



Discretionary Distributions, A Trustee's Most Difficult Decision

During the drafting of a trust, a frequently overlooked provision is also perhaps one of the most important ones to consider; discretionary distributions. What is a discretionary distribution? Who makes them and how?

Most trusts provide named beneficiaries with net income for their lives or a term of years. They often include a provision allowing a beneficiary to request additional distributions from income and/or principal. However, the decision to grant the request is typically the trustee's responsibility and it is often deemed "Discretionary".

It is standard practice that a trust document will have some guidance in determining what distributions they deem appropriate. We often see content such as health, education, general welfare, and a standard of living the beneficiary has grown accustomed to. However, it is the gray area in between that can be the trickiest because this is where the true "discretion" lies.

For example, what one person considers general welfare, another may not. Can health or general welfare mean a six month stay at a luxury spa in the Swiss Alps due to the ordinary stresses of life? Does education mean an accredited university or would a trip around the world be considered "educational"? How can I be assured of what a beneficiary's standard of living was prior to them being a beneficiary?

Tough questions, right?

It is difficult, during the drafting of a trust document, for a grantor and their attorney to consider every possible future scenario. Therefore, choosing the right trustee becomes much more critical. It will be the trustee's responsibility to determine if a request for a discretionary distribution is approved or denied. Will the trustee maintain complete objectivity, or will they serve with some biases? We all have biases, don't we?

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So, at this point, you may be more confused than ever. What is the right answer? I wish there was just one right answer, but unfortunately, there is not. The best that a grantor of a trust can do is be as thoughtful as possible. They must do their best to narrow the gray area and select a trustee who might put aside any biases he or she may possess. An option to consider might be to name co-trustees. Perhaps even a corporate trustee serving alongside an individual trustee. An individual trustee may know the grantor's intent better. However, the corporate trustee may be more objective. They serve on many trusts, decide on discretionary distributions every day, have no skin in the game, and would be familiar with case law.

So, what began as a discussion about discretionary distributions, ends up leading into a discussion about trustee selection. The fact that discretionary distributions can be so difficult to navigate means the selection of a trustee(s) becomes that much more important.



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