for a chart of other possible expenditures that may be covered under a support and maintenance standard.²⁰³ These examples are not meant to be exhaustive.²⁰⁴ While some of these examples may seem frivolous, particularly for small trusts, their inclusion further supports the rule that individual circumstances must be considered at all times.²⁰⁵ Under all circumstances, however, support probably means more than the bare necessities.²⁰⁶

In *Rubion*, the Texas Supreme Court recognized a number of factors that should be considered by a trustee exercising its discretion in a "support" or "maintenance" trust.²⁰⁷ They include: (1) the size of the trust estate; (2) the beneficiary's age, life expectancy and condition of life; (3) the beneficiary's present and future needs; (4) the other resources available to the beneficiary's individual wealth; and (5) the beneficiary's present and future mental and physical health.²⁰⁸

198. See *State v. Rubion*, 308 S.W.2d 4, 9 (Tex. 1957) (citing *First National Bank of Beaumont v. Howard*, 229 S.W.2d 781, 785 (Tex. 1950)); *Anderson v. Menefee*, 174 S.W. 904 (Tex. Civ. App.—Fort Worth, writ ref'd); Austin W. Scott, SCOTT ON TRUSTS, § 187 (2d ed. 1956).

199. *Kelly v. Womack*, 268 S.W.2d 903, 907 (Tex. 1954); *Powell v. Parks*, 86 S.W.2d 725 (Tex. 1935); *Davis v. Davis*, 44 S.W.2d 447 (Tex. Civ. App.—Texarkana 1931, no writ).

200. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. d (2) (AM. LAW INST. 2003).

201. *Id.*

202. *Robison v. Elston Bank & Trust Co.*, 48 N.E.2d 181, 189 (Ind. App. 1943).

203. See Appendix A.

204. *Id.*

205. *Id.*

206. *Hartford-Conn. Trust Co. v. Eaton*, 36 F.2d 710, 711–12 (2d Cir. 1929).

207. *State v. Rubion*, 308 S.W.2d 4, 10 (Tex. 1957).

208. *Id.* See also *In re Gruber's Will*, 122 N.Y.S.2d 654, 657 (N.Y. Sur. 1953) (listing age and condition of beneficiary, amount of trust fund, and other factors); *Hanford v. Clancy*, 183 A. 271, 272 (N.H. 1936) (listing size of fund, present situation of beneficiary, present and future needs, other resources, and future emergencies); *Falsey's Estate*, Sur., 56 N.Y.S.2d 556, 563 (N.Y. Sur. 1945) (listing age of beneficiary, physical and mental health of beneficiary, size of trust compared to beneficiary's life expectancy).

Support has also been held to include the educational expenses of the beneficiary's dependents.²⁰⁹ In that case, the Texas Supreme Court held that the fact that the settlor had paid for his daughters' college education indicated that he considered the expense of a college education for a dependent a "necessary" expenditure.²¹⁰

The changes in a beneficiary's standard of living or the value of trust assets can impact the level of support considered proper.²¹¹ Thus, if a beneficiary's standard of living increases or if the trust's assets appreciate in value, then more liberal distributions should be permissible.²¹² Presumably, the converse is also true, so trustees should be careful.²¹³ Carrying on business as usual or doing something a particular way because it has always been done that way, may lead a trustee to peril.²¹⁴

A trustee should consider both the present and future needs of the beneficiary.²¹⁵ However, when the trust is potentially insufficient to provide for both needs, a trustee is faced with a difficult decision.²¹⁶ Unfortunately, the few courts that have addressed this issue have not held consistently.²¹⁷

In *Rubion*, the court ruled that the trustee abused his discretion by refusing to invade the principal of the trust to make payments for the beneficiary's care while she was in a state mental hospital.²¹⁸ The trustee argued that he was within his discretion to withhold payments of principal because the corpus of the trust should be preserved for her support if she were ever discharged from the hospital, and further, that if the trust corpus were used to pay all of her medical care it would completely destroy the trust.²¹⁹ Disagreeing, the court held the trustee abused his discretion by withholding the entire principal and the trustee should have determined what amount could have been distributed while still preserving the long-term health of the trust.²²⁰ Again, this underscores the trustee's duty to assess the situation before responding appropriately and with flexibility.²²¹

In *Penix*, the appellate court ruled that a trustee was within its discretion to withhold principal as well as income, in order to meet the future needs of

209. See *First Nat'l Bank of Beaumont v. Howard*, 229 S.W.2d 781 (Tex. 1950).

210. *Id.*

211. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. d (2) (AM. LAW INST. 2003).

212. *Id.*

213. Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 42 EST. PLAN. 3, 7–8 (2015).

214. *Id.* at 12.

215. *Id.*

216. *Id.*

217. Compare *State v. Rubion*, 308 S.W.2d 4 (Tex. 1957), with *Penix v. First Nat'l Bank of Paris*, 260 S.W.2d 63 (Tex. Civ. App.—Texarkana, writ *ref'd*).

218. *Rubion*, 308 S.W.2d at 8.

219. *Id.*

220. *Id.* at 9.

221. *Id.*

the beneficiary.²²² There, the trustee argued successfully that, because the beneficiary was only nine years old, the income produced from the trust was well in excess of what was needed for her current support, and any excess above the beneficiary's current needs should be held in reserve for emergencies.²²³ The court found that the trustee was within its discretion, relying heavily on the language granting the trustee the power to carry out the terms of the trust "free from any supervision by the probate or other courts."²²⁴ The court discounted any significance of the word "shall" within the grant.²²⁵

While the results in each case were different from the respective trustee's perspectives, *Penix* and *Rubion* adhere to the same rule.²²⁶ When exercising discretion in a support trust, a trustee should consider both the present and future needs of the beneficiary, as well as other relevant facts and circumstances.²²⁷

2. Education

Without limiting or expanding provisions, education includes living expenses, tuition, fees, books and other cost of higher education and/or technical training.²²⁸ As such, education would appear to be easy to define; however, many cases demonstrate ambiguous treatment amongst the courts.²²⁹ A list of common requests classified by corporate trustees and others as fitting within an education standard is provided in Appendix A.²³⁰

Of course, there are some conflicting decisions for review.²³¹ The court in *S. Bank & Trust Co. v. Brown* found that education did not include post-graduate studies but was limited to education up to and including a bachelor's degree.²³² Similarly, in *Lanston v. Children's Hospital*, the court found 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."²³³ And in *Steeves v. Berit*, which was abrogated by *Halpern v. Rabb*, the court adopted a similar definition of "college" in the

222. *Penix*, 260 S.W.2d at 67.

223. *Id.* at 64-65.

224. *Id.*

225. *Id.*

226. *Compare* *State v. Rubion*, 308 S.W.2d 4 (Tex. 1957), with *Penix v. First Nat'l Bank of Paris*, 260 S.W.2d 63 (Tex. Civ. App.—Texarkana, writ *ref'd*).

227. Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 42 EST. PLAN. 3, 8 (2015).

228. See RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. d (3) (AM. LAW INST. 2003).

229. *Steeves v. Berit*, 832 N.E.2d 1146, 1152 (Mass. App. Ct. 2005).

230. See Appendix A.

231. See *S. Bank & Trust Co. v. Brown*, 246 S.E.2d 598, 603 (S.C. 1978).

232. *Id.*

233. *Lanston v. Children's Hosp.*, 148 F.2d 689 (2d Cir. 1945).

context of a divorce case; and similarly, *Epstein v. Kuvin* held that the term “college education” does not include medical school.²³⁴

3. Health

The term health typically includes distributions for health as would be implied from a support standard alone.²³⁵

The Texas Property Code currently specifies that a “trustee may conclusively presume that medicine or treatments approved by a licensed physician are appropriate for the health of the beneficiary.”²³⁶ The legislature added this section because trustees administering judicially created trusts found the variety of health related requests to be daunting.²³⁷ Alternative treatment options present unique challenges for distribution decisions, including “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, tattoo removal, and concierge medicine.”²³⁸ Appendix A cites some examples.²³⁹

In *In re Stonecipher*, the Indiana court concluded that the trustee used appropriate discretion when the trustee decided that the beneficiary’s healthcare costs exceeded her actual needs based on her income, remainder beneficiaries, and gifts from personal funds.²⁴⁰

Usually, the settlor does not specify which health-related distributions are included and precluded in the terms of the document, but some examples exist.²⁴¹ An interesting example is “a grantor’s desire to exercise control from the grave and micromanage the determination of an appropriate distribution for health.”²⁴² Some grantors may limit distributions for situations arising from risky behavior or substance abuse.²⁴³ A grantor “may wish to limit all distributions to emergency situations of some sort in order to encourage some behavior or other result.”²⁴⁴ For example, a grantor’s children may receive trust fund distributions for specific emergency health conditions, such as, if the child is married and does not possess a marital

234. *Steeves v. Berit*, 832 N.E.2d 1146, 1152 (Mass. App. Ct. 2005), *Halpern v. Rabb*, 914 N.E.2d 110 (Mass. App. Ct. 2007), *Epstein v. Kuvin*, 95 A.2d 753, 754 (N.J. Super. Ct. App. Div. 1953).

235. See RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. d(3) (AM. LAW INST. 2003).

236. TEX. PROP. CODE ANN. § 142.005(b)(2) (West 2017) (emphasis added).

237. See H.B. 564, 80th Leg., Reg. Sess. (Tex. 2007) (enrolled version).

238. Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 206 (2014).

239. See *id.*

240. See *In re Stonecipher*, 849 N.E.2d 1191, 1197 (Ind. Ct. App. 2006).

241. See Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 42 EST. PLAN. 3, 13 (2015).

242. See Kelso, *supra* note 12, at 13.

243. See generally RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. a (AM. LAW INST. 2003); see also Appendix B.

244. Kelso, *supra* note 12 at 13.

property agreement, or if receipt is conditioned on the spouse signing the property agreement.²⁴⁵

4. General Considerations for HEMS Standards

In certain circumstances, distinguishing between ascertainable and unascertainable standards may present challenges.²⁴⁶ Typically, “one ‘bad’ word will spoil the bunch,” causing a beneficiary’s “health, support and comfort” to be subject to an unascertainable distribution standard.²⁴⁷ The addition of “comfort” expands the standard too broadly, causing it to become unascertainable.²⁴⁸ However, “support in reasonable comfort” is still considered ascertainable, as is “maintenance in health and reasonable comfort.”²⁴⁹ While adding one wrong word will transform an ascertainable standard into an unascertainable one, the opposite may also be true.²⁵⁰ In practice, however, the prudent drafter should always avoid verbiage that might bring the standard into doubt.²⁵¹ There is simply nothing to gain by adding such superfluous language.²⁵²

Furthermore, the above examples demonstrate the unpredictability of potential distributions by a trustee.²⁵³ For example, what if a beneficiary requests a distribution to pay for yoga classes arguing that they promote the beneficiary’s health?²⁵⁴ Did the grantor intend only traditional medicine or did he leave room for nontraditional treatment options?²⁵⁵ Is a course to reach the next level in Scientology education for purposes of the distribution?²⁵⁶ What about changes over time?²⁵⁷ Bloodletting and lobotomies may have “once been an accepted forms of mainstream medical treatment, but most would say that they are not anymore.”²⁵⁸

245. See *Hunter v. U.S.*, 597 F. Supp. 1293, 1298 (W.D. Pa. 1984).

246. See generally John G. Steinkamp, *Estate and Gift Taxation of Powers of Appointment Limited by Ascertainable Standards*, 29 MARQ. L. REV. 195, 199 (1995) (illustrating the challenges of defining ascertainable standards due to the consideration of various issues).

