Discretionary Support Trusts

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A property owner may seek to effectuate donative conveyances of personal wealth either by lifetime transfers or under the terms of a will. Two vehicles are available by which the donor can effect donative intentions. First, the donor may transfer property to the intended beneficiaries by means of an absolute gift. Alternatively, the donor may establish a trust, under the terms of which the donees, viewed as a singular legal entity, are vested with the complete equitable title to the trust assets.

The device of an outright gift may be inappropriate for a multiplicity of reasons. The prospective donee may be a minor, in which case an attempt to convey the legal and equitable title to the property would necessitate the creation of a guardianship with the attendant costs and inefficiencies. In addition, the class of potential beneficiaries

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The author wishes to acknowledge with gratitude the research assistance of Barbara Palmer and Robert Pincus and the editorial assistance of Martin Abravanel.

1. The term "trust," as used in this Article, is intended to refer only to the trust device as a vehicle for the donative disposition of wealth. No reference is made by the use of this term to such devices as the resulting or constructive trust. For a discussion of constructive trusts, see 4A R. Powell & P. Rohan, Powell on Real Property ¶ 593-598 (1981 & Supp. 1982).

2. It is hornbook law that the establishment of a trust effects a division of ownership between legal and equitable title in the specific assets that are the subject matter of the trust. The legal title to the trust corpus is in one party, the trustee, while the equitable title to the assets of which the trust is composed is in the beneficiaries. Restatement (Second) of Trusts § 2 comment f (1959).

3. The term "guardian," as it pertains to the laws governing guardianship of minors, has two meanings. The person charged with the custody and care of the minor and responsible for the minor's maintenance and education is denominated as a guardian of the person; the person or entity charged with the possession and management of the minor's property is designated as a guardian of the property. See R. Mackay, The Law of Guardianships 25-27 (3d ed. 1980).

4. The potential for guardianship administration of a minor's property when the decedent is survived by minor children is anathema to most estate planners. The lawyers' aversion for this mode of administering property is predicated upon the time-consuming, cumbersome, and costly nature of the process involved. One commentator has written: There are two basic problems with guardianship administrations. . . . First, the strict court supervision over virtually every action of the guardian is so burdensome and time-consuming that it hinders effective management of the estate, and the resulting court costs and attorney's fees constitute a substantial and often unnecessary expense of administration. Secondly, the investment power of the guardian is so restricted that it is impossible for the guardian to obtain a fair return on the money invested, or to protect the estate against inflation. Davis, Problems of Guardianship Administration in Texas, 47 Tex. L. Rev. 1124, 1124 (1969).
may include persons not in being on the effective date of the dispositive instrument. In order for these afterborn class members to share in the donor's largesse, the trust device must be utilized. Obtaining seasoned investment advice and conserving the assets of which the gift is composed are additional factors that may militate against a decision to structure the donative conveyance as an absolute gift. One obvious reason for using a trust rather than an outright gift to transfer property is that, by carefully selecting a trustee, the settlor can provide expert management of the property. A final reason for utilizing a trust device is that, depending on the manner in which the trust instrument is drafted, the settlor may seek to protect the trust assets, as well as the trust beneficiaries, from possible adverse consequences that may arise because of the profligate tendencies of the beneficiaries. No similar protective function can be achieved when assets are gifted absolutely to a

In fact, one of the principal usages of testamentary trusts is to seek to ensure that all property passing to minors will not pass outright to such persons but will, instead, be held in trust during their minority. R. MacKay, The Law of Guardianships iv (3d ed. 1980).

5. In the case of an inter vivos gift, the time of the delivery of the instrument of gift will mark its effective date. In the case of a testamentary disposition, the decedent's death establishes the relevant date. See R. Brown, A Treatise on the Law of Personal Property § 37 (1936).

