

# **DISCRETIONARY DISTRIBUTIONS**

**Given By  
Frank N. Ikard, Jr.  
Ikard & Golden, P.C.  
Austin, Texas**

**Advanced Estate Planning and Probate Course 2002  
June 5-7, 2002  
Dallas, Texas  
CHAPTER 40**



**FRANK N. IKARD, JR.  
IKARD & GOLDEN, P.C.**

Attorney at Law  
106 East Sixth Street, Suite 500  
Austin, Texas 78701  
(512) 472-2884

**EDUCATION:**

- University of Texas School of Law, J.D., 1968
- University of the South and University of Texas, B.A., 1965
- Phi Alpha Delta

**PROFESSIONAL ACTIVITIES:**

**Board Certified, Estate Planning and Probate Law**, Texas Board of Legal Specialization  
**American Bar Association**, Real Property Probate and Trust Law Section, Estate and Trust  
Litigation and Controversy Committee

**American College of Trust and Estate Council**, Fellow 1979 - present

Member, Fiduciary Litigation Committee; Chairman, Breach of Fiduciary Duty  
Subcommittee

**Greater Austin Crime Commission**, 1999 - present

Board of Director, 2000 - 2001

**Real Property Probate and Trust Law Section -American Bar Association**,

Estate and Trust Litigation Committee; Continuing Legal Education Subcommittee

**Real Estate, Probate and Trust Law Section, State Bar of Texas**, Member and Past  
Chairman; Past member of the Trust Code Committee and Legislative Committee

**Texas Academy of Real Estate, Probate and Trust Lawyers**, Co-Founder and Member  
Board of Directors,

**Texas Bar Foundation**, Fellow 1991 - present

**Travis County Bar Association**, Estate Planning and Probate Section

**The Best Lawyers in America**, 1993-2000

**Fifth Circuit Judicial Conference**, 1983

**SPEECHES AND PUBLICATIONS:**

*Specialty Drafting Regarding the Fiduciary*, Travis County Bar Association, Probate and Estate  
Planning Seminar, March 2001

*Fiduciary Duties: What are They and How to Modify Them*, Texas Banker's Association  
Estate Administration Seminar, October 2000.

*What Property Are You Administering?/Conducting Inventory/Making Consistent Valuation  
of Assets/Sections 177 and 706 Issues*, Co-Author Alvin J. Golden, Wills, Estates, and  
Probate (A Satellite Production), State Bar of Texas, January 2000.

*Administration of Community Property After a Spouse's Death*, Co-Author Alvin J. Golden, Trust Financial Services Division's Estate Administration Seminar, Texas Banker's Association, October, 1999.

*Disclosure by a Fiduciary/Trustee Outside Formal Discovery: Non-Traditional Rules and Alternative Methods*, Advanced Estate Planning and Probate Course, June 1999.

*Administration of Community Property After a Spouse's Death*, Co-Author Alvin J. Golden, Advanced Estate Planning and Probate Course, June 1996.

*Trust Litigation Suing and Defending a Trustee for Breach of Fiduciary Duty*, Docket Call in Probate Court Seminar, March 1996.

*Exculpatory Clauses and Their Effectiveness to Protect Drafters and Fiduciaries*, Central Texas Estate Planning Council, May 1994.

*Trust Litigation from the Perspective of Both the Plaintiff and Defendant*, Southwestern Legal Foundation, Institute on Wills and Probate, May 1994.

*Managing Risk for Greater Profits*, Current Industry Litigation Review, Southwest Trust Conference and Trade Show, April 1994.

*Suggestions for Drafting Needed Clauses in Wills and Trusts to Avoid or Minimize Potential Liability in Fiduciary Litigation*, Southwestern Legal Foundation, Annual Institute on Wills and Probate, May 1993.

*1991 Legislative Update*, Advanced Estate Planning and Probate Course, June 1991 and published in the State Bar Newsletter of the Real Estate, Probate and Trust Law Section, October 1991.

