Nebraska Law Review

Volume 46 | Issue 1 Article 7

1967

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PROBLEMS IN DRAFTING AND ADMINISTERING DISCRETIONARY TRUSTS

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A discretionary trust is one which gives the trustee the authority to exercise his own judgment in applying certain provisions contained in the trust instrument. Discretionary provisions are most prevalent in regard to the trustee's authority as to time, manner, amount or circumstances of payment of income or principal to certain beneficiaries.

By giving the trustee discretionary power, the settlor can secure several advantages. First, he can equip the trustee to deal with reasonably foreseeable, unforeseeable, and emergency situations. For example, the trustee can be given the discretionary power to invade principal in behalf of the beneficiary in order to pay unexpected medical expenses, or to meet the expenses of higher education.

Secondly, income tax savings can be effected by the use of discretionary trusts. If the trust provides for multiple income beneficiaries, the trustee in his discretion can either distribute or accumulate income according to the respective income tax brackets of the different beneficiaries. Only those amounts distributed to the beneficiaries would be taxable to them, while the income retained in the trust would be taxed to the trust. Under this flexible arrangement, the trust can serve as a significant tax-saving entity in the interest of the beneficiaries.

Although these and certain other advantages which are inherent in discretionary trusts have been widely recognized, the practical problems involved in drafting and administering such trusts too frequently are given insufficient consideration. As is the case with almost everything else, the discretionary trust has both its pluses and minuses. Therefore, in those cases where its use seems to fulfill a specific need, every effort should be made to maximize the potential advantages and minimize the possible disadvantages.

Perhaps the most difficult problem connected with discretionary trusts is that of communicating the settlor's true intentions from settlor to draftsman to trustee. To solve this problem, the drafting of the language of the trust instrument must be so precise and clear that subsequent interpretation by the trustee—and possibly by the courts—will accurately carry out the settlor's intentions.

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Accomplishing this objective requires careful thought and drafting, mainly because of the subjective nature of the word "discretion" and the subjective standards (such as "support," "education," "comfort," and "happiness") upon which the trustee is required to base the exercise of his discretion.

A Nebraska case which typifies the problems encountered in trying to accurately interpret the intent of the settlor is *In re Sullivan.*[1] This case involved an action to compel the trustees of a testamentary trust to pay the wife and minor child of the named beneficiary sufficient sums for their support and maintenance. The will stated:

> My said executor or executors shall securely and properly invest and re-invest said trust estate, or any part thereof available for such purpose, in good and valid investments under orders from the county court in which this instrument is admitted to probate, and they shall apply the proceeds or income therefrom for the *proper use, support and maintenance* of said son, Lawrence P. Sullivan, as the same is received by them or *as his needs may require or necessitate,* and for that purpose may use and apply any part or portion of the principal of said trust estate from time to time as in their judgment may be required or necessary therefor, *they being the sole judges of such necessity* without applying to the courts for authority so to do, and I declare that *said executors shall have full and uncontrolled discretion* as to the application of said income and trust estate for the uses aforesaid.[2]

Even though the will gave the trustee "full and uncontrolled discretion" and mentioned nothing about support of the wife and child, the court held that the "support and maintenance of said son, Lawrence P. Sullivan" included his wife and child, and stated that the failure of the trustee to support them was "arbitrary." The supreme court ordered the district court to require the trustee to pay for the support of Lawrence Sullivan's wife and child.

This case is typical of the administrative and legal problems which a trustee must face in order to determine and fulfill the intent of the settlor. Particularly, it illustrates the difficult problem of interpreting such subjective terms as "proper use," "support," "maintenance," "needs," and "full and uncontrolled discretion."

In order to draft discretionary trust provisions which will eliminate, or at least reduce these problems, the draftsman, of course, must be clearly apprised of the settlor's true desires and intent. In addition, he must possess a thorough understanding of

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[1] *In re* Sullivan, 144 Neb. 36, 12 N.W.2d 148 (1943).

[2] *Id.* at 37-38, 12 N.W.2d at 149. (Emphasis added.)

the legal meaning of each term which he chooses to employ in order to correctly and clearly express this intent. This knowledge will enable the draftsman to anticipate the administrative and legal interpretations which probably will be placed upon these terms, and he will therefore be able to determine their proper use in the instrument. Furthermore, he will recognize the need for, and provide clarification, emphasis, and additional definition where needed to lend support for significant terms and language.

