



Choose From an Array of Invasion Standards When Drafting Trusts

Determine how much discretion a client wants to give the trustee and what factors the trustee should consider in making distributions; then clearly impart that intent in the trust document.

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From time to time a client might want to include an invasion standard in his or her trust that is broader in scope than the typical "health, support, education, or maintenance" provision. For example, the client might want to create a trust that includes a "best interests" standard for a child. The inclusion of such a standard begs various questions, such as:

- What types of distributions does the client want the trustee to be able to make?
- What relevance is the beneficiary's station in life?
- Are the beneficiary's income and other resources required or permitted to be considered when applying this type of standard?
- What other factors affect whether a distribution should be made?

These issues are explored below.

Upside Limits of the Invasion Standard

A two-prong test is involved in determining the type of distributions permissible under a broad invasion power:

1. Does the proposed distribution fit within the definition of the standard used?
2. If yes, is the proposed distribution consistent with the purposes for which the trust was created?

Trustees sometimes apply only the first test. They fail to consider whether the proposed distribution is consistent for the purposes for which the trust was created, much to their later chagrin.

In attempting to ascertain the types of distributions permissible under broad invasion standards, two challenges are frequently

encountered. First, as one court in dealing with a "benefit" standard has stated:

Granting that this power of invasion does not bestow an unrestricted right to consume the principal, we are still unable to make more than an inaccurate guess at the extent of the power of invasion."¹

The second challenge has to do with the relevance of prior case law. As another court has pointed out, "precedents are of little value ..., because when used under different circumstances and with different context, the same words may express different intentions."² Even so, precedent does help to provide a general understanding of the types of distributions normally permitted under various broad invasion standards.

We begin with the premise established by longstanding case law that broad invasion standards are to be given their ordinary and common meaning, unless some other meaning is clearly implied in the trust

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instrument.³ Further, broad invasion standards are often used in conjunction with other invasion standards such as "care," "support," "maintenance," etc. In determining the breadth of the standard in that situation, the trustee is to follow whichever term proves to be more liberal.⁴ In other words, the broad or indefinite standard establishes the outermost limits of invasion, not the narrow or definite one.⁵

With the above in mind, the discussion that follows explores the types of distributions that have been determined to be either permissible or not permissible under some of the most commonly used broad invasion standards.

Simple additional pleasures and luxuries

In many cases, a client wants the trustee to have the ability to distribute to the beneficiary some additional small amounts from the trust that would not be authorized under the typical "health, support, maintenance, and education" provision. The invasion power that is typically chosen to achieve this objective is the "comfort" standard. One court has defined "comfort" as follows:

This may not mean a great deal more than "support" alone, but it is safe to say that the word "comfort" shows that the testator intended that the beneficiaries were to be assured something in addition to a minimum endurable standard of living.⁶

Another court has quantified "comfort" as something more than maintenance but something less than welfare.⁷ A third court has stated, "Comfort embraces a variety of things, it is not limited solely to the necessities of life but may include things which brings ease, contentment or enjoyment."⁸ A court, for example, found this standard was met when the distributions allowed beneficiaries to quit their jobs so as to experience comfort in their lives.⁹ The court concluded that the testator's intent was not to limit the trustees' discretion to invade principal only to those amounts necessary to allow the beneficiaries to maintain their way of life as it was prior to the testator's death. The significance of this conclusion is explained in more detail below.

Permitting the beneficiaries to quit their jobs in the above case presumably assumes that the size of the trust is substantial enough to make these distributions and still provide for the future needs of the beneficiaries. Further, it likely also assumes that the trust addresses the interests of remaindermen, as is also discussed below.

Importance of beneficiary's lifestyle. Most courts have attached to the term "comfort" a close association with a beneficiary's station in life or lifestyle. As one court has stated, "Obviously, the testator did

not mean to authorize his executors to gratify any possible desire on the part of that beneficiary to branch out into a more expansive lifestyle."¹⁰ Consequently, what is comfort to someone who is lower middle class is clearly not the same thing as comfort to someone who is super rich.

Two courts have stated that the term "comfort" has at most only minor subjective connotations and that what is envisioned by this term is primarily the beneficiary's physical comfort.¹¹ Following this reasoning, a "comfort" standard should merely allow the trustee to make those distributions that provide a middle-class individual additional simple pleasures of life, such as an extra vacation (which might not be permitted under a support standard), a housekeeper twice a week, a day spa visit every other week, a first-class airplane ticket rather than tourist, a Toyota Camry as opposed to a Corolla, a country club membership at a local country club, etc.—all of which based on this beneficiary's station of life would presumably not be authorized under a health, support, maintenance, and education provision.

Impermissible distributions. Using the ordinary and usual meaning of the term "comfort," distributions to allow a beneficiary to make gifts should not be permitted.¹² Similarly, distributions that would augment a beneficiary's estate should also not be permissible. Consequently, a trustee of even a large trust should not be able to purchase a house in the beneficiary's name as might be permissible under either a "welfare" or "best interest" standard. In *Lord v. Roberts*,¹³ however, the court indicated that the purchase of a home is an act that promotes comfort. Presumably, this is not the majority view.

¹ *Newton Trust Co.*, 160 F.2d 175, 35 AFTR 974 (CA-1, 1947). See also, *Coleman v. Colman*, 269 S.W. 2d 730 (Ky., 1954) (as to "happiness"); *Merchants Bank of Boston*, 132 F.2d 483, 30 AFTR 813 (CA-1, 1942) (as to "happiness"); *Blodget v. Delaney*, 201 F.2d 589, 43 AFTR 198 (CA-1, 1953) (as to "welfare")

² *Hoffman v. McGinness*, 277 F.2d 598, 5 AFTR2d 1904 (CA-3, 1960).

³ *Barnett First Nat. Bank of Jacksonville v. Cobden*, 393 So.2d 78 (Fla., 1981); *In re Bueil's Estate*, 68 N.Y.S.2d 180 (N.Y., 1946).

⁴ *Guarantee Trust Co. of New York v. New York City Cancer Committee*, 144 A.2d 535 (Conn., 1958).

⁵ *Commercial National Bank of Kansas City*, 404 F.2d 927, 21 AFTR2d 1719 (CA-10, 1968);

Union Trust Company v. Tomlinson, 355 F.2d 40, 17 AFTR2d 1342 (CA-5, 1966).

⁶ *Price v. Rothensies*, 67 F.2d 591, 35 AFTR 271 (DC Pa., 1946).

⁷ *Lord v. Roberts*, 153 A.1 (N.H., 1931).

⁸ *Zumbro v. Zumbro*, 69 Pa. Super. 600 (Pa., 1918).

⁹ Note 6, *supra*.

¹⁰ Note 6 *supra*.

¹¹ Note 6, *supra*. See also *Blodget v. Delaney*, *supra* note 1.

¹² *Sicker v. Foster*, 60 N.E. 407, 178 Mass. 591 (Mass., 1901); *Bishop v. Groton Savings Bank*, 144 A.88 (Conn., 1921).

¹³ Note 7, *supra*.

Even assuming that most courts would decide that a trustee is not authorized to purchase a home for a beneficiary under a "comfort" standard, nothing prevents the trustee from either paying the beneficiary's rent on an upscale dwelling or buying the house in the trust's name and allowing the beneficiary to live rent-free—thereby providing for the beneficiary's comfort.

