

TRUST DISTRIBUTIONS IN TEXAS PART I

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I. INTRODUCTION

“Show me the money!” was the tag line from the Jerry McGuire movie. But trustees often hear this on a daily basis from beneficiaries who have wants and needs. True, trustees have to follow the trust document in making distributions, but trust documents often give trustees great discretion in making distributions. Trustees must decide how much to give, how to give it, and when to give it.

Conversely, a beneficiary may have a legitimate need or want that should be paid by a trustee; yet, the trustee refuses to make the distribution. Perhaps the trustee makes the decision to ignore the request or outright deny the request based on an improper motive, like hostility toward the beneficiary. What recourse does the beneficiary have when the trustee abuses its discretion in refusing to make a proper distribution?

Also, a trustee may make generous distributions to one set of beneficiaries and remainder or secondary beneficiaries may have a complaint regarding those distributions. This is the first part of a two part series. This paper will address some of the more common issues that beneficiaries and trustees face regarding the standards for making distributions from trusts. The second part of the series will address other issues, including litigation and dispute resolution, regarding distribution issues.

II. TRUSTEES’ FIDUCIARY DUTIES

Before one can understand the rights and duties associated with making trust distributions, one has to understand the broad scope of the fiduciary relationship. A trustee is held to a high fiduciary standard. *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009). The fiduciary relationship exists between the trustee and the trust’s

beneficiaries, and the trustee must not breach or violate this relationship. *Slay v. Burnett Trust*, 143 Tex. 621, 187 S.W.2d 377, 387-88 (Tex. 1945); RESTATEMENT (SECOND) OF TRUSTS § 170 CMT. A (1959); G. BOGERT, TRUSTS AND TRUSTEES § 543, at 217-18 (2d ed. rev. 1993). The fiduciary relationship comes with many high standards, including loyalty and utmost good faith. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512 (Tex. 1942). At all times, a fiduciary must act with integrity of the strictest kind. *Hartford Cas. Ins. v. Walker Cty. Agency, Inc.*, 808 S.W.2d 681, 687-88 (Tex. App.—Corpus Christi 1991, no writ). The Texas Supreme Court has described the high standards that a trustee owes the beneficiaries of a trust: “A trust is not a legal entity; rather it is a ‘fiduciary relationship with respect to property.’ High fiduciary standards are imposed upon trustees, who must handle trust property solely for the beneficiaries’ benefit. A fiduciary ‘occupies a position of peculiar confidence towards another.’” *Ditta*, at 191. A trustee owes a trust beneficiary an unwavering duty of good faith, loyalty, and fidelity over the trust’s affairs and its corpus. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied) (citing *Ames v. Ames*, 757 S.W.2d 468, 476 (Tex. App.—Beaumont 1988), modified, 776 S.W.2d 154 (Tex. 1989)). To uphold its duty of loyalty, a trustee must meet a sole-interest standard and handle trust property solely for the benefit of the beneficiaries. Tex. Prop. Code §117.007; *InterFirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 898 (Tex. App.—Texarkana 1987, no writ). A trustee has a duty to refrain from self-dealing with trust assets. Tex. Prop. Code Ann. § 113.053(a).

A trustee has a duty to act prudently in managing and investing trust assets. A trustee has the duty to make assets productive while at the same time preserving

the assets. *Hershbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied). It has a duty to properly manage, supervise, and safeguard trust assets. *Hoening v. Texas Commerce Bank*, 939 S.W.2d 656, 661 (Tex. App.—San Antonio 1996, no writ). There is a duty to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. Tex. Prop. Code Ann. § 117.004.

A trustee also has a duty of full disclosure of all material facts known to it that might affect the beneficiaries' rights. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984). A trustee also has a duty of candor. *Welder v. Green*, 985 S.W.2d 170, 175 (Tex. App.—Corpus Christi 1998, pet. denied). Regardless of the circumstances, the law provides that beneficiaries are entitled to rely on a trustee to fully disclose all relevant information. See generally *Johnson v. Peckham*, 132 Tex. 148, 120 S.W.2d 786, 788 (1938). In fact, a trustee has a duty to account to the beneficiaries for all trust transactions, including transactions, profits, and mistakes. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); see also *Montgomery*, 669 S.W.2d at 313. A trustee's fiduciary duty even includes the disclosure of any matters that could possibly influence the fiduciary to act in a manner prejudicial to the principal. *Western Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360, 374 (Tex. App.—Fort Worth 2007, no pet.). The duty to disclose reflects the information a trustee is duty-bound to maintain as he or she is required to keep records of trust property and his or her actions. *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

III. THE TRUSTEE SHOULD LOOK TO THE TRUST DOCUMENT,

When a trustee or a beneficiary are faced with a question concerning a right or duty involving a trust distribution, they should focus on the following authority in this order: (1) the trust document, (2) the Texas Trust Code, (3) Texas common law, and (4) treatises/commentators.

The first place to look regarding a trustee's rights and duties is the trust document itself. Tex. Prop. Code §§ 113.001, 113.051. See *Myrick v. Moody Nat'l Bank*, 336 S.W.3d 795, 801 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (terms of trust instrument may limit or expand trustee powers supplied by the Trust Code). "The income and principal of a trust generally should be distributed in accordance with the settlor's intent, as manifested in the trust instrument." 72 TEX JUR 3RD, TRUSTS § 118 (citing *Kimble v. Baker*, 285 S.W.2d 425 (Tex. Civ. App.—Eastland 1955, no pet.); *Smith v. Kountze*, 119 S.W.2d 721 (Tex. Civ. App.—Austin 1938), *judgment rev'd on other grounds*, 135 Tex. 543, 144 S.W.2d 261 (Comm'n App. 1940)).

Generally, a trust document's terms govern, and a trustee should follow them. Tex. Prop. Code Ann §§ 111.0035(b), 113.001; RESTATEMENT (THIRD) OF TRUSTS § 76(1) ("The trustee has a duty to administer the trust ... in accordance with the terms of the trust"); RESTATEMENT (SECOND) OF TRUSTS § 164(a) (1959). The trustee shall administer the trust in good faith according to its terms and the Texas Trust Code. Tex. Prop. Code Ann. § 113.051; *Tolar v. Tolar*, No. 12-14-00228-CV, 2015 Tex. App. LEXIS 5119 (Tex. App.—Tyler May 20, 2015, no pet.). "The powers conferred upon the trustee in the trust instrument must be strictly followed." *Id.* "The nature and extent of a trustee's duties and powers are

primarily determined by the terms of the trust.” RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. B; *Stewart v. Selder*, 473 S.W.2d 3 (Tex. 1971); *Beaty v. Bales*, 677 S.W.2d 750, 754 (Tex. App.—San Antonio 1984, no writ). If the language of the trust instrument unambiguously expresses the intent of the settlor, the instrument itself confers the trustee’s powers and neither the trustee nor the courts may alter those powers. *Jewett v. Capital National Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref’d n.r.e.); *Corpus Christi National Bank v. Gerdes*, 551 S.W.2d 521, 523 (Tex. Civ. App.—Corpus Christi 1977, writ ref’d n.r.e.). The terms of a trust may not require or allow the trustee to commit a criminal or tortious act or an act that is contrary to public policy. Tex. Prop. Code §112.031.

When construing a trust, a party should focus on the settlor’s intent. *Matter of Estate of Kuyamjian*, No. 03-18-00257-CV, 2018 Tex. App. LEXIS 6182, 2018 WL 3749834, at *2 (Tex. App.—Austin Aug. 8, 2018, pet. filed) (citing *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 639 (Tex. 2000)). A party should “ascertain a trust grantor’s intent from the language contained in the trust’s four corners and focus on the meaning of the words actually used, not what the grantor intended to write.” *Kuyamjian*, 2018 Tex. App. LEXIS 6182, 2018 WL 3749834, at *3 (citing *Soeffje v. Jones*, 270 S.W.3d 617, 625 (Tex. App.—San Antonio 2008, no pet.)). “In this light, courts must not redraft [trust documents] to vary or add provisions ‘under the guise of construction of the language of the [trust documents]’ to reach a presumed intent.” *Id.* “We must interpret a trust to give meaning to all its provisions and to enact the intent of the grantor.” *Id.* In interpreting a trust document, a court will “(1) [c]onstrue the agreement as a whole; (2) give each word and phrase its plain, grammatical meaning

unless it definitely appears that such meaning would defeat the parties’ intent; (3) construe the agreement, if possible, so as to give each provision meaning and purpose so that no provision is rendered meaningless or moot; (4) [ensure that] express terms are favored over implied terms or subsequent conduct; and (5) [note that] surrounding circumstances may be considered—not to determine a party’s subjective intent—but to determine the appropriate meaning to ascribe to the language chosen by the parties.” *McCarty v. Montgomery*, 290 S.W.3d 525, 532 (Tex. App.—Eastland 2009, pet. denied)). Also, a party “must be particularly wary of isolating individual words, phrases, or clauses and reading them out of the context of the document as a whole.” *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995)).

One commentator advises those administering trusts to regularly read the trust document, maintain documents in the trust file that assist in construing the trust document, and provides the following advice on construing a trust:

It is important that trustees read the trust instrument carefully, even if they are sure that it is unambiguous and can perfectly recollect what it says. All trust administrators should make it a practice to review the relevant distribution provisions in the trust document each time they consider making a distribution, and at least once a year, they should review the entire trust instrument—a good time is during the annual review. Not only should trust administrators review the terms of the trust

instrument, but they should also review any extrinsic evidence in the file that clarifies the settlor's intent or that further explains any circumstances that might be relevant.

Sometimes, the trust administrator must gather basic information. For example, a file might contain a memo from a previous trust administrator, letters from the settlor, or written trust modifications; this information could be useful in interpreting the document. Additionally, it is often appropriate to understand the settlor's circumstances when the trust was executed and in testamentary trusts, the circumstances existing at the time of the settlor's death. The trust administrator should look to the trust document to see if the settlor provided express instructions or included a direct statement of the purpose of the trust. The trust administrator may be able to infer the purpose of the trust from its structure, and there may be an expression of preference between current and future beneficiaries. Some basic rules of construction have evolved to help in the interpretation of discretionary distribution clauses, or for that matter, any part of a trust agreement:

(1) Every trust is different. Trust administrators must try

to determine the settlor's goals from the content of the trust instrument and must try to implement these goals. Trust administrators must be sure to carefully read the entire instrument.

(2) Trust administrators must draw the settlor's intent from the instrument. They should clear their mind of what they think the document says or what they want it to say, and read what it actually says.

(3) Trust administrators cannot "correct" the work of a testator, a settlor, or counsel. "The very purpose of requiring a will to be in writing is to enable the testator to place it beyond the power of others, . . . to change or add to [it,] or to show that he intended something not set out in . . . his will."

(4) This is not math—trust administrators cannot add to or subtract from anything that appears in the instrument. If the instrument is unambiguous, courts do not admit other evidence for the purpose of interpreting the trust. If, however, the document is truly unclear, courts may consider extrinsic evidence to determine what a settlor or a testator intended by using or including a particular word or phrase.

(5) There is no reason to be afraid of the dictionary—use it.

(6) An expression of specific intent controls over an expression of general intent; if two expressions of specific intent are in conflict, trust administrators should choose the expression that least conflicts with the general intent.

(7) The term “may” means maybe--use discretion. The term “shall” means mandatory--just do it.

(8) When interpreting a document, certain legal presumptions may be useful.

(9) Be certain to have knowledge of what rules may apply that do not appear in the document...

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 186 (2014).

Another important point of trust construction deals with language that is precatory versus mandatory. Precatory language means that that trustee expresses his or her desire that the trustee consider some factor but does not require the trustee to do so. As one court stated:

A court's analysis regarding whether particular words are precatory or mandatory turns on "the testator's expressed intent as evidenced by the context of the will and surrounding circumstances,

'and words which are precatory in their ordinary meaning will nevertheless be construed as mandatory when it is evident that such was the testator's intent.'" *In re Estate of Abshire*, No. 02-10-00060-CV, 2011 Tex. App. LEXIS 6676, 2011 WL 3671998, at *4 (Tex. App.—Fort Worth, pet. denied) (mem. op.) (quoting *Wattenburger v. Morris*, 436 S.W.2d 234, 239 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.)). Generally, courts construe words akin to "want," "wish," "request," and "desire" as precatory in their ordinary sense and not as imposing a legal obligation. *Id.*; see *Bergin v. Bergin*, 159 Tex. 83, 315 S.W.2d 943, 947 (Tex. 1958) (recognizing that "[i]t is my desire" is usually precatory language but can be changed to mandatory by the will's context); *Thomasson v. Kirk*, 859 S.W.2d 493, 495 (Tex. App.—Houston [14th Dist.] 1993, writ denied). These same words, however, become mandatory "when used in a will where it appears from the context or from the entire document that they are the expression of the testator's intention in disposing of his property.'" *Estate of Abshire*, 2011 Tex. App. LEXIS 6676, 2011 WL 3671998, at *4 (quoting *First United Methodist Church of Marlin v. Allen*, 557 S.W.2d 175, 177 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.)).

In re Estate of Rodriguez, No. 04-17-00005-CV, 2018 Tex. App. LEXIS 254, at *7(Tex. App.—San Antonio Jan. 10, 2018, no pet.) (“[W]e hold the reference to Frank’s “desire” to keep the Ranch intact is precatory language which did not impose any legal obligation preventing Frank from entering into the to sell the Ranch to Christians.”). See also *In re Estate of Wharton*, No. 08-20-00002-CV, 2020 Tex. App. LEXIS 6956 (Tex. App.—El Paso August 27, 2020, no pet.) (“A careful review of the complete will leads us to conclude that despite the use of precatory terminology, it was the testator’s intention—and his instruction to his executor—that the stock be offered for sale to his business partner, on terms that would effectuate his larger plan for the distribution of the estate to his heirs. Considered in isolation, Section 1.01 does describe a sale of shares to McKay in terms of preference rather than command. But a comprehensive review of the entire will tells another story.”); *Archer v. Archer*, No. 05-13-01341-CV, 2014 Tex. App. LEXIS 6551 (Tex. App.—Dallas June 17, 2014, no pet.) (the word request in a trust meant that the parties were not required to arbitrate disputes); *Bergin v. Bergin*, 159 Tex. 83, 89, 315 S.W.2d 943, 947 (1958) (“It is true that such words as ‘wanted’, ‘wish’, and ‘desire’ in their ordinary and primary meaning are precatory. But, they are often construed as mandatory when used in an instrument admittedly a will or when it appears from the context or from the entire document that they are the expression of the testator’s intention in making disposition of his property.”).

There are certain terms in a trust that cannot contravene the Texas Trust Code, which is contained in the Texas Property Code. Tex. Prop. Code § 111.001 et. seq. The Texas Trust Code provides that a trust’s terms may not control in certain circumstances, including: (1) requiring a trustee to do an

illegal or tortious act or an act that is contrary to public policy; (2) the application of exculpation provisions; (3) limit statute of limitations periods; (4) limit the duty to respond to a demand for an accounting in certain circumstances or to act in good faith; (5) limit a court to take certain judicial action regarding a trust, including removing a trustee, modifying a trust, order disgorgement of trustee’s compensation for breach of trust, award attorney’s fees, or exercise jurisdiction under Section 115.001 (which is described below); or (6) the application of forfeiture clauses. Tex. Prop. Code Ann § 111.0035(b). *Id.*

Otherwise, the Texas Trust Code provides default rules that a trustee and beneficiary should follow absent contradiction by the trust document. *Id.* As one commentator provides:

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. This makes sense when one considers the practical implications of trust drafting. 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. 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.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying Hems Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L.J. 1 (2017).