This article will examine the meanings of the most common terms used in discretionary trusts, and will attempt to point out some ways in which these terms can be utilized to avoid some of the problems mentioned above.[3]

I. DISCRETION

The first consideration in a discretionary trust is the question of just how much discretion is to be bestowed upon the trustee. The cases clearly indicate that the chances of judicial review of the trustee's discretion are reduced as the amount of discretion conferred upon the trustee is increased.[4] Thus, if the draftsman limits the discretion of the trustee and thereby makes the decisions of the trustee more likely to be subject to judicial review, he enhances the ability of the beneficiary to enforce rights to which he feels he is entitled, but of which he may have been deprived. On the other hand, if the settlor has intended to bestow liberal benefits, stipulations of limited discretion in the trustee will enhance the trustee's fear of surcharge and thus make him more reluctant to confer the liberal benefits actually intended. Thus the settlor, in determining the amount of discretion to be employed, must balance the desirability of protecting the trustee from judicial review against the desirability of giving the beneficiary easier access to the courts to protect rights to which he feels he is entitled.

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[3] It hardly need be pointed out that to define these terms with complete precision is virtually impossible. This is not only because the courts of different states have placed different meanings on the same terms, but also because the meaning of these terms can vary in accordance with their context and the over-all impression of intent created by the complete instrument.

[4] BOGERT, TRUSTS AND TRUSTEES § 560 at 125 (2d ed. 1960); Halbach, *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425, 1430-33 (1961); ABA, REPORT OF THE SUBCOMMITTEE ON TRUSTEES' ABSOLUTE AND UNCONTROLLED DISCRETIONARY POWERS, COMMITTEE ON TRUST ADMINISTRATION AND ACCOUNTABILITY OF TRUSTEES, PROCEEDINGS OF PROBATE AND TRUST LAW DIVISIONS, SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 185, 187 (1965) (hereinafter referred to as the ABA REPORT ON DISCRETIONARY POWERS); Annot., 2 A.L.R.2d 1383, 1408-10 (1948).

A. LIMITED DISCRETION

The degree of discretion conferred is usually determined by the presence or absence of such words as "sole," "absolute," and "uncontrolled" in conjunction with the word "discretion." The absence of such terms limits the trustee's discretion, and therefore the use of the unmodified term "discretion" will be referred to as "limited discretion."

To the extent that the trustee has "limited discretion," a court will not interfere so long as the trustee's exercise of such discretion is reasonable.[5] Furthermore, judicial intervention is not authorized even though the court would have exercised the discretion differently.[6] The Nebraska Supreme Court has followed this rule:

> The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee.[7]

However, the courts will intervene if the trustee abuses his discretion. This rule is summarized in the following quote from the *Restatement of Trusts* as cited in the case of *Scully v. Scully*.[8]

> As stated in Restatement, Trusts, § 187, comment e, p. 481: "If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment."[9]

In determining the question of whether the trustee is guilty of an abuse of discretion in exercising or failing to exercise a power, the Nebraska court again adheres to the *Restatement* guidelines:

> Also, as said in Restatement, Trusts, § 187, comment d, p. 480: "In determining the question whether the trustee is guilty of an abuse of discretion in exercising or failing to exercise a power, the following circumstances may be relevant: (1) the extent of the discretion intended to be conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or in-

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[5] BOGERT, TRUSTS § 89 (3d ed. 1952); SCOTT, TRUSTS § 187 (abr. ed. 1960); Scully v. Scully, 162 Neb. 368, 76 N.W.2d 239 (1956).

[6] Scully v. Scully, 162 Neb. 368, 76 N.W.2d 239 (1956); *In re* Vohland, 135 Neb. 77, 280 N.W. 241 (1938); Rowe v. Rowe, 219 Ore. 599, 610, 347 P.2d 968, 974 (1959); Estate of Genung, 161 Cal. App. 2d 507, 326 P.2d 861 (Dist. Ct. 1958).

[7] *In re* Vohland, 135 Neb. 77, 86, 280 N.W. 241, 246 (1938), quoting RESTATEMENT, TRUSTS § 187, comment e (1959).

[8] Scully v. Scully, 162 Neb. 368, 76 N.W.2d 239 (1956).

[9] *Id.* at 375, 76 N.W.2d at 245.

> definiteness, of an external standard by which the reasonableness of a trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or non-existence of an interest in the trustee conflicting with that of the beneficiaries."[10]

In sum, although there is a wide area within which the trustee may determine whether or not to act and when and how to act, beyond that area the court will control him. The extent of that area of discretion depends upon the terms of the trust, the nature of the power, and all of the circumstances.