247. Kelso, *supra* note 12, at 14.

248. See *id.*

249. Treas. Reg. § 20.2041-1(c)(b)(2) (as amended in 1961).

250. Kelso, *supra* note 12, at 14.

251. See William F. Fox, *INTERNATIONAL COMMERCIAL AGREEMENTS: A PRIMER ON DRAFTING, NEGOTIATING, AND RESOLVING DISPUTES* 124 (Kluwer Law International, 4th ed. 2009).

252. See *id.*

253. Kelso, *supra* note 12, at 14.

254. See *id.*

255. See *id.*

256. See *id.*

257. See Robert Esperti, Renno Peterson & Robert Keebler, *IRREVOCABLE TRUSTS: ANALYSIS WITH FORM 3.04(3)* (West 2017).

258. See Jennie Cohen, *A Brief History of Bloodletting*, HISTORY (May 30, 2012), <http://www.history.com/news/a-brief-history-of-bloodletting> perma.cc/E5P3-GVH2. See also Tanya Lewis, *Lobotomy: Definition, Procedure & History*, LIVE SCIENCE (Aug 28, 2014, 10:32 PM), <https://www.livescience.com/42199-lobotomy-definition.html> perma.cc/EGHY-JSR9 (outlining the development and eventual demise of the lobotomy procedure).

Trustees may find limited comfort in the fact that some distributions may fit into multiple categories.²⁵⁹ For example, a trustee may not agree that a yoga class is appropriate for a beneficiary's health, but might nonetheless make a distribution by determining that the class is educational.²⁶⁰

Still, this problem underscores how "drafters should, where possible, provide clarification as to the intent of each grantor."²⁶¹ Sadly, drafting attorneys almost never bother to delve into their clients' intent in this regard and many beneficiaries have suffered because of it.²⁶² Unfortunately for them, the law generally denies recompense on the theory that, because those beneficiaries are not clients, they lack the requisite privity to assert any cause of action against the attorneys.²⁶³ Thus, at least for the foreseeable future, trustees must be prepared to deal with minimally descriptive trust documents.²⁶⁴

D. Mandatory Distributions

A mandatory distribution requires "the distribution of income and/or principal in a manner that does not require the exercise of a trustee's discretion."²⁶⁵ The most common mandatory distribution "requires that the trust distribute all of its income currently for the taxable year."²⁶⁶ Another type of trust, a qualified terminable interest property (QTIP), also dictates distribution.²⁶⁷ Federal law requires QTIP trusts to distribute income at least annually in order to trigger the estate tax marital deduction.²⁶⁸

A mandatory discretionary distribution standard does not mean it "involves little intellectual machination."²⁶⁹ A mandatory trust distribution "must be triggered by some event or set of facts because, absent the trigger, the beneficiary's gift would simply be outright (i.e. not in trust)."²⁷⁰ Circumstances dictate if these triggers are easy or difficult to determine.²⁷¹ Consider the hypothetical situation where a trust allows distributions upon

259. See Amman, *supra* note 238, at 206.

260. See Kelso, *supra* note 12, at 14.

261. *Id.*

262. See generally *Frost Nat'l Bank of San Antonio v. Newton*, 554 S.W.2d 149, 153–154 (Tex. 1977) (concluding that beneficiaries could not terminate a trust because the four corners of the document provided for specific conditions of termination).

263. See *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 621 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

264. See generally Kelso, *supra* note 12, at 14 (highlighting for clear intent of the grantor wherever possible in drafting trust documents).

265. See *id.*

266. Treas. Reg. § 1.651(a)-1 (1960).

267. See Kelso, *supra* note 12, at 16.

268. See I.R.C. § 2056(b)(7) (2012).

269. See Kelso, *supra* note 12, at 14.

270. *Id.*

271. See *id.*

the beneficiary's attainment of thirty years of age.²⁷² The beneficiary's thirtieth birthday is the trigger.²⁷³ This should be straightforward, but "what if the beneficiary's birthday is not known or is in dispute?"²⁷⁴ People lie about their birthdays for a myriad of reasons.²⁷⁵ If records conflict, problems will ensue for a trustee faced with this distribution requirement.²⁷⁶ Exceptions also apply to disabled individuals.²⁷⁷ Typically, the trustee may continue to hold the trust's assets for the duration of the incapacity.²⁷⁸ But, a corporate trustee who is out of regular contact with the beneficiary may not realize that the beneficiary is incapacitated.²⁷⁹ This might be the case, for example, if the beneficiary only contacts his or her trust officer in the mornings when he or she is sober.²⁸⁰

Think about the QTIP trust with a mandatory annual income distribution.²⁸¹ One must determine how income is calculated.²⁸² This may be difficult in some circumstances.²⁸³ Section 116.002(4) of the Texas Property Code defines trust income as "money or property that a fiduciary receives as a current return from a principal asset."²⁸⁴

Trust income, financial accounting income, and taxable income are all different matters.²⁸⁵ While accrual principles direct financial income and taxable income, "trust income generally is computed on a cash basis."²⁸⁶ Also, the UPIA applies in determining trust income.²⁸⁷ Not only does the UPIA provide rules for allocating between income and principal, it also authorizes a trustee to adjust between the two when certain conditions are met.²⁸⁸ Thus, income distribution to a beneficiary presents unforeseen challenges.²⁸⁹

272. *Id.*

273. *Id.*

274. *Id.*

275. *Why Do People Lie About Their Age?*, BBC NEWS (Sept. 24, 2013) <http://www.bbc.com/news/blogs-magazine-monitor-24219342>. Perma.cc/PBA8-YUT3

276. *See* Kelso, *supra* note 12, at 14.

277. *See* Amman, *supra* note 238, at 209.

278. *See id.*

279. *See generally* Kelso, *supra* note 12, at 14. (providing various hypotheticals of trustee distributions).

280. *See generally id.* (providing various hypotheticals of trustee distributions).

281. *See id.*

282. *See id.*

283. *See id.*

284. TEX. PROP. CODE ANN. § 116.002(4) (West 2007).

285. *See* Kelso, *supra* note 12, at 16.

286. *Id.*

287. *See* 72 TEX. JUR. 3D *Trusts* § 123 (2017).

288. TEX. PROP. CODE ANN. § 116.005 (West 2011).

289. *See* Kelso, *supra* note 12, at 16.

V. MODIFYING LANGUAGE

In addition to the terms above, trust instruments typically include modifying language which impacts how distributions are to be made.²⁹⁰ These terms complicate the problem of interpreting trust language.²⁹¹

In many ways, these modifiers are like the wheels on the Enigma machines which the Germans developed to scramble messages for coded radio communication in World War II.²⁹² The Enigma machine looked and functioned much like a typewriter, except that inside, it had several disks with complex circuitry.²⁹³ As an uncoded message was entered by the operator, the disks would rotate, thereby changing the internal circuitry and randomizing the code.²⁹⁴ As each letter of the original message was entered, the changing circuitry would indicate a seemingly random letter for coded transmission.²⁹⁵ In other words, “a” might be coded as “f” in one instance and then “g” the next.²⁹⁶ As the Germans added more disks to the machine, the possible letter combinations increased exponentially, making the code that much more difficult to break.²⁹⁷

Modifiers such as those discussed below act like extra wheels in the Enigma machine.²⁹⁸ That is to say, altering the modifiers can lead to different, and seemingly maddening, results.²⁹⁹ Even if a trustee can uncode the concepts of health, education, maintenance and support, the modifiers can cause him or her to abide by separate and functionally different rules for each set of modifiers.³⁰⁰

It is worth noting that this modifier concept alone can make finding case law difficult because it creates too many permutations.³⁰¹ Even in the unlikely event that a case is on point in regard to external facts and the distribution standard at issue, a single modifier can completely alter the result, rendering the case distinguishable as precedent.³⁰²

However, the following gives some guidance on a few modifiers that trustees should consider.³⁰³

290. *Id.*

291. *Id.*

292. Alan Stripp, *How the Enigma Works*, NOVA (Nov. 9, 1999), <http://www.pbs.org/wgbh/nova/military/how-enigma-works.html>. perma.cc/F7CA-GRGY

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *See* Kelso, *supra* note 12, at 16.

299. *Id.*

300. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. d(1) (AM. LAW INST. 2003) (commenting on the construction of frequently used expressions and how they change distribution power).

301. *See* Kelso, *supra* note 12, at 16.

302. *Id.*

303. *Id.*

A. “Shall” v. “May”

The term “may” implies discretion.³⁰⁴ If a trustee *may* make distributions for HEMS, he or she may, for example, determine that a beneficiary needs a distribution for a mortgage payment and still determine properly that the distribution should be withheld.³⁰⁵ Conversely, the term “shall” is mandatory.³⁰⁶ If the same trustee *shall* make distributions for HEMS, the distributions become compulsory and enforceable upon the trustee’s determination that the beneficiary needs it for the mortgage payment, assuming, of course, that the trust instrument does not somehow provide otherwise.³⁰⁷ Compelling a distribution, however, is difficult in practical terms because the beneficiary must prove the trustee’s intent for the determination.³⁰⁸ But trustees do sometimes leave evidence of their findings.³⁰⁹ For example, an individual trustee may have discussed their determination with a friend, spouse, or family member of the beneficiary.³¹⁰ Likewise, a corporate trustee may make such determinations by committee, for which there are discoverable meeting notes.³¹¹

On a more theoretical front, a “may” modifier effectively creates an upper limit to permissible distributions.³¹² A trustee who *may* make distributions for HEMS, might never make any distribution at all.³¹³ On the other hand, a “shall” modifier triggers every distribution that falls within the standard.³¹⁴ Because it therefore makes the related distribution standard more ascertainable, a “shall” standard is preferred when tax is a prime consideration.³¹⁵

Similarly, a “may” modifier subjects a trustee to attack on multiple fronts, creating a catch-22.³¹⁶ In the above example involving the trustee who may make a distribution to cover the beneficiary’s mortgage payment, if the trustee makes the distribution, the beneficiary will be satisfied but the remainder beneficiaries are likely to complain.³¹⁷ On the other hand, if the

304. See TEXAS GOV’T CODE ANN. § 311.016 (West 1997) (stating that “may” creates discretionary authority or grants permission or a power).

305. *Id.*

306. *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).

307. *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).

308. *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).

309. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. c (AM. LAW INST. 2003) (noting how a settlor can manifest intent from different aspects of a will or trust).

