

Discretionary Distributions: A Trustee's Guideline

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INTRODUCTION

When beginning the process of establishing a trust, grantors often have a general idea as to whom they will name as a beneficiary. Often, they will also know under what circumstances they would like a trustee to make a distribution to said beneficiary. However, effectively conveying that intent within a trust document is often a daunting task. This task requires more than a grantor simply conveying his wishes to the drafting attorney. It also requires that a grantor understand: (1) what options are available for conveying his intent, (2) what the language used within the trust document really means, (3) how others will interpret the language selected, and (4) what limitations the language selected places on the trustee being asked to affect his wishes. Grantors often ask too few questions and spend far too little time ensuring that the selected trustee fully understands who they are, what defines their value system, and what particular concerns they might have regarding the welfare of individual beneficiaries.

In addition to conveying their intent to the trustee, grantors should also ask questions of the trustee. Questions such as: (1) how the trustee interprets particular distribution standards, (2) what is the trustee's process for making discretionary distribution decisions, (3) what does the trustee require when asked to consider other resources and establish the beneficiary's standard of living, (4) does the trustee work with distribution advisors, and (5) does the trustee offer any educational training to new beneficiaries? Having a clear understanding of all parties' expectations at the outset will lead to a more effective trust administration.

I. **Getting Started:**

When a grantor begins the trust process, he should be thinking about: (1) what types of distributions they would like a beneficiary to receive, (2) for what purposes can the beneficiary request a distribution from the trust, (3) when they would like these distributions to be made and in what priority, (4) what circumstances should or should not exist, (5) who should be involved in the decision making process and (6) how the decision-maker should measure the beneficiary's need for a distribution (e.g., a grantor may wish to: (a) provide funds for a child's education, when she is ready to begin college; however, he might not wish to provide funds for her to go on to medical school or pursue other graduate studies, (b) provide for his children to live comfortably, while at the same time avoid utilization of the trust for excessive activities, and/or (c) prioritize beneficiary needs by providing first for spouse or children, allowing distributions to others only after the first tier beneficiaries' needs are satisfied).

Understanding the family dynamic, the trust's goals and the grantor's value system in advance of the trust's administration will make for a much more effective process. In short, the grantor should be well aware of his intentions and honest about each beneficiary's particular needs. The more clearly the grantor is able to communicate both his value system and the needs of the proposed beneficiaries in the trust documentation; the better advised the trustee will be. As the old adage goes, knowledge is power.

II. **What are Some of the Common Distribution Standards Used Within a Trust Document to Convey the Grantor's Intent?**

There are many standards regularly used to convey a grantor's intent with regard to distributions to beneficiaries. The most commonly used standard is the Health, Education, Maintenance and Support ("HEMS") standard, as it is expressly referenced in Internal Revenue Code Section 2041(b)(1)(A).¹ This HEMS standard is commonly referred to as an "ascertainable standard" as it allows a trustee with parameters in which to make decisions regarding what distributions are appropriate for a particular trust beneficiary. In using this standard, a grantor can be assured that there will be a balance between the prevention of distributions for extravagant purposes and provision for the beneficiary's needs.

In addition to the lack of arbitrary decision making which accompanies the use of an ascertainable standard, there are important estate planning purposes for utilizing this type of standard. Where a trust may at some time have a beneficiary serving as trustee, its safe harbor can guard such a beneficiary-trustee from estate tax inclusion and avoid the pitfalls of Internal Revenue Code Section 2041. Under this Section, a trustee whose discretionary authority is exercised without sufficient parameters can be deemed to have exercised a general power of appointment. By utilizing an ascertainable standard to determine scope of

¹ See also Treas. Reg. §20.2041-1(c)(2).

the trustee's authority, the trustee can avoid such inclusion concerns as the exercised power will be deemed to be limited.²

When applying an ascertainable standard, it is important to note that the specific definition of each term within the HEMS standard will vary from state-to-state as the definition is dependent upon how the specific terms have been construed under the jurisdiction's statutory provisions and case law.