B. Absolute Discretion

The discretion of the trustee may be expanded by giving the trustee "sole," "absolute," or "uncontrolled" discretion. Nebraska has adopted the *Restatement* rule as to the authority of the trustee when he is given such expanded discretion. The *Restatement* rule, as quoted in *In re Sullivan*,[11] is as follows:

> We think a correct statement of the law appears in Restatement, Trusts, sec. 187 (j), wherein it is said: "The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have "absolute" or "unlimited" or "uncontrolled" discretion. These words are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act. But the court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment."[12]

Thus, this standard emphasizes the "state of mind" of the settlor and declares that the "reasonableness" of the trustee's action is not the test. However, the Nebraska court in the *Sullivan* case, and numerous courts in other jurisdictions which condemn "capricious" or "arbitrary" action by the trustee, seem to be applying criteria not unlike the norm of "reasonableness."[13]

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[10] *Id.* at 375-76, 76 N.W.2d at 245.

[11] *In re* Sullivan, 144 Neb. 36, 12 N.W.2d 148 (1943).

[12] *Id.* at 39-40, 12 N.W.2d at 150.

[13] Lyter v. Vestal, 355 Mo. 457, 196 S.W.2d 769 (1946); *In re* Sullivan, 144 Neb. 36, 12 N.W.2d 148 (1943); *In re* Ledyard, 21 N.Y.S. 2d 860 (Surr. Ct. 1939); Rinkers v. Simpson, 159 Va. 612, 166 S.E. 546 (1932); *In re* Koos, 269 Wis. 478, 69 N.W.2d 598 (1955).

In sum, the difference between limited discretion and absolute discretion seems to be one of degree rather than kind.[14] Under both types of discretion, the action of the trustee must not only conform to the "state-of-mind test," but also to some degree of reasonableness.[15] However, it seems clear that the courts presume the trustee to have broader discretionary authority when the discretion is "absolute."[16]

One of the primary objectives of the draftsman in giving the trustee absolute discretion is to accord the trustee sufficiently broad powers that he will be generous with the primary beneficiaries without being in fear of future surcharge from remaindermen. This can be accomplished by clearly stating in the trust that certain beneficiaries are to be considered primary and others subordinate.[17] Also, it can be stated that any good faith distributions to primary beneficiaries are to be absolutely binding upon all other beneficiaries.[18] This alternative would protect the right of the primary beneficiaries to petition the court if the trustee should be too conservative as to them, and would tend to develop a more liberal attitude on the part of the trustee toward the primary beneficiaries because of the virtual elimination of the danger of surcharge from future or subordinate beneficiaries.

A further device which might be employed if the testator is primarily concerned about certain beneficiaries is to state that the trustee is to be "liberal" toward them. This liberality can even be extended to the point of allowing complete exhaustion of principal

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[14] ABA, REPORT ON DISCRETIONARY POWERS, *supra* note 4, at 187; Halbach, *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425, 1433 (1961).

[15] *In re* Sullivan, 144 Neb. 36, 12 N.W.2d 148 (1943). In the ABA, REPORT ON DISCRETIONARY POWERS, *supra* note 4, at 187 it was stated: "Members of the committee who interviewed trust officers reported that there were no discernable differences of approach in the exercise of discretion based on whether the governing standard was 'state of mind' or reasonableness. Moreover, most trust officers appeared to regard their rights and duties no differently when their discretion was absolute than where it was not." (Footnote omitted.) See, Halbach, *supra* note 14, at 1432.

[16] BOGERT, TRUSTS AND TRUSTEES § 560 (2d ed. 1960); Halbach, *supra* note 14, at 1430-33; ABA REPORT ON DISCRETIONARY POWERS, *supra* note 4, at 187; Annot., 2 A.L.R.2d 1383, 1408-10 (1948).

[17] Halbach, *supra* note 14, at 1432. ABA, REPORT OF THE SUBCOMMITTEE ON TESTAMENTARY TRUSTS FOR INCOME TAX SAVING, COMMITTEE ON ESTATE AND TAX PLANNING, PROBATE AND TRUST LAW DIVISIONS, SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 79, 88 (1965) (hereinafter cited as ABA, REPORT ON TESTAMENTARY TRUSTS).

[18] ABA, REPORT ON TESTAMENTARY TRUSTS, *supra* note 17, at 90.

if the trustee determines that the needs of certain beneficiaries meet the standards set out in the instrument.

