I. Introduction

A. The trust professional's involvement with distribution standards takes place on two levels.

1. The trust professional may have an opportunity to be involved at the planning stage, in educating the client about the standards to be used for determining what distributions are appropriate and the impact of various alternatives.

2. He or she also faces the practical application of those standards during the administration of a trust. The trust professional, often with the assistance and guidance of a discretionary distribution committee, will have to apply his or her judgment to the beneficiaries' situations, and determine if a distribution is appropriate.

B. Both levels require a firm understanding of the common meanings given to the distribution language used in trusts. These materials review the judicial interpretations of common distribution provisions, and suggest alternative provisions that can be used to provide more guidance. The materials also examine various ways in which lawyers are trying to provide greater flexibility in trusts, and to respond creatively to the demands of the "trust consumer."

C. The materials also discuss recent state law changes in the treatment of income and principal. These changes, such as Principal and Income Act provisions allowing trustees to provide current beneficiaries with a unitrust interest instead of an income interest, are a response to total return investment concepts. At its core, though, these developments are also responses to clients' demands for greater flexibility and for more consumer friendly trusts.

D. The heart of the trust business is service. Good service requires an understanding of trust distribution standards and a willingness to work with unique versions of those standards.

II. Particular Standards of Distribution: What Does the Trust Language Mean?

A. When creating a trust, clients often ask about the meaning of various standards of distribution. What, for example, is the real difference between "support and maintenance" and "best interests and welfare" in terms of what access the beneficiaries will have to the trust assets? Or,
what factors related to the beneficiary's other resources, lifestyle, etc. will
the trustee take into account in making distributions?

1. Most attorneys have a standard procedure for addressing these
issues and answering the client's questions. For instance, many
clients have been told that "support and maintenance" allows the
beneficiary to maintain his or her accustomed standard of living,
whereas "best interests and welfare" could include distributions for
luxury items -- a Mercedes Benz or a trip to Europe.

2. The brevity of focus on these issues is often necessary for very
practical reasons -- many clients cannot afford to have the attorney
spend hours exploring the client's goals and drafting unique,
specific provisions governing distributions. However, some can
afford, and indeed expect it. In these situations, often involving the
bank's most important customers, trusts are likely to contain very
customized distribution provisions.

3. Any decision regarding the appropriate distribution standard for a
trust must take into account the transfer tax consequences of using
the distribution standard. A trustee who has the discretionary
power to distribute trust property to himself as a trust beneficiary
possesses a general power of appointment unless the discretionary
power is limited by an ascertainable standard related to his or her
health, education, support or maintenance. IRC §§ 2041(b)(1)(A);
2514(c)(1).

B. The interpretation of terms which set out a standard of distribution, such
as "best interests," "support" and "comfort," is governed by state law.
Therefore, the meaning of a particular term may be more or less
restrictive, depending on the law of the state that governs the interpretation
of the instrument.

C. In general, if the trustee's authority to make distributions is discretionary,
and the trustee uses its judgment and makes a reasonable decision, a court
will not disturb the trustee's decision to distribute or withhold trust assets
unless there has been evidence of bad faith or an abuse of discretion.
Where the trustee's discretion is "absolute" or "uncontrolled," a court will
grant the trustee's decision even more deference. Bogert § 811.

D. "Support" and "maintenance"

1. Support and maintenance encompasses more than bare subsistence.
Hartford-Connecticut Trust Co. v. Eaton, 36 F.2d 710 (2d Cir.
1929). These terms include the beneficiary's normal living
expenses, such as housing, clothing, food, and medical care,
depending on the standard of living enjoyed by the beneficiary
during the settlor's or testator's life. In re Levinson's Will, 5 Misc.
2d 979, 162 N.Y.S.2d 287 (1957); Hill v. Comm'r, 88 F.2d 941
2. In many states, if a trustee may distribute principal for a beneficiary's support, the trustee also may distribute principal for the support of the beneficiary's spouse and children. The beneficiary's legal obligations of support are a part of his living expenses. See In re Sullivan, 12 N.W.2d 148 (Neb. 1943); Robinson v. Robinson, 173 Misc. 985, 19 N.Y.S.2d 44 (Surr. Ct. 1940); Seattle-First National Bank v. Crosby, 254 P.2d 732 (1953); Akers v. Fidelity & Columbian Trust Co., 234 S.W. 72 (1921). However, one court limited the permissible distributions to those for the support of the beneficiary alone, and not for the support of his wife and dependent children. Cavett v. Buck, 397 P.2d 901 (Okla. 1964). If the settlor wishes to allow the trustee to make distributions to spouses of the settlor's descendants, he or she should include a specific provision in the trust instrument.