A. **The Ascertainable Standard: the HEMS standard.** The following are examples of distributions which would be permissible under a HEMS standard:

1. **Health.** The standard of "health" is generally thought to include the following:
 - a. Emergency medical treatment;
 - b. Psychiatric treatment;
 - c. Psychological treatment;
 - d. Routine health care examinations;
 - e. Dental;
 - f. Eye care;
 - g. Cosmetic Surgery;
 - h. Lasik surgery;
 - i. Health, Dental, or Vision Insurance;
 - j. Unconventional medical treatment;
 - k. Home health care;
 - l. Gym memberships;
 - m. Spa memberships;
 - n. Golf club memberships; and
 - o. Extended vacations to relieve tension and stress.³

**If a grantor does not wish to make any of the above items accessible to beneficiaries, it is important to expressly provide such limitations by defining the term within the trust document.*

2. **Education.** The standard of "education" is thought to include the following:
 - a. Grammar, secondary and high school tuition;
 - b. Graduate school;
 - c. Post-graduate school;
 - d. Medical school, law school, or other professional school;

² See Estate of Wall v. Commissioner, 101 T.C. 300 (1993); Estate of Vak v. Commissioner, 973 F.2d 1409 (8th Cir. 1992); Rev. Rul.95-58. Whereas pursuant to I.R.C. §2041, the exercise of a general power of appointment by an individual is deemed to cause estate tax inclusion of the assets which were the subject of the exercise in the estate of the trustee having exercised the discretion.

³ RESTATEMENT (THIRD) OF TRUSTS, §50 (2003).

- e. Support of the beneficiary while in school;
- f. Support of beneficiary while not in school (between semesters);
- g. Studies for the student that makes a career out of learning;
- h. Technical school training;
- i. Career training;
- j. College in Europe as part of a study abroad program⁴; and
- k. Related expenses such as supporting the beneficiary not only during the semester, but, also between semesters.⁵

**A grantor should again consider how he would like the term defined. This is particularly true with regard to the term “education” which can be interpreted broadly to include multiple levels of education. The grantor may wish to include limitations as to precisely how much education the trust will provide (e.g., a beneficiary may wish to go to law school, and then subsequently wish to go to medical school. In the foregoing scenario, the grantor may wish to limit distributions for this purpose to one level of graduate studies or a certain dollar amount). Failing to adequately explain the grantor’s specific intent will result in the trustee performing a facts and circumstances type analysis which may not yield the desired result.⁶*

3. **Support and Maintenance.** The terms “support” and “maintenance” are considered synonymous.⁷ When applied, these terms do not limit a trustee to providing merely the bare necessities in life but allow for significant discretion. To provide additional clarity, these terms are often used in conjunction with additional language, such as: “support in reasonable comfort,” “maintenance in health and reasonable comfort,” or “support in the beneficiary’s accustomed manner of living.” In addition, the Restatement (Third) of Trusts takes several notable positions with regard to what can fairly be interpreted to be permissible distributions pursuant to a “support and maintenance” standard. The list provided within the Restatement (Third) is specifically broken down into three categories: (1) what is generally deemed to be included, (2) what might be included, and (3) what expressly is not included.

- a. **Generally included:**
 - 1. Regular mortgage payments;
 - 2. Property taxes;
 - 3. Suitable health insurance or care;

⁴ *Id.*

⁵ See Estate of Egan, 39 N.Y.S2d 96 (Sur. Ct. 1942).

⁶ Paying for education of the beneficiary during his adult life permitted where testator was a scholarly man himself. In the Matter of Estate of Wolfe, 164 Misc. 504, 299 NY Supp 99 (Sur. Ct. 1937). *But see* Lanston v. Children’s Hospital, 148 F. 2d. 689 (D.C. Cir. 1945) Trustee was upheld in refusing payment for education of a 42 year old beneficiary; and Southern Bank & Trust Co. v. Brown, 246 S.E.2d. 598 (S.C. 1978) payment for post graduate education is not usually authorized pursuant to education standard.

⁷ See Delaware Trust Co. v. Tease, 125 A.2d 169 (Del.Ch. 1956) states that support and maintenance are often employed synonymously, meaning to provide a beneficiary with sufficient means to “live comfortably.”

