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"Building Your Trust"

This is your opportunity to communicate your views and guidelines as to how the trust to be created for your spouse/children/grandchildren and other family members is to be administered by the Trustee. Specifically, what follows is a list of desires and statements that might reflect some of your objectives and guidelines as to how and when distributions should be made from the trust. Consider this as a roadmap that your Trustee can follow in carrying out your intentions.

I. Partial Discretion Granted to Trustee

In this approach, you want the Trustee to have some discretion in deciding what types of distributions can be made from the trust and the amounts of distributions.

Here, you might set a standard for distributions. For example, the standard might be the health, education, maintenance and support (HEMS) of the trust beneficiary.

A. Health

I intend that distributions for the "health" of a trust beneficiary include:

- ☐ 1) medical treatments considered necessary by health care professionals
(including doctors, nurses, physicians' assistants)
- ☐ 2) prescriptions
- ☐ 3) physical, speech and occupational therapies
- ☐ 4) medical durable equipment
- ☐ 5) prosthetics
- ☐ 6) in-home nursing care and custodial assistance
- ☐ 7) elective procedures and treatments
- ☐ 8) cosmetic surgery and treatments and procedures
- ☐ 9) experimental treatments
- ☐ 10) improvements and repairs to living quarters to accommodate medical
equipment and administration of therapies
- ☐ 11) health related travel for beneficiary and personal traveling companion
(including a health care provider) related to health of beneficiary
- ☐ 12) medical and health insurance premium costs
- ☐ 13) medical and health insurance deductibles
- ☐ 14) mental health care treatment

- ☐ 15) modifications of a home to make it accessible for an incapacitated/disabled beneficiary
- ☐ 16) vision treatments and care, including laser
- ☐ 17) dental treatments and care, including orthodontia

B. Education

I intend that distributions for the education of a trust beneficiary include not only tuition fees and expenses, but also the following:

- ☐ 1) room and board (living expenses)
- ☐ 2) education at public and private institutions
- ☐ 3) both accredited four-year baccalaureate degrees and non-accredited programs
- ☐ 4) trade and vocational school
- ☐ 5) professional degrees/schools, such as doctors and lawyers
- ☐ 6) post-graduate courses of study
- ☐ 7) costs of books and supplies related to education
- ☐ 8) study outside the U.S.

C. Maintenance and Support

I understand that these two terms are generally viewed as synonymous and that distributions for maintenance and support are NOT limited to the bare necessities of life.

The standards for maintenance and support are subjective and depend on the terms of the trust, circumstances when the trust was written, and case law.

Examples of permissible expenses that fall within a liberal interpretation of support include normal living expenses:

1. regular mortgage payments
2. property taxes
3. suitable health insurance or care
4. existing programs of life and property insurance
5. accustomed patterns of vacation
6. accustomed patterns of charitable and family giving
7. might include distributions to a beneficiary to help beneficiary support his/her spouse and/or children

D. Alternative Standards of Distribution

Often, use of alternative standards and the interpretation given to the alternative standards depends on the surrounding language in the instrument. If the surrounding language is limiting, a court is more likely to find an ascertainable standard.

1. Needs

- Generally refers to "universal" needs such as basic food, shelter and clothing.
- Use of this term may or may not be held to constitute an "ascertainable standard" (tax sensitive).
- Need can be considered to be synonymous with necessity, as in when a sense of urgency is present.

2. Emergency or illness

- Suggests that the grantor/donor wishes to exercise the ultimate level of preservation of assets.
- This standard generally is considered by the courts to create an "ascertainable standard" (tax sensitive).
- It is generally construed as narrower than support and maintenance.
- Trustee decision-making involves whether there is a bonafide emergency or whether there is an actual illness.

3. Comfort

- Use of this term alone does not create an "ascertainable standard" because it is not capable of limitation (tax implications).
- Restatement says "comfortable support," "support in reasonable comfort" and "continued comfort" should qualify as an "ascertainable standard."
- When the word "comfort" is used with other words, generally a limitation can be construed such as accustomed living standard.
- Restatement 3rd of Trusts provides that "comfort" generally relates to a beneficiary's accustomed standard of living.

4. Welfare

- Serves to increase Trustee's discretion but opens the Trustee's decisions to question by the beneficiary.
- From a tax perspective, this generally means there is no ascertainable standard.
- Use of this term could connote several meanings, ranging from basic necessities to overall happiness.
- This is a subjective standard and will vary depending upon whose perspective is used (beneficiary/grantor/trustee).