*Liability of Executors and Trustees for Breach of Fiduciary Duty*, Texas College of Probate Judges, Annual Meeting, September, 1991.

*Risk Management for Corporate Trustees*, Texas Bankers Association, Trust Financial Services Division, Administration and Taxation Seminar, October, 1991.

*Jurisdiction in Probate Practice*, Co-Author Mary E. Fullmer, Texas College of Probate Judges, Annual Meeting, September, 1990.

*Pleading-Discovery-Special Issues-Order*, Co-Authors Edward V. Smith, III, Michael Cenatiempo and the Honorable Nikki T. DeShazo, State Bar of Texas, Advanced Drafting: Estate Planning and Probate Seminar, November, 1990.

*Fiduciary Duties of Executors and Trustees*, Co-Author Bob D. Harrison, Texas Bankers Association, Trust Financial Services Division, Trust Compliance Seminar, October, 1988.

**Table of Contents**

**I. SCOPE ..... 1**

**II. PRELIMINARY MATTERS ..... 1**

    A. THE DISTRIBUTION STANDARD ..... 1

    B. APPLICABILITY OF DISTRIBUTION STANDARDS TO THE DISTRIBUTION ..... 1

    C. APPLICABILITY OF THE DISTRIBUTION STANDARD TO BENEFICIARIES ..... 1

    D. INSTRUCTION REGARDING THE EXERCISE ..... 1

    E. THE FIDUCIARY DUTY OF IMPARTIALITY ..... 2

    F. THERE IS NO SUCH THING AS ABSOLUTE DISCRETION ..... 2

    G. EQUITABLE SUPERVISION BY A COURT ..... 3

    H. CRITERIA APPLICABLE TO THE EXERCISE OF DISCRETION ..... 3

        1. Other Sources Of Income: ..... 3

        2. Other Assets: ..... 3

        3. Other Income: ..... 3

        4. Accustomed Standard of Living: ..... 3

        5. Special Health Problems: ..... 3

    I. FACILITIES OF PAYMENT DISTRIBUTIONS ..... 3

    J. ABUSE OF DISCRETION ..... 4

    K. FAILURE TO EXERCISE DISCRETION ..... 4

    L. SELF SETTLED TRUSTS ..... 4

**III. PURE DISCRETIONARY DISTRIBUTION STANDARD ..... 5**

    A. EXAMPLE OF THE STANDARD ..... 5

    B. SPRINGING DISCRETIONARY STANDARD ..... 5

    C. RIGHT OF A BENEFICIARY TO COMPEL DISTRIBUTION ..... 5

    D. RIGHT OF A BENEFICIARY TO TRANSFER INTEREST ..... 6

    E. RIGHT OF A CREDITOR OR TRANSFEREE TO ATTACH ..... 6

**IV. PURE SUPPORT DISTRIBUTION STANDARD ..... 6**

    A. EXAMPLE OF THE STANDARD ..... 7

    B. RIGHT OF A BENEFICIARY TO COMPEL DISTRIBUTION ..... 7

    C. RIGHT OF A BENEFICIARY TO TRANSFER INTEREST ..... 7

**V. NON ASCERTAINABLE DISTRIBUTION STANDARD ..... 8**

    A. EXAMPLE OF THE STANDARD ..... 8

    B. RIGHT OF A BENEFICIARY TO COMPEL DISTRIBUTION ..... 8

    C. RIGHT OF A BENEFICIARY TO TRANSFER INTEREST ..... 8

    D. RIGHT OF A CREDITOR TO ATTACH ..... 8

**VI. “DISCRETIONARY” ASCERTAINABLE DISTRIBUTION STANDARD: ..... 8**

    A. EXAMPLE OF THE STANDARD ..... 8

    B. RIGHT OF A BENEFICIARY TO COMPEL DISTRIBUTION: ..... 8

    C. RIGHT OF A BENEFICIARY TO TRANSFER INTEREST ..... 9

---

**VII. DISCRETIONARY DECISIONS INDIRECTLY INFLUENCING DISTRIBUTIONS: ..... 9**  
    A. DISCRETION REGARDING ALLOCATION OF RECEIPTS AND ..... 9