A trustee and beneficiary should also consult with common law authorities. The Texas Trust Code specifically states that “[i]n the absence of any contrary terms in the trust instrument or contrary provisions of [the Texas Trust Code], in administering the trust, the trustee shall perform all of the duties imposed on trustees by the common law.” Tex. Prop. Code § 113.051. There are several different types of common law authority. There may be controlling authority for the court that the party is litigating in front of, the court of appeals for that court, or the Texas Supreme Court. A court must follow controlling authority. There may be persuasive authority from other Texas intermediate courts of appeals or from other jurisdictions. Courts do not have to follow persuasive authority, but that authority is just that, persuasive.

Finally, a trustee or beneficiary should consult secondary sources, such as commentators, treatises, law review articles, etc. The author generally finds that the Restatements of Trusts are very authoritative and Texas courts generally rely upon it for guidance (where it does not conflict with the Texas Trust Code or common law). *See, e.g., Westerfeld v. Huckaby*, 474 S.W.2d 189 (Tex.1971); *Messer v. Johnson*, 422 S.W.2d 908 (Tex. 1968); *Mason v. Mason*, 366 S.W.2d 552, 554–55 (Tex. 1963); *Lee v. Rogers Agency*, 517 S.W.3d 137, 160–61 (Tex. App.—Texarkana 2016, pet. denied); *Woodham v. Wallace*, No. 05-11-01121-CV, 2013 Tex. App. LEXIS 50 (Tex. App.—

Dallas January 2, 2013, no pet.); *Wolfe v. Devon Energy Prod. Co. LP*, 382 S.W.3d 434, 446 (Tex. App.—Waco 2012, pet. denied); *Longoria v. Lasater*, 292 S.W.3d 156, 168 (Tex. App.—San Antonio 2009, pet. denied). The Restatement is a treatise created by contributions from judges, scholars, and trust practitioners. RESTATEMENT (THIRD) OF TRUSTS (Am. Law Inst. 2003). It is an amalgamation of court decisions and statutes across the country that intends to provide the best principles of trust law. Although the Restatement can be a useful guide, it is critical to emphasize that the Restatement is not primary authority for any particular legal argument or position. In other words, Texas courts are not bound to follow the principles of the Restatements. However, because Texas case law is somewhat limited, the Restatement provides some insight with respect to how a Texas court might approach the meaning of a specific trust provision or the rights and duties of trustees and beneficiaries. The author also relies on the Uniform Trust Code and other treatises, many of which are cited in this paper.

IV. TRUST DISTRIBUTION STANDARDS IN GENERAL

One purpose of a trust is for the trustee to make distributions to beneficiaries. The trustee must generally follow the standards for making these distributions as set forth in the trust document. There are three general types of standards for distributions: mandatory or nondiscretionary distributions, complete and unfettered discretionary distributions, or limited discretionary distributions (unascertainable standards and ascertainable standards). The Author will discuss these three general types of distribution standards below.

V. TRUST PROVISIONS
REQUIRING DISTRIBUTIONS

A. Trustees Must Make Mandatory
Distributions

Some trusts provide that a trustee shall distribute income or principal to beneficiaries. The Texas Trust Code Section 113.051 requires that a trustee administer a trust according to its terms and Texas law. Tex. Prop. Code § 113.051. When a settlor chooses to use the word “shall” in a trust instrument, it imposes a mandatory obligation on the trustee. *Moser v. Bank of Texas (In re Chambers)*, 384 B.R. 460, 2008 Bankr. LEXIS 1492 (Bankr. E.D. Tex. 2008). Accordingly, when the trust document states that a trustee shall make a distribution, the trustee generally breaches its duty by failing to comply with the trust’s terms.

Restatement (3rd) of Trusts Section 76 states: “In administering the trust, the trustee has a duty to comply with the terms of the trust and applicable law providing for the distribution or application of trust income and principal to or for the beneficiaries or for the charitable or other purposes of the trust throughout the period of its ongoing administration, and also at the time of its termination.” RESTATEMENT (3RD) OF TRUSTS, § 76 “The trustee has a duty not to misdeliver trust funds or other trust property, and is ordinarily liable for failure to deliver the property to its proper distributee—that is, to the designated beneficiary or his or her assignee.” *Id.*

B. Mandatory Income Distributions

A settlor often directs that the income from a trust be distributed to a beneficiary. This is common for marital trusts, such as Qualified Terminable Interest Property (QTIP) trusts. *See* I.R. C. 2056(b)(7). It is also common for

charitable remainder unitrusts. Restatement (3rd) of Trusts Section 49 states:

Where a trustee is directed to pay the trust’s income to a beneficiary for life or a designated period, in the absence of other direction the trustee is under a duty to pay the beneficiary the net income of the trust property at reasonable intervals, normally monthly or quarterly, but at least annually, whether or not the beneficiary needs the income.... Despite a duty to distribute all income periodically, the trustee can properly withhold a reasonable amount of income receipts to meet present or anticipated expenses that are properly chargeable against income, or temporarily for the trustee’s and beneficiaries’ protection where there is reasonable doubt as to the amount of income properly payable to the income beneficiary.

RESTATEMENT (3RD) OF TRUSTS, § 49. Likewise, the Restatement (2nd) of Trusts Section 182 states:

Where a trust is created to pay the income to a beneficiary for a designated period, the trustee is under a duty to the beneficiary to pay to him at reasonable intervals the net income of the trust property.” “By the terms of the trust the trustee may be authorized or directed to accumulate the whole or a

part of the income. If such a provision is not invalid, the trustee is not under a duty to pay to the beneficiary during the period in which he is authorized or directed to accumulate it such income as he is authorized to accumulate.

RESTATEMENT (2ND) OF TRUSTS, § 182.

Regarding a trustee's common law duty to pay income to a beneficiary, Scott, *The Law of Trusts*, provides in part:

Where the income from the trust estate is payable to a beneficiary for life or for a designated period, the trustee is under a duty to pay him the net income, after deducting from the gross income the expenses properly incurred in the administration of the trust. He need not however pay the net income as soon as it is received but can properly pay it at reasonable intervals.

Where the terms of the trust do not specify the times at which such payments are to be made, it is ordinarily reasonable to make payments semiannually or quarterly. Where by the terms of the trust the income is payable to life beneficiaries, the trustee has no right to withhold the income and accumulate it in order to pay the beneficiaries the accumulated income on the termination of the trust, but it is his duty to pay the income currently.

2 Scott, *Trusts* § 182 (3d ed. 1984).

One commentator provides that even though this type of trust calls for distributions by a formula, there may still be some discretionary decisions involved:

Because some trusts call for distribution by virtue of a specific formula, the trustee may not distribute under a traditional discretionary standard. A charitable remainder unitrust, for example, may simply require the trustee to exercise discretion in the choice of investments and apply a formula to determine how much to distribute. It is not uncommon for a trust to fix the amount of such a distribution but to require the trustee to exercise discretion in the choice of the charity that will receive the distribution. This would still require the trustee to read the instrument and file carefully to determine what charitable purposes the grantor or testator intended to accomplish. In trusts requiring the mandatory distribution of income, the trustee is required to exercise discretion in the decision whether to use the adjustment power (discussed below), rather than make specific distributions for specific purposes. In each instance, however, determining the intent of the grantor remains important.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 189 (2014).

Regarding time of payment, one treatise provides that “Except where the instrument creating the trust confers authority to do so, a trustee should, ordinarily, not withhold or defer payment of income, but should pay it over as it is received.” 90 C.J.S., Trusts, § 353(e). “If the time for the payment of income is not fixed by the trust instrument, it should be paid at reasonable intervals. There is no duty to pay income immediately upon its receipt.” BOGERT’S THE LAW OF TRUSTS AND TRUSTEES, § 814. Further, “If there is a dispute as to the status of the trust, the trustee may withhold income payments for a reasonable time pending the settlement of the litigation or controversy.” *Id.*

One issue that arises is when the trust provides that “the income” of the trust shall be paid, does this allow a trustee to accumulate income or does the trustee have to distribute “all income”? One Texas treatise provides, “When a trustee is given no discretion as to when all of the income is payable to the income beneficiaries, the trustee is not empowered to accumulate any income except with the consent of the income beneficiary.” 1 TEXAS ESTATE PLANNING § 34.06. *See also* 9 TEXAS TRANSACTION GUIDE--LEGAL FORMS § 50B.300. Thus, a trustee is not allowed to accumulate income unless it is specifically authorized in the trust instrument. *Republic National Bank of Dallas v. Fredericks*, 155 Tex. 79, 283 S.W.2d 39, 44 (1955). In *Republic*, the will stated: “The income from said trust fund shall be paid in equal shares to my beloved children, NELSON RUSSELL EBIE and MRS. DOROTHY EBIE WRIGHT, for and during the terms of their natural lives and in monthly

payments.” *Id.* The Texas Supreme Court held:

When we consider the language of the will as a whole and give due regard to all the provisions therein, we are convinced that the paramount purpose of A. C. Ebie was to provide for the comfort, care and support of his two children above any desire to benefit strangers or outsiders. How was this desire on the part of the testator to be accomplished? First, the testator directs that all of the income from the trust estate shall be paid by the Trustee in equal shares and “in monthly payments” to the two children, or children of a deceased child during the minority of such children...

The Trustee being given no discretion as to the amount of monthly payments of income to be paid to the children, it follows that, except by agreement of the child or children, they were entitled to receive these monthly payments and the Trustee would accumulate no income beyond month to month.

Id. So, if the trust says that “the income” will be paid to a beneficiary, then all income will be distributed except for allowed expenses attributable to income. The trustee can only hold back income or accumulate it if the trust expressly authorizes accumulation.

C. Mandatory Principal Distributions

Settlers can also provide that a trustee shall distribute portions of principal to a beneficiary. It is common for a trust to provide that a portion of the trust's principal be distributed to a beneficiary upon certain age attainments. For example, a trust may provide that a beneficiary is entitled to a third of the trust's principal upon attaining the age of twenty-five, another third of the trust's principal at age thirty, and the remaining third of the trust's principal at age thirty five. The trust may provide that the beneficiary has a duty to request the distribution before the trustee has a duty to make the distribution.

For example, in *Lesikar v. Moon*, the court held that the trustee violated the terms of the trust when he failed to divide the trust principal into two equal portions and distribute one portion to a new trust for one beneficiary. 237 S.W.3d 361, 367(Tex. App.—Houston [14th Dist.] 2007, pet. denied). The court held:

Of the remaining assets in the Trust, the Amended Family Trust provided “[o]ne-half (1/2) shall be transferred into a separate trust for CAROLYN, if living, . . .” Under the Trust, Woody had no discretion to do other than fund the special trusts. Because Woody had no discretion not to fund Carolyn’s special trust, it was not necessary for the trial court to make of finding of fraud, misconduct, or abuse of discretion.

Id.

In *Doherty v. JPMorgan Chase Bank, N.A.*, a court of appeals wrestled with whether trust language required mandatory distributions or whether the trustee had discretion. No. 01-08-00682-CV, 2010 Tex. App. LEXIS 2185, 2010 WL 1053053, at * (Tex. App.—Houston [1st Dist.] Mar. 11, 2010, no pet.). The court of appeals held that the trust required mandatory distributions upon request by the beneficiary:

Paragraph 3.3. of the Trust states that JPMorgan “shall also distribute to [Doherty] such amounts of trust principal as she may request to provide for her com fort, health, support or maintenance, in order to maintain her in accordance with the standard of living to which she was accustomed at the time of [her husband’s] death.” This right to withdraw principal is to be construed “liberally.” In addition, the Trust allowed JPMorgan, in its sole discretion, to “distribute to [Doherty] such amounts of trust principal as [JPMorgan] deems desirable from time to time to provide liberally for her comfort, happiness, health, support or maintenance, including principal which may be requested by [Doherty] to make gifts to any one or more of [her husband’s] descendants.”

JPMorgan, for its part, does not dispute that the disbursement Doherty requested was for her “comfort, health, support or

maintenance.” Doherty argues that the terms of the Trust therefore compelled JPMorgan to make the requested disbursement, so as to allow Doherty to remodel the bathroom in her daughter’s house for her use after her incapacitation. We agree.

The plain language of Paragraph 3.3 required JPMorgan to distribute funds from the principal of the Trust when requested to do so by Doherty so long as those funds were requested in order to “provide for her comfort, health, support or maintenance, in order to maintain her in accordance with the standard of living to which she was accustomed at the time of [her husband’s] death.” Paragraph 3.3 contains a second, discretionary power that allows JPMorgan to distribute such funds as it, “in [its] sole discretion . . . deems desirable from time to time to provide liberally for [Doherty’s] comfort, happiness, health, support or maintenance, including principal which may be requested by my wife to make gifts to any one or more of my descendants.” This latter, discretionary power does not restrict or affect JPMorgan’s mandatory duty to make distributions when requested by Doherty to provide for her comfort, health, support or

maintenance. JPMorgan’s duty to make distributions when Doherty requested funds to remodel the bathroom at her daughter’s house for her own use was therefore absolute and nondelegable.

Id.

Accordingly, where a trust provides that a trustee must make certain principal distributions, a trustee must make those distributions unless the trustee obtains judicial relief to the contrary or the beneficiary consents and releases the trustee from that duty. It should be noted that often a trustee needs the beneficiary to assist it in making the distribution. The trustee may need a directive or request, information on where to send the assets, information on whether the assets should be liquidated or transferred in kind, etc. Until a beneficiary complies with these reasonable requests, a trustee may not have a duty to transfer the assets.

D. Community Property Implications For Mandatory Distributions

It should also be noted that mandatory distributions may have impact on whether they are considered separate or community property. Courts have held that distributions from testamentary or inter vivos trusts to married recipients who have no right to the trust corpus are the separate property of the recipient because these distributions are received by gift or devise. *See Benavides v. Mathis*, 433 S.W.3d 59 (Tex. App.—San Antonio 2014, pet. denied); *Sharma v. Routh*, 302 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Cleaver v. Cleaver*, 935 S.W.2d 491, 492-94 (Tex. App.—Tyler 1996, no pet.). The *Sharma* court held that, “in the context of a

distribution of trust income under an irrevocable trust during marriage, income distributions are community property only if the recipient has a present possessory right to part of the corpus, even if the recipient has chosen not to exercise that right, because the recipient's possessory right to access the corpus means that the recipient is effectively an owner of the trust corpus." *Sharma*, 302 S.W.3d at 364.

In *Ridgell v. Ridgell*, the court addressed the characterization of mandatory income distributions to the wife from two testamentary trusts. 960 S.W.2d 144, 147-50 (Tex. App.—Corpus Christi 1997, no pet.). The court stated that trust income received by a married beneficiary is community property if the receiving spouse "is entitled, or becomes entitled" to distributions of trust corpus. *Id.* at 148. The wife received mandatory distributions of trust income, and, in addition, the testamentary trusts mandated that the trustee make annual distributions of trust corpus to the wife during the first eleven years of the marriage. *See id.* at 146-50. As to the trusts in question, the wife either had received mandatory distributions of corpus or had a present possessory right to receive mandatory distributions of corpus. *See id.* at 147-50. The court held that the income distributions from the two testamentary trusts to the wife were community property.

Accordingly, a settlor should consider the tax and community property implications that arise when a trustee has a mandatory duty to make income or principal distributions.

VI. TRUST PROVISIONS PROVIDING ABSOLUTE DISCRETION TO TRUSTEE TO MAKE DISTRIBUTIONS

A settlor may want to imbue a trustee with the ultimate discretion on whether to make a distribution or not.