310. *Id.*

311. *Id.*

312. See *Kelso*, *supra* note 12, at 16.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

trustee withholds the distribution, the beneficiary will complain but the remainder beneficiaries will be satisfied.³¹⁸

B. Accustomed Standard of Living

Trusts regularly direct trustees to give distributions in order to allow beneficiaries to maintain a standard of living.³¹⁹ The law calculates a beneficiary's standard of living as of the time of the grantor's death or when the trust became irrevocable.³²⁰ The reason for this is in keeping with interpreting the trust according to what the settlor intended.³²¹ Even without specific language, distributions are to be made "according to the beneficiary's station in life."³²² However, a trustee may be justified in giving lower levels of distributions if the trust estate is modest in relation to the future needs of the beneficiary.³²³ In a pair of cases, New Hampshire courts treated references to such words as "needs," "necessities," and "necessary" as the substantial equivalent of support in the beneficiary's accustomed manner, rather than being limited to what is essential.³²⁴

C. Other Sources of Support

A trustee may be obligated to consider the beneficiary's other resources when making discretionary distributions.³²⁵ However, the trustee must follow any guidance that the settlor provided in this area.³²⁶ All rules are framed by the grantor's intent in keeping with the overall purpose of the trust.³²⁷

A trustee should consider other resources, but they may have some discretion in determining the impact of those resources on the distributions if the trust document is silent.³²⁸ The consideration of these resources involves balancing the intent of the grantor in making the trust in regards to the

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. d(2) (AM. LAW INST. 2003).

323. *Id.* See also, *Estate of Miller*, 41 Cal. Rptr. 410 (Cal. Ct. App. 1964), appeal after remand, 66 Cal. Rptr. 756 (Cal. Ct. App. 1968) (stating the trustee is to maintain the beneficiary "in the social and economic position in which the latter had been living at the time of the creation of the trust, and give him the comforts and necessities to which he had become accustomed and not merely . . . the bare necessities of life.").

324. *Amoskeag Trust Co. v. Wentworth*, 111 A.2d 198 (N.H. 1955), and *Orr v. Moses*, 52 A.2d 128 (N.H. 1947). Compare *Huntington National Bank v. Aladdin Crippled Children's Hosp. Ass'n*, 157 N.E.2d 138 (Ohio 1959); and *Wright v. Trust Company Bank of Nw. Ga.*, 396 S.E.2d 213 (Ga. 1990).

325. See *Kelso*, *supra* note 12, at 16.

326. *Id.*

327. See RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e (AM. LAW INST. 2003).

328. *Id.*

treatment of the beneficiary.³²⁹ For example, even if a trust instrument directs that trust assets are to be distributed liberally, withholding distributions may be appropriate where the beneficiary is facing creditor problems and the intent behind the trust was protecting the beneficiary from creditors.³³⁰ Conversely, where distributions are to be made sparingly, a trustee might still properly distribute trust income to a married beneficiary if applicable community property laws would cause that income to taint otherwise separate trust corpus and render it subject to attack in the event of divorce.³³¹

The Restatement sets out the following two qualifications to the general rules:

One qualification is that, if the discretionary power is one to invade principal for (or to distribute additional income to) a beneficiary who is entitled to all or a specific part of the trust income, or to an annuity or unitrust amount, the trustee must take the mandatory distributions into account before making additional payments under the discretionary power. Where a beneficiary is entitled to payments from another trust created by the same settlor (e.g., nonmarital and marital deduction trusts for a surviving spouse), or as a part of coordinated estate planning with another (such as the settlor's spouse), required distributions from the other trust—and the purposes of both trusts—are to be taken into account by the trustee in deciding whether, in what amounts, and from which trust(s) discretionary payments are to be made.

Another qualification is that, to the extent and for as long as the discretionary interest is intended to provide for the support, education, or health care of a beneficiary . . . for periods during which a beneficiary probably was not expected to be self-supporting, the usual inference is that the trustee is not to deny or reduce payments for these purposes because of a beneficiary's personal resources.³³²

References to other resources and similar terms are normally understood to include the beneficiary's other incomes, but not the principal available to the beneficiary.³³³ In *Keisling*, the appellate court held that a beneficiary was not required to exhaust all her assets, other than a house and car, in order to receive distributions from a trust that required—shall—the trustee to distribute trust income when the beneficiary's "own income and other financial resources from sources other than from this trust [were] not sufficient to maintain her standard of living."³³⁴ In its decision, the court found that "other financial resources" were limited to "income and other

329. *Id.*

330. *Id.*

331. *Id.*

332. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e. (AM. LAW INST. 2003).

333. See *Keisling v. Landrum*, 218 S.W.3d 737 (Tex. App.—Fort Worth 2007, pet. denied).

334. *Id.* at 740.

periodic receipts, such as pension and other annuity payments and court-ordered support payments.”³³⁵

The principal of the beneficiary may still be relevant, depending on the purpose and terms of the trust.³³⁶ Once again, the list of what resources a trustee may consider includes: “(i) the settlor’s relationships both to the current beneficiary and the remainder beneficiaries, (ii) the liquidity of the beneficiary’s assets, and (iii) the purposes of the trust, both tax and non-tax.”³³⁷

D. Support v. Supplement?

A particularly vexing problem is determining whether a trust was intended to support a beneficiary or merely supplement their lifestyle.³³⁸ As discussed in more detail below, the language in a trust can restrict distributions for “nonproductive” beneficiaries or even prohibit them altogether.³³⁹ Also, when a trustee is directed to take other sources of support into consideration, the trust is likely to be for supplementing income rather than being used as the beneficiary’s primary source of support.³⁴⁰ Rules of construction include a presumption that the grantor and the drafting attorney understand the terms of the trust instrument; however, this presumption is seldom the case from a practical standpoint.³⁴¹

The problems are that (1) people’s opinions differ significantly in this regard and (2) slightly different standards can result in completely opposite results for various beneficiaries.³⁴² For example, one testator might create a trust to support his children and grandchildren as long as he can. A second testator may create a similar trust, but not necessarily with the intent of giving inheritance to his grandchildren.³⁴³ And yet, these two, very different clients, might have used the same Will form from a single attorney.³⁴⁴ The second testator may want his children to provide inheritance for his grandchildren.³⁴⁵

335. *Keisling v. Landrum*, 218 S.W.3d 737 at 743, citing RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e(2) (AM. LAW INST. 2003).

336. *See Kelso*, *supra* note 12, at 16.

337. *Id.* at 17.

338. *Id.*

339. *Id.*

340. *Id.*

341. *See Karina R. Stanhope, California Courts Interpret Ambiguous Trust Documents by Stepping Into Creator’s Shoes*, TRUST ON TRIAL (Aug. 29, 2016), <http://www.trustontrial.com/2016/08/california-courts-interpret-ambiguous-trust-documents-by-stepping-into-creators-shoes/>. Perma.cc/Z8CP-UJGC

342. *See Hollis F. Russell and Dana W. Hiscock, Power to Replace a Trustee Can Produce Adverse Tax Results*, 18 EST. PLAN. 276, 278 (1991).

343. *See Kelso*, *supra* note 12, at 17.

344. *See id.*

345. *See generally* Thomas W. Abendroth, *Use and Abuse of Discretionary Distribution Powers*, CTFA CONTINUING EDUCATION SEMINAR (May 24, 2001), <http://www.estateplan-hc.org/abendroth%20article%202.pdf> perma.cc/43HV-MSG7 (discussing that most of the time, attorneys have standard procedure when consulting with clients about these distributions).

Experience proves trustees benefit from going beyond the four corners of the document, especially with endless boilerplate language.³⁴⁶

When drafting the instrument, using the words such as “generously” or “adequately” will help specify distributions.³⁴⁷ This language does not negatively impact taxes and is conjunctive with distribution standards.³⁴⁸ Such language can be used in conjunction with a HEMS or other ascertainable standard without negatively impacting the tax result.³⁴⁹

E. Legal Duty to Support

Grantors may add a provision that prohibits a trustee from relinquishing their legal duty.³⁵⁰ Such language, which is sometimes referred to as an “Upjohn” clause after the case of *Upjohn v. U.S.*, is often intended to prohibit a trustee from using trust assets to pay for anything which he or she is obligated to provide to his or her child as a matter of law and regardless of the trust.³⁵¹

Under Texas law, a parent has a legal obligation to support his or her minor children.³⁵² This obligation includes the duty to provide a child with clothing, food, shelter, and medical and dental care.³⁵³ A parent’s obligation of support exists without the need for a court order.³⁵⁴

The prohibitive language of an Upjohn clause typically comes into play in one of two scenarios, where in one, either a grandparent has established a trust for the benefit of a minor grandchild and named the intervening child as trustee, or in the second, a spouse has established a trust for the benefit of a minor child and named the other spouse as trustee.³⁵⁵ In either case, the

346. See Kelso, *supra* note 12, at 17.

347. See generally RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. on subsection (1) and (2)(g) (AM. LAW INST. 2003) (stating that factors can range from language to relationships).

348. See RESTATEMENT (THIRD) OF TRUSTS § 50 Cmt. d(3) (AM. LAW INST. 2003) (“On the other hand, stronger language, such as “generous” support, may permit and encourage the trustee to allow, and may even require, some reasonable enhancement of the beneficiary’s lifestyle; but it falls short of a “happiness” standard . . . in that the benefits still must normally be support-related.”).

349. See *id.*

350. *Id.*

351. See Mark Merric and Rod Goodwin, *The Good, Bad, and Ugly of Spousal Access Trusts – Part III*, STEVE LEIMBERG’S ESTATE PLANNING NEWSLETTER, 4 (Dec. 2, 2008), <http://www.internationalcounselor.com/Merric%20Law%20-%20Documents/spousalaccess1.pdf>.

352. *Id.* at 7. See also *Upjohn v. U.S.*, 30 A.F.T.R. 2d 72-5918 (W.D. Mich. 1972).

353. TEX. FAM. CODE ANN. § 151.001 (a)(3) (West 2017). See also *Daniels v. Allen*, 811 S.W.2d 278 (Tex. Civ. App.—Tyler 1991, no writ) (stating that a parent has obligation to support his minor children and provide necessities).

354. See *In Interest of A.D.E.*, 880 S.W.2d 241 (Tex. Civ. App.—Corpus Christi 1994, no writ) (holding that a father has duty to support child, even when not ordered by trial court to make payments of support); *Boriack v. Boriack*, 541 S.W.2d 237 (Tex. Civ. App.—Corpus Christi 1976, *dism’d*) (holding that a mother, as well as a father, has duty to support her minor children).

355. See Jeffrey N. Pennell and Corey E. Fleming, *Avoiding the Discharge of Obligation Theory*, 12 PROB. & PROP. 49, 52 (1998).

trustee is the parent of the beneficiary and owes the beneficiary a legal duty of support because the beneficiary is a minor.³⁵⁶

To be certain, however, the prohibition is not limited to situations where the trustee is also the parent of a minor beneficiary.³⁵⁷ The legal duty might arise if the trustee is also the guardian of an adult but otherwise incapacitated beneficiary.³⁵⁸ Spouses also have support obligations to each other which can come into play.³⁵⁹ In Texas, “[e]ach spouse has the duty to support the other spouse and [a] spouse who fails to discharge the duty of support is liable to any person who provides necessities to the spouse to whom support is owed.”³⁶⁰ In any event, the duty referenced in an Upjohn clause has nothing to do with the trustee/beneficiary relationship; so, it may be better to say that the prohibition invokes where an individual who happens to be trustee of a given trust also owes a legal duty of support to the person who happens to be a beneficiary of the trust.³⁶¹

Conversely, if the beneficiary is not a minor or the spouse of the trustee and no other relationship exists to create a legal duty of support, the prohibition will not apply.³⁶² Thus, corporate and unrelated trustees need not concern themselves with this particular legal landmine.³⁶³ In fact, many trust instruments provide for the appointment of a “special trustee” who is free from this constraint (and often others as well).³⁶⁴ Typically, these temporary appointed special trustees may do something the existing trustee cannot do, such as make a support distribution.³⁶⁵ However, the trustee must exercise care when drafting language for the appointment of a special trustee.³⁶⁶

356. RESTATEMENT (THIRD) OF TRUSTS §50 cmt. (e)(3) (AM. LAW INST. 2003) (“the presumption is that the trustee *is* to take account of a parental duty to support a youthful beneficiary under applicable state law.”).