II. THE INTENTION OF THE SETTLOR—STANDARDS FOR THE TRUSTEE'S GUIDANCE

Standards, which are typically couched in terms of the beneficiaries' needs or requirements—such as support, education, welfare, etc.—are an appropriate means of expressing the intent and scope of a discretionary power. Standards serve as a helpful guide to the trustee in the exercise of his discretion and, if properly used, will serve to inform the trustee of the purpose of the trust, the type and extent of benefits to be conferred, and the various factors to be considered.

A. Limited Standards

(1) *Support and Maintenance*[19]

Perhaps the most common standard used in trusts is that of "support and maintenance." In using such terms, however, the draftsman should specify the precise nature and extent of such support and maintenance. If this is not done, it is generally established that the courts will conclude that such standards extend support beyond the bare necessities of life and that the beneficiary is to be maintained in accordance with his station in life, at least to the extent that the size of the trust fund allows such a degree of support.[20] It has been suggested by one of the leading authorities in this area that "station in life" probably means support similar to that enjoyed at the time an inter vivos trust was created, or, in the case of a testamentary trust, during the settlor's lifetime.[21]

The Nebraska court has not been specific in defining "support and maintenance" in connection with trusts. However, it appears that the Nebraska rule is generally in accord with the general rule stated above. In *Roats v. Roats*,[22] the court stated that " 'care and

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[19] The courts have interpreted "necessities" and "needs" to be substantially similar to "support and maintenance." *In re* Sullivan, 144 Neb. 36, 12 N.W.2d 148 (1943); Orr v. Moses, 94 N.H. 309, 52 A.2d 128 (1947).

[20] Hartford-Connecticut Trust Co. v. Eaton, 36 F.2d 710, 711 (2d Cir. 1929); Hicks v. Jones, 138 N.J.Eq. 280, 47 A.2d 894 (Ch. 1946).

[21] Halbach, *supra* note 14, at 1434; Sibson v. First Nat'l Bank and Trust Co., 61 N.J. Super. 88, 160 A.2d 76 (Ch. 1960), *modified* 64 N.J. Super. 225, 165 A.2d 800 (App. Div. 1960).

[22] 128 Neb. 194, 258 N.W. 264 (1935); see also Lighthill v. McCurry, 175 Neb. 547, 122 N.W.2d 468 (1964); *In re* Sullivan, 144 Neb. 36, 12 N.W.2d 148 (1943).

support' are very broad terms, and may be restricted or enlarged according to the necessities of the beneficiary."

The draftsman must also specify to whose benefit these standards are to be applied. Nebraska has made it clear that "support" includes provision for support of persons relying upon the beneficiary for support in normal family situations.[23]

It must be kept in mind that the terms "support and maintenance" although not limited to necessities, do not encompass extremely liberal or luxurious benefits (that is, unless the beneficiaries' station in life has been such as to encompass such benefits). It has been held that such standards do not include payments which merely contribute to the beneficiaries' happiness, contentment and peace of mind.[24] Thus, the draftsman may not safely conclude that these terms will encompass such luxuries as expensive European trips, vacation homes, and the like.

Perhaps this problem can best be avoided by using other inherently more liberal standards such as "comfort" or "happiness"; by further defining the extent of "support and maintenance" intended as "good," "comfortable," or "generous"; or by stating in detail the upper limits of support, *e.g.* support shall include routine vacations encompassed in the accustomed manner of living.

(2) *Emergency and Casualty*

The term "emergency" is more limited than "support" and has been construed to mean an extreme need which calls for immediate action.[25]

In *Pyne v. Payne*, the Nebraska court held that the term "casualty" embraces only those things which are a departure from what may be regarded as foreseen or foreseeable contingencies.[26]

Due to the scarcity of cases defining these terms, their meaning is even more uncertain than some of the more common discretionary standards. Therefore, the use of such terms requires additional definition and perhaps the use of particular examples.

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[23] *In re* Sullivan, 144 Neb. 35, 12 N.W.2d 148 (1943); First Nat'l Bank v. Howard, 149 Tex. 130, 229 S.W.2d 781 (1950); Robison v. Elston Bank & Trust Co., 113 Ind. App. 633, 48 N.E.2d 181 (1943).

[24] Amoskeag Trust Co. v. Wentworth, 99 N.H. 346, 111 A.2d 198 (1955).