**VIII. SPECIAL PROBLEMS: ..... 9**  
    A. BENEFICIARY FAILS/REFUSES TO SUPPLY INFORMATION: ..... 9

**DISCRETIONARY TRUST DISTRIBUTIONS****I. SCOPE:**

A trust instrument will frequently charge a trustee with the duty to make discretionary decisions with respect to the administration of the trust. Often the instrument granting discretionary decisions will provide that the exercise of discretion is "absolute," "uncontrolled" or in the "sole" discretion of the trustee.

This paper deals primarily with discretionary powers to distribute income and principal. A trustee may also be granted other discretionary powers that indirectly influence the amount of income or principal distributed to the trust beneficiaries. These other powers will be dealt with briefly.

**II. PRELIMINARY MATTERS:****A. THE DISTRIBUTION STANDARD:**

The distribution standard is the provision in a trust instrument that directs the trustee to distribute a part of the trust estate of the trust to one or more of the trust beneficiaries.

**B. APPLICABILITY OF DISTRIBUTION STANDARDS TO THE DISTRIBUTION OF INCOME AND PRINCIPAL:**

A distribution standard may apply to the distribution of income, corpus, or both income and corpus. A trust may have one type of distribution standard that governs the distribution of income and a completely different type of distribution standard that governs the distribution of corpus.

A distribution standard may either govern distributions of all or a portion of the trust estate of a trust during its administration or distribution of the entire trust estate of the trust on termination.

**C. APPLICABILITY OF THE DISTRIBUTION STANDARD TO BENEFICIARIES:**

The trust distribution standard may permit distribution to a single beneficiary (to "my wife"), to a class of beneficiaries having the same relationship to the settlor (to "my children"), or to a class of

beneficiaries having different relationships to the settlor (to "my descendants"). If distribution may be made to a class of beneficiaries then the trust is usually referred to as a "spray" trust.

**D. INSTRUCTION REGARDING THE EXERCISE OF A DISTRIBUTION STANDARD:**

A well drafted trust will frequently contain provisions assisting the trustee in the application of the distribution standard.

Instruction may be either precatory or mandatory and may apply to any type of distribution standard. There is no standard form for these provisions; they should embody the settlor's intent in creating the trust.

An example of instruction with respect to a spray trust might be as follows:

"It is not my intention to provide for equal distribution of the income or principal of this trust to support all of my children so long as any one or more of them is actively seeking a reasonable level of college or post graduate education and is expending reasonable effort toward attaining this end. Once a child attains his highest reasonable level of education then I am no longer as interested in supporting such child as I am in providing for the support and education of such child's siblings who have not completed such level of education.

I realize that my children may have different desires regarding college or post graduate education and that the cost of educating one or more of my children may greatly exceed the cost of educating other of my children.

Rather than have the trust estate of this trust diminished when one or more of my older children complete their education I would prefer for the entire trust to remain intact until such time as my youngest living child attains the highest level of education reasonably available to him or her. Once

this occurs, I desire for all future distributions to be made to my children in equal shares.

Without limiting the foregoing I also wish to provide for the health of all of my children and, to this end my trustee is authorized to make unequal distributions to any one or more of my children that have special health needs.”

Note that these instructions both assist the trustee in exercising discretionary distribution decisions and modify the fiduciary duty of impartiality described below.

#### **E. THE FIDUCIARY DUTY OF IMPARTIALITY:**

The fiduciary duty of impartiality overlays every distribution decision.

The Restatement (Second) of Trusts, § 183 provides:

“When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.”

The exercise of a discretionary distribution power may affect both income beneficiaries and remainder beneficiaries. For example, if the trustee makes distributions to the income beneficiaries, this may reduce the value of the trust estate of the trust that is ultimately available to the remainder beneficiaries. Conversely, if the trustee refuses to make distributions to the income beneficiaries, this may increase the trust estate that is ultimately available to the remainder beneficiaries.