A. Historically Courts Would Not Interfere With A Trustee's Discretionary Decision

Historically, courts in Texas have uniformly held that where a trustee has complete discretion in making distributions, a beneficiary cannot sue the trustee for breach of fiduciary duty for not making a distribution. *See Burns v. Miller, Heirsche, Martens & Haygood, P.C.*, 948 S.W.2d 317 (Tex. App.—Dallas 1997, writ denied); *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App.—Corpus Christi 1997, writ denied). Rather, under a discretionary trust, the beneficiary is entitled only to the income or principal that the trustee, in his discretion, shall distribute to the beneficiary. *See Kolpack v. Torres*, 829 S.W.2d 913, 915 (Tex. App.—Corpus Christi 1992, writ denied). The beneficiary of a discretionary trust cannot compel the trustee to pay him or to apply for his use any part of the trust property, nor can a creditor of the beneficiary reach any part of the trust property until it is distributed to the beneficiary. *Id.* In a discretionary trust situation, a court cannot substitute its discretion for that of a trustee. *See Di Portanova v. Monroe*, 229 S.W.3d 324, 329-332 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Aguilar v. Garcia*, 880 S.W.2d 279, 281 (Tex. App.—Houston [14th Dist.] 1994, orig. proceeding) (noting that trial court had no discretion to limit discretionary authority granted solely to trustee by statute).

The Fifth Circuit has described discretionary trusts as follows:

Additionally, “where by the terms of the trust a beneficiary is entitled only to so much of the income or principal as the trustee in his uncontrolled discretion shall see fit to give him,” the trust is denominated a “discretionary trust” by Texas law. It follows that when “no standard or guide is affixed to the trustee’s distribution power,” a beneficiary has no authority to force a trustee to distribute trust assets. A universal canon of Anglo-American trust law proclaims that when the trustee’s powers of distribution are wholly discretionary, the beneficiary has no ownership interest in the trust or its assets until the trustee exercises discretion by electing to make a distribution to the beneficiary. Texas law is to the same effect: “Where discretionary trusts are involved, the beneficiary has no right to trust income [or assets] until the trustee elects to irrevocably and unconditionally place it in the beneficiary’s control.” It follows that when such discretionary powers are granted to trustees of a spendthrift trust, assets of the trust are immune from claims of the beneficiary’s creditors, who can stand in his shoes but no higher:

Discretionary trusts are similar in effect to a spendthrift trust in that where a trustee has been invested with a discretionary power to give an interest in a trust fund to a named beneficiary, the beneficiary cannot alienate the funds nor can creditors reach the fund until the trustee’s discretion has been exercised.

A universally recognized corollary is that courts can neither prevent or force the exercise of discretion by the trustee nor specify a particular exercise or otherwise interfere with or impinge on such discretion when it is expressly vested, without condition or limitation, under the terms of the trust instrument. Again, Texas is in accord: Texas courts “are limited in their powers over the trustee of a discretionary trust,” prohibited by law from interfering with the discretion of the trustee absent a clear showing of fraud or other egregious conduct.

In re Bass, 171 F.3d 1016 (5th Cir. 1999).

In *Malone v. Malone*, a beneficiary sued a trustee for breach of fiduciary duty for not making any distributions to her (other than a one-time \$5,000 payment). No. 02-08-157-CV, 2009 Tex. App. LEXIS 6589 (Tex. App.—Fort Worth August 20, 2009, pet.

denied). The trust specifically stated: “The Trustee shall have complete discretion to pay or use . . . the net income and/or corpus of the Trust as the Trustee, in its sole discretion, may determine to be reasonably necessary for [Ann].” *Id.* at *8. The trustee filed a no-evidence motion for summary judgment, and the beneficiary filed evidence that showed that the trustee admitted to withholding funds of the trust in order to keep the beneficiary from being with her mother at the end of her mother’s life and to “punish” her for past acts that the trustee found unacceptable. *See id.* Nonetheless, the court of appeals affirmed the summary judgment for the trustee stating that “it was within the trustee’s discretion to make distributions to [the beneficiary], and a court cannot substitute its discretion for that of the trustee.” *Id.* The court concluded that the beneficiary presented no evidence that the trustee breached any fiduciary duty he may have owed under the trust and that the trial court did not err by granting a no-evidence summary judgment on the breach of fiduciary duty claim. *See id.*

In *Di Portanova v. Monroe*, a plaintiff sought declaratory relief concerning the trustee’s authority to make distributions. 229 S.W.3d 324, 327(Tex. App.—Houston [1st Dist.] 2006, pet. denied). The wills provide that the Trustees may make distributions from the trust estate only if the distribution, “in the discretion of the Trustee, [is] in the best interests of [the beneficiary].” *Id.* The trial court granted the requested relief and held that the trustees were authorized to make the distribution, and the court of appeals reversed. The court held:

the trial court’s declaration that the Trustees were authorized to fund the proposed LaMatta trust decides the preliminary issue

of whether the proposed disbursement to the LaMattas would be in Ugo’s best interest. Put another way, the Trustees would not be authorized to make the proposed disbursement to the LaMattas unless it was in Ugo’s best interest to do so...

However, in this discretionary trust, the Trustees, not the court, are given the power to determine the best interest of the beneficiary. Under a discretionary trust, the beneficiary is entitled only to the income or principal that the trustee, in his discretion, shall distribute to the beneficiary. The beneficiary of a discretionary trust cannot compel the trustee to pay him or to apply for his use any part of the trust property, nor can a creditor of the beneficiary reach any part of the trust property until it is distributed to the beneficiary. A court cannot substitute its discretion for that of a trustee, and can interfere with the exercise of discretionary powers only in cases of fraud, misconduct, or clear abuse of discretion...

In this case, there has been no pleading or proof that the Trustees have acted with mala fides or a lack of good faith. Instead, by seeking a declaratory judgment that the trustees are authorized to fund the proposed LaMatta

trust—i.e., that funding the proposed trust is in Ugo’s best interest—the Guardian has effectively bypassed the Trustees and prevented them from determining what action, in their opinion, is in Ugo’s best interest. Similarly, by declaring that the Trustees are authorized to fund the proposed LaMatta trust, the trial court has usurped a power granted exclusively to the trustees under the Cullens’ wills; the power to determine when Ugo’s best interest would be served by distributions made from the trust estate.

Id. at 331.

In *In re Estate of Bryant*, a trustee misapplied assets and deposited them into the wrong trust but later deposited them into the correct trust. No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo Mar. 11, 2020, no pet.). The beneficiary of the correct trust sued the trustee for “damages for her loss of use of the funds in the Children’s Trust and Jane A. Bryant Trust from April 14, 2014, when Bill received the insurance proceeds, to May 5, 2015, when those proceeds were returned to the Children’s Trust.” *Id.* The court of appeals affirmed the trial court’s ruling that the beneficiary was not entitled to the damages. The court noted that the trust was a discretionary trust, and there was no requirement that even if the assets had been in the correct trust that the trustee had to distribute them to the beneficiary:

Although the trial court found that Bill breached his fiduciary duty with regards to

the funds intended for the Children’s Trust, this does not necessarily indicate that Jane suffered the loss of use of those funds. Bill, as trustee of the Children’s Trust, had discretion whether and when to distribute trust funds to or for the benefit of beneficiaries. The evidence shows that, after the insurance proceeds were returned to the Children’s Trust in 2015, Bill made no distribution to Jane from the trust. The trial court found that the language of the trust “arguably supports” Bill’s decision to consider Jane’s existing assets before he made distributions to Jane. Because Jane could not show that Bill was required to exercise his discretion to make a distribution to her from the trust, she could not establish that she incurred damages for the loss of use of the trust funds.

Id. (internal citations omitted).

B. Trustees Should Not Make A Discretionary Decision In Bad Faith

Some courts, however, held that trustees did not have unfettered discretion, even if the trust document said as much. “Even where a trustee is vested with broad discretion, courts may assert control over the trustee’s exercise of power ‘to prevent the frustration of the fundamental intent of the settlor’ and compel the trustee’s performance of his duty.” *In re Estate of Bryant*, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo Mar. 11, 2020, no pet.) (citing *Boyd v. Frost Nat’l Bank*, 145

Tex. 206, 196 S.W.2d 497, 504 (Tex. 1946)). A trustee must exercise a discretionary power “reasonably” and in the best interests of the beneficiaries. *See Sassen v. Tanglegrove Townhouse Condo. Assoc.*, 877 S.W.2d 489 (Tex. App.—Texarkana 1994, writ denied). A court should not allow a trustee to abuse his or her discretion. *Coffee v. William Marsh Rice Univ.*, 408 S.W.2d 29 (Tex. Civ. App.—Houston 1966, no writ); *Brown v. Sherck*, 393 S.W.2d 172 (Tex. Civ. App.—Corpus Christi 1965, no writ); *Nations v. Ulmer*, 122 S.W.2d 700 (Tex. Civ. App.—El Paso 1938, no writ). A trustee’s discretion is not unbridled discretion. *State v. Rubion*, 308 S.W.2d 4 (Tex. 1957); *First National Bank of Beaumont v. Howard*, 229 S.W.2d 781, 785 (Tex. 1950).

For example, in *In re XTO Energy Inc.*, the court of appeals wrestled with the issue of whether a beneficiary could file suit on behalf of a trust where the trustee refused to exercise its discretion to do so. 471 S.W.3d 126 (Tex. App.—Dallas July 27, 2015, original proceeding).

Generally, when a trustee is given discretion with respect to the exercise of a power, a court may not interfere except to prevent an abuse of discretion. A power is discretionary if a trustee may decide whether or not to exercise it... Under Texas law, a court may not interfere with the exercise of a trustee’s discretionary powers and substitute its discretion for that of the trustee *except in cases of fraud, misconduct, or a clear abuse of discretion.*

Id. (internal citations omitted). Accordingly, broad discretion did entitle a trustee to act with fraud, misconduct, or with a clear abuse of discretion, and a beneficiary could challenge the trustee if one of those exceptions occurred.

The Restatement provides:

A court will not interfere with a trustee’s exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust. Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.

On the other hand, a court will not permit abuse of discretion by the trustee. What constitutes an abuse depends on the terms of the trust, as well as on basic fiduciary duties and principles (§§ 76-83). Of particular importance are the purposes of the power and the standards, if any, applicable to its exercise (see Comments d-f) and the extent of the discretion conferred upon the trustee (Comment c). Relevant fiduciary principles include (i) the general duty to act, reasonably informed, with impartiality among the various beneficiaries and interests (§ 79) and (ii) the duty to provide the beneficiaries with information concerning the trust and its administration (§

82). This combination of duties entitles the beneficiaries (and also the court) not only to accounting information but also to relevant, general information concerning the bases upon which the trustee's discretionary judgments have been or will be made. See Comment e(1).

Court intervention may be obtained to rectify abuses resulting from bad faith or improper motive, and to correct errors resulting from mistakes of interpretation. Absent language of extended (e.g., "absolute" or "uncontrolled") discretion (Comment c), a court will also intervene if it finds the payments made, or not made, to be unreasonable as a means of carrying out the trust provisions. For example, a beneficiary may be entitled to amounts sufficient to provide support, or to meet some other standard, and the amounts being paid by the trustee may be clearly excessive or inadequate for the purpose. It is not necessary, however, that the terms of the trust provide specific standards in order for a trustee's good-faith decision to be found unreasonable and thus to constitute an abuse of discretion.

Furthermore, a court will intervene where the exercise of a power is left to the

judgment of a trustee who improperly fails to exercise that judgment. Thus, even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion.

...

Although the discretionary character of a power of distribution does not ordinarily authorize the trustee to act beyond the bounds of reasonable judgment (Comment b), a settlor may manifest an intention to grant the trustee greater than ordinary latitude in exercising discretionary judgment. How does such an intention affect the duty of the trustee and the role of the court?

It is contrary to sound policy, and a contradiction in terms, to permit the settlor to relieve a "trustee" of all accountability. (Cf. § 87, and also § 76.) Once it is determined that the authority over trust distributions is held in the role of trustee (contrast nonfiduciary powers mentioned in Comment a), words such as "absolute" or "unlimited" or "sole and uncontrolled" are not interpreted literally. Even under the broadest grant of

fiduciary discretion, a trustee must act honestly and in a state of mind contemplated by the settlor. Thus, the court will not permit the trustee to act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power. Except as the power is for the trustee's personal benefit, the court will also prevent the trustee from failing to act, either arbitrarily or from a misunderstanding of the trustee's duty or authority.

Within these limits, it is a matter of interpretation to ascertain the degree to which the settlor's use of language of extended (e.g., "absolute") discretion manifests an intention to relieve the trustee of normal judicial supervision and control in the exercise of a discretionary power over trust distributions.

...

Extended discretion serves to discourage challenges by remainder beneficiaries to the generosity of trustees, as in Illustration 4. On the other hand, it may also make it difficult for a discretionary beneficiary to obtain judicial intervention when a trustee's judgments are highly conservative with regard to matters that fall within the settlor's authorized purposes. The overall tenor of the terms of a power may, however, in

the context of the trust's more general purposes, lead to an interpretation granting the trustee ordinary discretion with respect to the benefits to which the discretionary beneficiary is minimally entitled (e.g., reasonable support), with the extended discretion applicable to the trustee's allowance of more. This "one-sided" liberalization of the discretionary authority, where a court finds the settlor's language was intended to assure generosity in favor of a life beneficiary, would thus tend to encumber the efforts of remainder beneficiaries who seek to challenge what might otherwise be excessively generous decisions by a trustee.

RESTATEMENT (THIRD) OF TRUSTS § 50.

One commentator states:

A settlor may permit their trustee, in the trustee's discretion, (1) to withhold all income or to pay the whole or any part (in which case the trust is called, for the purpose of deciding questions of voluntary or involuntary alienability, technically a "discretionary trust"); or (2) to select and exclude beneficiaries from a class; or (3) to decide the amount, form, time, purpose, or other feature of payment. As previously explained in a discussion of discretionary

powers of all types, an honest exercise of this discretion with a view to the accomplishment of the settlor's purposes will be decisive, and a court will interfere and upset the determination only where there has been abuse of the discretion because of dishonest, arbitrary action or other conduct in frustration of the trust's objectives.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 811.

In 2009, the Texas Legislature created a statutory limitation on trustee discretion. *Sharma v. Routh*, 302 S.W.3d 355, n. 6 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (op. on reh'g). Texas Property Code Section 113.029 provides:

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as “absolute,” “sole,” or “uncontrolled,” the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

Tex. Prop. Code § 113.029. *Faulkner v. Kornman*, No. 10-00301, 2015 Bankr. LEXIS 3595 (Bankr. S.D. Tex. Oct. 23, 2015). This provision was added in 2009, and older cases may not reflect this statutory enactment. Acts 2009, 81st Leg., ch. 672 (H.B. 2368), § 3, effective September 1, 2009. Cases held that “Even where a trustee is vested with broad discretion, courts may assert control over the trustee's exercise of

power ‘to prevent the frustration of the fundamental intent of the settlor’ and compel the trustee's performance of his duty.” *In re Estate of Bryant*, No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo Mar. 11, 2020, no pet.) (citing *Boyd v. Frost Nat'l Bank*, 145 Tex. 206, 196 S.W.2d 497, 504 (Tex. 1946)).

Further, the Texas Property Code provides that the “trustee shall administer the trust in good faith according to its terms and this subtitle.” Tex. Prop. Code § 113.051. The Texas Trust Code goes on in Section 111.0035(b)(4)(B) to state: “[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.” *Id.* at § 111.0035(b)(4)(B). One commentator describes these two provisions thusly:

The first, which is theoretically waivable, references good faith according to the trust instrument's terms. On the other hand, the latter, non-waivable statute references good faith in accordance with the purpose of the trust. Standard rules of statutory construction mandate a presumption that this distinction is both purposeful and meaningful. In drafting § 111.0035, the legislature could have simply referenced § 113.051 as it did with several other non-waivable provisions. Instead, § 111.0035 adopts language which is more onerous on trustees. In other words, the legislative intent clearly

indicates that trustees are actually supposed to act in a fiduciary capacity. 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.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying HEMS Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L.J. 1, 17 (2017).

Accordingly, even where a trust gives a trustee complete, unfettered, or sole discretion, the trustee must act with good faith. One court has held that bad faith in the context of trustee's actions is as follows:

The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. It has been held that a finding of bad faith requires some showing of an improper motive, and that improper motive is an essential element of bad faith.