More substantial distributions

In certain instances, a client will want to give the trustee the ability to make more substantial distributions to the beneficiary than can be made under a "comfort" standard. In such a case, the client might want to consider using either a "best interest" or a "welfare" standard.

Best interest standard

The types of distributions permissible under a "best interest" standard include "not only the relief of poverty and distress, but may well comprehend whatever within its spirit and intendment aids to their welfare and advancement, and enables them to establish themselves in life."¹⁴

Education. Based on this definition, examples of possible permissible distributions should include tuition payments for enrollment at a prestigious prep school (in light of its possible qualification for a future education at a prestigious college), vocational training, post-graduate education, membership in an exclusive country club, or establishment of a business.

Post-graduate education tuition is not usually an authorized payment pursuant to an invasion provision for someone's "education."¹⁵ Because post-graduate education is something that would aid in a beneficiary's advancement and establishment in life, however, distributions made to pay its cost should be

permissible under a "best interest" standard. Likewise, membership at an exclusive country club can be useful in making contacts with influential club members that could lead to the beneficiary's advancement and establishment in life. A distribution to allow a beneficiary to start a business could also help the beneficiary to advance and establish himself or herself in life.

Home purchase. Other examples of possible permissible distributions would be to pay off the beneficiary's debts or put a down payment on a house (or the whole purchase price of the house if the trust was sufficiently funded).

Deplete trust. Given the breadth of "best interests," the upper limit of the term could permit a distribution that terminates a trust in appropriate circumstances. However, in *Kemp v. Paterson*,¹⁶ the court stated:

While undoubtedly, in a sense, these purposes will serve the beneficiary's "best interest", the later words must be interpreted not in the broadest meaning but in a manner which is consistent with the trust deed.

With these words, the court in *Kemp v. Paterson* was pointing out that the previously mentioned two-prong test applies to any broad invasion standard. Not only must the proposed distribution come within the definition of "best interests," it must also be consistent with the purposes for which the trust was created.

Support of dependents. The term "best interest" permits distributions to support the beneficiary's dependents. Such a distribution would be permitted on the grounds of being an aid to the beneficiary's welfare. Any distribution to aid or assist anyone other than the ben-

eficiary's dependents, however, is another story.

Gifts not allowed. With a term like "best interest," the trustee must decide not only what is in the beneficiary's current "best interests" but also in his or her long-term "best interests." That is why distributions are not permitted for the beneficiary to assist others. For instance, in *In re Estate of Howard*,¹⁷ the court ruled that gifts were not permitted. It found that the primary purpose, as indicated by a reading of the entire trust instrument, was to provide for the surviving spouse during her lifetime. Thus, the trustee had a duty to conserve corpus to ensure her future protection and security.

Further, any benefits, such as tax savings to the beneficiary from the making of gifts, accrue incidentally or remotely to the beneficiary rather than directly. As stated in *Kemp v. Patterson*, "Benefits which may incidentally or remotely accrue to the beneficiary are not the type of benefits normally contemplated by the trust deed (i.e., the term 'best interests')." Consequently, distributions to enable beneficiaries to make gifts are not permissible distributions.

Welfare standard

The term "welfare" is rather unique. As the U.S. First Circuit Court of Appeals stated in *Blodgett v. Delaney*,¹⁸ "It ... is a word whose general content of meaning cannot be defined with precision." With this in mind, the cases in explaining the type of permissible distributions are all over the board. Whenever this term is included,

¹⁴ *Bowditch v. Attorney General*, 134 N.E. 796, 242 Mass. 168 (Mass., 1922).

¹⁵ See *Southeastern Bank and Trust Co. v. Brown*, 246 S.E.2d 598 (S. Car., 1978). See also Annotation at 36 A.L.R.2d 1323.

¹⁶ 163 N.Y.S.2d 245 (N.Y., 1957).

¹⁷ 236 S.E.2d 423 (S. Car., 1977).

¹⁸ Note 1, *supra*.

courts first have to determine whether the settlor intended to limit the term's definition to only the beneficiary's "physical" welfare or to give the term its broadest dictionary definition. If the later, then the possibilities are almost endless.

Physical welfare. Assuming the settlor intends to limit the distributions to the beneficiary's physical welfare, as previously indicated, "comfort" is more than "maintenance," and "welfare" is more than "comfort."¹⁹ As one court has stated, the term "welfare" when limited to physical welfare "may be said to pertain primarily to those material things of life having a relation to one's physical well-being and comfort, which are dependent, under our economic system, on the individual's financial resources."²⁰

Assuming that the beneficiary's station in life is a factor that the trustee must consider (as explained below), however, the type of distributions would be roughly akin to the type permitted under a support standard. Such a construction would prohibit any distributions to cover the whim or caprice of the beneficiary or to allow distributions to a beneficiary to make gifts. It has been found, however, to permit the establishment of a business for the beneficiary.²¹

Broadest definition. If the settlor intends to give this term its broadest definition, *Powell*,²² citing Webster's dictionary, defines "welfare" as "the state or condition in regard

to well-being; especially condition of health, happiness, prosperity or the like." In *Estate of Nettelton*,²³ the Tax Court stated, "The term 'welfare' has a broad connotation and may denote a condition of happiness and prosperity." Interestingly, very few cases set forth examples of actual distributions permissible when this term is accorded its broadest definition. One of the few examples of the type of distributions found to be permissible was the purchase of a large country estate for the beneficiary in *Estate of Nettelton*. Presumably, the trust in this case was large enough to make this purchase and still provide for the future welfare of the beneficiary and provide for the interests of remaindermen.

In other cases, when the term "welfare" is accorded its broadest definition, it is synonymous with the term "happiness."²⁴ This is significant because a term like "happiness" permits distributions for almost any conceivable purpose. Consequently, if it is found that the settlor intended to give this term its broadest definition, either because the beneficiary is the main object of the settlor's bounty or for some other reason, then the trustee could make the same type of distributions as under a "happiness" standard (as explained below).

Gifts to others. *Black's Law Dictionary* defines "welfare" as "[w]ell-doing or well-being in any respect; the enjoyment of health and common blessings of life;

exemption from any evil or calamity; prosperity; happiness. The above definition states that welfare means well-being "in any respect." This is also significant since it indicates that one possible definition of welfare includes not only the beneficiary's physical and financial well-being but possibly his or her mental and emotional well-being as well. Such a definition arguably permits distributions to the beneficiary to assist family members who are not the beneficiary's dependents and others, assuming the beneficiary indicates that such distributions would promote his or her emotional welfare and assuming, of course, that the size of the trust is adequate to provide these gifts and still provide for his or her future welfare.²⁵

Even broader distributions

Even a "best interest" or a "welfare" standard might not be broad enough to suit the tastes of some settlors.

Benefit standard

When a broader range of distributions is desired, the "benefit" standard (or the "use and benefit" standard) may be appropriate. In dealing with this standard, most courts have closely followed its dictionary definition.²⁶ For instance, in *Strite v. McGinnes*,²⁷ the court pointed out that the term "benefit" is a much broader word than "support" and has no such limited meaning as the later word. The court then referred to the definition of "benefit" as "advantage, gain, profit and its manifest signification is anything that works to the advantage or gain of the recipient." Another court has stated, "Benefit means everything that is connoted by the term 'support' or 'maintenance' as well as it can, in a proper case, be construed to embrace many things over and beyond bare necessities"²⁸ A third

¹⁹ Note 7, *supra*.