The duty of impartiality obviously comes into play when there are multiple beneficiaries eligible for the same distributions. For example, in situations where the trustee of a spray trust has discretion to distribute income among a class of beneficiaries consisting of numerous beneficiaries the duty of impartiality will always be a consideration.

This duty may be modified or eliminated by the settlor. The author recommends that if a trustee is given discretionary distribution powers then consideration should be given to putting specific language in the trust that modifies or eliminates this duty. This is especially important with respect to spray trusts.

#### **F. THERE IS NO SUCH THING AS ABSOLUTE DISCRETION:**

The discretion with which a trustee of a trust is clothed to determine how much of the trust property shall be made available for the support of the beneficiary and when it shall be used is not an unbridled discretion. *Rubion v. Rubion*, 158 Tex. 43, 308 S.W.2d 4 (Tex. 1957); *First National Bank of Beaumont v. Howard*, 149 Tex. 130, 229 S.W.2d 781 (Tex.1950). He may not act arbitrarily in the matter, however pure his motives. In *Re Browns Appeal*, 345 Pa. 373, 29 A.2d 52; *Restatement of Trusts*, Sec. 187, p.487; 90 C.J.S. *Trusts* §261, p.310. His 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.

See also *Restatement of The Law of Trusts*, 2d §187 which provides that:

Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse of the trustee of his discretion. (emphasis supplied)

Issues involving court intervention are much more prevalent in connection with support trusts than with pure discretionary trusts. Courts will generally not substitute their discretion for that of the trustee in a pure discretionary trust unless the acts of the trustee are completely outside the bounds of reasonable conduct.



**G. EQUITABLE SUPERVISION BY A COURT:**

Whenever the equitable jurisdiction of a court of competent jurisdiction is invoked in trust litigation, the court acquires the equitable jurisdiction to supervise the administration of the trust. In extraordinary situations this jurisdiction may be invoked to cause the court (rather than the trustee) to exercise the distribution standard.

**H. CRITERIA APPLICABLE TO THE EXERCISE OF DISCRETION:**

There are numerous criteria that should be considered by the trustee in formulating his, her or its exercise of discretion. These always include the component elements, if any, that are actually contained in the distribution standard (such as “health”, “support”, “maintenance”, “education”, “welfare”, “comfort”, “best interest” etc.).

There are additional factors that a trustee may want to consider in exercising discretion. Many times one or more of these factors will be set forth in the instrument creating the trust. Even if they are not set forth in the instrument creating the trust, the trustee may consider:

1. Other Sources Of Income:

The trustee may consider whether or not the beneficiary is also the beneficiary of other trusts which would provide for the beneficiary and if these trusts are, in fact, making distributions to the beneficiary.

2. Other Assets:

The trustee may consider what other assets the beneficiary owns and whether or not these assets generate sufficient income to provide for the beneficiary.

3. Other Income:

The trustee may consider other income that the beneficiary is actually receiving. For example, is the beneficiary employed? How much is the beneficiary paid by virtue of this employment?

4. Accustomed Standard of Living:

The trustee may consider the accustomed standard of living that the beneficiary enjoyed at the time of the creation of the trust; or, at the time that the anticipated distribution is to be made.

5. Special Health Problems:

The trustee may consider any unusual mental or physical health problems that the beneficiary may have at the time. Do these problems prevent the beneficiary from earning income? What is the cost of treatment? To what extent does the beneficiary have health insurance that will provide for these problems?

**I. FACILITIES OF PAYMENT DISTRIBUTIONS:**

Many trusts will contain a “facilities of payment” clause. An example of such a clause is:

Notwithstanding anything to the contrary in this instrument, the Trustee, in its sole discretion, may make any distribution required or permitted to be made under this instrument in any of the following ways (regardless of whether or not the beneficiary is a minor or is incapacitated):

1. to the beneficiary directly;
2. to the guardian of the beneficiary’s person or estate;
3. by utilizing the distribution, without the imposition of a guardian or any other person, for the health, support, maintenance or education of the beneficiary;
4. by paying the distribution to third persons in accordance with written instructions from the beneficiary;
5. to a custodian for the minor beneficiary under the Texas Uniform Transfer to Minors Act or a uniform gifts to minors act of another state; or

6. by reimbursing the person who is actually taking care of the beneficiary, even though the person is not the legal guardian, for expenditures made by the person for the benefit of the beneficiary.