357. See *infra* note 392, at 49.

358. TEX. FAM. CODE ANN. §154.306 (West 2017).

359. See *infra* note 387.

360. TEX. FAM. CODE ANN. § 2.501(a) & (b) (West 2017).

361. See also Mark Merric and Rod Goodwin, *The Good, Bad, and Ugly of Spousal Access Trusts – Part III*, STEVE LEIMBERG’S ESTATE PLANNING NEWSLETTER, 7 (Dec. 2, 2008), <http://www.internationalcounselor.com/Merric%20Law%20-%20Documents/spousalaccess1.pdf> (“A common savings clause found in most trusts is that the trustee may not make a distribution to any beneficiary that would relieve a support obligation of the trustee. This savings clause is to prevent an estate inclusion issue if a beneficiary is also serving as a trustee.”).

362. See Jeffrey N. Pennel and Corey E. Fleming, *Avoiding the Discharge of Obligation Theory*, 12 PROB. & PROP. 49, 49 (1998) (stating the types of beneficiaries where the prohibition does apply).

363. *Id.*

364. RESTATEMENT (THIRD) OF TRUSTS §81 cmt. (b) (AM. LAW INST. 2003) (expressing that a special trustee’s role is limited).

365. *Id.*

366. See H. Carter Hood, *Special Purpose Advisors and the Trustees They Direct: Background, Recent Cases & Practical Considerations*, ABA SECTION OF REAL PROPERTY, PROBATE & TRUST LAW, 21 (2007), https://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/symposia/2007/hood.authcheckdam.pdf perma.cc/8ES7-SWN9 (“Because of the possibility of adverse tax consequences to the power holder, the drafter must be cautious in naming as the trust advisor or a beneficiary of the trust.”).

Without certain protections, the special trustee might be determined to be merely an agent of the existing trustee or the entire arrangement may be interpreted as a sham, either of which will likely lead to adverse consequences.³⁶⁷

The legal duties prohibition intends to cure two tax problems.³⁶⁸ First, if a grantor creates a trust for the benefit of a minor child or a dependent spouse, any income of the trust distributed for the support of the minor child or dependent spouse is treated as taxable income to the parent/spouse.³⁶⁹ Second, § 2036 of the IRC may cause inclusion of the entire corpus of a given trust in the estate of its trustee if that trustee has the power to discharge a legal obligation.³⁷⁰ Importantly, the trustee does not have to actually discharge his or her obligation.³⁷¹ The mere power to do so is enough to cause inclusion.³⁷² This is why some affirmative mechanism is needed to deny the trustee such power.³⁷³ In fact, some states have gone so far as to codify the prohibition.³⁷⁴

The boilerplate language of a trust instrument often contains legal support prohibitions which individual trustees are unlikely to bother reading and less likely to understand.³⁷⁵ Catching a trustee off-guard in this situation can be all too easy, and seasoned practitioners, therefore, know to discuss such provisions with their clients in terms that are relevant to a given scenario.³⁷⁶ Litigators who specialize in trust administration issues also know to look for these clauses and point out violations when doing so might further a client's case.³⁷⁷ If a trustee makes even a small distribution in violation of an *Upjohn* clause, he or she has violated his or her fiduciary duty and may be subject to reprimand in the form of repayment or removal from the trusteeship.³⁷⁸ This underscores the point that trustees, and in particular

367. *Id.*

368. Jeffrey N. Pennell and Corey E. Fleming, *Avoiding the Discharge of Obligation Theory*, 12 PROB. & PROP. 49, 49 (1998).

369. Treas. Reg. § 1.677(b)-1 (as amended in 1971).

370. 26 U.S.C. § 2036 (West 1985).

371. *See infra* note 405.

372. *Estate of Prudowsky v. Comm'r*, 55 T.C. 890 (1971); *Estate of Pardee v. Comm'r*, 49 T.C. 140 (1967).

373. *See* Jeffrey N. Pennell and Corey E. Fleming, *Avoiding the Discharge of Obligation Theory*, 12 PROB. & PROP. 49, 53 (1998) (discussing that drafters of trusts should discuss *Upjohn* clauses to avoid litigation).

374. *See* N.C. GEN. STAT. ANN. § 36C-8-814(b)(3) (West 2017).

375. *See generally* Bea Wolper, *Bea's Blog: The Importance of Trusts – Not Boilerplate!*, CONWAY CENTER FOR FAMILY BUSINESS, <http://www.familybusinesscenter.com/importance-trusts-not-boilerplate/> perma.cc/L5KR-GCN9 (discussing the importance of avoiding boilerplate language and personalizing a trust).

376. *Id.*

377. *Id.*

378. Jeffrey N. Pennell and Corey E. Fleming, *Avoiding the Discharge of Obligation Theory*, 12 PROB. & PROP. 49, 53 (1998) (“no distribution from the trust *could* discharge a legal obligation of support”).

individual trustees, should maintain a close relationship with their attorneys and other professional advisors.³⁷⁹

Fortunately for trustees, the legal obligations included in an Upjohn clause are typically very narrow.³⁸⁰ Nonetheless, they raise some interesting issues.³⁸¹ Understanding where to draw the line between what is and what is not permitted can be daunting.³⁸² For example, parents are required to provide food, clothing, and shelter. In any interpretation, this does not mean luxury living.³⁸³ It is the trustee's job to interpret the language, most likely with assistance of counsel.³⁸⁴

Although the distributions prohibited by an Upjohn clause are narrow in scope, there is very little legal precedent for determining exactly what is prohibited and what is not.³⁸⁵ Just as with the questions trustees face regarding HEMS distributions themselves, reported cases are rare, and those that get reported will generally be distinguishable because of underlying differences in relevant facts, so the best course of action is to proceed conservatively and with an abundance of caution.³⁸⁶ For example, many individual trustees who are prohibited from discharging a legal duty of support will want to use their children's or spouses' trust assets to support their family lifestyle, which is often luxurious.³⁸⁷ Families who set up such trusts tend to have expensive tastes, and their lifestyle generally exceeds by far their base line duty of support.³⁸⁸

379. See Scott Grossman, *Understanding the Trustee Standard of Care*, GROSSMAN LAW, <https://www.grossmanlaw.net/blog/understanding-the-trustee-standard-of-care/> (last visited Sept. 30, 2017) perma.cc/H4PK-FVC4 (discussing that to ensure a trustee correctly carries out their duties, they should seek guidance from counsel).

380. See John G. Steinkamp, *Estate and Gift Taxation of Powers of Appointment Limited by Ascertainable Standards*, 79 MARQ. L. REV. 195, 214 (1995) ("No trustee or beneficiary shall have the power to distribute property to himself or his creditors in excess of his needs for health, education, support, or maintenance. Such a provision reduces an otherwise general power to one that fits within the ascertainable standard exception.").

381. See Jeffrey N. Pennell and Corey E. Fleming, *Avoiding the Discharge of Obligation Theory*, 12 PROB. & PROP. 49, 49-50 (1998) (discussing various issues that arise when discharging a support obligation through trust funds).

382. See Kelso, *supra* note 12, at 17.

383. *McHugh v. U.S.*, 142 F. Supp. 927, 929 (Ct. Cl. 1956) ("to provide properly for the essential needs—such as food clothing, shelter and illness expenses").

384. See Scott Grossman, *Understanding the Trustee Standard of Care*, GROSSMAN LAW, <https://www.grossmanlaw.net/blog/understanding-the-trustee-standard-of-care/> (last visited Sept. 30, 2017) (discussing that to ensure a trustee correctly carries out their duties, they should seek guidance from counsel).

385. Steve R. Akers, *Trustee Selection; Retaining Strings Without Getting "Strung-Up" OR "The Fancy Stuff is Fun—But This Is What I Wrestle With Every Day,"* TEXAS BAR COLLEGE, 69, <https://texasbarcollege.com/wp-content/uploads/2015/11/Akers.pdf> perma.cc/XJ9K-AJPD

386. *Id.*

387. See Tim Parker, *How to Set Up a Trust Fund If You're Not Rich*, INVESTOPEDIA (Apr. 11, 2017), <http://www.investopedia.com/articles/pf/12/set-up-a-trust-fund.asp> (discussing how trusts are often time set up by the wealthy to take care of family). perma.cc/T7WK-NS8A

388. *Id.*

In the absence of legal precedent to the contrary, more conservative guidelines are advisable.³⁸⁹ Thus, where an Upjohn clause applies, the following expenditures are best avoided:

- Rent or any similar payments
- Home improvements or decor
- Homeowners or renters insurance
- Basic utilities for the home
- Property taxes
- Clothing
- Health insurance
- Non-elective healthcare
- General dentistry
- Dentures
- Optometry
- Prescription glasses
- Food.³⁹⁰

On the other hand, there are a number of expenses which do not fall within support obligation, so trust assets should be properly expendable on the following:

- Cell phones
- Pets
- TV, cable, or satellite service
- Internet service
- Personal accessories
- Automobiles
- Auto insurance
- Private school education (because public school education is provided free of charge by the state)
- Extracurricular activities
- Trips and vacations
- Elective health care
- Orthodontics.³⁹¹

389. RESTATEMENT (THIRD) OF TRUSTS §50 cmt. d (AM. LAW INST. 2003). *See also*, CYNTHIA D. M. BROWN, DISCRETIONARY DISTRIBUTIONS: A TRUSTEE'S GUIDELINE 4-6 (2013), <http://comtrst.com/wp-content/uploads/2013/05/CDMB-Presentation-re-Discretionary-Distributions-A-Trustees-Guideline.pdf> (gives examples of distributions under a HEMS standard). perma.cc/K48K-DWCX

390. CYNTHIA D. M. BROWN, DISCRETIONARY DISTRIBUTIONS: A TRUSTEE'S GUIDELINE 4-6 (2013), <http://comtrst.com/wp-content/uploads/2013/05/CDMB-Presentation-re-Discretionary-Distributions-A-Trustees-Guideline.pdf>.