4. Existing programs of life and property insurance;
5. Continuation of accustomed patterns of vacation;
6. Continuation of family gifting; and
7. Continuation of charitable gifting.

b. Might be included:

1. Reasonable additional comforts or luxuries; and
2. Special vacations of a type the beneficiary had never taken before.

c. Not included:

1. Payments unrelated to support which merely contribute to the beneficiaries contentment or happiness;
2. Distributions to enlarge the beneficiaries personal estate; and
3. Distributions to enable the beneficiary to make extraordinary gifts.⁸

**It is important to note that the standard of “support and maintenance” is often interpreted to include not only the support of a beneficiary, but, also support of beneficiary’s family living with him at the time of the distribution request (or those who may be entitled to his support). It may also be deemed to require the trustee to consider the support available to the beneficiary from other persons. Thus, a grantor might wish to expressly provide that he does not intend to provide support for a beneficiary’s spouse, or that he does not wish to cut-off support to a beneficiary upon marriage.⁹*

- B. **Other Distribution Standards Available – “Unascertainable Standards”**. A grantor may also choose to use terms that allow broader discretion on the part of the trustee rather than the HEMS standard. This group of standards is often referred to as “unascertainable standards.” (e.g., the term “comfort” is considered to be somewhat broad and allows a trustee the discretion to provide for a beneficiary’s needs that are less standard. Similarly, the terms “happiness” or “best interest” would convey a similar intent for broad discretion when making discretionary distribution decisions.

For federal tax purposes, however, it is important to remember that few of these terms will constitute an “ascertainable standard” and thus the application of the same by a beneficiary-trustee may cause estate tax inclusion for that beneficiary. By way of example, the term “comfort” used alone is not considered an ascertainable standard, whereas “support in reasonable comfort” and

⁸ RESTATEMENT (THIRD) OF TRUSTS, §50 (2003).

⁹ See SCOTT, THE LAW OF TRUSTS, §128.4 (4th ed., 1988) which asserts that “...where a trust is created for the support of a married man, the inference is that he is entitled to receive enough to support his wife and minor children also.”

“maintenance in health and reasonable comfort” are considered ascertainable standards.¹⁰

Some examples of commonly used “unascertainable standards” are:

1. **Comfort:** When construing terms such as “comfortably to support” or simply “comfort”, a court deems the needs, desires and habits of the beneficiary to be significant, giving them significant weight but not allowing them to justify the indulgence of every whim of the beneficiary.¹¹ Generally speaking, the beneficiary’s appropriate level of “comfort” is determined by the beneficiary’s standard of living at the time that the trust is created or at the time of the grantor’s death.
2. **Benefit:** The term “benefit” is often used within the context of the HEMS standard as a replacement for the “health” term. What is deemed appropriate by a trustee under this standard will typically be measured in light of the circumstances of the beneficiary and the trust as a whole. (e.g., when a beneficiary might request funds to acquire a jet plane, a trustee would be charged with reviewing the beneficiary’s “benefit” in light of the circumstances of the trust. Where the trust was funded with closely-held stock, a court would likely guide a trustee towards the preservation of trust corpus (and thus the business) as opposed to giving the beneficiary large lump sum distributions).¹²
3. **Best Interest, Welfare and Happiness.**
4. **Necessary, Necessities, Need and Emergency.**
5. **Complete Discretion of the Trustee:** In this instance, a trustee will need to be particularly careful to ensure that it has established policies in order to provide beneficiaries with consistent treatment as there is often no or little guidance provided for within the trust document. How a trustee makes on-going distribution decisions will be strictly a question of the trustee’s own internal policies and procedures.

¹⁰ RESTATEMENT (THIRD) OF TRUSTS, §50, Comment (d)(3) (2003). See also, Lord v. Roberts, 153 A. 1, 4, 84 N.H. 517 (1931) “comfort is something more than maintenance but something less than welfare...;” Zumbro v. Zumbro, 69 Pa.Super 600, 603 (1918) “comfort... may include things which bring ease, contentment or enjoyment...” But see In re Estate of Howard, 236 S.E.2d. 423 (1977) comfort does not include the ability to make gifts; and Stoker v. Foster, 60 N.E. 405, 178 Mass. 591 (1901) comfort does not include the power to augment the beneficiary’s estate.