²⁰ *In re Buell's Estate*, 66 N.Y.S.2d 180 (N.Y., 1946).

²¹ Note 7, *supra*.

²² 307 F.2d 821, 10 AFTR2d 6242 (1962) (as to a happiness standard).

²³ 4 TC 987 (1945).

²⁴ *National Security Co. v. Jarret*, 95 W. Va. 420, 121 S.E. 291 (W. Va., 1924); *Combs v. Carey's Trustee*, 287 S.W.2d 443 (Ky., 1955). But see *Blodget v. DeLaney*, *supra* note 1.

²⁵ See *In re Estate of Howard*, 236 S.E. 423 (S. Car., 1977).

²⁶ See *Strite v. McGinnes*, 330 F.2d 234, 13 AFTR2d 1863 (CA-3, 1964); *Bird v. Newcomb*, 170 Va. 208, 196 S.E. 605 (Va., 1938); *Holvering v. Evans*, 126 F.2d 270, 28 AFTR 1322 (CA-3, 1942); *Newton Trust Co.*, 160 F.2d 175, 35 AFTR 974 (CA-1, 1947); *In re Estate of Howard*, *supra* note 25; *Ferrigno v. Keasbey*, 93 Conn. 445, 106 A. 445 (Conn., 1919).

²⁷ Note 26, *supra*.

²⁸ *In re Emmon's Will*, 300 N.Y.S. 580 (N.Y., 1937).

court indicated that "This standard is so loose that the trustee is in effect uncontrolled."²⁹

There is one reported case in which a beneficiary requested an invasion of a trust to purchase for himself a \$4.5 million jet plane pursuant to a provision authorizing distributions for his "support, maintenance, benefit and education."³⁰ Although the court did not approve the invasion of the trust in this instance, its decision was based on the fact that the settlor (1) used the conjunctive word "and" in the above provision rather than the disjunctive term "or,"³¹ and (2) also that the trust instrument indicated the dominating purpose (i.e., the primary purpose) and function of the trust was to preserve the settlor's family's significant interest in the Carnation Company. If the provision authorizing distributions had been for the "support, maintenance, benefit or education," of the beneficiary, an invasion to purchase the plane would presumably have been a permissible expenditure, although the trustee might have still refused the distribution on the grounds that such a distribution would have been defeating the principal purpose for which the trust was created (i.e., the retention of the stock in the Carnation Company). Notwithstanding the holding in this case, it still indicates the breadth of this term and that under appropriate circumstances the term includes distributions to meet whims and subjective yearnings of the beneficiary.

Depleting trust. Two cases appear to permit a trustee, pursuant to a discretionary invasion provision authorizing distributions for a beneficiary's "benefit," to pay over the entire principal of the trust to the beneficiary, thereby terminating the trust.³² As long as the rest of the will or trust does not indicate

any other contrary purposes that this type of distribution would defeat, the definition of this term is indeed broad enough to permit such a termination.

Purchase of residence. Another example of a possible permissible distribution pursuant to a "benefit" standard is an invasion to permit beneficiaries to purchase a residence. Although the court in *In re Levinson's Will*³³ stated that it would not advise the trustees in advance as to whether they could invade principal for this purpose, the court pointed to the broad powers given in the trust to the trustees, which included the power "or for the purposes of making any provisions that my said trustees shall deem proper for the benefit of both or either."

Business formation. Based on the broadest meaning of the term "benefit," another possible permissible purpose might be to enable a beneficiary to start a business. Although there are no reported cases permitting such a distribution, this is clearly something that could result in gain or profit to the beneficiary as envisioned by the definition of this term. Also, as previously mentioned, the term "welfare" permits a distribution to enable a beneficiary to start a business. If, as *Salisbury*³⁴ indicates, "benefit" is a synonym for "welfare," then starting a business should likewise be permissible pursuant to this term. This assumes, of course, that

the trustee is reasonably satisfied that the beneficiary has the knowledge, experience, and work ethic necessary to successfully run the type of business involved.

Cosmetic surgery. Another possible permissible purpose would be for cosmetic surgery because this type of distribution would provide the requisite gain, advantage, or profit to the beneficiary.

Pay debts. Whether a distribution to pay off debts of the beneficiary is appropriate depends on if it provides a benefit. If the trust is substantial in size and the beneficiary indicates a desire that the debts be paid, presumably the payment would be a permissible purpose. If, however, the beneficiary's financial condition is dire and the trust assets will be needed for the beneficiary's current or future needs, payments of debts would clearly not be for the beneficiary's benefit.³⁵

Assisting others. The discharge of the beneficiary's primary duty to support his or her children is so obviously for his or her benefit that the demand for it cannot properly be held unreasonable.³⁶ However, a distribution requested by the beneficiary to aid or benefit others is not permissible.³⁷ In one case, the beneficiary wanted the trustees to invade principal to establish a cardiac research unit at a hospital in memory of the settlor.³⁸ The court

²⁹ National Bank of Commerce of San Antonio 369 F. Supp. 990, 33 AFTR2d 74-1387 (DC Tex., 1973).

³⁰ *Stuart v. Wilmington Trust Co.*, 474 A.2d 121 (Del., 1984).

³¹ This case appears to be out of the mainstream of cases since most courts treat invasion standards the same regardless of whether the settlor uses either "and" or "or." See, e.g., *Boston Safe Deposit & Trust Co. v. Stebbins*, 34 N.E.2d 616 (Mass., 1941), which includes a comfort support, and convenience invasion standard and where the court stated "Plainly 'convenience' is an alternative notwithstanding that it is preceded by 'and' as otherwise it would add nothing to 'comfort' and 'support'."

³² *In re Rachlin's Will*, 133 N.Y.S.2d 151 (N.Y., 1954); *Lees v. Howath*, 131 A.2d 229 (R.I., 1957).

³³ 162 N.Y.S.2d 287 (N.Y., 1957).

³⁴ 377 F.2d 700, 19 AFTR2d 1867 (CA-2, 1967).

³⁵ *Blakemore v. Jones*, 22 N.E.2d 112 (Mass., 1939).

³⁶ *Fowler v. Hancock*, 197 A. 715 (N.H., 1938). See also *Eaton v. Lovering*, 125 A. 433 (N.H., 1924).

³⁷ *Weston v. Second Orthodox Congregation Church*, 95 A. 146 (N.H., 1915). See also *In re Watson's Estate*, 88 A. 433 (Pa., 1913).

³⁸ *In re May's Estate*, 112 N.Y.S.2d 847 (N.Y., 1952).

denied her request because the settlor stated elsewhere in the will that his paramount intention was that his wife have anything she required or desired for "her personal welfare and comfort" thus limiting the purposes for which distributions could be made. Even if the above-quoted language was not included, it is questionable whether distributions to assist others would be permitted pursuant to this standard.

The definition of this standard indicates that only distributions that provide advantage, profit, or gain to the beneficiary are permitted. As indicated above in the discussion regarding the term "best interests," the tax benefits to the beneficiary from gifts are benefits that incidentally or remotely accrue to the beneficiary rather than directly accrue. Benefits that incidentally or remotely accrue are not the type of benefits presumably contemplated by the settlor. A distribution to assist others does not provide the beneficiary the requisite direct advantage, profit, or gain that would justify the distribution.