[25] *In re* Tone, 240 Iowa 1315, 39 N.W.2d 401 (1949); *In re* Shiel, 120 N.Y.S. 2d 632 (Surr. Ct. 1953).

[26] 152 Neb. 242, 40 N.W.2d 682 (1950).

(3) *Education*

The term "education" as a standard should be expanded to state specifically the type and level of formal schooling contemplated, and whether or not the settlor intended the term to include other broadening activities which provide an educational benefit, such as travel. In the absence of such explanation, it is difficult to state how the courts would interpret "education." In one leading case, it was limited to that schooling "associated with youth and the instruction received from their teachers . . . [and is] the general and formal word for schooling . . . especially in an institution of learning.[27] However, a fairly recent case states the more common rule that "education is a broad term and is not limited to knowledge acquired in the classroom."[28] An unanswered problem in regard to "education" is whether it is to extend to those whom the beneficiary is required to support.

(4) *Health*

Although "health," or "medical and surgical needs" would come within the ambit of "support and maintenance,"[29] these terms add specificity and thus should be included if these needs are intended to be covered by the settlor.

B. LIBERAL STANDARDS: COMFORT, WELFARE, BENEFIT, HAPPINESS

Use of broader terms such as "comfort, welfare, benefit and happiness" may allow the trustee to be more liberal and thus bestow some additional benefits.[30] There are many cases which generally hold that "happiness," "welfare" and "comfort" are synonymous.[31] These terms have been held to mean "a state or condition in regard to well being."[32] They have also been construed to mean "ease, contentment, or enjoyment."[33] In some instances, they have been extended to mental, emotional and spiritual happiness.

[27] New Britain Trust Co. v. Stoddard, 120 Conn. 123, 127, 179 Atl. 642, 643 (1935), citing WEBSTER'S COLLEGIATE DICTIONARY.

[28] Willheat v. Fite, 341 S.W.2d 806 (Mo. 1960); see also Hooker v. Parkin, 235 Ark. 218, 226-27, 357 S.W.2d 534, 540 (1962).

[29] *In re* Sullivan, 144 Neb. 36, 12 N.W.2d 148 (1943).

[30] Blodgett v. Delaney, 201 F.2d 589 (1st Cir. 1953); Rock Island Bank & Trust Co. v. Rhoeds, 353 Ill. 131, 187 N.E. 139 (1933); Equitable Trust Co. v. Montgomery, 28 Del. Ch. 389, 44 A.2d 420 (1945).

[31] Combs v. Carey, 287 S.W.2d 433 (Ky. 1955); In the Matter of Buell, 198 Misc. 358, 66 N.Y.S.2d 180 (Surr. Ct. 1946); National Surety Co. v. Jarrett, 95 W. Va. 420, 121 S.E. 291 (1924).

[32] United States v. Powell, 307 F.2d 821 (10th Cir. 1962).

[33] Strite v. McGinnes, 330 F.2d 234 (3d Cir. 1964).

For example, in *United States v. Powell*,[34] the court stated that comfort, welfare and happiness were synonymous. With respect to happiness, it said: "Happiness, in the full sense, is mental or spiritual or both. . . ."[35] It seems that these cases now allow extreme liberality by the trustee, for these terms seem to require him to provide not only for the physical well-being of the beneficiary, but also for his mental and emotional contentment and well-being.

An excellent example of the liberal meaning of these terms is contained in *Combs v. Carey*.[36] In that case, the trustee was given the authority to invade the trust principal for the settlor's daughter's comfort, welfare and happiness. The daughter had for many years maintained an "extremely high standard of living." She lived in a luxurious hotel in New York City, maintained a chauffeur and several maids, and traveled and entertained extensively. In holding that the trustee had properly exercised its discretion to invade, the court stated:

> All that is necessary to authorize invasion of the corpus is that Mrs. Walsh convince the trustee that such an invasion is necessary to her "happiness" . . . . While the language used in the trust instrument may not have created a prudent standard to guide the trustee in the administration of the trust, yet it is the standard chosen by the settlor, and the one followed by the trustee.[37]

The term "benefit" usually is also construed to allow for liberal payments by the trustee. It was stated in *In re Emmon's Will* that:

> Words and Phrases Judicially Defined, First Series, vol. 1, p. 751, has the following: " 'Benefit,' as used in a will directing payment of income to one for his own use and benefit of property, is a much broader word than 'support,' and has no such limited meaning as the word 'support.' It is thus defined in Worcester: 'Advantage; gain; support;' and its manifest signification is anything that works to the advantage or gain of the recipient."[38]

There are several possible problems which must be considered in employing such liberal standards as comfort, welfare, happiness, benefit, etc. In several recent cases, the Internal Revenue Service has argued that these standards are so broad that the trustee's authority is unlimited and that state courts would consider it an abuse of the trustee's authority for him to refuse a beneficiary's

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[34] 307 F.2d 821 (10th Cir. 1962).