InterFirst Bank Dallas, N.A. v. Risser, 739 S.W.2d 882, 888-89 (Tex. App.—Texarkana 1987, no writ) (citing Black's Law Dictionary). To the contrary, one Texas court has held that a standard of good faith for an executor is part subjective and part objective. See *Lee v. Lee*, 47 S.W.2d 767,

795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). A fiduciary acts in good faith when he or she: (1) subjectively believes his or her defense is viable, and (2) is reasonable in light of existing law. *Id.* See also *In re Estate of Nunu*, 542 S.W.3d 67, 81 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

One commentator states:

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.

Christian S. Kelso, *Get HEMS Straight: Tailor the Right Distribution Standard*, 43 EST. PLAN. 3 (2015). Accordingly, even in a discretionary trust situation, a trustee cannot act arbitrarily and must act in good faith and in accordance with the terms and purposes of the trust and for the interests of the beneficiaries.

VII. TRUSTS THAT CREATE UNASCERTAINABLE STANDARDS FOR DISTRIBUTIONS

A settlor may want to create a trust that has some standards for distributions (more than just the sole discretion of the trustee) but which allow for broad discretion to the trustee. "A

distribution standard will usually be considered unascertainable without an objective manner to determine whether a distribution fits within the instrument's distribution standard." Kelso, 10 TEX. TECH EST PLAN COM PROP L J. 1, 18 (2017). "There is no clear definition of an unascertainable standard. Nor is there an exclusive list of terms to create one." *Id.* Generally, the following terms imply an unascertainable distribution standard: "comfort, happiness, benefit and welfare." *Id.* (citing 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.") and 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)).

One commentator provides:

While an ascertainable standard is commonly used, it is not mandatory. A settlor can simple [sic] provide that distributions can be made in the trustee's sole discretion. Alternatively, the settlor can use other standards on which distributions can be made. These are generally considered to be unascertainable as there is no objective manner by which to determine whether a distribution (requested or made) fits within the distribution standard of the instrument. Unascertainable standards may be used when the settlor is less concerned about maintaining the trust principal for the remainder beneficiaries or when he or she wants the trustee to have more flexibility in making

distributions. Due to the potential tax implications, these standards should be used with caution and only with independent trustees.

Sarah Patel Pacheco, *What Did You Mean By That? Trust Language And Application By Trustees*, State Bar of Texas, 35th Annual Advanced Estate Planning and Probate Course, (2011).

Adding the term "comfort" generally means that the distribution standard is unascertainable. *Lehman v. United States*, 448 F.2d 1318 (5th Cir. 1971). In *Lehman*, the Fifth Circuit reviewed a will with the following language: "[a wife] 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." *Id.* (emphasis added). The court held that this term 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." *Id.*

Other common terms that effectuate an unascertainable standard are happiness or benefit. The Restatement provides:

Language of "comfort" often accompanies a support standard. Whether modifying support (e.g., "comfortable support" or "support in reasonable comfort") or as an additional standard ("support and comfort"), the normal construction is the same: the

language adds nothing to the usual meaning of accustomed support (supra) for a beneficiary whose lifestyle is already at least reasonably comfortable. Such terms, however, would tend to elevate the appropriate standard for a beneficiary whose accustomed lifestyle has been more modest. “Comfort,” in isolation, normally has like effect, impliedly referring to a comfortable level of support. 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 (infra) in that the benefits still must normally be support-related.

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. (See also loans to beneficiaries, infra this

Comment.) Terms 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. See Comment e.

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 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.

RESTATEMENT (THIRD) OF TRUSTS § 50.

Welfare has also been a term that creates an unascertainable standard. Sarah Patel Pacheco, *What Did You Mean By That? Trust Language And Application By Trustees*, State Bar of Texas, 35th Annual Advanced Estate Planning and Probate Course, (2011) (citing Treas. Reg. § 20.2041-1(c)(2) and *First Virginia Bank v. United States*, 490 F.2d 532 (4th Cir. 1974)).

For example, in *Ballenger v. Ballenger*, the court reversed an injunction precluding trustees from making large distributions to themselves. 694 S.W.2d 72 (Tex. App.—Corpus Christi 1985, no writ). The court primarily held that there was no showing of an irreparable harm because money damages would be sufficient. However, the court also discussed that the trust allowed distributions for “comfort”:

The appellants introduced testimony to the effect that they were elderly and each was having health problems. Appellant Katherine Fairchild testified that they, the co-trustees, honestly believed that the proposed distribution of money was appropriate for their “comfort,” as contemplated by the trust agreement. She also negated appellee’s charges of fraudulent intentions on their part by stating that the reason they wrote Robert Ballenger, Sr., in advance was to let him know their plans for distribution of the cash. There is no doubt that the appellants could have distributed the assets without Robert B. Ballenger, Sr.’s prior knowledge or consent.

We find that the evidence presented, at the very least, raised material disputed issues of fact for the trier of facts. It was error for the trial court to make a finding in advance of a trial on the merits that the income is not insufficient for the care, comfort and support of any of the beneficiaries and, by so doing, deprived appellants of the right to exercise their “sole discretion” in distributing corpus.

Id. at 79.

As we will see in the next section, an ascertainable standard (health, education, maintenance and support) has more restrictions than an unascertainable standard. One commentator astutely questions:

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?” Why is the former unascertainable compared to the latter? Stated another way, are “maintenance and support” really that much more ascertainable than “welfare and benefit?”

Kelso, 10 TEX. TECH EST PLAN COM PROP L J. 1, 20 (2017).

VIII. TRUSTS THAT CREATE AN ASCERTAINABLE STANDARD FOR DISTRIBUTIONS

A settlor may want to provide ascertainable standards by which the trustee will

determine distributions. Although a settlor can use other terms to create an ascertainable standard, most frequently, a settlor uses the terms health, education, maintenance and support (“HEMS”). There are several reasons for doing so, including limiting a trustee’s discretion and also important tax and creditor protection implications.

A. Tax and Creditor Implications For Ascertainable Distribution Standards

If a trustee is also as a beneficiary of a trust, and the trust gives the trustee complete discretion to make distributions to himself or herself, then the IRS will disregard the trust and consider the trust’s assets as part of the trustee’s estate. Most trustees/beneficiaries want to keep assets out of their estates. So, the IRS has created ascertainable distribution standards, and if those standards are in the trust document, then the assets will not be considered as part of the trustee/beneficiary’s estate. Christian S. Kelso, 10 TEX. TECH EST PLAN COM PROP L J. 1 (2017). Examples of ascertainable standards are: support, support in reasonable comfort, maintenance in health and reasonable comfort, support in his accustomed manner of living, education, and health. Tr. Reg. § 20.2041-1(c)(2).

As stated in Treasury Regulation Section 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.” Tr. Reg. § 20.2041-1(c)(2). This ascertainable standard can also impact and protect a beneficiary from gift tax liability when he or she holds the right to make distributions to others. 26 C.F.R. § 25.2511(g)(2).

As one commentator provides:

If a beneficiary of a trust holds a power, as trustee or otherwise, to make distributions to himself or for his benefit, and the power is limited by an ascertainable standard relating to the beneficiary’s health, education, support, or maintenance, then the trust property will not be included in the gross estate of the beneficiary for federal estate tax purposes by reason of the beneficiary’s possession of such power, because such a limited power does not constitute a “power of appointment.” Also, the lapse or other release of exercise of such a power limited by such an ascertainable standard will not be a taxable gift for federal tax purposes by the beneficiary which held the power.

...

Similarly, a trust beneficiary that 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, will not be deemed to have made a taxable gift for federal gift tax purposes. But, this same regulation states that “if a

trust instrument provides that the determination of a 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. Furthermore, 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 beneficiary/trustee’s gross estate for federal estate tax purposes, unless the trustee is prohibited from making any distributions to a beneficiary that would satisfy the trustee’s individual legal obligations to support such beneficiary.

Several court cases and IRS rulings have held that if the settlor is the trustee or controls the trustee of a trust, then the trustee’s possession of a power to make distributions to or for the benefit of a beneficiary of the trust, if limited by an ascertainable standard relating to the beneficiary’s health, education, support, or maintenance will not cause the trust property to be included in the gross estate of the settlor/trustee for federal estate tax purposes under I.R.C. Sections 2036 or 2038.

The power of any trustee, including the settlor, to distribute corpus to or for a beneficiary or beneficiaries, limited by a “reasonably definite standard” set forth in the trust instrument, will not cause the trust income to be taxed to the settlor for federal income tax purposes. A “reasonably definite standard” includes “a power to distribute corpus for the education, support, maintenance, or health of the beneficiary.” Yet, a reasonably definite standard which limits the power to distribute income to the or for the beneficiary or beneficiaries, is not sufficient to prevent the trust income from being taxed to the settlor, if the settlor or settlor’s spouse is one of the trustees holding the power to distribute income.

Sarah Patel Pacheco, *What Did You Mean By That? Trust Language And Application By Trustees*, State Bar of Texas, 35th Annual Advanced Estate Planning and Probate Course, (2011).

Regarding creditor protections, the Texas Trust Code provides that “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.” Tex. Prop. Code § 112.035.

Section 113.029 provides:

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.

Tex. Prop. Code § 113.029(b). This provision 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.” *Id.*

B. Distribution Standards Limit Trustee Discretion

In Texas, the use of the words “support” and “maintenance” in a trust instrument evinces the creation of “support trusts.” *State v. Rubion*, 158 Tex. 43, 308 S.W.2d 4, 8-10 (1957); *Duncan v. O’Shea*, No. 07-11-0088-CV, 2012 Tex. App. LEXIS 6494 (Tex. App.—Amarillo Aug. 7, 2012, no pet.). Under common law, the considerations a trustee must refer to in exercising its discretion regarding a support and maintenance trust, include “(1) the size of the trust estate, 2) the beneficiary's age, life expectancy, and condition in life, 3) his present and future needs, 4) the other resources available to him or his individual wealth, and 5) his present and future health, both mental and physical.” *Estate of Dillard*, 98 S.W.3d 386 (Tex. App.—Amarillo 2007, pet. denied). *See also Keisling v. Landrum*, 218 S.W.3d 737, 744 (Tex. App.—Fort Worth 2007, pet. denied). Even though a trustee has a responsibility to distribute the trust's income and principal for maintenance, it also has a competing responsibility to manage the trust prudently and responsibly to preserve it for her future support and maintenance. Tex. Prop. Code Ann. § 113.006 (Vernon Supp. 2006) (stating that a trust may manage the trust property on the conditions and for the lengths of time as the trustee deems proper); *Keisling v. Landrum*, 218 S.W.3d at 744; *Brault v. Bigham*, 493 S.W.2d 576, 579 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.) (holding that safety of the trust fund is the first care of the law, and on this depends every rule which has been made for the conduct of trustees). Thus such a trust “does not state that [the trustee] must give into [a beneficiary's] every support and maintenance whim; it simply notes that income and principal from the trust shall be distributed to appellant to support and maintain her if appellant's income does not

suffice.” *Keisling v. Landrum*, 218 S.W.3d at 744.

So, a distribution standard featuring the terms support and maintenance, does not afford trustees unbridled discretion. 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.” *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). This concept developed by Texas courts also aligns with the Restatement:

A court will not interfere with a trustee’s exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust. Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion. On the other hand, a court will not permit abuse of discretion by the trustee. . . . Of particular importance are the purposes of the power and the standards, if any, applicable to its exercise . . . and the extent of the discretion conferred upon the trustee . . .

RESTATEMENT (THIRD) OF TRUSTS § 50.

For example, in *State v. Rubion*, the court had to decide what interest the beneficiary had when the trust instrument allowed the trustee to distribute assets for the beneficiary’s support and maintenance. 158

Tex. 43, 308 S.W.2d 4, 8 (1957). The court noted that those terms evinced the creation of a support trust. *Id.* And, though a trustee’s discretion regarding distributions from such a trust may be considerable, it was not unbridled. *Id.* at 8-9. The trustee must act reasonably and in a manner commensurate with the purpose of the trust. *Id.* at 9. This meant that his decision to distribute income or corpus for the beneficiary’s support and maintenance could not be exercised at a whim. 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. 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. 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.

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 the beneficiary. *Penix v. First Nat’l Bank of Paris*, 260 S.W.2d 63 (Tex. Civ. App.—Texarkana, writ ref’d). 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. The court found that the trustee was within its discretion. The court discounted any significance of the word “shall” within the grant.

In the *Estate of Dillard*, the trustee argued that the trust was a discretionary trust (so that he could distribute as much principal to himself as a beneficiary as he wanted), but the court disagreed. 98 S.W.3d 386 (Tex. App.—Amarillo 2007, pet. denied). The court found that the trust was a support trust that required that the trustee evaluate each distribution under the factors set out by the Texas Supreme Court in *Rubion*:

Admittedly, Iris used the word “discretion” when expressing the scope of the trustee’s authority. Yet, she also incorporated therein the words “support and maintenance” and stated that the corpus could be expended when “necessary” to serve that purpose and when he was in “need of additional funds.” “Support and maintenance,” “additional funds,” and “necessary” hardly connote utter discretion to do that which the trustee may care to at any given moment. Rather, they evince a restriction on the trustee’s discretion and authority and denote an intent to permit expenditure when needed for Dillard’s support and maintenance. So, like the testatrix in *Rubion*, Iris too created a support trust. Given that, distributions of principal therefrom could be made only in ways commensurate with that purpose. In other words, and contrary to the suggestion of Dillard, the discretion vested in the trustee under the instrument at bar was and is not unbridled or absolute.

Instead, he, like the trustee in *Rubion*, must exercise it only after considering the beneficiary’s needs, age, condition, separate resources, the size of the trust estate, health, and the like. And, if upon considering those factors, the trustee reasonably concludes that a distribution is warranted, only then can it be made. Finally, the wording used by the trial court at bar to describe the trustee’s authority merely reflects the restrictions imposed by Iris and recognized by the Supreme Court long ago.

Id. at 395.

In *First Nat’l Bank v. Howard*, the settlor was a widower whose will created a spendthrift trust in favor of his two daughters. 229 S.W.2d 781 (Tex. 1950). Its terms provided that each daughter would receive the net income of the trust until one daughter died, at which point the principal would go one-half to the deceased daughter’s heirs per stirpes and one-half to the remaining daughter. The trust terms also provided, that

In the event the net income from this Trust Estate shall be insufficient in the discretion and judgment of the Trustee to properly maintain and support those persons who, under the preceding paragraph are entitled to portions of said net income and to enable said persons to procure necessary and reasonable medical care, aid and assistance, and to give said persons proper

educational advantages, then, and in that event, said Trustee shall be authorized to pay for such purposes such additional sums out of the corpus of the said Trust Estate as may in its sole and uncontrolled discretion be necessary or advisable. In determining whether such additional sums shall be paid out for said persons, the decision of the Trustee shall be final and conclusive.

Id. One daughter was relatively well off, while the other lived in near poverty. Both the daughters sued the trustee after it denied the impoverished daughter's request for support above her share of the trust's income. *Id.*

The Court first noted that it would not treat the trustee's decision as final or conclusive, but could interfere if the trustee acted "outside the bounds of reasonable judgment." *Id.* It next determined that the trustee had done just that, as the trustee failed to act "in that state of mind in which the settlor contemplated it should act." *Id.* The settlor had been generous with his daughters in life, including paying for their college educations. *Id.* While the trustee's was obligated to invade the trust's principle only in instances of need, the need in this case included helping one daughter escape her position and to allow that daughter to pay the college costs of the settlor's grandson. *Id.* The case was remanded to determine what the trustee should have paid. *Id.*

Accordingly, though a support trust seems as though it provides very broad discretion to a trustee to make distributions, that discretion is not unbridled, and there are factors and limitations associated with it.

C. Warning For Drafters Of Ascertainable Standard Trusts

Courts are very literal in interpreting trusts. A drafting attorney should be very careful regarding the words that he or she uses in forming the distribution standard in the trust. As one commentator states:

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

...