391. *Id.*

VI. OTHER CONSIDERATIONS

Many times, trusts must consider external factors when determining trust distributions; fortunately, a discussion of some of these factors proceeds below.³⁹²

A. *Determining a Beneficiary's Needs*

Prior to issuing a distribution, independent trustees must first determine whether the distribution is needed by the beneficiary.³⁹³ Does making this determination necessarily mean that a trustee must be granted access to personal information such as bank accounts and tax records?³⁹⁴ The answer is typically no, although there are exceptions.³⁹⁵ The key to this question is reasonableness.³⁹⁶ According to the Restatement (Third) of Trusts § 50 Comment c(1):

The trustee has a duty to act in a reasonable manner in attempting to ascertain the beneficiary's needs and, under the usual rule of construction, other resources that may be appropriately and reasonably available for purposes relevant to the discretionary power. The trustee generally may rely on the beneficiary's representations and on readily available, minimally intrusive information requested of the beneficiary. This reliance is inappropriate, however, when the trustee has reason to suspect that the information thus supplied is inaccurate or incomplete.³⁹⁷

Therefore, in order to make reasonable decisions regarding distributions, trustees must obtain reliable information from the beneficiary.³⁹⁸ Specifically, "the trustee should solicit information from the beneficiary regarding his or her financial needs, wants, resources, and standard of living."³⁹⁹ Necessary documents will vary depending on the case and situation but may include items such as:

- Income and cash flow information

392. See RESTATEMENT (THIRD) OF TRUSTS §50 cmt. on subsection (1) and (2)(g) (AM. LAW INST. 2003) (factors can range from language to relationships). See also, *First National Bank of Beaumont v. Howard*, 229 S.W.2d 781, 783 (Tex. 1950) (citing *McCreary v. Robinson*, 59 S.W. 536 (Tex. 1900)) (relations and circumstances should be considered when there is ambiguous language).

393. See TEX. PROP. CODE ANN. § 117.007 (West 2006); accord Christian S. Kelso, *Ascertainable Standard*, 43 EST. PLAN. 3, 17 (2015).

394. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. c(2) (AM. LAW INST. 2003); accord Christian S. Kelso, *Ascertainable Standard*, 43 EST. PLAN. 3, 17 (2015).

395. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. c(2) (AM. LAW INST. 2003); accord Christian S. Kelso, *Ascertainable Standard*, 43 EST. PLAN. 3, 17 (2015).

396. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e(1) (AM. LAW INST. 2003).

397. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e(1) (AM. LAW INST. 2003).

398. *Id.*; accord Christian S. Kelso, *Ascertainable Standard*, 43 EST. PLAN. 3, 17 (2015).

399. RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e(2) (AM. LAW INST. 2003).

- Financial statements
- All trust instruments under which the beneficiary has a right to receive or request a distribution
- Income tax returns
- Tuition statements or estimates and agreements relating to the beneficiary's education;
- Receipts or invoices as to any amounts to be reimbursed
- Information regarding the beneficiary's employment status and efforts to obtain employment
- Status of the beneficiary's housing, transportation and any other relevant information regarding support
- Status of the beneficiary's medical insurance and anticipated health care needs
- Debts of the beneficiary and status of any litigation related thereto
- Standing with regard to taxes, particularly where the beneficiary owes back taxes or penalties
- Notification of any significant changes in any beneficiary's housing, education, development or medical needs
- History of assistance previously supplied by the grantor to the beneficiary.⁴⁰⁰

Determining how much information and which information is an art.⁴⁰¹ Trustees who collect too much information may make the beneficiary feel as if their privacy is being invaded which may lead to animosity between the trustee and beneficiary.⁴⁰² Trustees who collect too little information may experience the opposite result.⁴⁰³ Failure to adequately collect information may lead to beneficiaries claiming the trustee breached his or her fiduciary duty.⁴⁰⁴

A trustee should be prepared to maintain open communication with the beneficiary.⁴⁰⁵ Many of the problems which arise out of the trustee-beneficiary relationship could be easily avoided by consistent

400. *See generally id.* (explaining that any information relevant to the beneficiary's estate, employment, and income may be relevant to a trustee).

401. *See generally id.* (contending that what information the trustee should gather is a judgement call based on the relationship between the trustee and beneficiary).

402. *See Kelso, supra* note 12, at 19.

403. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e (AM. LAW INST. 2003) (purporting that trustees may be acting inappropriately if they request too much, or too little, information).

404. *See* TEX. PROP. CODE ANN. § 114.001 (West 2006); *see also*, 42 U.S.C. § 9607(n) (West 2002).

405. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. d (AM. LAW INST. 2003) (explaining that the duties of a trustee include communication with beneficiaries, not simply approving and denying distribution requests).

communication between the two.⁴⁰⁶ For example, a good trustee would take the time to explain to a beneficiary all of their options, along with the tax consequences and benefits of each, prior to making any decisions regarding distributions.⁴⁰⁷

B. Multiple Beneficiaries

Trusts often have multiple beneficiaries, forcing the trustee to balance the various rights of each.⁴⁰⁸ For example, “[a] trust instrument that categorizes certain persons as ‘primary’ or otherwise preferred beneficiaries is easier for the trustee to administer, and so-called ‘pot trusts’ (i.e. trusts with more than one current beneficiary) make the trustee’s work more difficult.”⁴⁰⁹

Often times, however, no such designation is made and the trustee must act impartially as to the beneficiaries.⁴¹⁰ Specifically, Texas Trust Code § 116.005(b) provides as follows:

In exercising the power to adjust under Section 116.005(a) or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate *impartially*, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries (Emphasis added).⁴¹¹

In addition, Texas Trust Code § 117.008 provides:

If a trust has two or more beneficiaries, the trustee shall act *impartially* in investing and managing the trust assets, taking into account any differing interests of the beneficiaries (Emphasis added).⁴¹²

Note, however, that the restatement suggests that trustees may, at times, prioritize beneficiaries.⁴¹³ These inferences are generally in conflict with the

406. See generally *id.* (suggesting that trustees not only have a duty to communicate with their beneficiaries in certain circumstances, but that as a practical matter they should communicate with and inform their beneficiaries).

407. See generally *id.* (describing situations in which the trustee should communicate with, and inform, the beneficiary before taking action).

408. TEX. PROP. CODE ANN. § 117.004(b)–(c) (West 2006); see 72 TEX. JUR. 3D., *Trusts* § 64 (2017).

409. See generally 2 Ronald R. Cresswell, *Texas Practice Guide: Wills, Trusts and Estate Planning* § 5:67–71 (2016) (describing different types of beneficiaries).

410. TEX. PROP. CODE ANN. § 116.006(b) (West 2006).

411. *Id.*

412. *Id.* § 117.008.

413. See generally RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. b (AM. LAW INST. 2003) (suggesting that a trustee may have discretion in prioritizing distributions to beneficiaries).

statutes cited above; so, the statutes should control whenever Texas law is to be applied.⁴¹⁴ However, situations might arise where ambiguity in the trust document make the Restatement relevant, despite Texas law.⁴¹⁵

Yet another problem appears when a beneficiary is responsible for minor children.⁴¹⁶ As discussed above, parents are legally obliged to provide their children with certain basic necessities like food, clothing, housing and medical care.⁴¹⁷ This duty of support, now owed by the beneficiary rather than the trustee, must be considered when making distributions from a trust.⁴¹⁸

Unfortunately, no Texas decision has provided clear guidance as to the amount of weight a trustee should place on the parent's obligation of support.⁴¹⁹ But, the decision in *Deweese v. Crawford* provides some guidance in this area.⁴²⁰ In *Deweese*, the court considered a demand by the parents of minor children on a third party to distribute social security benefits the third party was receiving as "trustee" for the minor children.⁴²¹ The court noted that the parents are principally responsible for the minor children's support and maintenance.⁴²² Therefore, only when it was shown that the parents were unable to meet their obligation to properly support and maintain the children was the trustee required to distribute funds for their benefit.⁴²³ Until the parents established they were unable to provide the requisite support, the court held that the trustee could appropriately choose to accumulate the benefits.⁴²⁴

In reaching its decision, the *Deweese* court noted that issues regarding distributions of social security benefits are governed by federal law.⁴²⁵ Therefore, while it is not certain that the court's decision would have been the same if the case involved a traditional trust instead of a trust created to administer federal benefits, the analysis and results should be the same.⁴²⁶ Furthermore, the decision in *Deweese* is consistent with Texas courts'

414. Compare TEX. PROP. CODE ANN. § 117.008, with RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. b (AM. LAW INST. 2003) (suggesting that a trustee may have discretion in prioritizing distributions to beneficiaries).

415. See generally RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. b (AM. LAW INST. 2003) (offering illustrations of when a trustee may have no choice but to prioritize).

416. TEX. PROP. CODE ANN. § 113.021 (West 2006).

417. See TEX. FAM. CODE ANN. § 151.001 (West 2007).

418. See *Gray v. Bush*, 430 S.W.2d 258 (Tex. Civ. App.—Fort Worth 1968, ref. n.r.e.) (stating in the absence of financial necessity to do so, mother was not authorized to invade funds provided by trust that was separate estate of children and was created for purpose of prescribed support payments).

419. See *Kelso*, *supra* note 12, at 18.

420. *Deweese v. Crawford* 520 S.W.2d 522, 527 (Tex. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

historical hesitancy to interfere with the reasonable exercise of a trustee's discretions.⁴²⁷

Not surprisingly, however, beneficiaries will often seek or use distributions to support their family.⁴²⁸ This begs the question of whether the needs of the beneficiary's family may be accounted for by the trustee when making a distribution.⁴²⁹

In one case, the guardian of the estate of a minor attempted to enforce a claim to an undivided interest in the corpus of three trusts.⁴³⁰ Construing the terms of the trusts, the court held it was clear that the trust did not contemplate an adopted child as a potential contingent beneficiary.⁴³¹ Clearly the *Cutrer* court saw no need to stretch the class of beneficiaries using unrelated "family" definitions, but instead focused on the intent of the settlor and the terms of the trust.⁴³²

According to the Texas Family Code, "[r]egardless of the grantor's intent, however, a trustee of a support or discretionary trust may be required to make distributions for support of a beneficiary's child when the beneficiary has been ordered to make child support payments."⁴³³ The amount the trustee distributes for the purposes is often dependent on the trustee and how much discretion they have been given.⁴³⁴

A trustee subject to a HEMS distribution standard may be required to make distributions for the support of the beneficiary's child.⁴³⁵ Specifically, "[a] trustee of a purely discretionary trust may only be ordered to make child support payments for the benefit of the child from income but not principal."⁴³⁶

A condition precedent to such an obligation, however, is that the beneficiary has been ordered to pay child support.⁴³⁷ In *Kolpack*, the

427. *Id.*

428. See generally RESTATEMENT (THIRD) OF TRUSTS § 13 cmt. d (AM. LAW INST. 2003) (offering examples of how a beneficiary may try and use distributions for family); RESTATEMENT (THIRD) OF TRUSTS § 45 cmt. e (AM. LAW INST. 2003) (defining family and suggesting how a trust should be established to explicitly allow sharing of distributions with family).

429. See generally 72 TEX. JUR. 3D, *Trusts* § 6 (2017) (stating that the interpretation of how trust funds are distributed and used is often a discretionary judgement by the trustee to fulfil the intentions of the settlor).

430. *Cutrer v. Cutrer*, 345 S.W.2d 513 (Tex. 1961).

431. *Id.* at 517–18.