While the principal purpose of this type of clause is to allow the trustee flexibility to provide needs of trust beneficiaries, a facilities of payment clause may be used in some situations to provide for a beneficiary in a manner that can not be attached by creditors.

#### J. ABUSE OF DISCRETION:

In general, a court will not substitute its own discretion for that of a trustee, however, the court will not permit him to abuse the discretion. See *Coffee v. William Marsh Rice University*, 408 S.W.2d 269 (Tex. Civ. App.-Houston, 1966, writ ref'd n.r.e.); *Brown v. Scherck*, 393 S.W.2d 172 (Tex. Civ. App.-Corpus Christi, 1965, no writ) and *Nations v. Ulmer*, 122 S.W.2d 700 (Tex. Civ. App.-El Paso, 1938, writ dismissed).

An abuse of discretion does not usually occur unless the trustee acts outside the bounds of "reasonable judgment." *Scott on Trusts* § 187. A court should look to the following factors in determining whether a fiduciary has abused his discretion in making a trustee decision:

1. the extent of discretion conferred;
2. the existence of a definable external standard by which the reasonableness of the trustee can be judged;
3. if such a standard exists, the due diligence the trustee used to obtain the facts necessary to comply with this standard;
4. the circumstances surrounding the decision;
5. the factors that the trustee considered in making the decision;

6. the motives of the trustee; and

7. whether or not the trustee had a conflict of interest when making the decision.

#### K. FAILURE TO EXERCISE DISCRETION:

Failure to Exercise Discretion: It is an abuse of discretion for a trustee to fail to exercise judgment at all, no matter how broad the standard. *Scott on Trusts* § 187.3. A trustee can exercise its fiduciary duties in such a negligent manner that the lack of diligence will result in a breach of trust. *Jewett v Capital Nat'l Bank of Austin*, 618 S.W.2d 109 (Tex.App. - Waco, 1981, writ ref'd n.r.e)

#### L. SELF SETTLED TRUSTS:

The rules set forth below (Paragraph 3.5) do not apply to self settled trusts. See *Restatement of the Law of Trusts*, 2d. §156 provides that:

(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest.

(2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.

See also *Bank of Dallas v. Republic National Bank of Dallas*, 540 S.W.2d 499 (Tex. App. - Waco, 1976, writ ref'd n.r.e).

#### III. PURE DISCRETIONARY DISTRIBUTION STANDARD:

A trust is a discretionary trust if the trustee is authorized to make distributions in his sole discretion which is not subject to any objective standard.

A description of discretionary trusts is contained in Section 228 of Bogert, Trusts and Trustees, which provides that:

A settlor may provide that his trustee shall have absolute and uncontrolled discretion whether to pay or apply trust income or principal to or for the benefit of a named beneficiary, without fixing any standard or guide which the trustee is to consider and that the income which the trustee does not elect to use for the beneficiary shall be accumulated or paid to another or to a class of other persons. Such a trust has been called a "discretionary trust" and this term has a technical meaning for the purpose of determining the rights of the beneficiary and his assignees and creditors. It must be distinguished from trusts where the discretion of the trustee pertains only to the time or manner of the payments, or to the size of the payments needed to achieve a certain purpose, for example, to support the beneficiary. The trustee must have complete discretion to pay or apply or to totally exclude the beneficiary, if the trust is to be called "discretionary" in a technical sense.