¹¹ See Equitable Trust Co. v. Montgomery, 44 A.2d 420 (Del.Ch. 1945) trustees authorized to invade principal whenever the income of the beneficiary was insufficient comfortably to support her, allowing the trustee to construe the words liberally and exercise broad discretion, giving weighty consideration to the needs, desires and habits of the person to be supported. This was balanced against not being required to indulge every whim of the beneficiary.

¹² See Cox v. Sellers, 33 A.2d 548 (Del. Supr. 1943) wherein it is established that in order to attempt to ascertain the intention of the creator of a trust the trust instrument must be examined to discover a rational scheme of disposition or dominant purpose and, if found, give it effect.

III. **Other Means of Conveying Grantor Intent?**

In addition to the use of the standard discretionary terms in a trust document, a grantor may choose to provide further guidance to a trustee. There are several methods of doing so, both within and outside of the trust document:

- A. **Definitions:** Where a grantor is not entirely comfortable with the standard interpretation of a particular discretionary term, it is always possible to re-define or further define the term within the trust document. In so doing, a grantor can specify exactly what he intends the trust to provide for and under what circumstances.
- B. **General Purpose Statement:** A grantor can also elect to include within the trust document a general statement of: (1) the purposes of the trust, (2) the factors which the grantor would like the trustee to consider when making a discretionary distribution decision, or (3) an illustration to assist the trustee with decision making. A general purpose statement can also be used to express the grantor's overall value system or provide the trustee with the tax or estate planning objects which the trust is intended to serve. In addition, the general purpose statement might be used to explain the grantor's specific concerns with regard to one or more individual beneficiaries and his goals for them.
- C. **Statement of the Hierarchy of Distribution:** A grantor can also express his desire to prioritize the interests of certain beneficiaries within the trust by providing a hierarchy with regard to distributions. For example, a grantor may provide that the trustee should consider the needs of his spouse as paramount or that the primary beneficiary is to be given priority over the remainderman, even if it requires the trustee to exhaust the trust.
- D. **Distribution Advisor or Committee:** Under the laws of some states, a grantor can bifurcate trustee duties and appoint a distribution adviser or distribution committee to specifically direct the trustee with regard to distributions.¹³ A Distribution Adviser or Distribution Committee can:
 - 1. Provide the trustee with direction regarding sensitive issues (i.e., substance abuse, etc.);
 - 2. Provide the trustee with direction as to all distributions (i.e., perhaps the advisor is more intimately familiar with the family or the beneficiaries' individual needs and lifestyle); and
 - 3. Provide the trustee with information as to beneficiary capacity.

¹³ See 12 Del. C. §3313.

- E. **Letter of Wishes**: A grantor may wish to express his intent more clearly in a Letter of Wishes, which is a separate non-binding document wherein the grantor can more freely state his intentions when creating the trust. While it is not binding on the trustee, it is very useful in making sure that the grantor's thoughts and intentions are clearly communicated to the trustee. Where there is ambiguity, a court may be able to look to the letter of wishes as additional evidence of the grantor's intent.

IV. **Other Means of Assessing a Beneficiary's Needs.**

- A. **Consideration of Other Resources**: Another manner in which a grantor might choose to convey his intent with regard to the application of distribution standards is by providing that the trustee must consider the beneficiary's other means of support when exercising discretion.¹⁴ This type of provision often establishes that a trustee is to limit the application of trust funds for a particular beneficiary should there be other resources currently available to satisfy the same. In so doing, this provision will allow a trustee to preserve the trust property for the use of beneficiaries who are more in need of the funds. It can also be used to place additional qualifications on the rights of a trustee to make distributions through the inclusion of requirements that a beneficiary be living within a certain lifestyle to avoid allowing a beneficiary to become complacent or spoiled. In so doing, the grantor can ensure that the beneficiary learn to preserve their resources rather than waste them. It is also possible that a grantor require that a trustee consider not only the beneficiary's resources, but, other resources available to the particular beneficiary such as the beneficiary's spouse's financial resources. Grantors may also require consideration of a beneficiary's potential resources by inclusion of language requiring a review of the beneficiary's earning capacity or employment status.