5. Happiness

- Serves to increase Trustee's discretion but opens the Trustee's decisions to question by the beneficiary.
- Use of this term by itself does not create an ascertainable standard and hence, the Trustee's discretion is arguably greatly expanded and the term is generally construed liberally.
- This is a very subjective standard and will vary with the perspective of the person from whom it is viewed.

6. Satisfaction

- Very loose guidelines to Trustee.
- It is a subjective standard and therefore, not likely to qualify as an "ascertainable standard" (tax sensitive).
- Likely to be considered broader than comfort and support.
 - Can be interpreted to include contentment or gratification.

E. Consideration of Other Resources

Should the Trustee look at other resources that might be available to the beneficiary when considering whether to make distributions?

1. The language of the distribution provisions could effect whether a Trustee has abused or not abused its discretion when looking to other resources.

- Language like "necessary" in describing distributions might suggest that the Trustee look to other resources.
- Language that the Trustee be liberal in distributions suggest that other resources not be considered.

2. What other resources should Trustee look at?

- Restatement 3rd Trusts states that it includes a beneficiary's income and other periodic receipts such as pensions, annuities, etc.

F. Drafting to effect the Grantor's intention is Paramount

_____ Trustee to consider only beneficiary's income

_____ Trustee to consider beneficiary's income and separate estate

_____ Ex. Beneficiary must sell assets and pay capital gains taxes before accessing the trust

_____ Trustee to consider only liquid resources

_____ Trustee to consider both liquid and non-liquid resources, including, for example, equity in real estate

G. "May" vs. "Shall"

_____ Trustee "may" invade principal for HEMS of the beneficiary

- Trustee retains discretion but is not obligated to make distributions for HEMS even if a beneficiary shows a need that would qualify as HEMS

_____ Trustee "shall" invade principal for HEMS of the beneficiary

- Trustee has no discretion to withhold distributions if the beneficiary can show the distributions qualify as HEMS

II. Full Discretion Granted to Trustee

When full discretion is granted to the Trustee, the Trustee has the maximum amount of freedom and flexibility (to be exercised in a fiduciary manner) to administer the trust.

The Trustee will have the greatest range within to act and the Trustee's choices will be less subject to review.

Words evoking broad or full discretion include:

- "absolute" discretion or judgment
- "sole" discretion or judgment
- "unfettered" or "unlimited" discretion or judgment

Often, grantors want the Trustee to have full discretion when a trust is created to last a long time or when the grantor wants the Trustee to be able to adapt to a beneficiary's changing needs over time.

Often, decisions of a Trustee are harder to challenge by beneficiaries.

With broad discretionary authority, a Trustee could be too liberal or too conservative in administering the trust.

- It is important for the grantor to make sure that the Trustee understands his/her intentions.

Restatement 2nd Trusts, Section 187 - a court will not interfere with a Trustee's discretion "unless the Trustee, in exercising or failing to exercise the power, acts dishonestly or with an improper, though not a dishonest motive, or fails to use his judgment or acts beyond the bounds of reasonable judgment."

Restatement 2nd Trusts, Section 187 states that if no standard is created for the exercise of discretion, a reasonableness test is NOT imposed on the Trustee if the Trustee has full discretion.

- However, if Trustee acts or fails to act due to prejudice or spite, or acts in the Trustee's own interest over that of a beneficiary, then the court will review Trustee's actions/failure to act.

Restatement 3rd Trusts, Section 50 provides that a discretionary power is subject to judicial control to prevent misinterpretation of the trust agreement in addition to the Restatement 2nd reasons for review.

- Restatement 3rd may impose a reasonableness standard with respect to the Trustee's exercise of a discretionary power.

If Trustee is granted absolute discretion, review the Trustee removal provisions.

- Want to make sure that the beneficiaries cannot easily remove a Trustee that they believe is not acting favorably toward them.

III. No Discretion

In this situation, the grantor restricts the discretion of the Trustee by providing mandatory distribution provisions in the trust.

Mandatory type language, like "shall" indicates no discretion is given.

In a "no discretion" situation, the grantor maintains maximum control over the interpretation of the trust.

- The standard is rigid and the Trustee cannot adapt to emergencies or changes in circumstances

In a "no discretion" situation, the Trustee will not be questioned if the Trustee follows the directions.

IV. Other Directions

_____ Give preference to one or more beneficiaries

Ex. Spouse vs. children vs. grandchildren

_____ Trustee to be liberal in distributions

_____ Trustee to grow assets of the trust over time

_____ Create committee to make distribution decisions

_____ Trustee to distribute a unitrust amount to the beneficiary

_____ Trustee can make distributions to a beneficiary to enable beneficiary to make gifts and/or support his/her family

V. Other Issues

The more discretion the Trustee has, the less likely a court will second guess the Trustee's exercise of discretion.