Still, this problem underscores how "drafters should, where possible,

provide clarification as to the intent of each grantor.” Sadly, drafting attorneys almost never bother to delve into their clients’ intent in this regard and many beneficiaries have suffered because of it.

Kelso, 10 TEX. TECH EST PLAN COM PROP L J. 1, 26-27 (2017).

D. HEMS Standard Distributions

1. Distributions for Health

Trust documents do not usually elaborate on the specifics of what the term “health” or “health care” means for the purposes of distributions. Regarding a court created trust, the Texas Property Code states:

The trustee may disburse amounts of the trust’s principal, income, or both as the trustee in the trustee’s sole discretion determines to be reasonably necessary for the health, education, support, or maintenance of the beneficiary. *The trustee may conclusively presume that medicine or treatments approved by a licensed physician are appropriate for the health of the beneficiary.*

Tex. Prop. Code § 142.005(b)(2) (emphasis added). In another statute, the term “physician” means a person who is: “(1) licensed to practice medicine in one or more states in the United States; or (2) a graduate of a medical school accredited by the Liaison Committee on Medical Education or the American Osteopathic Association ...” Texas Civ. Prac. & Rem. Code § 74.401(g). This provision obviously provides great

protection to a trustee who makes a distribution based on a licensed physician’s recommendation.

The Restatement (Third) of Trusts provides that the standard of “health” is generally thought to include the following: emergency medical treatment; psychiatric treatment; psychological treatment; routine health care examinations; dental; eye care; cosmetic surgery; Lasik surgery; health, dental, or vision insurance; unconventional medical treatment; home health care; gym memberships; spa memberships; golf club memberships; and extended vacations to relieve tension and stress. RESTATEMENT (THIRD) OF TRUSTS, §50 (2003). The Restatement elaborates:

[W]ithout more, references to “health,” “medical care,” and the like in the terms of a discretionary power may be useful to inform beneficiary expectations or guide an inexperienced trustee, but presumptively they provide merely for health and medical benefits like those normally implied by a support standard. Thus, if the intention is to assure the beneficiary some special form of education, or expensive home care when not cost efficient, further elaboration would be helpful. Even a grant of extended discretion is likely to make it more difficult, if the trustee does not act generously, for a beneficiary to compel a trustee to follow a particular course of action (see Comment c).

Id.

Another commentator states:

Some of the obvious, and more traditional, requests that fall under the category of health include the following: health, dental, life, and long-term care insurance premiums; uninsured doctor, hospital, and lab costs; home health care; physical therapy; psychiatric treatment/psychological counseling; mental health and mental retardation services; occupational therapy; medical expenses of beneficiary's children where a duty to support exists; dental and orthodontia expenses; medical supplies, equipment, and batteries; pharmaceuticals; medically prescribed therapeutic items such as whirlpools, horses, pools; hospital beds and specially designed furniture for the handicapped; eye care, eyeglasses, and contact lenses; linens and special clothing requirements; handicap transport vans and lift equipment; ramp construction, adaptation of doors, and remodeling to accommodate handicaps; installation of safety equipment such as handrails; and specialized cleaning to eliminate allergens.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 204-05 (2014).

A trustee has a more difficult time deciding whether alternative treatment options should be paid for by a trust. Alternative treatment options include, but are not limited to, “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.” Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 206 (2014).

For example, in *Cadwell v. River Oaks Trust Co.*, a trustee's decision to cease paying for a beneficiary's hotel room following the beneficiary's release from a hospital was not an abuse of discretion when the beneficiary's healthcare provider indicated it was not necessary and the beneficiary refused to work with the trustee to get his apartment cleaned, his stated need for remaining in the hotel. 1996 Tex. App. LEXIS 1798 (Tex. App.—Houston May 2, 1996, writ denied). The trust provided that the trustee was to distribute all income to the settlor's son as the beneficiary, and pursuant to its “sole reasonable discretion,” it could invade the principal as necessary to provide for the beneficiary's “health, support, maintenance, comfort and welfare.” *Id.* at *3. The trustee was further directed to consider the standard of living the beneficiary enjoyed while the settlor was living. *Id.* at *4.

The evidence showed that the beneficiary solely lived on trust distributions. *Id.* at *3. Following a stint in a hospital for a leg infection, the trustee arranged for the beneficiary to stay for two weeks in a hotel. *Id.* at *6. At the end of the two weeks, the beneficiary asked to continue staying at the hotel because his apartment was dirty. *Id.* The trustee decided to not make a distribution for this request, and the hotel

eventually locked the beneficiary out of his room. *Id.* In the meantime, the beneficiary rejected the trustee's efforts to assist in having the apartment cleaned. *Id.*

The beneficiary sued to have the trustee replaced, claiming among other things breach of fiduciary duty for failing to pay for a continued stay at the hotel or at a new apartment. *Id.* at *7. The trustee responded that its refusal complied with the discretion it was afforded by the terms of the trust. While some evidence suggested that the beneficiaries housing concerns stemmed from fear of another leg infection, all testimony indicated that the trustee agreed to allow the continued hotel stay if the beneficiary would provide a letter from a healthcare provider justifying the request. *Id.* at *38. No such letter was ever provided. *Id.* Indeed, the beneficiary's doctor said alternative housing was not necessary. *Id.* Based on that evidence, the court of appeals agreed that the trustee's actions were an appropriate exercise of discretion. *Id.* at *41. The beneficiary made no showing of fraud in the trustee's decision, and so the court affirmed summary judgment on that ground for the trustee. *Id.* at 43.

2. Distributions for Education

The standard of "education" is thought to include the following: grammar, secondary and high school tuition; graduate school; post-graduate school; medical school, law school, or other professional school; support of the beneficiary while in school; support of beneficiary while not in school (between semesters); studies for the student that makes a career out of learning; technical school training; career training; and college as part of a study abroad program. RESTATEMENT (THIRD) OF TRUSTS, §50 (2003). "The term "education," without elaboration, is ordinarily construed as extending to payment of living expenses as

well as fees and other costs of attending an institution of higher education, or the beneficiary's pursuit of a program of trade or technical training, and the like, as may be reasonably suitable to the individual and to the trust funds available for the purpose." *Id.* A trustee can also make distributions for a beneficiary's dependant's educational expenses. See *First National Bank of Beaumont v. Howard*, 229 S.W.2d 781 (Tex. 1950).

Another commentator states:

Common requests classified by corporate trustees as "education" include, but are not limited to, the following: tuition for, including private school, college, graduate school, trade or vocational training; study skills classes and tutoring; speech or reading therapy; room and board at school; summer school and summer activities; after school programs and extended day care; costs of travel to and from school; sports activities and lessons; computer purchases, maintenance, and repair; graduation costs, proms, class rings; music lessons and instrument purchase and repair; books and school supplies; and uniforms and school clothes.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 205 (2014).

3. Distributions for Support and Maintenance

The terms “support” and “maintenance” are considered synonymous, and are generally placed into three categories: what is generally deemed to be included, what might be included, and what expressly is not included. RESTATEMENT (THIRD) OF TRUSTS, §50 (2003). The following expenses are generally included: regular mortgage payments; property taxes; suitable health insurance or care; existing programs of life and property insurance; continuation of accustomed patterns of vacation; continuation of family gifting; and continuation of charitable gifting. The following expenses might be included: reasonable additional comforts or luxuries; and special vacations of a type the beneficiary had never taken before. The following expenses are generally not included: payments unrelated to support which merely contribute to the beneficiaries’ contentment or happiness; distributions to enlarge the beneficiaries’ personal estate; and distributions to enable the beneficiary to make extraordinary gifts. When applying this standard, a trustee should consult the law of the relevant jurisdiction because these categories and what are included may vary.

In *In re Willa Peters Hubberd Testamentary Trust*, the court of appeals affirmed a modification of a trust to allow a trustee to pay for health insurance for a beneficiary where such was appropriate to support and maintain the beneficiary. 432 S.W.3d 358 (Tex. App.—San Antonio 2014, no pet.). The court noted: “Dahlman’s failure to maintain such insurance would substantially impair the accomplishment of the purpose to provide for the health, support, education, and maintenance of Dahlman and the grandchildren.” *Id.* at 367.

In *Duncan v. O’Shea*, the court held that a trustee’s distributions to herself as a beneficiary under a support and maintenance standard were permissible even though the distributions exceeded her household budget at the time of the settlor’s death. 07-11-0088-CV, 2012 WL 3192774, at *4-5 (Tex. App.—Amarillo Aug. 7, 2012, no pet.). The beneficiary was the trustee of a marital trust and a family trust created under her late husband’s will. She was the sole beneficiary during her lifetime of the marital trust (initially funded with approximately \$200,000 in assets). Principal could be distributed as “necessary, when added to the funds reasonably available to [the beneficiary] from all other sources . . . to provide for [the beneficiary’s] health, support and maintenance in order to maintain her, to the extent reasonably possible, in accordance with the standard of living to which [the beneficiary] is accustomed as the time of [the settlor’s] death.” *Id.* The trust terminated on the beneficiary’s death with the remainder passing to the settlor’s descendants.

The family trust initially was funded with approximately \$1,680,000 in assets. The terms of that trust authorized the trustee to distribute both income and principal to the beneficiary under the same terms that applied to principal of the marital trust. Additionally, the family trust could distribute income and principal to the settlor’s descendants if such distributions did not jeopardize the beneficiary’s financial security.

The beneficiary’s annual income and distributions from the trusts exceeded her annual expenses with respect to the maintenance of her residence, healthcare, and property taxes. The beneficiary’s personal assets were worth \$1,425,000 (\$400,000 in a brokerage account with the remainder in real estate).

A child of the settlor filed a lawsuit against the beneficiary for a breach of fiduciary duty. The child claimed that the beneficiary was withdrawing (as the trustee) “more income and principal than was necessary to maintain [the beneficiary’s] standard of living prior to [the settlor’s] death.” *Id.* at *4.

The court found that the “testimony established that during [the settlor and beneficiary’s marriage, the settlor] was ‘frugal but he was generous’ and that although the beneficiary had a household budget of \$1,500 per month, the settlor was generous with gifts to the beneficiary that included “cars, horse trailers, raised barns, land, remodeling of a vacation home in Maine, [and] a three and one-half carat diamond.” *Id.* at *1. Ultimately, the court held that the beneficiary had not distributed more to herself than what was permitted under the standards of the trusts. The court’s analysis to reach this conclusion is not well developed. With limited discussion, it appears that the court relied on (i) testimony of the settlor’s generous gift-giving towards the beneficiary and (ii) the factors of the “support trust” doctrine to conclude that the distributions to the beneficiary were permitted.

4. Words of Restriction On Distributions

A trust may provide that distributions may only be made for support of a beneficiary where there is an emergency or hardship. When those words are used, they restrict the trustee’s discretion to make distributions. The Restatement provides:

Illustrative of terms that tend to be highly restrictive are those that authorize invasion of principal or other discretionary payments in the

event of an “emergency,” “severe hardship,” “disability,” or the like. These are construed as authorizing distributions only when the described conditions or circumstances arise, and then only to the extent appropriate to alleviate the emergency, hardship, or special need.

RESTATEMENT (THIRD) OF TRUSTS § 50.

For example, in *Ellison v. Ellison*, a settlor created a testamentary trust for the benefit of his wife and minor child via a lengthy and convoluted will. 164 S.W.2d 775, 776 (Tex. App.—Fort Worth 1942, writ ref’d for want of merit). The purpose of the trust was, in part, the following:

[T]o provide my wife with a net spendable income of about \$ 500.00 per month after the expenses of handling the estate have been paid. \$ 500.00 is specified because that is about the amount we are now spending but should be adjusted according to the net income and condition of the estate and the value of the American dollar. Based on present money values, I recommend that on no condition shall the Executor allow a larger living expense, except in case of sickness and such tuition fees and most conservative allowance for the education of my son, or heirs. In addition to the \$ 500.00 per month I recommend that my wife be given about \$ 5000.00 cash every third year for the

purpose of travel, automobile, or other luxury she may choose. . .

And [trustee] shall have and exercise all other powers that an absolute owner could, with respect to the control, management, disposition, investment and preservation of this trust, and the different items of property that may belong thereto from time to time.

Id. at 777. Other clauses presented the trustee with more precise and often conflicting direction. *Id.* The trustee sought a determination of whether it could increase the monthly sum above \$500 and whether that increase would be within his discretion. *Id.* at 778–79.

The court began its analysis repeating the maxim that the trustee’s obligations would be determined by construing the trust-creating document’s terms as a whole. *Id.* at 780. It then considered what it perceived was the settlor’s intent in drafting the trust: (1) to support his wife and son in their lifestyle and (2) to provide for his son into adulthood. *Id.* Furthermore, the court noted that in the trust the settlor stated that his wife would care for their child, citing some provisions of the trust that gave the wife authority to direct the trustee to make certain distributions. *Id.*

Based on these broad considerations the court stated, “We think it clear from the language used it was the intention of the testator to vest the trustee with such power and authority; the discretion used by the trustee to be in harmony with and controlled by the things pointed out as affecting changed conditions, if they should occur.” *Id.* at 781. The court thus held that the

monthly payment to the beneficiaries could be increased within the discretion rooted in evidence on a cost of living increase of the trustee. *Id.* at 782–83.

E. Consideration of a Beneficiary’s Lifestyle

Trusts often require a trustee to consider the beneficiary’s lifestyle in determining the amount of distributions.

“Support” and “maintenance” distribution standards extend beyond a beneficiary’s bare necessities to include the beneficiary’s accustomed style of living. *Id.* Although the general starting point on which to base a beneficiary’s accustomed style of living is when a trust became irrevocable, distributions for a higher standard of living over time may be appropriate. Specifically, such distributions may be appropriate:

The accustomed manner of living for these purposes is ordinarily that enjoyed by the beneficiary at the time of the settlor’s death or at the time an irrevocable trust is created. The distributions appropriate to that lifestyle not only increase to compensate for inflation but also may increase to meet subsequent increases in the beneficiary’s needs resulting, for example, from deteriorating health or from added burdens appropriately assumed for the needs of another. Also, if a beneficiary becomes accustomed over time to a higher standard of living, that standard may become the appropriate standard of support if consistent with the trust’s

level of productivity and not inconsistent with an apparent priority among beneficiaries or other purpose of the settlor. Furthermore, distributions allowing the beneficiary an increased standard of living may be appropriate if, in light of the productivity of the trust estate, the eventual result would otherwise favor the remainder beneficiaries over the present beneficiary to a degree unlikely to have been intended by the settlor.

...

Under the usual construction of a support standard (*supra*) it would not be reasonable (Comment b), or even a result contemplated by the settlor (Comment c), for the trustee to provide only bare essentials for a beneficiary who had enjoyed a relatively comfortable lifestyle. (This is so even though the discretionary power is couched in terms of amounts the trustee considers “necessary” for the beneficiary’s support.)

Id.

Another commentator provides:

In such a trust the settlor may reasonably be held to have intended to provide for the maintenance of 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 to give the beneficiary the comforts and necessities to which they had been accustomed, and not merely to provide the beneficiary with the bare necessities of life. A trustee has been held entitled to include under the term “support” the education of the beneficiary, the maintenance of the beneficiary’s family, the purchase of life insurance on the beneficiary’s life to secure the beneficiary’s creditors, a vacation, nursing and medical care, and the payment of debts. Under a strict construction of support and living expenses the trustee may be held not entitled to pay the costs of the funeral of a life beneficiary, but a contrary view has been adopted in some decisions.

BOGERT’S THE LAW OF TRUSTS AND TRUSTEES, § 811.

One commentator provides:

There is more precedent on standard of living than nearly any other issue facing the trustee. This is probably because so many testamentary trusts incorporate the desire of the testator to provide support to a loved one “in the manner to which [the loved one] has been accustomed immediately prior to my death.” The “appropriate” standard of living may be

important even in trusts where the beneficiary's previous standard of living is not an issue.