Virtually unlimited distributions

A client who wants to place virtually no limit on the type of distribution that is permissible should consider the inclusion of either a "happiness," "enjoyment," "desire," or "pleasure" standard. The Tax Court has stated that the term "enjoyment" connotes consolation, contentment, ease, happiness, pleasure, and satisfaction.³⁹ The court further indicated that a power to

invade principal for those purposes is so broad it "may not be limited at all."

In one case, the First Circuit indicated that the term "pleasure" is at least no narrower than "happiness."⁴⁰ In another case, the First Circuit stated that the term "desire" "may be somewhat broader than the term "happiness."⁴¹

Happiness standard

Comparing "enjoyment," "desire," and "pleasure" to "happiness" increased the relevance of determining what type of distributions can be made under a "happiness" standard. The First Circuit has stated, "It is, of course, true that it is difficult to define precisely what happiness means, but happiness is essentially a subjective matter and must be left to the honest determination of the widow. ... If the widow should desire to provide permanently for the adopted children or for near relatives, such a desire would be within the term 'happiness.'"⁴² The Tenth Circuit stated that if pleasure and happiness are different, the difference is that "happiness has the characteristics of permanence or endurance, as distinguished from pleasure, which is transitory."⁴³ The court explained this difference as follows:

Happiness is ... more serene and rational than pleasure, pleasure is of necessity transient; happiness is abiding; thus, we speak of pleasures, but the plural of happiness is scarcely used. Happiness, in the full sense, is mental or spiritual or both, and is viewed as resulting from some worthy gratification or satisfaction; we can speak of vicious pleasure or delight, but not of vicious happiness....

Mental satisfaction and gifts to others. The effect of the inclusion of the "happiness" standard in a trust has been considered by the U.S. Supreme Court in *Merchant's*

National Bank.⁴⁴ This case is significant for two reasons:

1. It recognized that the term "happiness" includes mental satisfaction as well as physical comfort.⁴⁵
2. It mentioned in a footnote the type of expenditures for which the spouse received distributions, thus indicating what kind of expenditures are permitted pursuant to this term. Those expenditures included the purchase of two automobiles and a fur coat for the beneficiary, two pleasure trips, financial assistance for a niece, financial help to send a grandnephew through medical school, and the purchase of a fur coat for one of her late husband's daughters.

These type of expenditures indicate that the inclusion of the term "happiness" permits distributions not only to satisfy the "whims" and "desires" of the beneficiary for his or her own wants, but also to aid and assist others. It is indeed a very broad term and like the term "enjoyment," the list of permissible distributions may also be unlimited.

Also, one court has ruled that the trustee has discretion to cancel obligations owed by the beneficiary to the trust because "such action would be necessary to the happiness of the beneficiary."⁴⁶

Classifying broad invasion powers

Broad invasion standards generally fall into one of two categories:

1. Those with only minor subjective connotations in that they do not permit distributions to satisfy the mere whims, desires, and caprice of the beneficiary (i.e., the beneficiary's subjective yearnings). This category includes standards such as "com-

³⁹ *Stafford*, 236 F. Supp. 132, 15 AFTR2d 1279 (DC Wis., 1964).

⁴⁰ *Industrial Trust Company*, 151 F.2d 592, 34 AFTR 351 (CA-1, 1945).

⁴¹ *Merchant's Nat. Bank of Boston*, 132 F.2d 483, 30 AFTR 613 (CA-1, 1942).

⁴² *Id.*

⁴³ *Powell*, *supra* note 22.

⁴⁴ 320 U.S. 256, 31 AFTR 752 (1943).

⁴⁵ See also *Dana v. Dana*, 79 F.2d 49 (Miss., 1934).

⁴⁶ *Conley v. Conley's Trustee*, *supra* note 24.

Decanting's Need for Broad Invasion Powers

The choice of invasion standards can be critical if a trustee seeks to decant a trust. For instance, the key to a trustee being able to use the decanting provision in Fla. Stat. § 736.04117 (enacted in 2007) is his, her, or its possession of an invasion power that the statute refers to as "an absolute power not limited to specific or ascertainable standards (hereinafter referred to as an 'absolute power')." The statute gives four examples of what constitutes an absolute power. Those examples are "comfort," "welfare," "best interests," and "happiness."

Particularly with an invasion standard such as "comfort," as discussed in the article, the trustee rarely, if ever, possesses an absolute power. Under the Florida statute, however, "comfort" apparently is an absolute power for decanting purposes. The Florida legislature, by enacting this statute, has created a dichotomy with standards such as "comfort," "welfare," and "best interests." For all purposes other than decanting, the two-pronged test discussed in the article should apply. Not only must the proposed distribution fit within the definition of the invasion power, it must also be consistent with and not frustrate the purposes for which the trust was created. (See, e.g., *Dunkley v. Peoples Bank and Trust Company*, 728 F.2d 547 (DC Ark., 1989), which involved a Florida trust, and the invasion power included "comfort," "welfare," and "best interests.")

In the case of a "welfare" power, for instance, the trustee should be empowered to distribute the entire trust to the beneficiary only if the entire trust confirms that the power is to be given its broadest meaning. In contrast, if the trustee intends to decant to another trust, the trustee appears to need merely the possession of a power to pay principal for the beneficiary's "welfare." The second prong of the test is not applicable for decanting purposes.

The Florida approach should be contrasted to the approach taken by New York in enacting EPTL 10-6.6. Under EPTL 10-6.6, the trustee must have "absolute discretion" under a trust to decant to another trust. Whether a trustee has absolute discretion in New York is determined case by case. This allows the intent of the settlor to control and the purposes for which the trust was created to be considered. Factors such as the context in which the term is used come into play. In Florida, the intent of the settlor, however, appears no longer to be relevant.

fort," "best interest," and "welfare" (as long as the context in which "welfare" is used relates to the beneficiary's physical welfare). For the remainder of this article, these standards are referred to as "minimally subjective standards."

2. Those standards with what one court has referred to as "sweeping subjective connotations."⁴⁷ They permit distributions to satisfy the mere whims, desires, and caprice of the beneficiary. Included within this second class would be "benefit," "happiness," "enjoyment," "pleasure," "desire," and "welfare" (when "welfare" is the being used as the equivalent to happiness). To use the term coined by the court in *Lincoln Rochester Trust Company v. McGowan*,⁴⁸ these standards shall be hereinafter referred to as standards portraying "patently subjective criteria."

Depending on the category in which a particular standard falls, various factors may apply that can affect the trustee's ability to make a particular distribution or the amount that can be distributed, as explained hereafter.

Factors that might affect a trustee's decision

As mentioned previously, whether a particular distribution is permitted under any broad invasion standard depends on:

1. The breadth of the standard used.
2. The purposes for which the trust was created.
3. The context in which the standard is used.
 - Is it grouped together with other clearly objective standards? If so, and the conjunction "and" is used, at least one court has found this to be a limiting factor.⁴⁹
 - Is it a stand-alone provision? If so, at least one case indicates that this would dictate

that the term be given its broadest definition.⁵⁰

- What words are used to modify or supplement the invasion standard? For example, a direction that the trustee exercise the power liberally indicates an intent to give the term its broadest definition.⁵¹

Certain other factors also may affect the trustee's decision regarding making a distribution, as well as affecting the amount that can be distributed. The following are some of those factors.