SAMPLE TRUST PROVISION: In the trustee's sole and uncontrolled discretion, the trustee also may distribute income or principal to any individual who at any time was married to a descendant of mine in such amounts as the trustee, other than the distributee, deems necessary for the distributee's health and support in reasonable comfort in light of the distributee's role within the family of that descendant of mine.

E. "Comfort"

1. In some states, the term "comfort" is limited to an ascertainable standard related to the beneficiary's health and support. Estate of Vissering, 990 F.2d 578 (10th Cir. 1993).

2. In other states, the standard is broader than "support or maintenance," and encompasses a beneficiary's enjoyment, pleasure, happiness, satisfaction, or peace of mind.

3. In applying this standard, one court allowed distributions to purchase an automobile to enable the beneficiary's daughter to visit the beneficiary because her visits "did much to ease the mind" of the beneficiary. In re Mirfield's Estate, 126 N.Y.S. 465 (Sur. Ct. 1953).

4. "Comfort" has also been construed as relating to the grantor's, rather than the beneficiary's, accustomed standard of living. The Mississippi Supreme Court ruled that the term "comfort" should be construed according to the grantor's understanding of the word, which could be discovered by looking at the grantor's standard of living. Gulf National Bank v. Sturtevant, 511 So. 2d 936 (Miss. 1987).

F. "Best interests" or "best interests and welfare"
1. Under these standards, the trustee may make distributions to allow the beneficiary to enjoy a high standard of living, including extensive travel or the purchase of luxury automobiles and jewelry.

2. The term "best interests" has been interpreted to allow distributions for more than the beneficiary's pecuniary interests. Best interests include peace of mind, as well as financial gain. Wiedemaneyer v. Johnson, 254 A.2d 534, aff'd, 259 A.2d 465 (1969). In light of the broad meaning of the term and the liberal attitude towards distributions that it encompasses, it may be appropriate to add some limitations to the standard, such as the italicized language below.

SAMPLE TRUST PROVISION: The term "best interests" with respect to distributions to any beneficiary shall be construed to provide the beneficiary with the means to enjoy a comfortable lifestyle, including recreation, cultural pursuits, and travel, but, in the case of a descendant of mine, shall not be construed so generously as to discourage the descendant from assuming the responsibilities of self-support.

SAMPLE TRUST PROVISION: The term "best interests" refers to all aspects of a beneficiary's happiness and well-being within the context of reasonable personal and social conduct, as determined in the absolute discretion of the trustee.

3. Although distributions are permissible for a wider variety of purposes under a best interests standard than under a standard of support, the beneficiary may be less able to compel the trustee to distribute trust assets since the beneficiary's best interests are less easily defined. In other words, the standard is less enforceable from a beneficiary's perspective and therefore grants the trustee greater latitude.

4. Some courts have held that if the trustee is authorized to distribute principal under a best interests or similar standard, then the trustee has the authority to distribute the entire trust principal to the beneficiary in a lump sum, provided that such a distribution is not an abuse of the trustee's discretion. See, e.g., Lees v. Howarth, 131 A.2d 229 (R.I. 1957). Therefore, if a best interests standard is used, but the settlor wants to preserve trust principal for the remaindermen, the trust instrument should contain language which expresses that intention.