Likewise, a grantor may indicate that they do not wish to consider a beneficiary's other resources when making a distribution. Where that is the case, it is important to consider the particular distribution standard being used to ensure that it conveys the grantor's intent. For instance, Treasury Regulations Section 20-2041-1(c)(2), indicates that when using the terms maintenance and support,

¹⁴ See President, Directors, Etc. v. Delaware Trust Co., 95 A.2d 45 (Del. Ch. 1953) which states that determining whether or not a trustee must consider a beneficiary's other assets rests not only upon the trust language itself, but also on an analysis of the relationship between the grantor and the trust beneficiary, the beneficiary's needs and circumstances at the time the trust was created and the manner in which the grantor had been attending to those needs. See also Arcaro v. Girard Bank, WL 21873 (Del. Ch., Dec. 12, 1984) wherein the court confirmed that absent factual information regarding the relationship of the beneficiary and the grantor and his or her circumstances at the time the trust was funded, a determination cannot be made.

a beneficiary is not required to exhaust his or her other income before power can be exercised.¹⁵

- B. **Standard of Living Considerations**: Some grantors include language within the trust document requesting that the trustee consider the standard of living to which the beneficiary has become accustomed prior to making a discretionary distribution decision. Generally, the accustomed manner of living for these purposes is deemed to be the manner of living enjoyed by the beneficiary at the time of the grantor's death or at the time that an irrevocable trust is created.¹⁶

In assessing this standard of living, it may be helpful to a beneficiary to establish a baseline standard at the time of the grantor's death or at the time the irrevocable trust was created. In order to establish a baseline, a trustee should make a list of the beneficiary's current level of consumption with regard to:¹⁷

1. Motor vehicles: List those currently owned and how often they are replaced;
2. Homes: List those currently owned, the length of time spent in each, furniture, etc.;
3. Vacations: Method of transportation, locations, frequency, costs, etc.;
4. Entertainment: Frequency of guests, cost for events, season tickets owned;
5. Personal Items: List of some more significant items owned;
6. Hobbies; and
7. Education.

V. **Some Specific Areas of Concern to Consider when Making Distribution Decisions**:

A. **Funding a new business**.

1. A distribution to fund a new business will probably fall within a "support and maintenance" standard (or a broader standard).
2. Often a grantor will provide that the provision of funds for this purpose is dependent upon the business' prospect of success.
3. When assessing whether or not to allow a distribution for the funding of a new business, a trustee's decision will depend largely on its confidence in the beneficiary and his business plan. It is important that a trustee request and

¹⁵ SCOTT, THE LAW OF TRUSTS, §128.3 (4th ed., 1988) notes that typically a grantor using the terms maintenance and support intend to provide for the support of the beneficiary even if he might have other resources; however, cases go both ways in that regard.

¹⁶ See RESTATEMENT (THIRD) OF TRUSTS, §50, Comment (d)(2)(2003) there are corresponding adjustments for inflation and it may also increase to meet subsequent increases in the beneficiary's needs resulting there from.

¹⁷ Trent S. Kiziah, Discretionary Distributions: Drafting and Implementation (date unknown).

study the business plan and make any discretionary distribution decisions based only upon sound business principles.

4. Even if the trustee decides against making a distribution to support a beneficiary's business, the trustee may want to consider providing the beneficiary with a *loan* from the trust, based on the strength of the business plan. If the trustee decides to move forward with the loan, it will be important to follow all of the formalities of a proper third-party loan and have the beneficiary sign a promissory note requiring repayment of the principal and interest at market rates. In considering the appropriate rate, it is important to remember that market rates will require the utilization of, at a minimum, the *applicable federal rate* as issued by the IRS on a monthly basis.