6. Of course, the utilization of the trust device does not necessarily result in the sharing in the beneficial ownership of the trust assets by all persons who otherwise qualify for membership in the class. Class closing principles may mandate the result that a class member who is born after the final distribution of the trust fund will be precluded from participating in the fund. 5 American Law of Property §§ 22.40, 22.41 (A.J. Casner ed. 1952). Afterborns will be protected, however, in cases in which no class member is entitled to possession of the fund at the time initially set for distribution, id. § 22.43, at 366, or in which the gift to the class is only of the income derived from the fund, id. § 22.46, at 389.

7. The relative importance that the settlor is likely to attach to the goal of procuring skilled management of the property will vary depending on the quantum of assets involved and the financial sophistication of the donee.

8. 2 A. Scott, The Law of Trusts § 151 (3d ed. 1967). This statement raises issues concerning spendthrift trusts and the spendthrift implication that arises in the case of a trust created for the beneficiary's support. Valid spendthrift limitations preclude predistribution anticipation or assignment of the beneficiary's interest in a trust. Also, creditors of the beneficiary of a spendthrift trust cannot reach the interest while it remains in the hands of the trustee; they will be able to have the beneficiary's interest applied in satisfaction of their claims only when it has ceased to be trust property. Id. In the case of a trust created for the beneficiary's support, even though the settlor does not purport to directly restrain the alienability of the beneficiary's interest, the courts have held uniformly that the interest of a beneficiary in such a trust is not subject to voluntary alienation and cannot be reached by creditors. Id. § 154.

9. The phrase "protective function" connotes the general idea that the purpose of the settlor in creating such a trust is to protect the trust assets from creditors' claims as well as to protect the beneficiary from personal improvidence. No reference is made by the use of this term to the device known as a protective trust. A protective trust is created when some type of forfeiture restraint is attached to the beneficiary's interest, which is activated if the beneficiary seeks to transfer the interest or creditors seek to reach it. The trust may provide that the beneficiary's interest will terminate if the violative event occurs. Id. § 155, at 1183. Alternatively, the trust may provide that, if the violative event occurs,
When a property owner decides to use the trust device, there are various modes in which the donative disposition can be structured. A number of prototypes recur with such frequency, however, that they warrant special discussion. A common trust, notable for its relative simplicity, is the straight income trust. Under the terms of this trust, the income beneficiary is entitled to receive, in annual or more frequent installments, the net income generated by the trust fund. The trust corpus is distributed to the ultimate remaindermen upon the termination of the interest of the income beneficiary.

The straight income trust, however, may be seriously deficient in a number of important respects. For example, numerous scenarios can be posited in which the net income derived from the trust principal turns out to be insufficient to provide the income beneficiary with the means necessary for mere subsistence. Yet, the trust instrument fails to vest the trustee with the requisite authority to invade trust principal even in cases of extreme emergency. The failure to provide the trustee with the powers necessary to enable the fiduciary to respond with a degree of flexibility to the beneficiary's right to compel the trustee to distribute any part of the trust property will terminate and that the beneficiary is thereafter entitled to receive only those distributions that the trustee, in the exercise of unfettered discretion, deems appropriate. Id. at 1183-84.

10. Whereas a disabling restraint attached to the equitable interest of a trust beneficiary is generally recognized as valid, a similar restriction attached to the grant of any legal interest will be held void as offensive to notions of free marketability. 6 AMERICAN LAW OF PROPERTY §§ 26.16, 26.94-.99 (A.J. Casner ed. 1952); 2 A. SCOTT, supra note 8, § 150, at 1125-26. It should be noted, however, that some jurisdictions have invalidated spendthrift limitations, particularly as applied to a beneficiary’s right to receive trust corpus. See KAN. STAT. ANN. § 58-2404 (1976); 2 A. SCOTT, supra note 8, § 153; Note, Spendthrift Trusts—Validity in Kansas, 9 WASHBURN L.J. 75, 84-85 (1969). Cases in which spendthrift clauses have been generally invalidated include: Athorne v. Athorne, 100 N.H. 413, 416, 128 A.2d 910, 912 (1957); Sherrow v. Brookover, 174 Ohio St. 310, 316, 189 N.E.2d 90, 94 (1963); Industrial Nat'l Bank v. Budlong, 106 R.I. 780, 789, 264 A.2d 18, 23 (1970). Cases that voided spendthrift provisions only as applied to the beneficiary’s right to receive trust corpus include: Lynch v. Lynch, 161 S.C. 170, 174-75, 159 S.E. 26, 28 (1931); McCreery v. Johnston, 90 W. Va. 80, 86, 110 S.E. 464, 466 (1922).