SAMPLE TRUST PROVISION: My primary concerns during the life of the child are to preserve trust principal for ultimate distribution to the child's descendants while at the same time reasonably providing for the health, support, education and best interests of the child.
5. If the settlor does want the trustee to have the power to distribute the entire trust principal to the beneficiary, the settlor could use the following provision:

**SAMPLE TRUST PROVISION:** If at any time the trustee believes that it would be in my child's best interests and determines that it is otherwise appropriate under the circumstances, it may in its absolute discretion distribute to him the entire principal of his trust and terminate his trust, without regard to the interests of remaindermen. My child shall have no right to require that the trustee make any distribution that is not subject to an ascertainable standard, and the trustee is expressly exonerated from all liability to my child and all other interested parties by reason of the exercise or non-exercise of its discretionary authority in such matters.

G. "Education"

1. In general, the term "education" includes college education, but does not include graduate level or professional education, unless specifically provided by the trust instrument. Bogert § 182; Murphy v. Morris, 141 S.W.2d 518 (Ark. 1940); Epstein v. Kuvin, 95 A.2d 753 (N.J. Super. 1953).

2. The term "college education" has been held to include the expenses of a high school education, since a high school education is normally required to prepare the beneficiary for college. Security Trust Co. v. Smith, 145 S.W.2d 512 (Ky. 1940).

**SAMPLE TRUST PROVISION:** The term "education" includes, but is not limited to, the expenses of private schooling at the elementary and secondary school level, college, graduate and professional schools, and specialized or vocational training.

**SAMPLE TRUST PROVISION:** The term "education" includes all expenses of public and private education at any level, such as tuition, room and board, books, fees, all desirable study materials, dues, reasonable allowance and travel to and from home, as well as graduate and professional education, and specialized or vocational training.

H. "Health"

1. The term "health" includes all routine medical care, medication, surgery and hospitalization, as well as expenditures for extended nursing care and mental health.

2. Some commentators have suggested that the term "medical care" may be more limited than health, because it may not cover treatment for psychological or mental health problems or addictions, which have not been universally accepted as "medical" problems. See Q. Heisler, Jr. & W. Butler, "Discretionary

**SAMPLE TRUST PROVISION:** The term "health" shall be construed liberally to include all forms of mental or physical health care, including, but not limited to, nursing or other extended care.

**SAMPLE TRUST PROVISION:** The term "health" includes all expenses of health care providers net of insurance benefits paid to or for the beneficiary, such as hospital charges, physician service fees, lab charges, ambulance, nursing care at any location, physical and psychological therapy, drugs and the like, health insurance premiums for a beneficiary, as well as all costs of an extended health care facility, including an entrance fee or endowment fee (whether refundable or not), interest free loan and other forms of capital charge, as well as monthly assessments and other periodic charges.

3. In some cases, the settlor may wish to express a preference for home health care over nursing home care, and specifically to authorize distributions for that purpose.

**SAMPLE TRUST PROVISION:** In making discretionary distributions for me or my spouse under this instrument, the trustee shall consider my strong desire that medical care, nursing care, and other types of care and assistance that are necessary for me or my spouse be provided to me or my spouse in the familiar environment of our home to the greatest extent practicable, without regard to the additional cost of such home care and assistance.

I. "Emergency"

1. Many courts interpret the term "emergency" as a very narrow and restrictive standard, which authorizes distributions only for the beneficiary's unusual and unforeseen expenses, and not for the beneficiary's routine or ordinary support and maintenance. See, e.g., Nardì v. United States, 385 F.2d 343 (7th Cir. 1967); Budd v. Commissioner, 49 T.C. 468 (1968).