#### **A. EXAMPLE OF THE STANDARD:**

Until this trust terminates, my trustee is granted absolute discretion to distribute all or any portion of the income and/or corpus of this trust to any one or more of the beneficiaries of the trust to the entire exclusion of any other beneficiary or beneficiaries of the trust or to refuse to make any distributions whatsoever to any beneficiary of this trust. In exercising this discretion my trustee shall not be subject to the fiduciary duty of impartiality and may apply any criteria that it deems necessary in its absolute discretion to determine whether or not any distribution should be made and the amount and type of any distribution.

#### **B. SPRINGING DISCRETIONARY STANDARD:**

A distribution standard may be purely discretionary from the inception or may, on the occurrence of a triggering event, convert into a purely discretionary distribution standard. In other words, a distribution standard could be a pure

support standard but could provide that if a creditor of any beneficiary makes a claim against the trust estate of the trust - the standard permanently converts into a pure discretionary standard.

#### **C. RIGHT OF A BENEFICIARY TO COMPEL DISTRIBUTION:**

The beneficiary of a purely discretionary trust may not compel the trustee to make trust distributions. See *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 948 S.W.2d 317 (Tex. App. – Dallas, 1997, writ den'd); Restatement of The Law of Trusts 2<sup>nd</sup> §155, comments note e.

See also *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App. – Corpus Christi, 1997 (no writ)); and *Kolpack v. Torres*, 829 S.W.2d 913 (Tex. App. Corpus Christi, 1992, writ den'd):

Under a discretionary trust, the beneficiary is entitled only to the income or principal that the trustee in her discretion, shall distribute to him. G. Bogert, *The Law of Trusts and Trustees* §228 (2d ed. 1979). 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.

In extraordinary situations a beneficiary may be able to convince a court that the trustee of a purely discretionary trust's failure to exercise discretion was so unreasonable as to constitute a breach of trust and/or to merit court supervision. For example, if the sole beneficiary of a multimillion dollar discretionary trust were to have a medical problem that could cause his death if he did not receive treatment, and if he did not have sufficient resources outside of the trust to provide for the treatment, then if the trustee refused to pay for the treatment, then the beneficiary may be able to compel distribution for his medical treatment.

**D. RIGHT OF A BENEFICIARY TO TRANSFER INTEREST:**

Absent spendthrift restrictions in the trust, a beneficiary probably may transfer his interest in a purely discretionary trust to a third person. It is doubtful, however, that a third person would have much of an interest in acquiring a discretionary distribution interest that he can not enforce. Even if a third person acquired a beneficiary's discretionary distribution interest - the third person would not become a beneficiary of the trust in a normal sense; the discretionary distribution beneficiary would continue to be the person designated in the trust.

**E. RIGHT OF A CREDITOR OR TRANSFEREE TO ATTACH:**

A creditor may not attach a beneficiary's discretionary distribution interest until it is distributed to the beneficiary. Ridgell, *supra* and Kolpack, *supra*.

Neither a creditor nor a transferee may compel a distribution from a pure discretionary trust. See Restatement of Trusts 2nd §155 (1) which provides that:

Except as stated in §156 [imposing special rules for self-settled trusts], if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income or principal or either as the trustee in his uncontrolled discretion shall see fit to apply, a transferee or creditor of the beneficiary can not compel the trustee to pay any part of the income or principal. (emphasis supplied)

A trustee may not, however, make any further discretionary distributions to the trust beneficiary after receiving notice of a transfer of the discretionary distribution interest or notice of attachment of the interest by a creditor of the

beneficiary. See Restatement of Trusts 2nd §155 (2) which provides that:

Unless a valid restraint on alienation has been imposed in accordance with the rules stated in §§152 and 153 [dealing with spendthrift provisions], if the trustee pays to or applies for the beneficiary any part of the income or principal with knowledge of the transfer or after he has been served with process in a proceeding by a creditor to reach it, he is liable to such transferee or creditor.

**IV. PURE SUPPORT DISTRIBUTION STANDARD:**

A trust is a support trust if it contains a distribution standard. The distribution standard of a support trust is generally an "ascertainable standard."