Degree of discretion granted. The degree of discretion granted to the trustee can affect the ability to make borderline distributions under certain broad invasion standards. Arguably, the broader the discretion, the more leeway that

⁴⁷ *Blodget v. De'aney* *supra* note 1.

⁴⁸ 217 F.2d 287, 46 AFTR 1151 (CA-2, 1954).

⁴⁹ *Stuart v. Wilmington Trust*, *supra* note 30.

⁵⁰ *Salisbury* *supra* note 3-1.

⁵¹ *Id.*

should be accorded the trustee in deciding the upside limits of the standard used.

The treatise *Scott on Trusts* states that when a trustee is granted discretion "there is a field, often a wide field, within which the trustee may determine whether to act or not and when and how to act."³² Scott goes on to say that one of the factors creating this wide field is the definiteness or indefiniteness of an external standard by which the reasonableness of the trustee's conduct can be judged. Another factor is the discretion granted the trustee.

Although this wide field that Scott talks about is not always the case with an objective standard such as "support," it may be closer to the truth when absolute discretion is combined with standards such as "benefit," "happiness," or some similar standard. The combination of absolute discretion and a broad invasion standard in many cases might sway a court not to question the trustee's decision, particularly regarding generous distributions based on the term used. Interestingly, however, few cases are directly on point.

*Lees v. Howarth*³³ is one case where a court specifically pointed to the unbridled authority given to the trustee as the primary reason for authorizing the turning over of the entire trust estate to the beneficiary. In this case the trust author-

ized the trustee to exercise his "sole and absolute judgment regarding payments from the trust in order to provide more effectually for his well-being, maintenance or otherwise for his benefit, ..." The court found that the testator intended to confer this unbridled power on the trustee. As a result, the trustee was authorized to pay over the entire trust corpus, which is broadest type of distribution permitted under a "benefit" standard.

Another case is *Doyle*,³⁴ where uncontrolled discretion was mentioned as one of the reasons for giving the term "comfort" its broadest meaning. In that case the court stated:

Although the extent of the power may not be absolute, ... a state court reviewing an invasion of trust corpus thought necessary by the trustees for the decedent's comfort would be hard-pressed to find a standard to limit that discretion without at the same time impinging on the trustees' control.

The degree of discretion granted to the trustee may also play a role in a trustee's consideration of other factors in deciding whether to make a distribution. For example, having absolute discretion may permit a trustee to consider the beneficiary's income and other resources as part of the decision-making process regarding distributions, assuming no statute or provision in the trust

provides otherwise.³⁵ The grant of absolute discretion arguably allows (but does not require) a trustee to consider many factors in reaching a decision on whether to make a distribution, and one of these factors could be the income and other resources of the beneficiary.

Beneficiary's station in life/standard of living. Except for the terms "pleasure," "enjoyment," "use and benefit," and "desires," there has been at least one court decision involving each other broad invasion standard mentioned herein to the effect that, absent a provision in the trust providing otherwise, a beneficiary's station in life/standard of living³⁶ is relevant and is a factor to be taken into account by the trustee in his or her decision-making process.³⁷ What must be understood, however, is the context in which these cases arose. Many of these cases were tax cases in which the taxpayer was trying to show that the standard used created an ascertainable standard to qualify for a charitable deduction under prior law. Possibly, some of the courts might have leaned over backwards to assist the taxpayers in their struggle with the IRS.

A few cases have gone even further than the above. The court in *Salisbury* framed the issue as whether the phrasing used "also implies that the extent of permissible invasion is limited to the maintenance of the beneficiary's "station in life." What the court meant was that with a "benefit" standard, the trustee has the duty to maintain the beneficiary in his or her station in life/standard of living as opposed to merely having a duty to consider the beneficiary's station in life as one factor among many factors to be considered.³⁸

In a second case, *Blodget v. Delaney*, the court reasoned that

³² Scott, *The Law of Trusts*, 4th ed. (Aspen, 1988) § 187.

³³ Note 32, *supra*.

³⁴ 358 F. Supp. 300, 32 AFTR2d 73-6252 (DC Pa., 1973).

³⁵ *Re Will of Flyer*, 23 NY2d 579, 297 NYS2d 956 (N.Y., 1969).

³⁶ The phrase station in life was equated with standard of living by Judge Learned Hand in *Hartford-Connecticut Trust Co. v. Eaton*, 36 F.2d 710, 8 AFTR 9900 (CA-2, 1929). The phrase "standard of living" has been defined as "[t]he type and size of dwelling in which one lives, one's table and wardrobe, number of domestic help employed, if any, number and price class of automobiles, membership in golf and other recreational and social clubs, philanthropic and religious interests, kind of vacations customarily taken, and

other everyday activities." In *re Galodetz Will*, 118 N.Y.S.2d 707 (N.Y., 1952).

³⁷ *Salisbury*, *supra* note 34 (as to the term "benefit"), in *re Levinson's Will*, 162 N.Y.S.2d 267 (N.Y., 1957) (as to the term "benefit"); *Blodget v. Delaney*, *supra* note 1 (as to the terms "wellfare" and "comfort"); in *re Buell's Estate*, 66 N.Y.S.2d 180 (N.Y., 1946) (as to the term "wellfare"); *Powell*, *supra* note 22 (as to the term "happiness"); in *re Eimendorf's Estate*, 129 N.Y.S. 370 (N.Y., 1954) (as to the term "happiness"); *Robertson's Estate*, 141 F.2d 855, 32 AFTR 502 (as to "best interests"); *Hartford National Bank and Trust Co.*, 467 F.2d 782, 30 AFTR2d 72-5884 (as to the term "physical wellfare"); in *re Hank's Estate*, 85 N.Y.S.2d 10 (N.Y., 1948) (as to the term "benefit"); *First National Bank of Birmingham v. Snead*, 24 F.2d 186, 6 AFTR 7281 (CA-5, 1928) (as to the term "comfort").

³⁸ *Pice v. Rothensies*, *supra* note 6.

by using a "welfare" standard, the testator intended "to authorize [the trustees] to go no further into capital than necessary to assure perpetuation of his sister's established way of life." Therefore, this court was saying that a "welfare" standard also permits the trustee to make only those distributions that maintain the beneficiary's station in life/standard of living.

There is a stark difference between merely considering someone's station in life/lifestyle and limiting distributions to only those that maintain a beneficiary's station in life/lifestyle. To use an extreme example, consideration of the beneficiary's station in life essentially means that a trustee cannot purchase a Mercedes-Benz for a lower-middle-class beneficiary when the appropriate standard is that beneficiary's "comfort"; the proposed distribution must have a closer connection to the beneficiary's station in life.

What does the requirement of maintaining a beneficiary's station in life/lifestyle possibly do to a broad invasion standard? Considering this factor changes a "benefit" standard into a "maintenance in accordance with the beneficiary's station in life/lifestyle" standard. Because maintenance and support mean essentially the same thing, the trust essentially becomes a "support" trust. If the beneficiary's station in life is lower middle class, in theory, no distributions from the trust would be permitted in excess of those distributions necessary to maintain the beneficiary in that lifestyle. Unless the beneficiary's station in life is upper middle class or higher, a duty to maintain someone's station in life has the effect of drastically limiting the type of distributions that might otherwise be permissible under broad invasion standards.