2. Nevertheless, the IRS has taken the position on a number of occasions that the term does not create an ascertainable standard for federal estate and gift tax purposes.
   a. The IRS has privately ruled that a standard of "great emergencies which may arise in the lives and affairs of [the beneficiary], such as extra needed medical services or hospitalization" did not restrict distributions to emergencies relating to medical needs. The language "such as extra needed medical services or hospitalization" merely illustrated some of the types of expenditures that would qualify as emergencies, but were not intended to be an
exclusive list. The IRS noted that distributions could also be made for any "sudden or unexpected happenings," such as being stranded in a foreign country without funds to return home. Letter Ruling 8304009 (Oct. 25, 1982).

b. The IRS has also ruled that the phrase "any other emergency condition of any exigencies" did not constitute an ascertainable standard. Letter Ruling 9044081 (July 31, 1990).

c. However, in Letter Ruling 200028008 (July 14, 2000), the IRS gave a more favorable interpretation to the standard "proper care, support and maintenance, or in the event of any other accident, illness or other emergency." The IRS concluded that "emergency" must be limited to the types of emergencies itemized before the word "other" and therefore constituted an ascertainable standard.


4. To forestall the IRS's argument that the term emergency is not an ascertainable standard, the draftsperson may wish to specify the types of emergencies for which distributions are authorized: such as financial emergencies or only those related to health or maintenance.

**SAMPLE TRUST PROVISION:** The trustee shall distribute as much of the principal of the trust, even to the extent of exhausting principal, as the trustee from time to time determines to be required to meet the expenses of an illness or other emergency relating to the health, support and education of the child and his or her descendants.

J. "Sole and absolute discretion" of the trustee

1. Under this standard, the trustee may make distributions for any purpose or withhold funds from the beneficiary, as long as the trustee does not act in bad faith or arbitrarily. The Restatement of Trusts states that the trustee's decision to distribute or withhold trust assets does not need to be reasonable. Restatement 2d of Trusts, § 187. See In re Ledyard's Estate, 21 N.Y.S.2d 860 (1939); Estate of Zuckerman, NYLJ, January 29, 1990, p. 30.
2. Nevertheless, courts will impose a standard of reasonableness, even where the trustees are given "absolute and uncontrolled discretion" to invade principal.
   a. In one case, the beneficiaries of two $8 million trusts requested distributions of $145,000 and $150,000 in principal. The trustees refused the request because the money was not needed and the beneficiaries' planned use for the money was unlikely to be productive. Although the court found that the trustees had acted in good faith in refusing the request, the court found that the trustees should not have applied such considerations in determining whether or not to make the requested distribution, and directed the trustees to make the distribution. Matter of Stillman, 433 N.Y.S.2d 701 (1980).
   b. In another case in which the trustees had the power to invade principal "as the trustees in their discretion shall deem proper," the court held that "even where the payment of principal rests in the uncontrolled discretion of the trustee, he must not in exercising his authority act dishonestly, or with an improper motive or fail to use his judgment or act beyond the bounds of reasonable judgment." Estate of Joseph P. Sanders, NYLJ, April 19, 1991, p. 25.
   c. In a Connecticut case, a trustee was given authority to distribute as much of the income as it thought advisable in its absolute discretion. The court found that the trustee could withhold income from the beneficiaries as long as it acted in good faith and without abuse of discretion. Auchincloss v. City Bank Farmers Trust Co., 70 A.2d 105 (Conn. 1949).
   d. The case law indicates that the use of the words "sole and absolute discretion" will not necessarily free the trustee completely from enforceable requests for distributions. If the settlor wants the trustee to have complete latitude and the beneficiaries to have no enforceable rights against the trustee, it may be necessary to be more explicit.

   **SAMPLE TRUST PROVISION:** My child shall have no right to require that the trustee make any distribution, and the trustee is expressly exonerated from all liability to my child by reason of the exercise or non-exercise of its discretionary power.

3. A trustee's power to make distributions in its sole discretion must be distinguished from a trustee's power, in its sole discretion, to make distributions pursuant to a particular standard, such as for the
beneficiary's support. In one case, the trustee argued that his authority to make payments for "the comfortable maintenance, support and education [of the beneficiary] as he or it shall, in his or its sole discretion, deem advisable" authorized the trustee to withhold any payments to the beneficiary. The court disagreed, and found that the trustee's power was limited by the standard of "comfortable maintenance, support and education," and that the trustee had the duty to make distributions in accordance with that standard. Kolodney v. Kolodney, 503 A.2d 625 (Conn. App. 1986).