B. Kids with questionable partners.

1. "Support and maintenance" has been held to include the needs of family members living with a beneficiary that might be deemed entitled to his support. To avoid court analysis, it is important for the grantor to make his intent clear on this point within the actual trust document.
2. To avoid inclusion of a former or separated spouse, a grantor must be clear within the trust document that the term "spouse" is defined in the manner he intends (e.g., a grantor may not want to treat an individual as spouse if the individual is no longer living with or married to the beneficiary or the grantor may wish to exclude a spouse who is legally separated from the beneficiary).

C. Buying a house.

1. The purchase of a home is typically permissible under a "best interests," "welfare," "happiness" standard.¹⁸
2. A "support and maintenance" standard will typically permit a distribution to purchase a primary residence, but, not a vacation home.
3. The type and size of house which is deemed reasonable for a particular beneficiary is dependent upon the manner of living that the beneficiary has become accustomed to, established at the time the trust was created.
4. A trustee should consider the trust's resources and the beneficiary's decision making skills when navigating this gray area. A trustee should be certain that the beneficiary can afford the house's ongoing expenses, maintenance, and real estate taxes when determining it prudent to make a distribution for the purchase of a home.

¹⁸ Kemp v. Paterson, 158 N.Y.S.2d 870 (1956), 163 N.Y.S.2d 245 (1957), 188 N.Y.S.2d 161 (1958).

5. Some trustees will look to whether or not there is an advantage to providing the beneficiary the funds necessary to acquire a home rather than pay on-going rental expenses.
6. Few trust instruments include specific language allowing distributions to a beneficiary for the purpose of purchasing a house. It is important to consider; however, that even if the trust does not permit such a distribution, it may permit a distribution for the purpose of making a down payment. This would allow a trustee to still provide the beneficiary with assistance.
7. Dependent upon the terms of the trust and the trustee's policies, it may be possible to have the trust purchase the actual home. In so doing, the trustee is assured that bills are paid promptly and regular maintenance is being performed. As a follow-up, the trustee should arrange regular maintenance inspections. Expenses should be handled under typical lease arrangements with the trust (as the owner of the property) being responsible for tax bills and improvements and the tenant/beneficiary being responsible for monthly utility bills.
8. Where a trustee prefers that the trust purchase the real estate, it may be better planning to title the same through an intermediary entity such as a limited liability company. In so doing, the potential liability of the property will be isolated from the trust's other holdings.

D. **Drafting around family dynamics.**

1. Generally, there are two categories of beneficiaries that grantors are concerned about:
 - a. Dysfunctional beneficiaries: due to addictions or other limitations.
 - b. Underperforming beneficiaries: under-employed or non-employed.
2. It is important to state the grantor's expectations for beneficiary behavior within the trust instrument, including a clear definition of prohibited behavior. In addition, it is helpful to establish parameters for testing the behavior and the hiring of professionals or experts to both evaluate the same and provide relevant counseling.
3. It is often beneficial to the trustee to involve someone who is familiar with the beneficiary's everyday life within the distribution decision making. This individual should be given some level of authority within the trust document, such as that of a consultant or direction advisor.

4. When making distributions to a beneficiary that has been deemed dysfunctional, it is important that a trustee remain aware of the types of potential claims to which they may be subject. Some of these claims include:
 - a. waste or dissipation of the trust assets;
 - b. harm to contingent beneficiaries; and
 - c. supportive v. addictive behavior.
5. Another useful method for managing family dynamics is the establishment of regular family meetings and on-going communication with the trustee. In so doing, a trustee is better able to educate the next generation of beneficiaries and set expectations while the grantor is still alive. Where this is possible, it can provide a trustee with invaluable information about the family dynamic.