432. *Id.*

433. TEX. FAM. CODE ANN. § 154.005 (West 2017).

434. TEX. FAM. CODE ANN. § 154.005(b).

435. See TEX. FAM. CODE ANN. § 154.005 ("The 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 as provided by this chapter.").

436. See *id.* ("If disbursement of the assets of the trust is discretionary, the court may order child support payments from the income of the trust but not from the principal.").

437. See *Kolpack v. Torres*, 829 S.W.2d 913 (Tex. Civ. App.—Corpus Christi 1992, writ denied); see also *Matter of Marriage of Long*, 542 S.W.2d 712 (Tex. Civ. App.—Texarkana 1976, no writ) (ordering trustees to pay to wife a certain sum per month for benefit of child was error; instead trial court should

appellate court held that a trial court could not obligate a trustee of a discretionary trust to make disbursement of trust income directly to a beneficiary's child until it first imposed that obligation on the parent.⁴³⁸

C. Encouraging or Discouraging Behavior: The "Dead Hand"

Situations occasionally arise in which the grantor attempts to sway the behavior of the beneficiary by encouraging or discouraging certain acts or accomplishments the trustee deems good or bad.⁴³⁹ This concept has come to be known as the "Dead Hand" principle because it is as if a testator or grantor reaches out of the grave to guide the behavior of another person, typically a young descendent who may subscribe to somewhat more modern moral standards.⁴⁴⁰

The Dead Hand principle raises significant issues because the grantor's intent is to be respected.⁴⁴¹ After all, transferred property, whether at death or before, initially belongs to the donor and he or she is generally free to do with it whatever he or she wants.⁴⁴²

And yet, so too must we respect a beneficiary's freedom to choose his or her own path in life.⁴⁴³ Therefore, certain rules of law override grantor intent.⁴⁴⁴ These typically relate to matters such as "spousal rights, creditor's rights, unreasonable restraints on alienation," the promotion of divorce, restrictions involving categories of people such as race or sex, and the promotion of illegal activity.⁴⁴⁵

Indeed, this topic has been long-debated.⁴⁴⁶ In his 1880 book, *The Dead Hand*, Arthur Hobhouse included the following:

A clear; obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know and see. Within the former province we may push his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not

have first ordered trust beneficiary parent to make child support payment or payments, after which it could have then ordered trustees to make disbursements for support of child).

438. Kolpack, 829 S.W.2d at 916.

439. Accord Christian S. Kelso, *Ascertainable Standard*, 43 EST. PLAN. 3, 18 (2015); Joshua Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROPERTY, PROBATE AND TRUST JOURNAL 3, 447-50 (2006).

440. *Id.* at 479-91.

441. See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) (giving effect to the donor's intention to the maximum extent allowed by law).

442. *Id.*

443. *Id.*

444. *Id.*

445. See RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003).

446. See Arthur Hobhouse, *THE DEAD HAND: ADDRESSES ON THE SUBJECT OF ENDOWMENTS AND SETTLEMENTS OF PROPERTY*, 114, 188 (1880).

extend, and the wisest judgment is constantly baffled by the course of events . . . What I consider to be not conjectural, but proved by experience in all human affairs, is, that people are the best judges of their own concerns; or if they are not, that it is better for them, on moral grounds, that they should manage their own concerns for themselves, and that it cannot be wrong continually to claim this liberty for every Generation of mortal men.⁴⁴⁷

In practice, language forbidding distributions to beneficiaries who fail drug or alcohol tests are generally acceptable, as are requirements that beneficiaries make themselves somehow productive in society.⁴⁴⁸ Similarly, conditional payments for things such as higher education are almost always perfectly valid.⁴⁴⁹

Perhaps unsurprisingly, the case law in this particular area—that is, the place where disputes seem most precipitous—seems to center around personal relationships.⁴⁵⁰ For example, language discouraging a beneficiary from marrying someone of a particular race is verboten!⁴⁵¹ Additionally, terms that encourage divorce are typically considered to be against public policy, particularly in conservative states such as Texas.⁴⁵²

Sometimes, however, a seemingly impermissible requirement will nonetheless be permitted if the proper intent can be found.⁴⁵³ As professor Gerry Beyer put it:

As a general rule, conditions that a beneficiary must be divorced to receive a benefit have been found to be contrary to public policy. Courts, recognizing the importance of the family unit in an organized, harmonious society, seek to protect the familial bond from injurious outside influences. In Texas, however, a provision requiring divorce as a precursor to receipt of a benefit was upheld where the testator's dominant motive was to provide support for the beneficiary if the beneficiary became divorced or widowed. When deviating from the norm, it is necessary that proper intent, i.e., the intent to provide support if the beneficiary loses the support of a spouse, be shown and that the provision be drafted carefully to demonstrate this good intent.⁴⁵⁴

A particularly interesting case was that of *Shapira v. Union National Bank*.⁴⁵⁵ In *Shapira*, a testator made a large bequest to his son on the condition that

447. *Id.*

448. See 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 21:6 (4th ed. 2016).

449. See *id.*

450. See *id.*

451. See 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 21.4 (4th ed. 2016).

452. See generally *Southwestern Bell Tel. Co. v. Gravitt*, 551 S.W.2d 421, 427 (Tex. Civ. App.—San Antonio 1976, writ denied) (illustrating the conservative nature of Texas on the public policy of marriage).

453. See Beyer, *supra* note 451, (citing *Hunt v. Carroll*, 157 S.W.2d 429 (Tex. Civ. App.—Beaumont 1941, writ ref'd)).

454. *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 838 (Ct. Com. Pl. Ohio 1974).

455. See *id.* at 826.

the son marry “a Jewish girl whose parents were both Jewish” within seven years of the testator’s death.⁴⁵⁶ Of course, the son failed to meet the condition, so he brought suit to have it invalidated.⁴⁵⁷ The primary issues of the case were whether the condition was (1) against public policy and (2) reasonable to the son.⁴⁵⁸ Perhaps surprisingly, the court in that case upheld the condition, finding that it was neither against public policy nor unreasonable.⁴⁵⁹ The court, noting an overwhelming majority of case law supporting such bequests, was unwilling to change the law.⁴⁶⁰ It noted that the bequest did not prohibit the son’s marriage.⁴⁶¹ That would have been against public policy.⁴⁶² Rather, said the court, the condition sought to promote Jewishness and, much to the son’s dismay, was allowable.⁴⁶³

In practice, one wonders if the rule in *Shapira* would (or should) stand today.⁴⁶⁴ Modern thinking might tend to view the condition of marrying someone within a given religion as being an unreasonable incursion on one’s religious and marital freedom.⁴⁶⁵ Additionally, the case raises practical issues.⁴⁶⁶ For example, how should one administering the estate of Dr. Shapira determine whether or not a person was really Jewish?⁴⁶⁷ What if the bride-to-be was a convert or a member of Jews for Jesus?⁴⁶⁸

Additionally, the Dead Hand principle poses the significant practical problem of particular trusts becoming inflexible over time.⁴⁶⁹ The world changes after we die and the future is unpredictable.⁴⁷⁰ What happens when a trust, which was meant to promote healthy living, conditions distributions on a school-age beneficiary’s consumption of a Dr. Pepper every day at 10am, 2pm, and 4pm, and then the beneficiary’s school, now aware of the mal-effects of soda consumption, bans them on school grounds?⁴⁷¹ Conversely, a trust may properly discourage the unhealthy habit

456. *See id.*

457. *See id.*

458. *See id.*

459. *See id.*

460. *See id.* at 829.

461. *See id.* at 828–29.

462. *See id.* at 829.

463. *See id.* at 832.

464. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) (“Among the rules of law that prohibit or restrict freedom of disposition in certain instances are those relating to . . . impermissible racial or other categorical restrictions.”).

465. *See id.*

466. *See id.*

467. *See Shapira*, 315 N.E.2d at 832 (failing to mention a test for determining whether the Jewish requirement is met).

468. *See id.*

469. *See* 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 21:3 (4th ed. 2016) (“Many forces may act to make the enforcement of a conditional gift problematic.”).

470. *See id.*

471. *See id.*

of smoking cigarettes, but what happens when the beneficiary takes up e-cigarettes?⁴⁷²

The long and short is that Dead Hand provisions cause problems all around.⁴⁷³ For the trustee stuck with conditional distributions, advice and counsel should be sought whenever a distribution is contemplated, particularly when personal matters are at issue.⁴⁷⁴ Similarly, drafters must take extreme care in drafting Dead Hand provisions.⁴⁷⁵ First, they must be carefully crafted so as to be enforceable in any event.⁴⁷⁶ Second, they must straddle a middle ground of flexibility and rigidity because being too far on either side of the spectrum will thwart the grantor's intent.⁴⁷⁷ If the provision is too flexible, it will have no teeth, and if it is too rigid, the beneficiary may be able to work around it.⁴⁷⁸

D. Taxes

Traditionally, taxes have been one of the primary motivating forces behind estate planning as an industry.⁴⁷⁹ According to the Restatement:

It is normally appropriate, and often necessary, for a trustee to take tax considerations into account in determining what discretionary distributions to make An often more troublesome question is whether distributions can properly be made purely for tax reasons to selected beneficiaries under a flexible power An appropriate answer may require careful consideration of the other resources of the various beneficiaries, as well as their income-tax and estate-tax positions, the tax circumstances of the trust, and the underlying purposes of the settlor.⁴⁸⁰

Note that this language comes from 2003, when tax rules were very different than they are now.⁴⁸¹ With the applicable exclusion amount now over \$20 million for a married couple, transfer taxes are far less of a concern, and capital gains tax is increasingly relevant.⁴⁸² Under estate planning techniques from 2012 and before, married couples would seek to gain an estate tax

472. See 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 21:6 (4th ed. 2016).

473. See 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 21:3 (4th ed. 2016) ("Many forces may act to make the enforcement of a conditional gift problematic.").

474. See 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 21:7 (4th ed. 2016) ("an attorney can enhance the likelihood of the court upholding a conditional gift").

475. See *id.*

476. See *id.*

477. See *id.*; see generally RESTATEMENT (THIRD) OF TRUSTS, ch. 1, intro. note (AM. LAW INST. 2003) (stating the importance of flexibility in the development of trusts).

478. See 9 Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 21:3 (4th ed. 2016).

479. See generally RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) (discerning how to achieve a donor's tax objectives through estate planning).