K. "Standard of living"

1. A distribution standard often refers to the beneficiary's standard of living. In most cases, it is not necessary to elaborate on this reference. However, if there is a concern about changing standards of living, the time to which the standard of living refers should be made clear. For example, it could refer to the standard of living when the instrument was drafted, when the instrument became effective (i.e., at the decedent's death in the case of the will), or when the beneficiary's interest vested.

2. One case has stated that a direction in a will to distribute trust property for the beneficiary's "support or maintenance in accordance with her present standard of living" referred to the beneficiary's standard of living at the time the will was executed, rather than at the decedent's death. Hart v. Connors, 228 N.E.2d 273, 275 (Ill. App. 1967).

3. In another case, however, the court found that the trustee's authority to invade principal to maintain the beneficiary's standard of living referred to the beneficiary's standard of living at the death of the testator. In re Golodetz' Will, 118 N.Y.S.2d 707 (N.Y. Sur. 1952).

4. If the beneficiary's standard of living substantially improves or is reduced between the time the instrument is drafted and the decedent's death, a standard of distribution tied to the beneficiary's standard of living may not carry out the settlor's intent.

**SAMPLE TRUST PROVISION:** The trustee shall distribute to my wife so much of the income and principal as it determines to be desirable for her comfortable support and reasonable health, considering our standard of living at my death and all other income currently available for such purposes.

L. Making Gifts

1. It is often uncertain whether a particular standard of distribution, such as a best interests standard, will allow the trustee to make distributions to a beneficiary for the purpose of allowing the
beneficiary to make gifts. Often distributions for this purpose are desired in order to allow a surviving spouse to make annual exclusion gifts from property held in the marital trust.

2. In one case, the trustees were given the power to invade principal under the following standard: "As in the absolute discretion of my Trustee shall be appropriate and to the best interest of my wife. . . . In determining whether or not to make these encroachments, my Trustee shall be liberal if it considers that an actual need or reasonable request of my said wife is involved." The South Carolina Supreme Court refused to allow the trustee to distribute principal to the wife in order to permit her to make gifts to her children. The court found that principal could be invaded only if it were to be used for the wife's own welfare. In re Estate of Howard, 235 S.E.2d 423 (S.C. 1977).

3. Similarly, the trustee was prohibited from distributing principal to the beneficiary of a marital trust where the will authorized distributions "for the spouse or for her use." Matter of Mandel, 46 Misc. 2d 850, 261 N.Y.2d 110 (1965).

4. In yet another case, a trustee did not have the authority to distribute principal to a beneficiary to allow her to make gifts to relatives where the trust instrument gave the trustee power to distribute principal to the beneficiary for her needs. Flowers v. Collins, 357 S.W.2d 179 (Tex. Civ. App. 1962) (dismissed for error).

5. A Connecticut trustee was authorized to invade principal "for any reason in its discretion for the benefit of" the beneficiary. At the request of the beneficiary, the trustee distributed the entire trust principal to the beneficiary, to be used by the beneficiary to support his stepchildren. The court construed the term "benefit" broadly, to include anything that worked to the "advantage, gain or happiness" of the beneficiary, and concluded that the distribution of principal to allow the beneficiary to support his stepchildren was for the benefit of that beneficiary. Ewing v. Ruml, 892 F.2d 168 (2d Cir. 1989).

6. The Illinois Supreme Court has construed the terms "comfort and satisfaction" to allow the trustee to distribute principal to the testator's wife to allow her to continue a program of charitable contributions. Rock Island Bank & Trust Co. v. Rhoads, 353 Ill. 131, 187 N.E. 139 (1933).

7. Trust language which defines the best interests of a beneficiary as including distributions for benefit of the beneficiary's descendants would allow the beneficiary to make gifts of trust property.