In many instances, settlors who include a broad invasion standard do not want this limitation. When

considering a "comfort" standard, the court in *Price v. Rothensies*⁵⁹ permitted distributions to the beneficiaries, who apparently were working-class individuals, so that they could quit their jobs to experience some comfort in their lives. Would this type of distribution be permissible under a standard that restricts distributions to those that only maintain the beneficiaries' stations in life? Clearly not, as such distributions would improve—rather than maintain—their way of life.⁶⁰

Defining a standard, such as "benefit," to require the trustee merely to maintain the beneficiary's station in life largely negates the meaning of this term as providing gain, advantage, and profit to the beneficiary. Experiencing gain means doing better than in the past. How can any advantage, gain, or profit be experienced if distributions are limited solely to ones that maintain the beneficiary's station in life or lifestyle? With a "best interest" standard, how could any distributions be for the beneficiary's advancement or to enable the beneficiary to establish himself or herself in life, if maintaining the beneficiary's station in life/lifestyle is the rule? Thus, forget the private boarding school, country club membership, and business opening unless the beneficiary's station in life is upper middle class or higher.

Should the beneficiary's station in life even be considered by a trustee with most broad invasion standards? This factor may be entirely appropriate with minimally subjective standards such as "comfort,"⁶¹ "best interests,"⁶² and "welfare"⁶³ (when welfare is used to mean the beneficiary's "physical welfare"). Consider the example put forth previously that a trustee should not purchase a Mercedes-Benz for a lower-middle-class beneficiary under a "comfort" standard. The reasoning behind that

example is that the proposed distribution should have some reasonable relationship to the beneficiary's station in life.

Although "comfort," "welfare," and "best interests" have some minor subjective aspects, they more or less involve the trustee's objective determination of what is comfort for a particular beneficiary. The beneficiary's opinion does not count.⁶⁴ If state law directs a trustee to take into account the beneficiary's station in life with an objective standard, such as support, the same rule should apply with standards such as "comfort," "best interests," or "welfare."

With patently subject criteria standards, such as "happiness," "pleasure," "enjoyment," or "benefit," however, considering the beneficiary's station in life is not compatible.⁶⁵ If, as mentioned previously, happiness is a subjective matter that must be left to the honest determination of the beneficiary, then that beneficiary's station in life is totally irrelevant. The determination is simple. Is the proposed distribution something that the beneficiary says will make him or her happy? By including a term such as "happiness," the settlor is presumed to understand that the trustee will make distributions to provide for the subjective yearnings and whims of the beneficiary. All that consideration of the beneficiary's station

⁵⁹ Note 6, *supra*.

⁶⁰ Even though the court found that, under Pennsylvania case law, principal could not be invaded beyond amounts needed to maintain the beneficiary's prior mode of life, the court determined that the testator's intent was not to follow that existing case law. Therefore, the court determined that the settlor did not intend for distributions to be limited to only amounts that maintained the beneficiaries' way of life as it was prior to the testator's death.

⁶¹ *First National Bank of Birmingham, Alabama v. Snead*, *supra* note 57.

⁶² See *Robertson's Estate*, *supra* note 57.

⁶³ *In re Buell's Estate*, *supra* note 57.

⁶⁴ See *Fowler v. Hancock*, *supra* note 36.

⁶⁵ See in this respect, *In re Robinson's Will*, 144 A. 457 (Vt., 1929) (as to the term "benefit").

in life would do in this situation is throw confusion into what otherwise should be a very straightforward determination.

Because of the uncertainty of the state of the law on this issue, however, the issue of whether to consider the beneficiary's station in life most definitely should be addressed when drafting the invasion provision.

Beneficiary's income and other resources. What is the significance of the beneficiary's income and other resources? Absent a provision requiring or permitting consideration of such income and other resources, is the trustee required or permitted to consider these factors when a broad invasion power is involved? Taking into account a beneficiary's income and other resources could affect decisions to make a distribution or at least limit the size of a requested distribution. On the other hand, if income and other resources are not considered, any distribution would reduce the size of the trust, which presents an issue regarding the trustee's duty to protect the interests of remaindermen.

The intent of the settler is, of course, controlling here. There appears to be no general rule on

this issue.⁶⁶ In trying to ascertain the settlor's intent on this issue, some courts use an approach similar to that used by New York courts with trusts including support standards. Under this approach, courts base their decisions on whether the settlor intended to make an absolute charge on both the income and corpus of the trust (i.e., an absolute gift of income and corpus) to provide for the specified purpose.⁶⁷ If the settlor did, then the beneficiary's income and other resources are not considered.

In making the above determination, courts ask themselves the following question: Does the trust instrument provide that principal may be invaded only if the beneficiary is in need (i.e., is the distribution of principal made conditional on a showing that the beneficiary has actual existing needs)? If it does, then the income and other resources must be taken into account. This is because the private income of the beneficiary is one of the factors used in determining whether a need actually exists. If, however, encroachment can be made even when the beneficiary has no actual financial need, the trustee cannot consider private income and other resources of the beneficiary.

Most broad invasion standards, by their very terms, do not base distributions on an actual financial need of the beneficiary. For example, with a "benefit" standard, the criteria for whether a distribution should be made is whether the proposed distribution will result in some advantage or gain to the beneficiary. Even though an encroachment is appropriate under such a standard when a beneficiary has a need, an encroachment can be and usually is made even when the beneficiary has no actual financial need. Encroachment is not conditioned on an actual need. Therefore, presumably, the beneficiary's income

and other resources should not be considered with such a standard.⁶⁸

Only a few cases involving broad invasion standards have dealt with this issue. In one case involving a "use, benefit and welfare" standard, the Vermont Supreme Court stated:

The question in the instant case is: "Does the will contemplate a gift of the property, both income and principal for the use, benefit and welfare of the widow during her life?" We think it does. Income and principal are not distinguished. Nothing is said about need or necessity.⁶⁹

In another case⁷⁰ involving a "use and benefit" standard, the court stated:

The will authorizes invasion of principal to the extent the trustees deem necessary for the widow's use and benefit. It is not made a condition to the exercise of this power that the widow be shown to be in actual financial need.

As a result, the income and other resources of the beneficiary were not considered in either case.

Some cases take a contrary approach and hold that the beneficiary's income and other resources should be considered. One case involves a "general welfare" standard,⁷¹ another case involves a "use and welfare" standard,⁷² and multiple cases involving a "comfort" standard⁷³ (where "comfort" was used with terms such as "care and support" or "care, maintenance, and support"). Furthermore, in a case involving a "benefit" standard, the court ruled that the beneficiary's income and other resources should be taken into account.⁷⁴ In this last case, however, the court based its ruling on the fact that the trustee's power was not an "unrestricted power." Without having more information, it is impossible to know what the court meant by the power "not being an unrestricted power."

With terms such as "happiness," "benefit," "enjoyment," and "plea-

⁶⁶ See "Propriety of Considering Beneficiary's Other Means under Trust Provision Authorizing Invasion of Principal for Beneficiary's Support," 41 ALR3d 255.

⁶⁷ See *In re Messers Will*, 231 N.Y.S.2d 201 (1962).