480. RESTATEMENT (THIRD) OF TRUSTS § 50, cmt. e(5) (AM. LAW INST. 2003).

481. See *id.*

482. See *id.*

advantage by implementing a “credit shelter” or “bypass” trust as part of their estate plan.⁴⁸³ Such a trust could be made available for use by a surviving spouse, but because its assets would not be counted as part of his or her gross estate for transfer tax purposes, they would not receive a step up in basis under IRC § 1014.⁴⁸⁴ Thus, taxpayers were encouraged to endure the expense of capital gains tax in order to lessen their exposure to the more expensive estate tax.⁴⁸⁵ Although this made sense in a world where the applicable exclusion amount was \$1 million, or \$2 million, or even \$3.5 million, the current exclusion exceeds the value of all but a small percentage of estates in America.⁴⁸⁶ Therefore, traditional planning may subject a taxpayer to capital gains tax even though no estate tax would apply, and many trusts which were primarily designed to lessen the amount of overall tax borne by their respective families are now likely to cause increased taxation.⁴⁸⁷

The trustee’s fiduciary duty in this respect remains unclear, but it underlies the point that he or she should take into consideration the tax impact that distributions from a particular trust will have.⁴⁸⁸ Whereas this had been relatively easy when estate tax was such an overwhelming concern, the best approach now appears to be more holistic and therefore complicated.⁴⁸⁹

Another example might be when trusts are created for children and grandchildren, some of which are grandfathered or otherwise exempt from generation-skipping taxes and others of which are not.⁴⁹⁰ The trustee in this situation should obviously strive to make distributions to the children’s generation from the non-exempt trust, while preserving the exempt trust for the grandchildren and younger beneficiaries.⁴⁹¹ Likewise, a trustee should generally make distributions to a surviving spouse from a marital trust that will be included in the spouse’s estate before making distributions to the spouse from a bypass or credit shelter trust.⁴⁹²

Thus, once again, trustees are well-advised to seek out professionals who know and understand these rules.⁴⁹³

483. *See id.*

484. *See* I.R.C. § 1014 (2015).

485. *See* Beyer, *supra* note 478.

486. *See id.*

487. *See id.*

488. *See id.*

489. *See id.*

490. *See* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. e (AM. LAW INST. 2003).

491. *See id.*

492. *See id.*

493. *See id.*

VII. BEST PRACTICES; A CONCLUSION OF SORTS

So, where does all of this leave everyone?⁴⁹⁴ Well, just as Dutch, Dillon, Blaine, and the rest could not see the Predator, so too does the ascertainable standard remain elusive to trustees and their advisors.⁴⁹⁵ But the cloaking device should be a little less hazy by now.⁴⁹⁶ At the very least, practitioners should now be able to discern a few general rules to avoid suffering at the hands of “el cazador trofeo de los hombres” (the demon who makes trophies of men).⁴⁹⁷

A. *Be Flexible*

Flexibility is a hallmark of the American trust.⁴⁹⁸ America’s flexible trust is both an advantage and a burden to the beneficiary.⁴⁹⁹ A beneficiary may not understand that a trust has more to offer than a solution by check.⁵⁰⁰ Considering that a trust may be subject to competing interests, the trustee should consider other solutions to satisfy a beneficiary’s distribution request.⁵⁰¹

To illustrate an alternative solution, consider loans.⁵⁰² Instead of making a distribution, a trustee may loan funds to a beneficiary for a particular purpose.⁵⁰³ A loan will benefit a trustee managing a multiple beneficiary trust, or “pot” trust, satisfying the particular beneficiary without giving the beneficiary an inequitable amount of the trust estate.⁵⁰⁴ When a trust will divide at a future date (i.e. death of surviving spouse, when a trustee reaches a certain age), the loan can be considered an offset against the beneficiary’s ultimate share.⁵⁰⁵ The trustee may choose to call in the loan if another beneficiary has a more pressing purpose for the funds.⁵⁰⁶

The trustee must be cautious when loaning money to beneficiaries.⁵⁰⁷ Initially, the trustee should consider whether the trust instrument will allow loans to beneficiaries.⁵⁰⁸ The trustee should then evaluate both the

494. *See id.*

495. *See* PREDATOR (20th Century Fox 1987).

496. *See id.*

497. *Id.*

498. *See* Kelso, *supra* note 12, at 19.

499. *Id.*

500. *Id.*

501. *Id.*

502. *Id.*, *see* TEX. PROP. CODE ANN. § 113.052 (West 2017) (trustee can loan money from the trust to beneficiaries).

503. *See* Kelso, *supra* note 12, at 19.

504. *Id.*

505. *Id.*

506. *Id.*

507. *Id.*

508. *Id.*

beneficiary's ability to repay the loan and any security the beneficiary might have for the loan money.⁵⁰⁹ If a beneficiary does not have the ability to, or the willingness to, repay a loan, the trustee is essentially making a distribution.⁵¹⁰ The trust estate and the trustee must be prepared for the possibility of default.⁵¹¹ Most importantly, the loan must have an evidentiary note with all appropriate security agreements attached.⁵¹²

Interest-free loans can be used to balance the secondary or tertiary beneficiary's wish to draw on the trust while maintaining protection for the superseding interest of the primary beneficiaries.⁵¹³ Trustees must note that forgone interest from an interest-free loan is a distribution from the trust; alternatively, any interest paid will be income subject to taxation.⁵¹⁴

Another solution for the trustee might be purchasing a property for a beneficiary rather than distributing money for rent.⁵¹⁵ This may be a good option for a beneficiary attending college, where the trustee could purchase a home for the beneficiary to live in.⁵¹⁶ The home would both generate rental income and capital gains as the property increases in value.⁵¹⁷

The trustee should evaluate trust assets to assure that a transaction is not uneconomical.⁵¹⁸ If a beneficiary requests money for a new vehicle every few years, the trustee could consider leasing a vehicle rather than purchasing outright.⁵¹⁹ The trustee can arrange cash distributions for the lease payments, subject to an analysis of the trust's terms and economic status.

B. Establish a Process and Follow It

All exercises of discretion hinge on reasonableness on the part of the trustee in moments where reasonableness is an amorphous standard.⁵²⁰ Though, when a trustee does not act at all, the trustee cannot be said to have acted reasonably.⁵²¹ Any procedure for evaluating distributions, used by the trustee, will be better than no procedure at all.⁵²² A reasonable decision-making process will likely make the trustee triumphant, even if their decisions appear to contradict the language of a trust or the clear intent of the

509. *See id.*

510. *See Id.*

511. *Id.*

512. *Id.*

513. *Id.*

514. *See id.*

515. *Id.*

516. *Id.*

517. *Id.*

518. *Id.*

519. *Id.*

520. *See id.*

521. *Id.*

522. *Id. See* Penix v. First National Bank of Paris, 260 S.W.2d 63, 65 (Tex. Civ. App.—Texarkana 1953, writ ref'd), Coffee v. Rice, 408 S.W.2d 269, 273 (Tex. Civ. App.—Houston 1996, writ ref'd n.r.e).

grantor.⁵²³ All information considered when making a distribution decision, including copies of documents and other steps taken in investigation, should be prepared and maintained by the trustee.⁵²⁴

The trustee will abuse his discretion if he fails to exercise judgment, notwithstanding the broad standard of discretion.⁵²⁵ The trustee's discretion must be "reasonably exercised to accomplish the purposes of the trust according to the settlor's intention and his exercise thereof is subject to judicial review and control."⁵²⁶

The trust instrument should be read and re-read with careful attention to distributions.⁵²⁷ The trustee should read before agreeing to serve the trust, before each yearly review, and any time where a distribution request is evaluated.⁵²⁸ While the grants of distribution power are important, the trustee should "review the entire trust instrument for other statements and clauses (i.e. modifiers) which indicate the settlor's intent with regard to distributions and the relative priority or preference to be given to different beneficiaries."⁵²⁹

The trustee should consider recording the following when evaluating the merits of the distribution request:

- Specifics of the beneficiary's request, including amount, purpose and method of the distribution (i.e. direct payment to third party, cash distribution to beneficiary, loan, etc.)
- Date the distribution is needed
- Other distributions to all beneficiaries to date
- Financial situation of all beneficiaries
- Alternatives to the requested distribution
- Anticipated distributions to all beneficiaries
- Description of distribution standard, including any modifiers, and reasons why the distribution would fit within such standard (or not)
- Description of beneficiary's lifestyle or standard of living
- Whether the distribution is requested from income or principal
- Tax impact to the primary beneficiary
- Tax impact to the trust and other beneficiaries
- Other assets and sources of income available to the beneficiary

523. See Kelso, *supra* note 12, at 19.

524. *Id.*, see Austin W. Scott, SCOTT ON TRUSTS § 187.2 (2d ed. 1956).

525. State v. Rubion, 308 S.W.2d 4, 9 (1957). See Austin W. Scott, SCOTT ON TRUSTS § 187, 187.1—.3 (2d ed 1956). See, e.g., Kelly v. Womack, 268 S.W.2d 903, 907 (Tex. 1954); Powell v. Parks, 86 S.W.2d 725 (Tex. 1935); Davis v Davis, 44 S.W.2d 447 (Tex. Civ. App.—Texarkana 1931, no writ).

526. Austin W. Scott, SCOTT ON TRUSTS § 187.1—.3 (2d ed. 1956); Kelly v. Womack, 268 S.W.2d at 907; Powell v. Parks, 86 S.W.2d at 725; Davis v. Davis, 44 S.W.2d at 447.

527. See Kelso, *supra* note 12.

528. *Id.*

529. *Id.*

- Beneficiary's obligations to family and/or obligations of family to the beneficiary
- Any other relevant factors.⁵³⁰

C. Maintain Open Lines of Communication

Once the trustee has made a decision, the trustee should then promptly alert the beneficiary in writing.⁵³¹ The beneficiary should feel free to request a discussion with the trustee about the trustee's decision.⁵³²

Most litigators will agree that the best way to keep a trust case out of court is to keep beneficiaries informed about the trust's administration.⁵³³ To be sure, this is not a foolproof or perfect strategy and privacy remains a definite concern. But the fact remains, rightly or wrongly, beneficiaries have credibility issues with both individual and corporate trustees.⁵³⁴ Sometimes these uses are related to family dynamics where jealousies and other emotions get in the way.⁵³⁵ Beneficiaries may feel that trustees are greedy and self-interested.⁵³⁶ The inescapable nature of the trustee-beneficiary relationship can be uncomfortable for beneficiaries because they feel beholden to their trustees and are uncomfortable asking for distributions.⁵³⁷ Finally, beneficiaries who suffer from such things as substance abuse, diminished capacity, or other mental problems are often paranoid.⁵³⁸ Communicating with beneficiaries, particularly before they can become disgruntled, can go a long way to show good faith on the part of the trustee and therefore alleviate tension inherent to their position.⁵³⁹

An ancillary benefit of a trustee's willingness to communicate openly with beneficiaries is that the trustee is forced to both develop and maintain effective administrative procedures and keep thorough records.⁵⁴⁰ A trustee simply cannot communicate effectively with a beneficiary without having the right information readily available and the beneficiary's information cannot be maintained without effective procedures.⁵⁴¹

In our Predator analogy, a trustee's willingness to deliver information to a beneficiary is like a special ops team member's willingness to put down

530. *Id.*

531. *Id.* at 23.

532. *Id.*

533. *Advice to Trustees: Get Along with Beneficiaries*, Nolo, <https://www.nolo.com/legal-encyclopedia/advice-trustees-get-along-with-32451.html>. (last visited Oct. 16, 2017). perma.cc/6OJ3-WQH9.