A trustee should investigate and document the beneficiary's activities; this might include visiting the beneficiary and following up on distributions for major expenses, vacations, and education. And it might include research to determine what the grantor's standard of living was more than a generation ago. The courts consider the following factors to be relevant in various circumstances: type and size of dwellings; type and expense of educational institutions attended; wardrobe; domestic help employed; number and price of automobiles; membership in recreational facilities; vacations; and everyday activities. The trustee should monitor, record, and consider these in making maintenance and support distribution decisions. The trustee must "determine the amount of trust income sufficient for the 'suitable' support and maintenance of the trust beneficiary." Despite the broad interpretation of state courts in considering what is appropriate to distribute under an "accustomed standard of living" trust, the prudent personal trustee should also be aware of the tax ramifications of such a standard. "[T]he power to

invade corpus . . . to continue an accustomed standard of living" without further limitation has been held to be outside the ascertainable standard, even if limited somewhat.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 191 (2014).

Another commentator states:

Trusts regularly direct trustees to give distributions in order to allow beneficiaries to maintain a standard of living. The law calculates a beneficiary's standard of living as of the time of the grantor's death or when the trust became irrevocable. The reason for this is in keeping with interpreting the trust according to what the settlor intended. Even without specific language, distributions are to be made "according to the beneficiary's station in life." 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.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying HEMS Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L.J. 1, 31-32 (2017).

F. Consideration of a Beneficiary's Other Resources

Settlers often state that a trustee is to consider a beneficiary's other resources in determining whether to make a support distribution and how much of a distribution to make. Sometimes the trust is silent on this issue. One commentator provides:

From state to state, the default approach falls into the following three broad categories: (1) The testator intended that the trust be an absolute gift of support, and the trustee should not look outside the trust to determine the beneficiary's other means; (2) The trustee must consider other means, but the beneficiary is not required to exhaust them; and (3) The beneficiary must rely completely on his own resources for support, unless such resources prove inadequate. Often, the settlor specifies what the trustee should consider regarding outside support. But when it is not specified in the instrument, Texas law follows the moderate path of assuming the beneficiary's other means of support should be considered, but it does not require a beneficiary to exhaust such outside resources. As noted, this is not the prevailing view everywhere. However, in Texas and in a majority of states, in considering distributions, the view is that there are no reasonable grounds to exclude

information regarding other means of support. In these jurisdictions, the most important factor considered is the ultimate intent of the settlor or the testator—generally presumed to be to provide support, as necessary.

The rationale is that to determine what amount of support is necessary, the trustee must consider the beneficiary's circumstances and determine need. In *Howard*, the court held that the requirement that the trustee consider income from any source included the family. It held that the trustee must "consider all income enjoyed by the beneficiaries from any and all sources, all income enjoyed by their husbands from whatever source so long as it is available for support of the beneficiaries and their sons," and income received by the sons. In some cases of doubt, courts have suggested the trustee should err on the side of the primary beneficiary. This, of course, presumes that one class of beneficiary is of primary importance. However, most trusts do not have a primary beneficiary. In fact, as noted below, in most cases the trustee has the same duty to all classes of beneficiary. This may create a conflict between the needs of the current income beneficiary and the needs of

the future income or principal beneficiaries

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 192-93 (2014).

The Restatement provides:

It is important to ascertain whether a trustee, in determining the distributions to be made to a beneficiary under an objective standard (such as a support standard), (i) is required to take account of the beneficiary's other resources, (ii) is prohibited from doing so, or (iii) is to consider the other resources but has some discretion in the matter. If the trust provisions do not address the question, the general rule of construction presumes the last of these.

Specifically, with several qualifications (below), the presumption is that the trustee is to take the beneficiary's other resources into account in determining whether and in what amounts distributions are to be made, except insofar as, in the trustee's discretionary judgment, the settlor's intended treatment of the beneficiary or the purposes of the trust will in some respect be better accomplished by not doing so.

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 (or group of beneficiaries, Comment f) 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. (But contrast the effect of

another's duty to support the beneficiary, Comment e(3)).

Furthermore, in cases of nonobjective standards (e.g., "benefit" or "happiness"), other resources have less direct relevance than with regard to additional amounts necessary to maintain an accustomed lifestyle, for example. Those resources, however, may have some bearing on the overall reasonableness of an exercise of the discretionary authority.

As a rule of construction, the above presumption, with its qualifications, does not apply when the settlor expresses a different intent or if the presumption is contrary to purposes or terms of the trust as interpreted in light of circumstances and other evidence of the settlor's intention (§ 4). Thus, the settlor may manifest an intention that other resources are not to be taken into account (as in an absolute gift of support) or that they must be (as in a provision for payments "only if and as needed" to maintain an accustomed standard of living), with the trustee to have no discretion in the matter. (Contrast, however, the common phrase "necessary for support," which without more normally does not limit the trustee's discretion in this way.) On factors relevant to this

question of interpretation, see Comment g.

A grant of extended discretion (Comment c) does not relieve the trustee of a duty to take into account, or of a duty to disregard, a beneficiary's other resources, although the extended discretion is a factor to be considered in the process of interpretation. If, under the general rule of construction, the trustee has discretion in the matter the trustee has greater latitude in exercising that discretion when the settlor has used language of extended discretion in granting the power of distribution.

...

Where a trustee is to take a beneficiary's other resources into account in deciding whether and in what amounts to make discretionary payments to satisfy a standard, those resources normally include the beneficiary's income and other periodic receipts, such as pension or other annuity payments and court-ordered support payments.

A trustee may have discretion, and perhaps a duty, to take account of the principal of the beneficiary's personal estate, depending on the terms and purposes of the discretionary power and other purposes of the trust. The

settlor's relationships and objectives with respect to both the beneficiary in question and the trust's other current and remainder beneficiaries are of particular relevance. Also important are any income, estate, and other tax purposes the trust may serve (see Comment g), as well as the liquidity (including marketability and income-tax basis) of the discretionary beneficiary's assets.

RESTATEMENT (THIRD) OF TRUSTS § 50.

A trustee may also take into account public benefits that a beneficiary receives. The Restatement provides:

If a discretionary beneficiary is or may be eligible to receive public benefits, this factor, like the availability of other resources generally, is to be taken into account by the trustee under the usual rule of construction. Thus, to the extent consistent with the terms and purposes of the trust, and allowable by applicable benefits statutes (see Reporter's Notes), the presumption is that the trustee's discretion should be exercised in a manner that will avoid either disqualifying the beneficiary for other benefits or expending trust funds for purposes for which public funds would otherwise be available.

Id. at e(4).

Another commentator provides:

A question which has caused much litigation is whether, where a trustee has power to pay or spend trust income to the extent necessary to support the beneficiary, the trustee may take into consideration the income then being received by the beneficiary from other sources, or capital assets which the beneficiary owns outside the trust, or obligations of third persons to support the beneficiary arising out of marriage or parenthood. It is of course possible for a settlor to express or imply, or to be presumed to have, an intent that nontrust property is not to be considered by the trustee, and that full support is to come from the trust income, even though it is wholly or partly unnecessary. Or obviously the settlor may have had the intention that the trustee should consider the property and means of support of the beneficiary which are unconnected with the trust in deciding how much trust income should be paid or applied for support.

In settling this question of construction, the exact wording of the trust instrument must be considered carefully, as well as the relationships between the settlor and beneficiary and other beneficiaries, the financial situations of the

income and principal beneficiaries, and knowledge by the settlor of the family and financial status of the particular beneficiary.

...

If the beneficiary's other resources are to be considered, does that mean just the beneficiary's sources of income or all of the beneficiary's assets? The general rule seems to be to limit the consideration to sources of income and not the beneficiary's assets in general.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 811.

Absent some provision in a trust, a trustee should generally take into account in making distributions to a beneficiary that the beneficiary may have other individuals that are obligated to support him or her.

One commentator states:

The existence of a trust generally does not abrogate the duty of any other person obligated to support the beneficiary. There are numerous factors for the trustee to consider in situations where others may be obligated to support a beneficiary. These are raised most often in court-created trusts, although they certainly may be an issue in any type of personal trust. Such considerations include the following: (1) the ability of a

parent, or parents, to support a beneficiary with a disability, educate the beneficiary, meet emergencies, or provide necessary training for life; (2) the age, the mental and physical condition of the beneficiary, and if incapacitated, the likely duration of the incapacity; and (3) the beneficiary's likelihood of having to continue medical needs or the beneficiary's ability to obtain insurance and to support himself. All states also have laws regarding the duty between spouses.

When a trustee asks about a third-party's obligation, beneficiaries and their family members may find such questions intrusive; others may refuse to respond. However, the information is necessary because the law charges the trustee with duties, regardless of whether the parents are satisfying their duty to support a child or whether the need for maintenance and support truly exists. Most people would rather answer specific questions or prepare financial statements than provide tax returns—tax returns often fail to provide a clear picture of financial resources. Notwithstanding their limited value, some corporate trustees still require

beneficiaries to provide tax returns.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 208 (2014).

Another commentator states:

A particularly vexing problem is determining whether a trust was intended to support a beneficiary or merely supplement their lifestyle.... 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.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying HEMS Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L.J. 1, 33 (2017).

Historically, in Texas, there have been conflicting authorities when a trust is silent on the issue. *Compare First Nat. Bank of Beaumont v. Howard*, 149 Tex. 130, 229 S.W.2d 781, 786 (1950) (should consider all income available to the beneficiaries from any sources in determining whether to make distributions from principal) *with Penix v. First Nat. Bank of Paris*, 260 S.W.2d 63, 67 (Tex. Civ. App.—Texarkana 1953, writ ref'd) (trustee required to consider need for distribution “without regard to the financial ability of [the beneficiary’s] parents”).

In *Keisling v. Landrum*, a husband and wife were married after each person had been in a

prior long-term marriage. 218 S.W.3d 737, 739 (Tex. App.—Fort Worth 2007, pet. denied). Prior to the marriage, the settlor’s assets were in excess of \$1.3 million, while the beneficiary’s assets were approximately \$300,000. *Id.* Although the settlor and beneficiary signed a prenuptial agreement, the settlor “agreed to provide for the couple’s standard of living and to pay [the beneficiary’s] mortgage, property taxes, and for repairs and maintenance for her home . . .” *Id.* After a three-year marriage, the settlor died, leaving a testamentary trust containing most of the settlor’s estate. *Id.* The trust was for the primary benefit of the beneficiary but also included the settlor’s children from an earlier marriage. *Id.* The relevant portion of the trust stated:

The primary purpose of [the settlor’s trust] shall be to provide for the support, maintenance, and health of my wife in the standard of living to which she is accustomed at my death. If my wife’s own income and other financial resources from sources other than from this trust are not sufficient to so maintain her in such standard of living, the Trustee shall distribute, from time to time, as much of the current trust net income, or accumulated trust net income, as shall be necessary to so maintain her. If my wife’s own income and other financial resources, together with distributions of current and accumulated trust net income from this trust, are not sufficient to maintain her in such standard of living, then the Trustee shall distribute as much of the trust

corpus as shall be necessary to so maintain her. After my wife has been provided for in the manner described above, and if in the Trustee's judgment, it will not endanger my wife's present or reasonably foreseeable future support, the Trustee may distribute to my descendants, from time to time, such amounts of the current or accumulated trust net income and as much of the trust corpus, as shall be necessary for their respective support, maintenance, health, and education . . .

Id. at 740. The trustee, who was a friend of both the settlor and his first wife, made no distributions to the beneficiary and claimed that the beneficiary "was not entitled to distributions until she exhausted all of her 'other financial resources,' which included everything save one home and one vehicle." *Id.* at 739. As a result, the beneficiary filed a lawsuit. The beneficiary claimed that she did not have to exhaust her other assets and that she was entitled to distributions consistent with her standard of living that included multiple vehicles, homes, and vacations. Specifically, the beneficiary argued that the trust should cover the difference between her estimated monthly expenses of \$5,600 at the time of the settlor's death and her \$1,137.75 monthly revenue. *Id.* at 741.

The court agreed with the beneficiary by relying on the "standard of living" provision quoted above. *Id.* at 740, 742-43. The court held that the "standard of living" provision dictated that distributions should be made for expenses in connection with the beneficiary's lifestyle (at the settlor's death) that featured multiple homes, vehicles, and vacations. *Id.* The settlor, during his life,

paid for all of the beneficiary's living expenses with his assets. Those assets passed to the testamentary trust under his will, and the opinion states that settlor "intended the trust to take his place supporting [the beneficiary's] high standard of living after he died." *Id.* at 740. The result from the court is that the trust was to pay for almost all of the beneficiary's living expenses

Although the court did not cite the Restatement when analyzing the beneficiary's standard of living, its analysis was in harmony with the Restatement's comments quoted above. The court held that a trust with a support and maintenance standard permitted distributions for the beneficiary's expenses related to "food, gas, gifts to church, gifts to children, utilities, a security system, maid service, yard maintenance, taxes, insurance, cruises to Panama and Alaska, dental and medical care, shopping, five vehicles, and costs to support multiple homes." *Id.* at 741.

Further, the trust in *Keisling* required distributions to be made if the beneficiary's "income and other financial resources" were not sufficient to maintain her accustomed standard of living. *Id.* at 740. The trustee interpreted that language to mean that the beneficiary was required to expend all of her assets except one house and one car before the trustee was required to make a distribution. The court strongly rejected the trustee's interpretation as follows:

While [the settlor] was alive, [the beneficiary] enjoyed the benefits and luxuries of cruises and vacations, multiple homes, and multiple vehicles. There is no evidence in the wording of the instrument that [the settlor] intended the trust to

be a parachute to protect [the beneficiary] from poverty after she had exhausted all of her own assets. On the contrary, the purpose of the trust was to step in and pay for [the beneficiary's] high standard of living upon [the settlor's] death. This high standard, which was established before [the settlor] died, included use of and access to not just one vehicle, but to several. [The beneficiary's] standard of living also included use of both of the couple's homes plus use and access to her own home in Oklahoma. It would be nonsensical to require [the beneficiary] to sell all of her vehicles and other assets save one home and one vehicle just so the trust could "step in" and provide her with funds to purchase new assets and vehicles to replace them. Further, if we construe "other financial resources" to mean all assets, nothing in the instrument shows an intent for [the beneficiary] to keep one home and one vehicle; in that situation, [the beneficiary] would have to sell everything she owns before receiving distributions, which is also nonsensical. . . .

Here, [the settlor's] trust is unambiguous in its intent to maintain [the beneficiary] in the standard of living to which she was accustomed at his death. By requiring [the

beneficiary] to use her own income and "other financial resources," [the settlor] did not intend for [the beneficiary] to become impoverished before the trust stepped in to again elevate her to a high standard of living. On the contrary, [the settlor] designed the trust to provide [the beneficiary] with a comfortable lifestyle, which included multiple vehicles, at least one vacation each year, and other reasonable luxuries. . .

More importantly, it is irrelevant that [the settlor and the beneficiary] enjoyed an inflated standard of living; what is relevant is the instrument language.

Id. at 742-43. The court sided with the beneficiary's expert witness who, citing Section 50 cmt. e(2) of the Restatement, testified that "other financial resources" meant income and cash flow from other sources such as "Social Security, pension payments, annuity contracts, and similar items." *Id.* at 741-42. In adopting this interpretation, the court stated as follows:

Because the trust language unambiguously shows [the settlor's] intent to provide for [the beneficiary] without [the beneficiary] having to exhaust any assets, we hold that "other financial resources" as used in [settlor's] will means "income and other periodic receipts, such as pension or other annuity payments and

court-ordered support
payments.”

Id. at 743.

The court did not address the portion of the Restatement indicating that “[a] trustee may have discretion, and perhaps a duty, to take account of the principal of the beneficiary’s personal estate, depending on the terms and purposes of the discretionary power and other purposes of the trust.” *Id.* The court likely did not do so because the beneficiary did not have a large separate personal estate.