⁶⁸ See *In re Rachtin's Will*, *supra* note 32. See also *McClintock v. Smith*, 29 N.W.2d 248 (Iowa, 1947).

⁶⁹ *In re Houghton's Estate*, 105 A.2d 257 (Vt., 1954).

⁷⁰ See *In re Badell's Estate*, 92 N.Y.S.2d 70 (N.Y., 1949).

⁷¹ *Guarantee Trust Co. of New York v. New York City Cancer Committee*, 144 A.2d 535 (Conn., 1958).

⁷² *In re Harris' Estate*, 187 N.Y.S.2d 700 (N.Y., 1959).

⁷³ See *Matter of Martin*, 259 N.Y. 305 (N.Y., 1936). *In re Messler's Will*, 231 N.Y.S.2d 201 (N.Y., 1962). *Emmert v. Old National Bank of Martinsburg*, 246 S.E.2d 236 (W.Va., 1978).

⁷⁴ *In re Hanft's Estate*, *supra* note 57.

sure," only this one case implies that the beneficiary's income and other resources should be considered, and the facts of that case are not clear as to just what type of power the trustee actually possessed. Therefore, if a general rule can be drawn from the lack of case law on this issue, it might be that with patently subjective criteria standards, the beneficiary's income should not be taken into account. The logic behind such a rule would be that, a settlor who wants to provide for a beneficiary's benefit or happiness would not want the trustee to consider the beneficiary's income or other resources, as these would detract from and diminish the gain, advantage, gratification, and satisfaction that the beneficiary would otherwise realize.

With terms such as "comfort," "best interests," and "welfare," however, possibly the beneficiary's income and resources should be considered. If the settlor's intention is to ensure the continued "physical welfare" or "comfort" of the beneficiary, and the beneficiary already has sufficient income or resources to experience welfare or comfort in his or her life, then no distributions from the trust are needed.

As indicated above, a lot of uncertainty remains with respect to this issue. In light of this uncertainty, particularly with standards such as "comfort" and "welfare," relevant issues should be addressed in the drafting of the invasion provision.

Objects of the settlor's bounty. One factor that courts considered in affording a broad invasion standard its broadest meaning is the beneficiary's being the principal object of the settlor's bounty.⁷⁵ In this regard, spouses are usually accorded special treatment, and settlors should clarify during the drafting process whether special treatment is intended.

Size of the trust. The size of the trust can have an impact, particularly on the amount that should be distributed. With minimally subjective standards such as "best interests," the trustee of a relatively small trust would presumably be limited to fewer and smaller distributions. The trustee in such a situation would presumably have a duty to preserve the trust, as much as possible, for the beneficiary's future needs. In contrast, substantial distributions are possible with a larger trust, presuming of course that the beneficiary's station in life does not otherwise limit the distribution.

In *Fowler v. Hancock*,⁷⁶ the issue was whether the term "benefit" permitted distributions to provide for the beneficiary's minor children. In ruling that a distribution for the support of the beneficiary's children was permissible, the court stated that "the extent and character of the children's support are to be measured, among other factors, taking into account the resources of the trust estate to supply them with due allowance for other benefits which the beneficiary is to have." This case states further that with a small trust, the denial of a dependent's support could be proper.

If patently subjective criteria standards are involved, the size of the trust should be less of an issue because the settlor obviously is aware that the standard used could result in the exhausting of the trust. This point has no definite general rule, however, so the settlor's intent should also be clearly indicated when the invasion standard clause is drafted.

Interests of remaindermen and the future needs of the beneficiary. What duties does a trustee owe to remaindermen and to the future needs of the current beneficiary with a broad invasion standard? Regarding the interests of remaindermen,

the court in *Matter of Ralph E. Breeding Trust*,⁷⁷ citing the Restatement (Third) of Trusts, stated:

If a trust is created for beneficiaries in succession, the trustee is under a duty to successive beneficiaries to act with due regard to their respective interests.

The Restatement goes on to say that the extent of the trustee's duty to successor beneficiaries is determined, among other things, by the trust's purposes.

Does the above duty apply merely to trusts including support standards or does it have a broader application? With minimally subjective standards, such as "best interests" or "welfare," case law indicates that trustees have a duty to consider how any proposed distribution could adversely affect the interests of remaindermen⁷⁸ or the future needs of the current beneficiary.⁷⁹ For example, in *Kemp v. Patterson*,⁸⁰ which involved a "best interest" standard, the court stated, "Nor may the rights of the remainder interests be ignored or disregarded." If patently subjective criteria standards are involved, however, the trustee's responsibilities to remaindermen under most states' laws would likely be less and possibly even be minimal, depending on what the rest of the trust provides.

The broader the invasion standard is, presumably the less rele-

⁷⁵ *Strite v. McGinnes*, 215 F. Supp. 513, 11 AFTR2d 1859 (DC Pa., 1963). *Henstee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 37 AFTR 455 (1949). *Miller*, 387 F.2d 866, 21 AFTR2d 1592 (CA-3, 1968). *Doyle*, 358 F. Supp. 300, 32 AFTR2d 73-6252 (DC Pa., 1973). *Sibson v. First National Bank & Trust Company of Paulsboro*, 160 A.2d 76 (N.J., 1960). *modified* 165 A.2d 800 (N.J., 1960). *Peoples Trust Company of Bergen County*, 412 F.2d 1156, 24 AFTR2d 69-6043 (CA-3, 1969).

⁷⁶ Note 36, *supra*.

⁷⁷ 899 P.2d 511 (Kan. App., 1995).

⁷⁸ See *Blodgett v. Delaney*, *supra* note 1 (as to the term "welfare"). See *Kemp v. Patterson*, *supra* note 16 (as to the term "best interests"). See also *Dunkley v. Peoples Bank & Trust Company*, 728 F.2d 547 (DC Ark., 1989) (as to the terms "comfort, welfare, and best interests").

⁷⁹ *In re Estate of Howard*, *supra* note 25.

⁸⁰ Note 16, *supra*.

vant are the interests of remaindermen. Therefore, with standards such as "happiness," "enjoyment," or "pleasure," a court would very likely find a remainderman's interest not to be a consideration. If a trust includes a "benefit" standard, the trustee must obviously give consideration to the beneficiary's sobriety, his competency to manage and husband property, and other relevant circumstances in deciding whether to make a current distribution.⁶¹ Included in those other factors would be whether the beneficiary might squander the distribution⁶² and as a result adversely affect the remaindermen's interest.

Thus, if the trustee knew that the beneficiary was a spendthrift or had an addiction, these factors have to be given serious consideration. Assuming the trustee gives due consideration to all these factors and that the beneficiary is neither a spendthrift nor has any addictions, based on the literal definition of "benefit," the primary focus is on whether the proposed distribution will result in some type of gain, profit, or advantage to the beneficiary. This standard permits distributions to satisfy the whims and desires of the beneficiary.⁶³ Obviously, the settlor has to be fully aware that including this subjective standard reduces the interests of the remaindermen accordingly and also that a substantial distribution would affect the trust balance available for future distributions to this beneficiary.⁶⁴

Supporting the above is *National Bank of Commerce of San Anto-*

nio.⁶⁵ In that case the taxpayer asserted that with a "benefit" invasion standard, the trustee was bound to administer the trust with an eye on the remainder interest. The court, in rejecting the taxpayer's argument, quoted the Fifth Circuit's opinion in *First National Bank in Palm Beach* to the effect that "when extraordinary powers of this kind are given to the fiduciary they are intended to modify the general rule with respect to the obligations [of] a fiduciary to deal with an even hand with respect to the life tenant as against the remainderman...."⁶⁶

Consequently, a strong argument can be made that the trustee need not even consider the interests of remaindermen and the future interests of this beneficiary in deciding whether to make a distribution as he or she might be required to under a "best interest" or a "welfare" standard. Maybe this is why, in the two cases alluded to previously in which a "benefit" standard permitted the termination of trusts, the courts did not even mention the remaindermen's interests or a beneficiary's future interests as being relevant.⁶⁷

A trustee might owe a duty to remaindermen, even with patently subjective criteria standards. For that reason, and to avoid the time and expense of having to obtain a court order prior to every distribution, the level of this duty should be addressed in the drafting of the invasion provision.