534. *Id.*

535. *Id.*

536. *Id.*

537. *Id.*

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.*

his weapon.⁵⁴² The Predator does not hunt unarmed humans because it is not sporting.⁵⁴³ But, psychologically speaking, those who figuratively draw their guns too quickly tend to regret it.⁵⁴⁴

Of course, not every beneficiary can be pacified, and when a dispute is unavoidable information becomes the weapon of choice.⁵⁴⁵ Good processes and thorough recordkeeping will often persuade the court to be accommodating to the trustee.⁵⁴⁶ A beneficiary will have no easier time proving their case over a trustee.⁵⁴⁷ By keeping good records the trustee will be able to justify the decisions made on distribution from the trust.⁵⁴⁸ Even if a court disagrees with the trustee's decision, careful records will curb the court's ability to call the decision unreasonable.⁵⁴⁹

Now, let's "get to the choppa!"⁵⁵⁰

542. PREDATOR (20th Century Fox 1987).

543. *See id.*

544. *See id.*

545. *See Kelso, supra* note 12.

546. *Id.*

547. *Id.*

548. *Id.*

549. PREDATOR (20th Century Fox 1987).

550. *Id.*

APPENDIX A

The following is a list, derived from various sources of some expenditures which might be properly payable under a HEMS standard. It is not intended to be exhaustive, nor should it be read to imply that every item will always be appropriate in every case.

<u>Health</u>	<u>Education</u>	<u>Maintenance & Support</u>
Emergency & regular medical treatment	Grammar, secondary and high school tuition	Mortgage payments & down payment on a home
Routine healthcare examinations	Medical school, law school, or other professional school	Continuation of accustomed patterns of vacation
Health, Dental or Vision Insurance	College in Europe as part of a study abroad program	Property/casualty/liability insurance for home, auto, etc . . .
Unconventional medical treatment	Costs for long-term studies or “career students”	Support for beneficiary engaged in charitable endeavors
Extended vacations to relieve tension and stress	Support of beneficiary while in school	Continuation of family gifting
Rehab for physical problem or addiction	Support of beneficiary between semesters	Life insurance
Health-related home renovations	Graduate & post graduate school tuition and expenses	Charitable gifting
Specialized cleaning services to remove allergens	Extracurricular activity fees, expenses & paraphernalia	Rent payments
Cosmetic surgery	Tutoring; speech or reading therapy	Automobiles
Home health care	Graduation costs, proms & class rings	Property taxes
Gym, Spa or Golf memberships	Books, computers, supplies, etc.	Home repair & maintenance
Dental & orthodontics	Study abroad	Support of family members
Golf club memberships	Technical school training	Assistance starting a business
Psychiatric treatment	Career training	Legal fees
Eye care	Day care	
Handicap transport	Uniforms & school clothes	
Lasik surgery	Room & board	

APPENDIX B

The following are examples of language which may be useful for drafters in the situations indicated, whether as form language or for perspective. No comment is intended with regard to the legal merit, practical effect, or overall desirability of any specific example.

a. Encouraging employment:

(a) It is the Grantor's overriding intent in establishing the trusts hereunder to benefit his descendants, supplement their earnings, and enhance their standard of living, but only if and to the extent that such descendants remain productive members of society and continue to be gainfully employed on a full-time basis. Full-time employment will require, 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. The trust distributions provided for hereafter in subsection (b) 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; provided that, the Trustee may rely upon the determination of the Trust Committee established under subsection x.x in a situation where the medical condition or employment status of a Beneficiary is not entirely clear. Once the Beneficiary regains full-time employment, trust distributions under subsection x.x shall not resume until the Beneficiary has maintained such employment for twelve (12) consecutive months. In the event that a child of the Grantor is a single parent as the result of divorce, death of a spouse, 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 the distributions authorized below in subsection (b).

(b) With regard to each trust administered under this Article with respect to which the Beneficiary is under the age of fifty (50) years, the Trustee may distribute to each Beneficiary, if the Trustee, in the Trustee's sole discretion, determines it to be in the Beneficiary's best interests, any amount not exceeding the lesser of (i) twice the annual earned income of the Beneficiary, or the Beneficiary's spouse in the event that the 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. Any distributions under this subsection shall be made in quarterly installments at the end of each calendar quarter. The annuity amount as to each trust is an amount equal to five percent (5%) of the average of the net fair market values of such trust as of the end of the prior two calendar years (except as provided in Subsection (c) below for the first four years of the trust).

b. Posthumous continuation of support and encouragement:

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.

c. Describing factors that may be important and encouraging productive behavior:

In an effort to provide the Trustee with guidance in making distributions under the standards provided in subsection X above, the Trustee may consider such circumstances and factors as the Trustee believes are relevant, including but not limited to the following: (a) the other income and assets known to the Trustee to be available to the distributee, and the advisability of supplementing such income or assets, (b) the tax consequences of any such distribution, (c) the character and habits of the distributee, including: the diligence, progress, and aptitude of the distributee in acquiring an education and advancing his or her career goals, the ability of the distributee to handle money usefully and prudently, and to assume the responsibilities of adult life and self-support, (d) the extent to which any such distribution could contribute to the development of negative attitudes in the distributee, such as entitlement, complacency, or narcissism, (e) external factors and circumstances which may threaten the distributee's financial security or progress toward financial maturity and independence,

and (f) the distributee'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.

d. Discouraging bad behavior:

My Trustee shall NOT distribute any trust 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 determination shall be binding on all parties. For purposes of this Will, "risky or irresponsible activity" shall include, but shall not be limited to, drunken driving, illicit drug use, unprotected sex, and any illegal actions.

e. Describing education:

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

f. Encouraging employment and payment of insurance

(a) If the Grantor's son is employed on a full-time basis (35 or more hours per week), the Trustee shall distribute to the Grantor's son monthly (for each month that the Grantor's son is employed on a full-time basis) an amount equal to ten percent (10%) of the annual compensation of the Grantor's son from the calendar year immediately preceding the year in which such distributions are to be made (as determined by reference to the Form W-2, Form 1099-Misc or similar form received by the Grantor's son 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 the Grantor's son is not working at all (as an employee or independent contractor), the Trustee shall distribute to the Grantor's son 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 the Grantor's son 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 the Grantor's son is below the age of sixty-five (65) years, the Trustee shall pay on behalf of the Grantor's son the premiums on a disability insurance policy with the Grantor's son named as the

insured and beneficiary, and with the maximum benefit level available elected;

(d) The Trustee shall pay on behalf of the Grantor's son the premiums on an insurance policy covering the personal items (including expensive computers and electronics) of the Grantor's son (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, the Grantor's son must provide annually to the Trustee a complete inventory of his possessions, supported by pictures; provided, further, that if the Grantor's son fails to provide the required inventory and supporting pictures, the Trustee shall not purchase such insurance; (e) If the Grantor's son owns his own home, the Trustee shall pay on behalf of the Grantor's son the premiums on a homeowner's insurance policy with terms and coverage standard at that time;

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

(f) The Trustee shall pay on behalf of the Grantor's son any medical expenses incurred by the Grantor's son (only after attaining the age of sixty years) that are not covered by his health insurance policy, Medicare, Medicaid, social security, or any other similar benefit plans;

(g) If the Grantor's son has biological or adopted children, then the Trustee shall purchase and pay the premiums on a term life policy insuring the life of the Grantor's son 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;

(h) The Trustee shall pay on behalf of or reimburse the Grantor's son for educational expenses only under the following guidelines: If the expenses relate to the current occupation of the Grantor's son, then the Trustee shall cover such expenses only if the employer of the Grantor's son refuses to cover such expenses; or if the expenses are unrelated to the current occupation of the Grantor's son, then the Trustee shall reimburse the Grantor's son for such expenses

only after the Grantor's son provides proof of a passing grade, graduation, or a certificate of passing.

g. Discouraging drug use:

If my Trustee reasonably believes that a beneficiary is abusing drugs or alcohol and that the resources of the Trust, if distributed, would facilitate continued abuse, my Trustee may establish a discretionary trust with all or any portion of the share which would otherwise be distributed to a 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, the Trustee may select a trustee, co-trustee, and/or successor trustees, and shall include all provisions determined to be reasonable and necessary by the Trustee after consultation with a qualified attorney. It is my intent that any discretionary trust established pursuant to this provision be drafted and managed so as to (1) prevent the resources in the Trust from being used to purchase drugs or alcohol in situations where the purchase of the same would work a detriment to the beneficiary, as perceived by the Trustee, (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 his/her drug and/or alcohol use and/or dependency. Trustee may demand, and the appointed Trustees of the discretionary trust established in accordance with this paragraph may demand, that a beneficiary participate in testing to determine if drug and alcohol use is occurring, demand a beneficiary to participate in drug or alcohol counseling or rehabilitation, and charge the beneficiary's share for all costs incurred in such testing and treatment. The remainder beneficiaries of any discretionary trust established pursuant to this provision shall be the descendants of the lifetime beneficiary, by right of representation, or if none, the estate of said beneficiary.

h. Encouraging drug rehab:

John Doe Trust. The gift to the trustee of the John Doe Trust (the "John Doe Trust") shall constitute the initial trust estate of a trust for the benefit of John, subject to the following conditions:

Distributions for John. No distributions shall be made to John, or on behalf of John, other than payment for the treatment described below, unless and until (i) John has attended "Survivors' Week" at the Happy Hills Rehabilitation Clinic, located at 123 ABC St., Shangri-La, or its successor institution or organization; provided however, if either Survivors' Week or Happy Hills is not then in

existence, the trustee, in the trustee's discretion, may require John to attend a similar program from a similar institution as a condition precedent to the termination of this trust; and (ii) John 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, family of origin issues, 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 Happy Hills (or its successor institution or organization or such similar institution, as the case may be, if a successor or similar institution is providing the Treatment). No distributions shall be made directly to John during the term of this trust.

Termination. The trust shall terminate upon the first to occur of (i) John's completion of the Treatment, (ii) John's failure to complete the Treatment within six (6) years from the date of my death, or (iii) John's death. Upon termination as a result of John's completing the Treatment, the trust estate shall be distributed to John, subject to the Contingent Trust provisions. Upon termination as a result of John's failure to complete the Treatment within six (6) years of my date of death, or as a result of John's death prior to the date which is six (6) years after my date of death, the trust estate shall be distributed as follows:

If any of my grandchildren or the descendants of any of my grandchildren are then living, to the trustee of the Descendants Trusts created herein. If none of my grandchildren or the descendants of any of my grandchildren 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 benefit of John if John agrees to follow the Treatment described above. The trust shall be managed accordingly.

i. Factors to consider; Encouraging productivity:

In making any discretionary distributions to a descendant of mine from any trust under this Article, the trustee of such trust shall have discretion to consider all relevant facts and circumstances, including the nature and size of the trust estate, tax aspects, the maturity of such descendant, and the particular situation of such descendant in his or her personal life. In exercising this discretion, the trustee shall consider my desire that such descendants seek to develop his or her talents and abilities through personal effort and become financially responsible and a credit to our family and the community. The trust estate shall be used only to help support a

constructive life of good character and responsibility on the part of each beneficiary of such trust. My trustee shall make distributions in such a manner as to encourage each descendant to reach his or her potential and to lead a productive and self-sufficient life.

j. Encouraging productivity:

It is the intention of the Settlor, that no such payment of income to such child shall be made if, in the judgment of the Independent 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 hereunder has become successful by such beneficiary's own endeavors, shall not cause the Independent Trustee to withhold any such payment from that beneficiary.