The standard is ascertainable because it is specific enough to be objectively applied. The distribution standard in a typical support trust permits distribution for the "health, support, maintenance and education" of the beneficiary.

The trustee of a support trust has discretion to determine the amount of income (and/or, if applicable, principal) necessary to provide for the support of the beneficiary. This discretion, however, is limited. See *Rekdahl v. Long*, 407 S.W.2d 339 (Tex. App. – Eastland, 1966, *aff'd* 417 S.W.2d 387 (Tex. 1967)); *State v. Rubion*, 308 S.W.2d 4 (Tex. 1957):

The discretion with which a trustee of a support trust is clothed in determining how much of the trust property shall be made available for the support of the beneficiary and when it shall be used is not an unbridled discretion. *First National Bank of Beaumont v. Howard*, 149 Tex. 130, 229 S.W.2d 781, 785; *Anderson v. Menefee*, Tex. Civ. App., 174 S.W. 904, writ refused; *Scott on Trusts*, Vol 2, sec. 187, p. 487; 90 C.J.S. Trusts §261, p. 310. His 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. Scott on Trusts, secs. 187, 187.1, 187.2, and 187.3; Kelly v. Womack, 153 Tex. 371, 268 S.W.2d 903, 907; Powell v. Parks 126 Tex. 338, 86 S.W.2d 725; Davis v. Davis, Tex. Civ. App., 44 S.W.2d 447, no writ history.

**A. EXAMPLE OF THE STANDARD:**

Until this trust terminates, my trustee shall pay or apply only so much of the income and/or corpus of the trust for the support or education of my son John.

**B. RIGHT OF A BENEFICIARY TO COMPEL DISTRIBUTION:**

The beneficiary of a support trust may compel distribution from the trustee.

**C. RIGHT OF A BENEFICIARY TO TRANSFER INTEREST AND THE RIGHT OF CREDITORS TO ATTACH THE INTEREST:**

The Restatement of The Law of Trusts, 2d §154 deals with support trusts that are solely for "education and support" of the beneficiary and provides that:

Except as stated in §§156 and 157 [situations where the settlor is a beneficiary and certain public policy considerations], if, by the terms of a trust it is provided that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education and support of the beneficiary, the beneficiary cannot transfer his interest and his creditors cannot reach it.

Comment e. to this section provides that "The rule stated in this section is not applicable where the amount to be paid by the trustee is a specified sum or is not limited to what is necessary for the education and support of the beneficiary, although by the terms of the trust it appears that

the settlor's motive in creating the trust is to provide for the education or support of the beneficiary. "

Texas case law is in agreement with this Restatement rule. See e.g. Monday et al v. Vance et. al, 51 S.W. 346 (Tex. App., 1899):

... it is also true that the right of alienation by the beneficiaries in the deed in question is utterly inconsistent with the purposes of the trust. The trust is an active one. The deed makes it the duty of the trustee to manage and control the property so as to produce the greatest possible income, and to appropriate the entire net income to the support of Mrs. Rice and to the education and maintenance of her children, and the means of educating the latter. To permit an alienation of the interest of the beneficiaries is destructive of the trust and incompatible with its purposes. In such cases the authorities hold that there is no power of alienation, although no restrictions upon the power are expressed in the conveyance.

Most support trusts contain the "safe harbor" distribution standard contained in Internal Revenue Code § 2041 (b) (1) (A). This standard is "health, support, maintenance and education". The regulations under I.R.C. §2041 (b)(1)(A) provide that "as used in this subparagraph, the words "support" and "maintenance" are synonymous in their meaning and are not limited to the bare necessities of life."

While there is no Texas authority directly on point, it is the author's opinion that the Restatement §154 Rule would apply to support trusts containing the I.R.C. 2041(b)(1)(A) distribution standard.

**V. NON ASCERTAINABLE DISTRIBUTION STANDARD:**

A trust may purport to be a support trust but may impose a non-ascertainable distribution standard on the trustee. The distribution standard is

non-ascertainable because it may not be objectively applied.