The court’s holding is consistent with a Texas Supreme Court case, *First Nat. Bank of Beaumont v. Howard*, 229 S.W.2d 781, 785-86 (Tex. 1950). In *Howard*, the trustee had discretion to distribute principal necessary for the beneficiaries’ support and maintenance. *Id.* at 783. Although the trust instrument was silent on whether to consider other resources, the court held that in determining whether a need existed, the trustee should consider “all income enjoyed by the beneficiaries from any and all sources,” including income from the beneficiaries’ husbands (if available to support the beneficiaries) and insurance policies from the settlor. *Id.* at 783, 786.

In *Duncan v. O’Shea*, which was discussed earlier, the trusts at issue also required the trustee to take into account “funds reasonably available to [the beneficiary] from all other sources . . .” 07-11-0088-CV, 2012 WL 3192774, at *4 —5 (Tex. App.—Amarillo Aug. 7, 2012, no pet.). With respect to distributions to the beneficiary, the court did not discuss whether the beneficiary’s personal assets should be taken into account, even though her assets (\$1,450,000) were similar in value to those held in the trusts (\$1,680,000 in the family trust and \$200,000 in the marital trust). Instead, the court focused on the

beneficiary’s cash flow and monthly expenses to determine whether the trustee had distributed more than was permitted under the trust standards, ultimately deciding that the trustee had not distributed too much.

G. Distributions When There Are Multiple Beneficiaries

A trustee’s duty to distribute trust assets becomes more complicated when there are multiple beneficiaries of a trust, especially those consisting of different generations and family lines. RESTATEMENT (THIRD) OF TRUSTS § 50. *See* Brink, Rhonda H., Cenatiempo, Michael J., and Moorman, R. Hal, *Where the Rubber Meets the Road: How Drafting Affects Discretion in Action*, 20th Annual Estate Planning & Probate Drafting Course at 5 (2009) (“One trust officer at this bank pointed out that most beneficiaries have an idea that there is a “fairness rule” with respect to discretionary distributions. Beneficiaries especially expect such a rule with pot trusts. The trust officer tries to educate the beneficiaries that there is no fairness standard. The exercise involves determining the settlor’s intent and following it. Once the intent is established, then a discretionary effort must be exercised to determine the relative need of each beneficiary and satisfy those needs if within the settlor’s intent to do so.”). The Restatement recognizes that although these scenarios must be resolved case-by-case in the context of the trust instrument, certain general inferences may be used as starting points. *Id.* For example, the Restatement provides that the beneficiary at the top of a line of descendants is favored over his or her own issue. *Id.* Where there are multiple lines of descent:

[T]here is an inference of priorities per stirpes, that is, that (i) the various lines are

entitled to similar, impartial [(but not necessarily equal)] treatment, with disparities to be justified on a principled basis consistent with the trust purposes, and that, (ii) the inference of favored status within a descending line begins with the person(s) at the top (e.g., the settlor's child or the children of a deceased child).

Id. Although the Restatement recognizes that there should be similar treatment between multiple family lines, it does not require equal distributions.

When a trust instrument clearly demonstrates that beneficiaries may receive unequal distributions, the Trustee is not required to make equal distributions among the beneficiaries. In *Paschall v. Bank of America*, the court examined the language of the trust instrument in considering the parties' arguments regarding whether the trustee was required to administer distributions in a manner that treated the settlor's grandchildren "equally" and the settlor's remote descendants "fairly." *Paschall v. Bank of Am., N.A.*, 260 S.W.3d 707, 709 (Tex. App.—Dallas 2008, no pet.). The trust instrument contained the following language regarding distribution of income and principal:

The Trustee shall distribute from each separate trust at any time and from time to time and at such intervals as it shall determine in its sole and absolute discretion, to or for the benefit of such grandchild, or the descendants of a grandchild, for whom such trust is held, such portion of

the income and/or principal of such separate trust as it shall determine to be advisable in its sole and absolute discretion, for the care, education, maintenance, family needs, and support of said grandchild or descendants, as the case may be, considering to such extent as the Trustee deems advisable in its sole and absolute discretion, resources otherwise available to said grandchild or descendants for such purposes. Such distribution need in no way be equal among descendants of a grandchild.

Id. at 709. The court noted that the inclusion of such language demonstrated the settlor understood the grandchildren may receive unequal distributions and that descendants of a grandchild may not necessarily be treated equally, and ultimately affirmed summary judgment in favor of the trustee. *Id.* at 713.

The Restatement provides:

Questions about the presumed meaning of standards and the significance of beneficiaries' other resources are complicated when a trust has multiple discretionary beneficiaries, whether of the same or different generations. Difficulty of generalization through rules or preferences is aggravated by the number and interrelatedness of issues and alternative meanings to be considered, and by diversity in the terms of these discretionary powers, in the

purposes and size of trusts, and in the beneficiaries' circumstances and their relationships to the settlor and to one another.

Illustrative is a trust in which the income is required to be distributed to B (usually the settlor's spouse or adult child), with discretion in the trustee to invade principal for the benefit of B and others, often a class consisting of B's or the settlor's children or descendants. A wholly discretionary variation of such a trust simply provides for discretionary distributions of income as well as principal to "any one or more of a group consisting of B and my [or B's] issue." Another example is a discretionary trust for "my children and their issue" (or, more simply, for "my descendants"), or for "X, Y, and Z and their issue." (In all of the above, the provisions for different individuals and classes may be separately stated, sometimes by generation, with the same or different standards for each.) A somewhat different prototype involves discretionary distributions among beneficiaries of one generation (e.g., "my children"), probably with contingent provision for distributions to the issue of any deceased members of that generation. A familiar version of this is the family trust providing collectively

for the young children of a deceased couple (or of a deceased parent under a grandparent's will) until some age or other condition is satisfied.

In all of these cases, the structure and terms of the interests may suggest a priority to be accorded various individuals or classes. Complex issues of management and distribution (as well as taxation) can be eliminated or simplified if the trust directs or allows either administration as separate shares or division into separate trusts, one for each member of the first beneficiary generation. This, however, is likely to be both impractical and undesirable in a trust for the support and education of orphaned children.

Most questions arising in these various situations must be resolved through case-by-case interpretation. Nevertheless, a few appropriate inferences and constructional preferences can be identified, and can be quite useful as starting points. Structure and context often suggest that someone is the trust's primary beneficiary or has "favored status" (see Illustration 9, *infra*), or that a particular person (e.g., an elderly in-law or collateral relative) stands lower in the settlor's priorities, perhaps to benefit only in the event of

need or hardship. In any event:

--Relationship to the settlor is relevant, leading in the most common situations to an inference that the beneficiary at the top of a line of descendants is favored over his or her own issue, with the settlor's spouse also so favored whether or not an ancestor of the others (e.g., settlor's issue by prior marriage).

--Among multiple lines of descent (e.g., all of the settlor's issue) there is an inference of priorities per stirpes, that is, that (i) the various lines are entitled to similar, impartial (see § 79, but not necessarily equal) treatment, with disparities to be justified on a principled basis consistent with the trust purposes, and that (ii) the inference of favored status within a descending line begins with the person(s) at the top (e.g., the settlor's child or the children of a deceased child).

--The preceding inference applies to the typical family trust for the support and education of minor or youthful beneficiaries following the death of one or both of their parents, with a preference for a common standard of living and similarity of opportunity to be balanced against usually modest funding and almost

inevitably different beneficiary needs, capacities, and interests.

--Because these various situations do not involve "substantially separate and independent shares" for different lines of beneficiaries (see Reporter's Notes), it is presumed that differences in benefits received by remainder beneficiaries or their ancestors during the trust period are not later to be taken into account in determining shares upon subsequent distribution, or in dividing the original trust for continuation thereafter in separate shares or trusts for separate lines of issue.

...

"Favored status" (or status as a "primary" beneficiary) does not necessarily mean that W should receive principal payments greater than--or even equal to--the distributions made to others; nor does it mean either that the trustee may not withhold principal payments to her because of her other resources or that in considering and making distributions to H's descendants T must take account of their independent resources (see Comment g). What W's favored status does mean is that, in the absence of compelling considerations, T is to give priority to

providing what she needs, if anything, to continue her lifestyle and to have appropriate care and other suitable benefits.

RESTATEMENT (THIRD) OF TRUSTS § 50(f).

Another commentator provides:

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

Certainly, there are several examples of trust documents that present clear and easily interpreted preferences for either the income or remainder beneficiary. Some settlors provide a clear mandate or a purpose statement. However, in many cases, the articulated standard is not sufficiently clear. If the document is silent or unclear, the trustee should turn to the standards set forth in the statutes—as noted above, the trustee must provide for the administration of the trust

with the same regard for the interests of all beneficiaries. In Texas, the Uniform Principal and Income Act and the Uniform Prudent Investor Act mandate consideration of the total investment strategy, stressing short-term results for the current income beneficiaries and long-term results for the future classes of beneficiaries.

Leslie Kiefer Amann, *Discretionary Distributions: Old Rules, New Perspectives*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 181, 195 (2014).

Another commentator provides:

The trust for support may be for the benefit of several beneficiaries, or of a family, and various questions of construction as to the propriety of payments or applications may arise. It becomes a question of construction of the instrument to ascertain whether the trustee had discretion to pay the beneficiaries unequal amounts, according to their respective needs or merits, or whether absolute equality of right among the beneficiaries was expected by the settlor.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 811.

In *In re Estate of Bryant*, the court of appeals affirmed a trial court's decision to terminate a trust and allow the trustee to distribute all of its assets to herself, thereby extinguishing the remainder beneficiary's

rights. No. 07-18-00429-CV, 2020 Tex. App. LEXIS 2131 (Tex. App.—Amarillo Mar. 11, 2020, no pet.). The court stated:

The purpose of the Jane A. Bryant Trust is to provide for Jane’s “health, education and maintenance needs.” The terms of the trust direct the trustee to “give primary consideration” to Jane when administering the trust. In addition, the trust gives the trustee discretion to distribute all of the income and/or principal of the trust when necessary or appropriate to provide for the beneficiary’s health, education, maintenance, and support.

The trial court heard evidence that Jane has significant medical expenses totaling over \$100,000, is unemployed, and has a terminal illness that prohibits her from working. Jane testified that she doesn’t have any retirement savings and that she has outstanding legal bills incurred in this litigation. Having sold her home, she now pays monthly rent. Jane testified that she sought a distribution from her trust to assist with these obligations. Bill maintains that Jane has “current, and significant, cash resources.” Jane testified that she had “about \$350,000 worth of cash left.”

The trial court found that “Jane’s circumstances justify the distribution of the entirety

of her part of the Children[‘]s Trust to her.” The trial court made this finding in light of evidence of the stated purposes of the trust; Jane’s health, maintenance, and support needs; the antagonistic relationship between Bill and Jane; Bill’s improper distribution of trust funds to himself and Leslie; and Bill’s reluctance to make distributions to Jane from her trust. Under these facts, we find no abuse of discretion in the trial court’s decision.

Id.

H. Trust Language That Impacts Interpretation of Distribution Standard

Once again, the primary goal of the trustee is to follow the settlor’s intent as expressed in the trust document. Often a settlor will use language to modify the distribution standard. The Restatement Provides:

Many factors may be influential in a process of interpretation that seeks to determine whether, based on evidence of the intention of a particular settlor, a relevant rule of construction or some aspect of it is inapplicable or modified with respect to the discretionary trust in question, or to decide how some inference may apply in a particular situation. This is evident in judicial opinions involving matters considered in the preceding commentary. Many reported cases have proceeded without

acknowledging any applicable presumption or constructional preference as a starting point.

Factors often cited in opinions as influential range from the particular language used in the grant of discretion (e.g., details of wording such as whether “may” or “shall” was used, whether discretion was about amounts “necessary” rather than “appropriate” to a beneficiary’s support, and whether remainder beneficiaries were to take “the principal” or “whatever principal remains”) to the relationships between the settlor and one or more of the beneficiaries. Relevant relationships include not only family relationships but also the settlor’s personal feelings about a beneficiary, and occasionally about the beneficiary’s spouse, and whether it had been customary or would be “natural” for the settlor to provide for the beneficiary’s needs. Among many other factors cited as influential are whether the trustee is also a beneficiary of the power, whether the discretion is applicable to income as well as principal, whether the settlor made other provision for the discretionary beneficiary (or other beneficiaries) under the same document or otherwise, whether the settlor was aware of the beneficiary’s other

resources or of other circumstances, whether a spendthrift restraint was imposed on the beneficiary’s interest, and whether a given interpretation might incidentally benefit someone other than the designated beneficiary.

Specific language, facts, and circumstances in a situation are properly to be considered in the process of interpretation, and may overcome, alter, or reinforce a particular presumption. Realistically, however, these factors often reveal little of a settlor’s actual intent. The settlor may have formed no intention on the matter at issue, or whatever intention may have existed might not have been ascertained by counsel or preserved in the drafting. In any event, the significance of particular facts and circumstances is often highly speculative, or they may cut both or several ways even if judicial opinions sometimes mention but one side. Furthermore, to be influenced by and draw meaning from subtle details of wording may well ignore the realities of how drafting is done, not to mention that the words were those of one whose work product suggests inattention to the particular issue or circumstances for which it has become necessary to discover, or attribute, an intention.

Frequently, therefore, the most revealing and reliable guides for resolving these types of questions are the underlying or general purposes of the trust or provision in question. From these it may be deduced what objectives the settlor had in mind, and thus what intention might appropriately be attributed to the settlor on the matter at issue. Accordingly, rather than relying on speculation about the import of specific details of fact or wording, it is often more instructive to analyze the variety of beneficial interests and other provisions of the trust as a whole, with any other available evidence, in a broader effort to ascertain why the trust was created and what role the particular discretionary power was to play in the trust plan.

RESTATEMENT (THIRD) OF TRUSTS § 50(f).

Another commentator states:

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

...

The term "may" implies discretion. 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. Conversely, the term "shall" is mandatory. 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.

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

Similarly, a "may" modifier subjects a trustee to attack on multiple fronts, creating a catch-22. 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. On the other hand, if the trustee withholds the distribution, the beneficiary will complain but the remainder beneficiaries will be satisfied.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying HEMS Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L.J. 1, 31 (2017).

I. There Must Be A Showing That The Standard Supported The Distribution

If a distribution for a support trust is ever challenged, a trustee should have proper support for the decision to make the distribution. Certainly, a trustee has a duty to investigate and have a factual basis for any discretionary act. *See* SCOTT ON TRUSTS, § 187.3 (4th Ed. 1988); *see also* BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 811 ("If the trustee is directed to pay the beneficiary adequate funds for support on demand, the trustee may have a duty to require the beneficiary to prove the need for a payment of principal to meet living expenses.").

The Restatement provides:

The duty of care requires the trustee to exercise reasonable effort and diligence in planning the administration of the trust, in making and implementing administrative decisions, and in monitoring the trust situation, with due attention to the trust's objectives and the interests of the beneficiaries. This will

ordinarily involve investigation appropriate to the particular action under consideration, and also obtaining relevant information about such matters as the contents and resources of the trust estate and the circumstances and requirements of the trust and its beneficiaries.

RESTATEMENT (THIRD) OF TRUSTS § 77.

A trustee has a duty to investigate the needs of the beneficiary and to make support distributions. That duty arises at the inception of the trust or when a successor trustee accepts the appointment. RESTATEMENT (THIRD) OF TRUSTS § 50; *Matter of JP Morgan Chase Bank, N.A. (Marie H.)*, 38 Misc 3d 363, 956 N.Y.S.2d 856 [Sur Ct, NY County 2012.] ("Both case law and basic principles of trust administration and fiduciary obligation requires the trustees to take appropriate steps to keep abreast of [the beneficiary's] condition, needs, and quality of life, and to utilize trust assets for his actual benefit.").