**SAMPLE TRUST PROVISION:** The term "best interests" shall be construed to provide the beneficiary with means to enjoy a
comfortable lifestyle and to assist the beneficiary's descendants as the beneficiary may wish, including distributions to allow the beneficiary to make gifts to the beneficiary's descendants.

M. Establishing Priorities

1. Unequal Distributions

   a. Where there are multiple current beneficiaries of a trust, and the trustee is not given discretion to make unequal distributions to those beneficiaries, there is a presumption that the beneficiaries should receive equal distributions from the trust. Bogert § 182. The presumption is based on the trustee's fiduciary duty to treat beneficiaries impartially.

   b. The fact that the beneficiaries are in different financial circumstances may justify unequal distributions even absent specific authority. However, as discussed later in this outline, the trustee may not be able to take into account the beneficiaries' other resources unless the trust instrument permits the trustee to do so.

   c. If the client wishes to give the trustee the power to distribute unequal amounts to beneficiaries or to favor one group of beneficiaries over another, the trust agreement should specify that unequal distributions are permitted.

   **SAMPLE TRUST PROVISION:** The trustee may make unequal distributions to the descendants of the child or may at any time make a distribution to fewer than all of them, and shall have no duty to equalize those distributions.

   d. As an alternative, the trust instrument may authorize unequal distributions, but provide that distributions for certain purposes, such as to start a business or for graduate education, will be treated as advancements.

   **SAMPLE TRUST PROVISION:** Any distribution (i) to a child for graduate or professional education, (ii) to permit a child to enter into or engage in a business or profession, (iii) to permit a child to make a downpayment on a personal residence, or (iv) to defray wedding expenses of a child, shall be charged as an interest-free advancement against the share, if any, distributable to that child or descendant of that child under [later provisions of the trust agreement].

2. Priority Among Beneficiaries

   a. The settlor may also wish to establish priorities among the beneficiaries in a trust benefitting multiple generations.

   **SAMPLE TRUST PROVISION:** My primary concern during the life of the child is for the child's health, support
and education and the trustee need not consider the interest of any other beneficiary in making distributions to the child for those purposes under this paragraph.

**SAMPLE TRUST PROVISION:** My spouse shall be accorded clear first priority, and my children second priority (particularly those under age 25).

**SAMPLE TRUST PROVISION:** My primary concern during the period described in this paragraph is for the health, support and education of my children and the descendants of a deceased child of mine, rather than for the preservation of principal for ultimate distribution to my children or their descendants.

b. Priorities can be made more explicit by providing that all income is to be paid to one beneficiary except for the amount not required for the beneficiary's support, and that only the excess may be used for other beneficiaries.

**SAMPLE TRUST PROVISION:** Commencing with the death of the last to die of me and my spouse, the trustee shall pay all of the net income of the trust to my child during his or her life. Notwithstanding the foregoing, whenever the trustee may determine that the income of the trust is partially or wholly in excess of that required for my child's support and health needs, considering his or her standard of living at my death and all other income available from time to time for such purposes, then the trustee may in its discretion withhold part or all of such excess income. Income not paid to my child may be paid in whole or in part to any one or more of his or her children, living from time to time, in such equal or unequal proportions as the trustee determines to be desirable for the support, education, health needs and best interests of each of them. Income not paid out may in the discretion of the trustee be added to principal from time to time.

**N. Consideration of the Beneficiary's Other Assets**

1. In general, unless the instrument expressly provides that the trustee may consider the beneficiary's other assets and income, the trustee may not consider those assets in determining what distributions are required for the support of the beneficiary. The beneficiary has the right to look first to the trust assets for his support. See Restatement (Second) of Trusts, § 128, comment e; Nielsen v. Duyvejonck, 236 N.E.2d 743, 747 (Ill. App. 1968); Hart v. Connors, 228 N.E.2d 273 (Ill. App. 1967); Demitz' Estate, 208 A.2d 280 (Pa. 1965); Matter of Martin, 269 N.Y. 305 (1936);
In many cases, this rule may be disadvantageous from both a tax and a fairness standpoint.

a. The settlor may wish trust property which is not needed for the beneficiary's support to remain in trust for other beneficiaries, especially if the trust property will not be taxable in the beneficiary's estate. For example, it may be desirable for the trustee of a credit shelter trust to consider the surviving spouse's marital trust and non-trust assets before making a distribution from the credit shelter trust, because those other assets will be included in the surviving spouse's gross estate, whereas the credit shelter trust assets will not.

b. If some trust beneficiaries have greater needs or less outside income or assets than others, the settlor may wish to provide for those beneficiaries support needs in preference to wealthier beneficiaries.