This type of distribution standard is for the “general welfare”, “comfort”, “best interest” or “well being” of the beneficiary. This imposes a standard that is so broad that it is difficult to ascertain exactly what the beneficiary is entitled to receive.

Because there is a distribution standard, the trust is not, in a pure sense, discretionary. The beneficiary may compel distribution under this standard and the beneficiary’s creditors may, in the absence of spendthrift provisions, attach a beneficiary’s undistributed interest.

**A. EXAMPLE OF THE STANDARD:**

*Until this trust terminates, my trustee shall pay or apply income and/or corpus of the trust for the welfare and comfort of my son John.*

**B. RIGHT OF A BENEFICIARY TO COMPEL DISTRIBUTION:**

The beneficiary of a trust containing a non ascertainable distribution standard may compel distribution from the trust. In fact, the standard may cause the entire trust estate of the trust to be included in the beneficiary’s federal estate tax base.

**C. RIGHT OF A BENEFICIARY TO TRANSFER INTEREST:**

In the absence of spendthrift provisions, the beneficiary of a trust with a non ascertainable distribution standard may transfer his or her interest in the trust to a third party.

**D. RIGHT OF A CREDITOR TO ATTACH:**

The creditors of a beneficiary of this type of trust probably can compel distribution and may attach the trust estate of this type of trust.

**VI. “DISCRETIONARY” ASCERTAINABLE DISTRIBUTION STANDARD:**

A trust may authorize a trustee to apply an ascertainable distribution standard in the trustee’s discretion.

This type of standard might authorize the trustee to distribute to a beneficiary “so much of the income of the trust as the trustee were to determine, in its absolute and uncontrolled discretion, to be necessary for the health, support, maintenance and education of the beneficiary”.

Because there is a distribution standard, the trust is not, in a pure sense discretionary. The beneficiary may compel distribution under this standard and the beneficiary’s creditors probably can attach, in the absence of spendthrift provisions, a beneficiary’s undistributed interest.

The trustee’s discretion in making this type of distribution is never absolute. It is always subject to review by a court of competent jurisdiction if the trustee acts outside the bounds of “reasonable judgment”.

**A. EXAMPLE OF THE STANDARD:**

*Until this trust terminates, my trustee shall pay or apply so much of the income and/or corpus of the trust as it, in its absolute and uncontrolled discretion, determines to be necessary for the health, support, maintenance or education of my son John.*

**B. RIGHT OF A BENEFICIARY TO COMPEL DISTRIBUTION:**

The beneficiary of this type of trust may compel distribution from the trustee. Notwithstanding the imposition of discretionary language, this is probably nothing more than a support trust.

**C. RIGHT OF A BENEFICIARY TO TRANSFER INTEREST AND THE RIGHT OF CREDITORS TO ATTACH THE INTEREST:**

This type of trust is subject to the same restrictions as support trusts (set forth above).

**VII. DISCRETIONARY DECISIONS INDIRECTLY INFLUENCING DISTRIBUTIONS:**

**A. DISCRETION REGARDING ALLOCATION OF RECEIPTS AND DISBURSEMENTS:**

Many trusts will grant the trustee the discretionary power to allocate receipts between the income and principal accounts of the trust. If the trust distribution standard provides that “all income” shall be distributed to the beneficiary, then the discretionary allocation to income will determine the amount that is distributable to the beneficiary.

**VIII. SPECIAL PROBLEMS:****A. BENEFICIARY FAILS/REFUSES TO SUPPLY INFORMATION:**

The beneficiary of a discretionary trust will occasionally fail or refuse to give the trustee sufficient information. When this occurs the trustee has three alternatives: (1) not to make the discretionary distribution; (2) to make the discretionary distribution without sufficient information; or (3) to seek judicial instruction. The author does not have a solution to this problem. If there is substantial acrimony between the trustee and the beneficiary and the amount involved is substantial then the trustee should probably seek instruction. If the trust is purely discretionary the beneficiary could probably never compel a distribution after refusing to supply information. The problem is obviously much more complicated when support trusts are involved.