11. There is limited authority for the principle of distributive deviation when the net income generated by the trust corpus is insufficient to provide the life income beneficiary with necessaries. Under very onerous circumstances, a few courts have directed the trustee to invade principal on behalf of the income beneficiary even though the terms of the instrument limit the beneficiary’s interest to the net income. See Petition of Wolcott, 95 N.H. 23, 28, 56 A.2d 641, 644 (1948); McAfee v. Thomas, 121 Or. 351, 357, 255 P. 333, 335 (1927). The doctrine has been codified by statute in a few jurisdictions. E.g., IND. CODE § 30-4-3-26 (1972); N.Y. EST. POWERS & TRUSTS LAW § 7-1.6(b) (McKinney 1967); WIS. STAT. § 701.13(2) (1981). Not surprisingly, the doctrine of distributive deviation has been the subject of much critical commentary. See Niles, Book Review, 32 N.Y.U. L. REV. 886, 892 (1957) (reviewing A. SCOTT, THE LAW OF TRUSTS (2d ed. 1956)). See generally Haskell, Justifying the Principle of Distributive Deviation in the Law of Trusts, 18 HASTINGS L.J. 267 (1967); Note, Deviation from the Distributive Terms of the Trust, 53 NW. U.L. REV. 269 (1958).
beneficiary’s changed circumstances may prove to be a serious shortcoming.\textsuperscript{12} In addition, the beneficiary’s interest in a straight income trust is freely alienable and is reachable by the beneficiary’s creditors.\textsuperscript{13} Thus, the desire of the typical settlor to furnish the beneficiary with an assured income stream may be thwarted when, for example, the beneficiary sustains business reverses and business creditors thereafter seek to attach the beneficiary’s interest in the trust.\textsuperscript{14}

\textsuperscript{12} The harsh consequences that may arise when the trustee lacks authority to apply corpus on behalf of the income beneficiary are exemplified by the facts of Petition of Wolcott, 95 N.H. 23, 56 A.2d 641 (1948). In Wolcott the testator established a straight income trust, naming his widow the life income beneficiary. There was a gift over to issue on the widow’s death. In the course of administering the trust, it became apparent that the net income of $2300 generated annually by the trust fund was insufficient to afford the beneficiary even a subsistence level of income. The consent of all persons beneficially interested in the trust estate to the requested invasion could not be obtained because of the possibility of unborn beneficiaries. The trustees instituted suit, seeking to obtain judicial authorization to invade the trust principal for the widow’s benefit. \textit{Id.} at 24, 56 A.2d at 643. Although the Wolcott court authorized the requested corpus invasion, most courts, when faced with substantially similar fact patterns, have construed the trust instrument literally and have denied the relief requested. \textit{E.g.}, Estate of Van Deusen, 30 Cal. 2d 285, 295, 182 P.2d 565, 573 (1947) (sympathy for respondents’ needs does not justify the taking of property from residuary beneficiaries and the undermining of the stability of testamentary trusts in California); Staley v. Ligon, 239 Md. 61, 71, 210 A.2d 384, 390 (1965) (real estate in corpus of estate could be mortgaged only to the extent that the enhancement of the building’s value would be greater than or equal to the amount expended); \textit{In re Trust under Will of Cosgrave}, 225 Minn. 443, 449, 31 N.W.2d 20, 25 (1948) (power to encroach on corpus is nonexistent unless found in the language of the will).