APPENDIX A

Discretionary Distribution Guidelines for the Trustee

1. **What is the standard for distribution within the document and is it defined within the document or does it rely on common law or statutory definitions?**
 - a. ***Ascertainable Standard*** such as HEMS per U.S. Code Section 2041 (b)(1)(A), Treasury Regulation Section 20.2041-1(c)(2), and Restatement of Trusts, Third, Sec. 50. SEE **APPENDIX B** for permissible distributions.
 - b. ***Unascertainable Standard*** rely more heavily on Trustee discretion, examples include:
 - i. Comfort: per Equitable Trust v Montgomery, 44 A.2d 420 (Del.Ch. 1945) – “comfortably to support” – needs desires and habits given weighty consideration but does not justify indulgence of every whim or caprice of the beneficiary.
 - ii. Benefit: per Wilmington Trust Co. v. Stuart, WL 18030 (Del.Ch., July 21, 1983) – Benefit used with HEMS terms, in place of health. Beneficiary wanted a Jet plane. In light of the circumstances it was obvious that the trust funded with stock sought to preserve the corpus (and thus the business) as opposed to giving the beneficiary large lump sums.
 - iii. Best Interest, Welfare and Happiness.
 - iv. Necessary, Necessities, Need and Emergency.
 - v. Complete Discretion of the Trustee.
 - c. ***Directed Distributions*** through the written direction of a Distribution Committee or Advisor – shifts discretion to the Committee/Advisor and Trustee is simply following direction.
2. **What has the grantor said about their intent with regard to distributions?**
 - a. Is there a Letter of Wishes? Is there a statement of purpose within the trust document?
 - b. How are the various terms defined in the document?
 - c. Does the trust document provide for any hierarchy as to distributions (i.e., “consider the needs of my wife first” or the “the needs of the primary beneficiary are paramount”)

3. **What is the purpose of the trust and is this request consistent with that purpose or does it frustrate the purpose of the trust?**
 - a. Trust funded with family stock which is intended to remain in trust for long term growth? Wilmington Trust Co. v. Stuart, WL 18030 (Del.Ch., July 21, 1983).
4. **Beneficiary's capacity, substance abuse, addiction issues?**
 - a. Have you been made aware of questionable capacity? What does the trust document say with regard to whether or not you may continue to make distributions? What does the trust document say regarding any other actions that you need to take?
 - b. To what extent do you need to inquire as to capacity?
 - i. Ensure that the document allows you to rely on information provided by others who are more intimately familiar with the beneficiary if there is on-going substance abuse or similar issue.
 - ii. Prefer to require actual knowledge – you won't see the beneficiary regularly enough, therefore, you cannot effectively carry-out the provision without third party assistance.
 - iii. Make sure that there is language allowing a third party to provide you with medical or other info, if required, so as to ensure that doctors won't run into HIPPA disclosure issues.
5. **Does the trust document require that you consider other resources of the beneficiary?**
 - a. If it says you "must" or "shall" consider, what do you look at? Does the trust document offer any guidance?
 - i. Tax returns;
 - ii. Financial statement; and
 - iii. Expenses, Budget.
 - b. If it says you "may" consider other resources, under what circumstances should you?
 - i. Need to consider significant change in the pattern of requests;
 - ii. Need to consider needs of multiple beneficiaries with limited trust resources available for distribution; and
 - iii. What was the relationship between the grantor and the beneficiary at the time the trust was created? See President, Directors, Etc. v. Delaware Trust Co., 95 A.2d 45 (Del. Ch. 1953); Arcaro v. Girard Bank, WL 21873 (Del. Ch., Dec. 12, 1984).
6. **What has been done in the past and if similar requests have been made in the past, what have you or prior Trustees determined to be appropriate?**

APPENDIX B

Permissible distributions include those listed below.

Health	Education	Maintenance & Support
Emergency medical treatment	Grammar, secondary and high school tuition	Regular mortgage payments
Psychiatric treatment	Graduate school tuition	Property taxes
Psychological treatment	Post graduate school tuition	Suitable health insurance or care
Routine healthcare examinations	Medical school, law school or other professional school	Existing programs of life and property insurance
Dental	Support of beneficiary while in school	Continuation of accustomed patterns of vacation
Eye care	Support of beneficiary between semesters	Continuation of family gifting
Cosmetic surgery	Studies for the student that makes a career out of learning	Continuation of charitable gifting
Lasik surgery	Technical school training	
Health, Dental or Vision Insurance	Career training	
Unconventional medical treatment	College in Europe as part of a study abroad program	
Home healthcare		
Gym memberships		
Spa memberships		
Golf club memberships		
Extended vacations to relieve tension and stress		