3. In some states, if a gift to the beneficiary is conditioned on need -- for example if the trustee is directed to make distributions "for a beneficiary's support as it deems necessary" or "as the beneficiary needs" or "if there is an insufficiency" -- then the beneficiary's outside assets and income must be considered. See Boston Safe Deposit & Trust Company v. Boynton, 443 N.E.2d 1344 (Mass. App. 1983); Matter of Martin, 269 N.Y. 305 (1936); Matter of A. David Bernstein, NYLJ, December 7, 1988, p.26; Stempel v. Middletown Trust Co., 15 A.2d 305 (Conn. 1940); In re Tuthill's Will, 76 N.W.2d 499 (Minn. 1956); In re Martin's Will, 199 N.E. 491 (NY 1936); In re Seacrist's Estate, 66 A.2d 836 (Pa. 1949).

a. However, this is not a hard and fast rule, and in many cases the courts have not required the trustee to consider the beneficiary's other resources although the terms "as needed" or "necessary" were attached to the standard of distribution. See Cross v. Pharr, 221 S.W.2d 24 (Ark. 1949); Hamilton National Bank of Chattanooga, Tennessee v. Childers, 211 S.E.2d 723 (Ga. 1975); McClintock v. Smith, 29 N.W.2d 248 (Iowa 1947); Sibson v. First National Bank & Trust Co. of Paulsboro, 160 A.2d 76 (N.J. Super. 1960); In re Stern's Will, 228 N.Y.S.2d 90 (1962).

b. Some courts have found that where the trustee was directed to pay income and principal as needed for the support of the beneficiary, the beneficiary's other income, but not his other assets, should be considered. Peoples Bank & Trust Co. v. Shearin, 219 S.E.2d 299 (N.C. App. 1975); Sibson
4. Some courts have held that if the trustee is granted broad discretion in making distributions, the trustee is permitted to consider the beneficiary's other assets.

   a. In one case, a standard which authorized the trustee to make distributions of principal which she "in her sole discretion, determines necessary for the support and maintenance" of the beneficiary allowed the trustee to consider the beneficiary's other assets. The Pennsylvania Superior Court held that such a broad grant of discretion indicated that the trustee had the authority to withhold trust principal from a beneficiary with independent resources. In re Estate of Tahjian, 544 A.2d 67 (Pa. Super. 1988).

   b. However, in a New York case involving similar language, the court held that the trustees should not require the beneficiary to use his personal assets for support before looking to the trust assets. In that case, the trustees were authorized to distribute as much of the trust income to the beneficiary as they in their sole discretion deemed advisable to supplement an annuity that the settlor gave to the beneficiary. Matter of Estate of McNab, 558 N.Y.S.2d 751 (1990).

5. If the settlor directs the trustee to consider the beneficiary's "other resources," there is still a question of which resources it may or must consider. In some circumstances, the settlor may want to specify whether the trustee is to consider only the beneficiary's liquid assets, or the beneficiary's entire estate, including non-liquid assets such as the beneficiary's home.

6. The settlor may also want the trustee to consider the income tax consequences to the beneficiary if the beneficiary must liquidate his own assets to meet expenses and incur capital gains tax.