\textsuperscript{13} Absent a statute or express provision otherwise, an equitable interest under a trust is as alienable as a corresponding legal interest. Demand v. Foley, 11 Ariz. App. 267, 270, 463 P.2d 851, 854 (1970); \textit{In re Moulton’s Estate}, 233 Minn. 238, 294, 46 N.W.2d 667, 671 (1951); Cavers v. St. Louis Union Trust Co., 531 S.W.2d 526, 531 (Mo. App. 1975); 2 A. SCOTT, supra note 8, § 132. In some jurisdictions there are statutes which state that income interests under any trust are spendthrift by operation of law, whether or not the settlor has chosen to include an express spendthrift provision. \textit{E.g.}, \textit{MICH. COMP. LAWS} § 26.69 (1974); \textit{MINN. STAT.} § 501.20 (1980); \textit{MONT. CODE ANN.} § 86-112 (1947). In other states there are statutes exempting a stated amount of income per year, or an amount needed for the support of the income beneficiary, from the claims of creditors; income produced by the trust in excess of the stated amount would be available to creditors. \textit{E.g.}, \textit{CAL. CIV. CODE} § 859 (West 1982); \textit{N.D. CENT. CODE} § 59-03-10 (1960); \textit{S.D. COMP. LAWS ANN.} § 43-10-13 (1967).

\textsuperscript{14} Normally, when an unsatisfied judgment creditor levies upon a property interest of his debtor, the attachment brings about a forced sale of the asset, with the creditor satisfying the outstanding indebtedness out of the proceeds of the sale. This result usually does not obtain when a creditor seeks to attach the equitable interest of the debtor in a trust. Even when, as here, the beneficiary of a trust is absolutely entitled to all income produced by the trust for a specified period and it is, therefore, feasible to actuarially value the interest, a court, upon attachment of the interest by a creditor of the beneficiary, will typically order that a lien be imposed on the debtor’s interest. The imposition of a lien on the beneficial interest in a trust will result in the funnelling of all subsequent distributions of trust income to the attaching creditor. Only after the creditor has been paid in full may the trustee resume making distributions to the \textit{cestui}. The reason that a court typically will choose to impose a lien, rather than order a forced sale of the underlying
It appears, then, that the devices of outright gift and straight income trust have serious disadvantages. To better effectuate the settlor's purpose of assuring the beneficiaries' financial security, it would be advisable for the draftsperson to include clauses that, in substance, permit the trustee to invade trust corpus and effectively preclude the beneficiary from effecting a voluntary or involuntary transfer of the equitable interest. Discretionary trusts and support trusts are of this nature.

The thesis of this Article is that there is a third type of trust, a "discretionary support trust," which is analytically distinct from both the discretionary trust and the support trust, but, for the most part, is unrecognized by the courts. This Article will first set out the analytical framework to define a discretionary support trust. Next, two representative case studies will be presented to illustrate that courts do not appreciate the distinct nature of the hybrid trust. The first case study involves the issue of the rights of creditors of the beneficiary of a discretionary support trust to reach the trust assets and have them applied in satisfaction of their claims against the debtor-beneficiary. The second case study involves the question whether the independent resources of the beneficiary must be taken into account by the fiduciary in determining whether to make a disbursement to the beneficiary of the hybrid trust. Finally, this Article will conclude with a recommendation that an explicit recognition by the courts of the hybrid trust would not only ease the courts' task of construction, but also would better effectuate the settlor's intent.

I. ANALYTICALLY DEFINING THE DISCRETIONARY SUPPORT TRUST

In the case of a pure discretionary trust the settlor vests the trustee with substantial dispositive discretion in the distribution of the trust fund. Assume, for example, that a property owner transfers certain assets "to T, in trust, to pay to W or apply for her benefit so much of the income or principal of the trust, from time to time, as T in his uncontrolled discretion shall determine," with remainder over to some third person upon the termination of the life tenant's interest. Notwithstanding the inclusion of the speculative value of the interest in question. See Showalter v. G.H. Nunnelley Co., 201 Ky. 595, 599, 257 S.W. 1027, 1029 (1924); Dillon v. Spilo, 250 A.D. 543, 545, 294 N.Y.S. 876, 878, aff'd, 275 N.Y. 275, 9 N.E.2d 864 (1937).