Drafting suggestions

Attorneys should consider discussing the following points with clients when drafting trusts that include broad invasion powers:

State the settlor's principal purpose for creating the trust and how the broad invasion standard is to be defined. As mentioned at the beginning of this article, a two-prong test applies when broad inva-

sion powers are involved. The second prong of that test is that the proposed distribution must be consistent with the settlor's principal or dominant purpose for creating the trust. Consequently, setting forth the settlor's principal purpose and how the standard is to be defined is always helpful. That statement can be as simple as:

My principal purpose for creating this trust is to provide for the "best interests" of my daughter, Joan, and all other considerations are purely secondary. It is my express intention that for purposes of determining whether a distribution to my daughter should be made, the term "best interests" shall mean whatever aids her welfare and advancement and enables her to establish herself in life. In light of the above, the trustee need not concern itself with the interests of remainder beneficiaries in making distributions to my daughter for her "best interests."

Separate the broad invasion power from other invasion standards.

Assuming the client desires that the broad invasion standard should be an independent basis on which the trustee can make a determination, the broad invasion standard should be stated in a separate paragraph. Combining the broad invasion standard and another invasion standard (i.e., support) in the same provision could only cause confusion as to whether the settlor intended the broad standard to be a separate standard for invasion or wanted it to be a catchall—particularly if the conjunction "and" is used.

Define the interests of the remaindermen.

Because of the uncertainty as to a trustee's duty to remainder beneficiaries when a broad invasion power is used, this issue should also be addressed in the drafting of the invasion provision. As indicated previously, even with a standard such as "welfare," case

⁶¹ See *In re Perkin's Estate*, 157 N.E. 750, (N.Y. 1927).

⁶² *In re Houghton's Estate*, *supra* note 69.

⁶³ *Stuart v Wilmington Trust Co.*, *supra* note 30.

⁶⁴ See *McClintock v Smith*, *supra* note 68.

⁶⁵ Note 29, *supra*.

⁶⁶ 443 F.2d 480, 27 AFTR2d 71-1808 (CA-5, 1971), cert. den. 404 U.S. 983.

⁶⁷ *In re Rachlin's Will*, *supra* note 32; *Lees v Howarth*, *supra* note 32.

law suggests that a trustee must consider how a proposed distribution would affect the interests of remaindermen.⁸⁸ Because of this prior case law, in many instances when a broad invasion power is involved, a trustee will either deny a borderline distribution or at least want to get prior court approval that will result in additional legal expenses to the trust.

A client can always release the trustee from his or her duty to protect the interests of remaindermen. In most cases, the client's decision to use a standard such as "benefit" or "happiness" is a pretty good indication of his or her intent that the interests of the remaindermen are clearly secondary and that the current beneficiary is the primary object of the settlor's bounty. To avoid any uncertainty, however, this issue should be clarified one way or the other. The following is a suggested provision, assuming the settlor wants to favor the current beneficiary:

In exercising the power to invade the principal of this trust for my wife's "best interests," the trustee shall concern itself primarily with the interests of my wife and need not be concerned with what, if any, part of the principal remains for the remaindermen on her death.

Define the trustee's duty regarding the future needs of the beneficiary. Again, because very little existing case law involves this aspect, the invasion provision should clearly set forth the client's intention regarding the possible future needs and welfare of the current beneficiary. Particularly with standards such as comfort, best interest, and welfare, providing for the future needs of the beneficiary might be extremely important to the settlor. With standards such as "benefit" or "happiness," however, the choice of such a term would in many cases

indicate that the beneficiary's present whims and desires are paramount. To avoid any questions, however, it is better to set forth clearly the trustor's intent. A possible provision could be:

My trustee [shall] [need not] consider the future welfare and well-being of my wife in deciding whether to make a current distribution pursuant to the above invasion standard.

Clarify that the trustee's judgment is controlling. In the 1960s, the IRS argued in two cases⁸⁹ that invasion standards such as "welfare," "best interest," "benefit," "happiness," etc., were so subjective that, if a trustee refused to make a distribution that a beneficiary requested, a state court would feel compelled to order the distribution. Fortunately, the courts did not agree with the IRS's argument.

The IRS's position in these two cases point out the need to clarify that the settlor is relying on the trustee's determination and not the beneficiary's opinion regarding what should be distributed. Even though a beneficiary has no power to control a trustee's action,⁹⁰ by making such a clarification, it will prevent any argument in this regard.

Also, to avoid uncertainty as to whether the income, other resources of the beneficiary, or the beneficiary's station in life should be considered when broad invasion standards are used, these aspects should be addressed in the invasion provision. The following is a suggested provision to accomplish these objectives:

The trustee may also pay to my wife so much or all of the principal of the trust estate as the trustee, in his total, absolute, and complete discretion, deems advisable from time to time for her best interest. It is my specific intention to rely totally and completely on

the judgment and wisdom of my trustee regarding (1) what he considers to be in my wife's best interest, (2) whether to make any distribution to my wife for her best interest, and (3) the amount of any distribution made, even if it results in the distribution of the entire trust estate.

My trustee need not consider the wishes or desires of my wife regarding whether a distribution should be made nor her wishes or desires regarding the amount of any distribution. My trustee need not consider the income or other assets of my wife, or her station in life, in deciding whether to make a distribution. To the extent permitted by law, the determination by my trustee as to both the propriety and amount of any distribution shall not be subject to question by anyone, including my wife and/or the remaindermen.

Conclusion

A broad invasion standard can be a welcome addition to many trusts. In picking the most appropriate broad invasion standard for a client's trust, the estate planner should obviously look for a standard that will provide the greatest flexibility to the trustee while at the same time provide certainty to all parties involved as to what they can expect from the trust. It should be noted that most of the better trust company form books use either a "best interest" or a "welfare" standard and sometimes add a "comfort" standard. At least in their opinion, these standards provide the most flexibility and present the least problems. ■

⁸⁸ Blodgett v Delaney *supra* note 1

⁸⁹ Security-Peoples Trust Company, 238 F. Supp. 40, 15 AFTR2d 1334 (DC Pa., 1965); Lettice, 237 F. Supp. 123, 15 AFTR2d 1286 (DC Calif., 1964). See also "Trustee's Absolute and Uncontrolled Discretionary Powers," 104 Tr. and Est. 1062 (October, 1965).

⁹⁰ See *In re Emmon's Will*, *supra* note 28. See also, *Fowler v Hancock*, *supra* note 36.