SAMPLE TRUST PROVISION: In determining whether to make discretionary distributions of net income or principal to a beneficiary, the trustee may consider such circumstances and factors as the trustee believes are relevant, including the other income and assets known to the trustee to be available to that beneficiary, including funds which might be made available by enforcement of the legal obligation of any person to furnish support or education, and the advisability of supplementing such income or assets, the tax consequences to the beneficiary of requiring the beneficiary to rely first on his or her own assets, and the tax consequences of any such distribution.
7. To give the trustee the maximum amount of flexibility in this matter, the settlor can authorize the trustee to consider a beneficiary's outside resources, but explicitly provide that those assets need not be considered. In one New York case, the court interpreted the following language in a marital trust: "In exercising this discretionary power [to invade principal], my corporate trustee may but need not consider any other resources of my said husband." The court found that the trustee could, but was not required to, consider the husband's other income and assets. Matter of Payson, NYLJ, June 20, 1989, p. 26.

O. Guidance to Fiduciary

1. It often is not sufficient to simply define for a trustee or other fiduciary the purposes for which distributions can be made. For example, if the client's goal is to make the trust fund available in a manner that will not interfere with a beneficiary's development as a productive member of society, the trustee should be given authority to consider factors related to the beneficiary's personal development in determining whether to make distributions for the purposes set forth in the trust agreement.

2. At a minimum it is good practice to give the trustee discretion to consider the beneficiary's personal characteristics. A trustee generally cannot do this unless specifically authorized in the trust agreement.

SAMPLE TRUST PROVISION: In determining whether to make discretionary distributions of net income or principal to a beneficiary, the trustee may consider such circumstances and factors as the trustee believes are relevant, including the other income and assets known to the trustee to be available to the beneficiary and the advisability of supplementing such income or assets, the tax consequences of any such distribution, and in the case of any descendant of mine, the character and habits of the beneficiary, the diligence, progress and aptitude of the beneficiary in acquiring an education and the ability of the beneficiary to handle money usefully and prudently and to assume the responsibilities of adult life and self-support.

3. The trust agreement also can direct the trustee to obtain certain information from a beneficiary regarding finances, spending habits, or personal activities before authorizing a distribution to that beneficiary.

SAMPLE TRUST PROVISION: In determining whether to make discretionary distributions of net income or principal to a beneficiary, the trustee shall consider the other income and assets known to be available to the beneficiary [same provisions as above] . . . adult life and self-support, it being my intent that the
failure of a beneficiary in any of these areas may, in the discretion of the trustee, constitute a reason for denying a distribution. In order to make these determinations, the trustee shall request any information it deems relevant from a beneficiary (and withhold a distribution if the beneficiary refuses to provide such information), including without limitation, the following:

1. A statement of the beneficiary's assets and liabilities, and the assets and liabilities of his or her spouse;
2. Copies of bank statements, cancelled checks, credit card statements or any related material that evidences the beneficiary's spending habits;
3. Evidence that the beneficiary is enrolled in school or employed and, for a beneficiary in school, copies of transcripts;
4. A beneficiary's employment history and authorization to contact and request employment information from the beneficiary's current employer;
5. A list of the beneficiary's place of residence for whatever period of time the trustee determines to be relevant;
6. Access to medical records, blood tests, or related medical information; and
7. Information concerning travel by the beneficiary and a copy of the beneficiary's passport.

4. The grantor can direct that the trustee should use the trust property for the purposes designated only as a last resort, if no other assets are available.

**SAMPLE TRUST PROVISION:** The primary purpose of the trust is to maintain a reserve fund to provide for the health, support and education of my descendants in situations in which all other assets and sources of income available to a descendant of mine are insufficient for those purposes.

5. A more common provision is one directing the trustee to make trust distributions sparingly so as to encourage self-sufficiency and avoid the development of unambitious children or grandchildren who are content to live off their inheritance.

**SAMPLE TRUST PROVISION:** The primary purposes of the trust are (i) to provide for the health, support and education of the child for whom the trust is named, and (ii) to avoid use of the trust property in a manner that might impair the desire of the child or a descendant of the child to be self-sufficient. I intend for the trustee to distribute trust income and principal to the child or his or her descendants on a selective and considered basis, my concern being
that the child or the child's descendants may receive too much rather than too little.