The term "hybrid trust" will also be employed in this Article to describe discretionary support trusts. "Hybrid trust" is used to underscore the notion that these trusts partake of the characteristics of the two different species of trusts of which they are composed.

15. See text accompanying notes 19-28 infra.
16. See text accompanying notes 31-90 infra.
17. See text accompanying notes 91-142 infra.
18. See text accompanying note 143 infra.
19. In the case of a pure discretionary trust, absent a clause purporting to restrain the beneficiary's right to transfer that beneficiary's interest, no such limitation will be implied. However, such a trust does constitute an indirect restraint on the alienability of the beneficial interest in the trust. That is, the mere fact that the beneficiary has assigned the interest or that creditors have attached it does not mean that the assignee or attaching
sion of such terms as "uncontrolled" or "sole and absolute" in describing the discretionary powers conferred on the fiduciary, it is clear that the trustee's exercise of those powers will be subject to judicial review and that, accordingly, the trustee will not be absolved from the proper performance of fiduciary responsibilities.

With respect to a pure support trust, the settlor seeks to establish a trust in which it is provided that the income, part of the income, or part of the principal is to be used for the "support" of a named beneficiary. Assume that a property owner transfers certain assets "to T, in trust, to pay to H or apply only so much of the income or principal of the trust, from time to time, as is necessary for the support and maintenance of H," with remainder over to some third person upon the termination of the life tenant's interest. In the case of such a trust, as distinguished from the pure discretionary trust, the trustee, in making distributive decisions, is governed by an ascertainable standard. In determining whether to make a disbursement to the support trust beneficiary, the trustee's decision must comport with the following standard: whether the contemplated disbursement will enable the beneficiary to maintain his or her accustomed standard of living.

Although a support trust is deemed to contain an ascertainable stan-

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20. See RESTATEMENT, supra note 2, § 187 comment j; 3 A. SCOTT, supra note 8, § 187, at 1502.

21. E.g., In re Clarke, 174 Iowa 449, 454-55, 154 N.W. 759, 760 (1915) (trustees precluded from directly or indirectly destroying or injuring the trust); In re Murray, 142 Me. 24, 30-31, 45 A.2d 636, 638 (1946) (trustees may not delegate discretion to beneficiary); In re Will of Sullivan, 144 Neb. 36, 39-40, 12 N.W.2d 148, 150 (1943) (court may intervene when trustees with "uncontrolled discretion" fail to provide support). A finding that the trustee's exercise of discretionary powers is not reviewable by the court would lead to the result that the trustee held the property in fee, free of any trust obligations. Judge Learned Hand stated:

[N]o language, however strong, will entirely remove any power held in trust from the reach of a court of equity. After allowance has been made for every possible factor which could rationally enter into the trustee's decision, if it appears that he has utterly disregarded the interests of the beneficiary, the court will intervene. Indeed, were that not true, the power would not be held in trust at all; the language would be no more than a precatory admonition.

Stix v. Commissioner, 152 F.2d 562, 563 (2d Cir. 1945).