[35] *Id.* at 827.

[36] 187 S.W.2d 443 (Ky. 1955).

[37] *Id.* at 445.

[38] 165 Misc. 192, 195, 300 N.Y.S. 580, 584 (Surr. Ct. 1937). See also, Warren v. Webb, 68 Me. 133, 135 (1878); *In re* Rachlin, 133 N.Y.S.2d 151 (Surr. Ct. 1954).

request based on these standards.[39] If the courts were to compel the trustee to conform to the beneficiary's wishes in every case, the beneficiary would be considered to have a taxable power of appointment. However, this argument has been unsuccessful since it is very questionable that a trustee with absolute discretion and subject to the control of the court would be considered subject solely to the direction of a beneficiary.[40]

A further problem in regard to these liberal standards is the possible loss of a charitable remainder deduction because the discretionary authority of the trustee to invade principal was so broad that the amount of the charitable remainder could not be computed with sufficient accuracy to sustain the deduction. The law on this point is very well summarized in a chart at the end of the opinion in *Kline v. United States*.[41] Generally, it can be stated that the terms "welfare, comfort, benefit and happiness" result in denial of the charitable remainder deduction.[42]

III. OUTSIDE RESOURCES

The question of whether the settlor intended the trustee to take into consideration the outside resources of the beneficiary in regard to the question of invasion of principal has proved a source of much litigation.[43] In the absence of any statement in the trust on this point, the general rule is stated in *Scott on Trusts* as follows:

> Where the trustee is directed to pay to the beneficiary or to apply for him so much as is necessary for his maintenance or support, the inference is that he should receive his support from the trust estate, even though he might have other resources.[44]

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[39] Security-Peoples Trust Co. v. United States, 238 F. Supp. 40 (W.D. Pa. 1965); Lettice v. United States, 237 F. Supp. 123 (S.D. Cal. 1964).

[40] In Security-Peoples Trust Co. v. United States, 238 F. Supp. 40, 47 (W.D. Pa. 1965) the court stated: "Rather the Pennsylvania rule appears to be that in a proper case, after considering the instrument creating the trust and ascertaining from it the donor's or testator's intentions; and considering the circumstances calling for the exercise of discretion, a Pennsylvania court can compel a Trustee's exercise of discretion to carry out the donor's or testator's intention, and conversely, under the proper circumstances, it will uphold the refusal of the Trustee to make payments under discretion granted it."

[41] 202 F. Supp. 849 (N.D. W.Va. 1962); see also Rev. Rul. 385, 1960-2 CUM. BULL. 77.

[42] Kline v. United States, 202 F. Supp. 849 (N.D. W.Va. 1962).

[43] SCOTT, TRUSTS § 128.4 (2d ed. 1956).

[44] *Id.* at 939.

The Nebraska rule is stated in *Roats v. Roats*[45] as follows:

> It is contended that the plaintiff has other funds which she can call in and use to care for her every need . . . . The provision of the mother in her will, setting up this $4,000 cash fund for the benefit of her daughter, did not provide that the trust fund should not be used until the daughter had first exhausted all other funds she might have, if any, but empowered the trustee not to hold and retain . . . . Equity and good conscience whisper that, in case of doubt in construing such a provision in a will, it is better to err in favor of the beneficiary, and against the trustee, than otherwise.[46]

The careful draftsman will want to eliminate any doubt on this point. He should spell out in detail what outside income or principal the trustee *must* or *may* consider in making a discretionary decision. Of course, a desire for liberality on the part of the trustee would require the trustee to disregard outside resources. However, to blindfold a trustee in this manner would reduce the advantage of flexibility. If maximum flexibility is desired, the will should give the trustee the option either to consider or disregard outside resources. In a tax-motivated trust, it would be a serious mistake not to authorize the trustee to take other resources into consideration. Without such authorization, unnecessary distributions might be made to beneficiaries resulting in unnecessary income tax burdens which the discretionary trust was employed to avoid.

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[45] 128 Neb. 194, 258 N.W. 264 (1935).

[46] *Id.* at 198, 258 N.W. at 266-67.