A beneficiary has a duty to provide the trustee with the information necessary to assist it in making the determination on distributions. *Keisling v. Landrum*, 218 S.W.3d 737, 741 (Tex. App.—Fort Worth 2007, pet. denied). The court in *Kiesling* stated that only the beneficiary "has access to her periodic receipts, income, and expenses, and a trustee may require a beneficiary to provide him with information necessary to use his discretion." *Id.* at 745.

One commentator states:

[I]n order to make reasonable decisions regarding distributions, trustees must

obtain reliable information from the beneficiary. Specifically, "the trustee should solicit information from the beneficiary regarding his or her financial needs, wants, resources, and standard of living." Necessary documents will vary depending on the case and situation but may include items such as: income and cash flow information; 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.

Determining how much information and which information is an art. 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. Trustees who collect too little information may experience the opposite result. Failure to adequately collect information may lead to beneficiaries claiming the trustee breached his or her fiduciary duty.

Christian S. Kelso, *But What's An Ascertainable Standard? Clarifying HEMS Distribution Standards And Other Fiduciary Considerations For Trustees*, 10 TEX. TECH EST PLAN COM PROP L.J. 1, 40 (2017).

A trustee can generally rely on a beneficiary's documents and statements regarding their needs. RESTATEMENT (THIRD) OF TRUSTS § 50(e)(1). The Restatement provides:

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.

Id.

For example, in *Sharma v. Routh*, the issue was whether a trustee's distribution of principal to himself was effective such that income from that distribution was community property. 302 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (Hedges, J., concurrence on op. on reh'g). One justice explained that the distributions were not proper:

The settlor to the two testamentary trusts authorized invasion of corpus only “as . . . necessary . . . to provide for [Sharma's] health, support, and maintenance in order to maintain him . . . in accordance with the standard of living to which [he] is accustomed” Without any evidence before us showing that a corpus distribution was necessary or made for Sharma's health, support, or maintenance, we conclude that Sharma did not meet the invasion criteria as set forth in the trust and was not entitled to trust corpus. Accordingly, principal payments made to the trusts could not properly be distributed to Sharma. Although Sharma improperly took personal possession of the funds, such physical possession without a showing

of need did not give Sharma a right to the principal payments or other trust corpus. As such, the principal payments remained trust property. Because the principal payments remained trust property, Sharma had no interest in the corpus. Accordingly, the trust income arising from trust corpus, namely the interest payments, were not community property.

Id.

Texas law indicates that a trustee when exercising discretion in making any decisions related to distributions the support or maintenance of a beneficiary cannot exercise that discretion without considering all of the material facts and circumstances. The trustee must consider the material facts and circumstances of the beneficiary's position from year to year when deciding to make, or not to make, any particular distribution.

The trustee should garner all relevant information to make a sound decision. The trustee should evaluate the financial market and where it is headed. The trustee should gather information for the requesting beneficiary's individual needs and sources of income. The trustee should seek a detailed report on all sources of funding for a beneficiary and all anticipated expenses. The trustee should also obtain the beneficiary's balance sheet showing all assets and liabilities. The trustee should also obtain the beneficiary's tax statements for the three previous years. The trustee should also seek information on the potential needs for other beneficiaries.

When exercising discretion in a support trust, a trustee should use this information to consider both the present and future needs of the requesting beneficiary and other beneficiaries, as well as other relevant facts and circumstances.

J. Right To Catch-Up Distributions

If a trustee has incorrectly withheld support distributions or calculated them wrong, then a beneficiary may be entitled to a catch-up distribution. For example, in *Keisling v. Landrum*, the trust instrument indicated that distributions shall be made “if [the beneficiary’s] own income and other financial resources from sources other than from this trust are not sufficient to so maintain her in [the] standard of living” to which she was accustomed at the settlor’s death. 218 S.W.3d 737, 743–45 (Tex. App.—Fort Worth 2007, pet. denied). The court considered this language and concluded that while the beneficiary’s other means of support should be considered by the trustee, it did not require the beneficiary to exhaust outside resources before making a distribution. *Id.* at 740-43. The trustee had a responsibility to distribute the trust’s income and principal to the beneficiary to maintain her in the lavish lifestyle to which she is accustomed “after considering her lifestyle needs, age, health, income, and size of the trust estate.” *Id.* Finally, and importantly, the court also held that the trial court had a duty to go back and “determine what that standard of living was and then make trust distributions to compensate [the beneficiary] from the date of [her husband’s] death.” *Id.* at 745. So, the trustees and trial court had to make the beneficiary whole by paying her for prior years when she was not distributed appropriate amounts.

K. Distributions For A Beneficiary’s Spouse and Minor Children

Distributions made for the support of a beneficiary’s spouse and minor child can be considered a HEMS distribution for the beneficiary parent because the beneficiary parent has an obligation to support his or her spouse and minor child. The Restatement provides:

A support standard normally covers not only the beneficiary’s own support but also that of persons for whom provision is customarily made as a part of the beneficiary’s accustomed manner of living. This generally includes the support of members of the beneficiary’s household and the costs of suitable education (*infra*) for the beneficiary’s children. The beneficiary is entitled also to receive reasonable amounts for the support of a current spouse, and of minor children who reside elsewhere but for whom the beneficiary either chooses or is required to provide support. Additional amounts to cover the beneficiary’s support obligation to a former spouse would normally be within the trustee’s reasonable discretion. (These matters of construction differ from but may be relevant to the question, discussed in § 60, whether a beneficiary’s discretionary interest may be reached in satisfaction of

claims for spousal or child support.)

RESTATEMENT (THIRD) OF TRUSTS § 50.

Another commentator provides:

A trust to support the beneficiary's family obviously entitles the trustee to expend money for the benefit of the beneficiary's spouse and dependent children, and may include a subsequent spouse and children. Whether the settlor intends to include members of the family as beneficiaries only as long as they live with the head of the family is a question of fact which must be decided in the light of all the circumstances. Such a trust has been held to extend to children of the marriage after the divorce of the parents, but there has been a disposition to include wives only so long as they remain undivorced and live with their husbands. Even if a wife and children are to receive benefits after a separation from the husband, it may well be that the trustee should make the payments to the husband and permit the latter to make a distribution.

BOGERT'S THE LAW OF TRUSTS AND TRUSTEES, § 811.

For example, in *First Nat'l Bank of Beaumont v. Howard*, HEMS distributions to a parent beneficiary was held to include the educational expenses of the beneficiary's dependents. 229 S.W.2d 781 (Tex. 1950).

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. *Id.*

In this regard, most of the case law deals with a related, but distinct question of whether funds of a discretionary trust may be reached by a former spouse for either the purposes of support for the non-beneficiary former spouse (alimony) or support for a non-beneficiary minor child. The majority view is that discretionary trust income may be accessed for support of a minor child (though not necessarily for the support of a non-beneficiary former spouse). Indeed, Texas has codified this in the Family Code, providing that a court may order a trustee of a discretionary trust to pay child support out of the trust income. *See* Tex. Fam. Code § 154.005. Texas law provides that parents are legally obliged to provide their children with certain basic necessities like food, clothing, housing and medical care. *See* Tex. Fam. Code § 151.001. This duty of support, owed by a beneficiary to his or her minor children, must be considered when making distributions from a trust. *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).

Texas law provides that a trustee subject to a HEMS distribution standard may be required to make distributions for the support of the beneficiary's child. *See* Tex. Fam. Code § 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.”). 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.” *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.”). A condition precedent to such an obligation, however, is that the beneficiary has been ordered to pay child support. *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 order trust-beneficiary parent to make the child support payment, after which it may then order the trustees to make disbursement for the support of the child).

In a more general sense, courts have held that consideration of a beneficiary’s familial obligations falls within a trustee’s discretion when determining what constitutes a proper distribution for the beneficiary’s “support.” *Estate of Stevens*, 617 S.E.2d 736, 739 (S.C. Ct. App. 2005). *See also First Nat’l Bank of Beaumont*, 229 S.W.2d 781, 785-86 (Tex. 1950) (holding that beneficiaries’ children were absolutely barred under the terms of the trust from claiming through the trust because they were not beneficiaries; however, consideration of their educational needs was within trustee discretion in determining the propriety of distributions to the beneficiaries [the parents]); *Robison v. Elston Bank & Trust Co.*, 48 N.E.2d 181, 189 (Ind. App. 1943) (“[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.”). This reasoning has been applied under circumstances where the beneficiary’s minor child does not reside with him or her. *See Matthews v. Matthews*, 450 N.E.2d 278, 281 (Ohio Ct. App. 1981) (concluding that “reasonable support” includes payment of all of the beneficiary’s normal, expected and legal responsibilities, including support of one’s child, and finding no reason why “reasonable support” should have any different application simply because the beneficiary lived apart from his child). The Restatement specifically provides that the beneficiary may receive reasonable amounts for minor children who reside elsewhere “but for whom the beneficiary either chooses or is required to provide support.” RESTATEMENT (THIRD) OF TRUSTS § 266.

Generally, a trustee may make direct distributions to the non-beneficiary parent for the benefit of the minor beneficiary. The common issue becomes whether the distributions will fall into “support and maintenance,” and whether resources of the non-beneficiary parent must be considered in determining the beneficiary’s needs. In making this determination, the trustee must first look to the trust instrument and the intent of the settlor. *See* 2 AUSTIN W. SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 13.2.4 (5th ed. 2006) (“With respect to a trust for the support of a minor, it is a question of the settlor’s intention whether the beneficiary is entitled to support from the trust if the beneficiary’s parents are able to support him or her.”). As the Restatement notes:

It is important to ascertain whether a trustee, in determining the distributions

to be made to a beneficiary under an objective standard (such as a support standard), (i) is *required* to take account of the beneficiary's other resources, (ii) is *prohibited* from doing so, or (iii) is to consider the other resources but *has some discretion* in the matter. If the trust provisions do not address the question, the general rule of construction presumes the last of these.

RESTATEMENT (THIRD) OF TRUSTS § 50, Comment e. With regard to other (non-beneficiaries') duty of support, the Restatement indicates that there is a presumption that a trustee *is* to take account of a parental duty to support a minor beneficiary under state law. *Id.* § 50, Comment e(3). The Restatement goes further and explains that "the trustee's discretionary authority normally should be exercised only to provide types of support or other benefits that fall beyond the parental obligation." *Id.*

Where the trust instrument is silent Texas case law is somewhat mixed as to whether other sources of income must be considered in determining a beneficiary's "needs" for purposes of a HEMS distribution. For example, in *Penix v. First National Bank*, the trust instrument provided that "During the pendency of the trust all net rents and revenues shall be used for [the beneficiary's] support, maintenance, and schooling." 260 S.W.2d 63, 64 (Tex. Civ. App.—Texarkana 1953, writ ref'd). Interpreting this language, the court considered whether the trustee's decision to withhold trust income above the beneficiary's current needs constituted an abuse of discretion. *Id.* The minor beneficiary's parents argued that all income

must be paid out for the benefit of the beneficiary, and that the trustee's failure to do so was an abuse of discretion. *Id.* at 64-65. The court noted the broad discretion granted to the trustee, as the will creating the trust provided that the trustee "shall be free in the carrying out of such trusts from any supervision by the probate or other courts." *Id.* at 66. The court further noted that "to pay such funds wholly to the natural and legal guardians of the minor would be to substitute the judgment and discretion of the guardians for that of the duly appointed trustee in expenditure of money" *Id.* The court held:

[W]e think the better rule is that the trustee has the duty to exercise reasonable discretion and judgment in determining the amounts reasonably and properly to be paid for the support, maintenance and education of the beneficiary in such case as this, and that he has the right to withhold surplus income for future emergencies and contingencies. In the exercise of a sound discretion the trustee should consider the beneficiary's station and condition in life, and we think that is broadly comprehended in the trial court's judgment.

Id. at 68. The court further affirmed the trial court's holding, which concluded:

[I]t is the duty of the trustee to make use of all sources of information, including the parents of [the minor beneficiary], for the ascertainment of her needs and the sums of money necessary

and reasonable for her support, maintenance and schooling; to exercise discretion in determining the sums and amounts reasonably necessary for such purposes without taking into consideration the financial ability of her parents to support, maintain and educate her; and to make all expenditures out of the revenue and income from property bequeathed to her and in trust for her as are reasonably necessary for her support, maintenance and education.

Id. at 64. Thus, the trustee had the duty to independently assess the needs of the minor beneficiary, and to make distributions in its discretion considering those needs. The non-beneficiary parents' financial ability was not to be considered, though information from the parents considering the minor's needs could (and should), among other sources of information, be considered. *Id.*

Further, the court in *Penix* affirmed the trial court's holding that the financial ability of the non-beneficiary parents need not be considered in determining the beneficiary's needs for purposes of distributions to be made for her support. *Id.* at 67. *But see Deweese v. Crawford*, 520 S.W.2d 522, 526 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.). In *Deweese* the court found that the non-beneficiary parents were required to show that they were unable to properly support and maintain the beneficiary children before *Crawford* was required to pay certain sums out of the Social Security benefits which he received as Trustee for the children. *Id.* at 526. Commentators have noted that *Deweese*

supports the contention that a trustee may refuse to make distributions for minors until the parents were unable to provide for them. However, *Deweese* dealt with Social Security benefits rather than a traditional trust, and, as the court itself noted “[c]omplaints as to [the trustee's] abuse of discretion or failure to pay over benefits is a question of federal law for which there is a federal administrative and judicial remedy.” *Id.* Therefore, *Deweese* is likely distinguishable on the facts and of limited utility when considering distributions from a discretionary trust. The court's holding in this regard is somewhat notable, as it is clear that distributions to a minor beneficiary for the purpose of support inevitably result in incidental benefit to non-beneficiary parents. The court did not express any concern for this issue in affirming the trial court's finding, demonstrating that incidental benefits to non-beneficiary family members resulting from HEMS distributions for a beneficiary need not be considered, so long as the trustee is acting based on the needs of the beneficiary. The interests of the non-beneficiary parent must be excluded from the trustee's consideration in administering the trust solely for the benefit of the beneficiary. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 543, at 218 (2d ed. Revised 1993).

However, the court in *First Nat'l Bank of Beaumont v. Howard*, when faced with the question of whether the trustee was required to invade the corpus of the trust to provide for the beneficiaries' needs, reached a slightly different conclusion. *First Nat'l Bank v. Howard*, 149 Tex. 130, 138, 229 S.W.2d 781 (1950). In this context, where the trust document was silent, the court found that the trustee was required to consider income from any source, including

the beneficiary's family. It held that the trustee must "consider all income enjoyed by the beneficiaries from any and all sources, all income enjoyed by their husbands from whatever source so long as it is available for support of the beneficiaries and their sons," and income received by the sons from any source. *Id.* at 786. Unlike in *Penix*, however, the trust instrument in *Howard* specified that the trustee make such distributions as, in the trustee's sole discretion, it determined to be "necessary or advisable." *Id.* at 783. Thus, this holding evidences the rationale that to determine what amount of support is *necessary*, the trustee must consider the beneficiary's circumstances and determine *need*.

Of course, the trust instrument is not always silent, and often the settlor specifies what the trustee should consider regarding outside support. *Keisling v. Landrum*, 218 S.W.3d 737, 743–45 (Tex. App.—Fort Worth 2007, pet. denied). For example, in *Keisling v. Landrum*, the trust instrument indicated that distributions shall be made "if [the beneficiary's] own income and other financial resources from sources other than from this trust are not sufficient to so maintain her in [the] standard of living" to which she was accustomed at the settlor's death. *Id.* at 740. The court considered this language, and concluded that while the beneficiary's other means of support should be considered by the trustee, it did not require the beneficiary to exhaust outside resources before making a distribution. *Id.* at 739–45 (explaining that beneficiaries need not exhaust all of their financial assets or resources).

IX. CONCLUSION

One of the most important aspects of trusts relates to a trustee's duty and power to make

distributions. There are many different types of standards for distributions and there are many different types of conflicts that can arise regarding distributions. This paper has attempted to address many, but not all, of the standards and conflicts.