22. See, e.g., McElrath v. Citizens & S. Nat'l Bank, 229 Ga. 20, 25, 189 S.E.2d 49, 53 (1972) (economic status of parents was such as to allow trust assets to be used to pay for minor beneficiaries' private school expenses); Kuykendall v. Proctor, 270 N.C. 510, 520-21, 155 S.E.2d 293, 302 (1967) (duty to support beneficiary in accordance with age, station in life, and physical and mental condition); Epp Estate, 17 Pa. D. & C.2d 278, 280 (Orphans' Ct. 1958) (beneficiary not entitled to income beyond her prevailing standard of living); 2 A. SCOTT, supra note 8, § 128.4, at 1019 & n.2.
dard by which the trustees’ distributive decisions can be measured, the trustee is vested with considerable dispositive discretion. The “discretionary” aspect of even a pure support trust arises by reason of the imprecise nature of the support standard. Assume, for example, that the beneficiary of a pure support trust has an annual income, independent of any distribution from the trust, of $15,000 in a given year, and that the trustee has failed to make any distribution out of the trust fund to the beneficiary. Given the meaning of the term “support,” if the beneficiary of this particular support trust and his family are, in fact, accustomed to an average annual income of $15,000, the trustee may be correct in failing to make a distribution to the beneficiary. If, on the other hand, the beneficiary of this trust is accustomed to a style of living made possible by an average annual income of $75,000, the trustee may be incorrect in failing to make a distribution to the beneficiary. So far, only the two ends of the spectrum have been delineated. Obviously, a much closer question would be presented if the beneficiary’s average annual income were $20,000. It is at this point that the imprecise nature of the support standard becomes relevant in that it affords the fiduciary a considerable amount of flexibility in making distributive decisions.

Frequently, the discretionary element of a support trust is made explicit, as when discretionary language is combined with language that, if taken alone, would be deemed to create a pure support trust. For example, a property owner transfers certain assets “to T, in trust, to pay to W or apply so much of the income or principal of the trust, from time to time, as T shall, in his uncontrolled discretion, deem necessary for the support and maintenance of W,” with remainder over to some third person upon the termination of the life tenant’s interest. This language creates a species of trust termed a discretionary support trust.

23. With respect to a pure support trust, Professor Scott wrote: [T]he extent of the interest of the beneficiary depends upon the manifestation of intention by the settlor. The court will not interfere to control the discretion of the trustee as long as he acts within the bounds of a reasonable judgment in the exercise of his discretion, but the court will interfere when he exceeds those bounds.

24. This assumes, for the purposes of analysis, that the trustee might properly consider the beneficiary’s independent resources in determining whether to distribute trust assets. See notes 91-142 infra and accompanying text.

25. The degree of flexibility afforded the trustee of a pure support trust is further enhanced by the fact that a court would employ a standard of abuse of discretion in reviewing the fiduciary’s decision. See note 23 supra.

26. The term “discretionary support trust,” as used in this Article, encompasses only those trusts in which explicit discretionary language is combined with language that, in itself, would be deemed to create a pure support trust. This limitation is necessary because the extant decisional literature often applies this nomenclature to trusts that, under the typology delineated in this Article, would be categorized as pure support trusts. See Dunklee v. Kettering, 123 Colo. 43, 46, 225 P.2d 853, 854 (1950); Bridgeport-City Trust Co. v. Beach, 119 Conn. 131, 141, 174 A. 308, 311 (1934); Kuykendall v. Proctor, 270 N.C.
It certainly appears that if express discretionary language is added to a support trust, the settlor must have intended that the trustee exercise greater latitude in distributive decisions than would be the case in the absence of the discretionary language. The converse should also hold true. Namely, the scope of the trustee's discretion in the case of a discretionary support trust should be more restricted than would be the case in the absence of the support language.

These suppositions seem particularly true in light of common principles of judicial construction. The cardinal rule of construction is that the courts must seek to ascertain and effectuate the settlor's intent. It is traditionally stated that, in endeavoring to ascertain the intention of the settlor, attention must not be confined to particular clauses or words of the dispositive instrument. Instead, the whole context of the instrument must be considered, and force and effect must be given, if possible, to every material word contained therein. The whole instrument must be construed so that all the words and expressions used by the property owner are reconciled and harmonized, if that can be done.

II. JUDICIAL APPLICATION OF THE DISCRETIONARY SUPPORT TRUST

Subject to a few notable exceptions, the court opinions in this area reflect a singular lack of judicial sensitivity to the distinction between discretionary support trusts, on the one hand, and pure support and pure discretionary trusts, on the other. When confronted with the task of construing a dispositive instrument, the terms of which establish a discretionary support trust, it is probable that a court will simply and, it is contended, erroneously analyze the trust as though it were either a pure discretionary trust or a pure support trust. The courts have been unable or unwilling to appreciate the concept that the hybrid nature of the discretionary support trust results in a trust relationship that is legally distinguishable from the individual elements of which it is composed.

510, 519, 155 S.E.2d 293, 301 (1967). The difference in nomenclature apparently stems from the courts' inability to distinguish between the "discretionary" nature of a pure support trust, on the one hand, and a discretionary support trust, on the other. See text accompanying notes 23-25 supra. Additionally, it should be noted that language which merely "authorizes" or "empowers" the trustee to pay or apply trust property for the support and maintenance of a designated beneficiary is not tantamount to a grant of express discretion. Professor Scott commented that "[e]ven though in terms the trustee is authorized or empowered to do something, the provision may be interpreted as directing him to do it." 3 A. SCOTT, supra note 8, § 187, at 1501.

28. Id.
29. This is not to say, however, that the designation of a trust as a discretionary support trust will necessarily result in a different outcome. In the creditors' rights area, for example, the fact that a hybrid trust partakes of the characteristics of a support trust means that, in the absence of an applicable exception removing the case from the operation of the implied spendthrift provision of a support trust, creditors of the beneficiary would
In failing to grasp this fundamental principle, the judiciary has not accorded the requisite primacy to the settlor’s intent and has failed to take cognizance of a number of canons of construction.  

A. Application of Discretionary Support Trusts in Creditors’ Rights Cases

In the field of creditors’ rights, the courts have delimited the scope of access, if any, that creditors of a trust beneficiary are entitled to have to the beneficiary’s equitable interest in the trust. Specifically, the courts have inquired whether the beneficiary’s creditors could compel the trustee to distribute trust property to them in satisfaction of their claims against the debtor-beneficiary. In the context of a pure discretionary trust, this question has been answered in the negative. Conversely, in the case of...
a pure support trust, certain classes of creditors have been granted access to the beneficiary's interest notwithstanding the existence of an implied spendthrift provision. The question, therefore, becomes what analytical model the courts should adopt in construing discretionary support trusts in the field of creditors' rights. As will appear hereinafter, the courts, for the most part, have treated the hybrid trust as though it were a pure discretionary trust, thereby disabling the creditors from reaching the beneficiary's interest in the trust. The validity of applying the pure discretionary trust model to a hybrid trust is the subject of the present inquiry.

The discretionary trust cannot compel the trustee to distribute trust property to them is in need of some refinement. Even in a wholly discretionary trust, the trustee, in exercising his discretion, must act as a fiduciary. If there are, objectively speaking, certain circumstances in light of which it would be inappropriate or unreasonable to withhold a distribution from the beneficiary of such a trust, a failure by the trustee to distribute in the face of those circumstances could be considered a nonfiduciary act. For example, if the income beneficiary of a pure discretionary trust does not have the means necessary for subsistence, what reasons could possibly motivate the trustee in failing to make a distribution under these circumstances? In the factual situation posited, the trustee's failure to exercise discretion in favor of a beneficiary who, by hypothesis, does not have the means for subsistence may constitute a breach of fiduciary duty. Further, the court having jurisdiction over the administration of the trust could direct that a distribution be made. See Colton v. Colton, 127 U.S. 300, 321-22 (1888); In re Estate of Ternansky, 4 Ohio Op. 2d 329, 331, 141 N.E.2d 189, 192 (Ct. App. 1957). To the extent to which a distribution could be compelled by the beneficiary under these circumstances, the beneficiary's creditors should be afforded correlative protection.

33. The Restatement (Second) of Trusts provides:

Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,

(a) by the wife or child of the beneficiary for support, or by the wife for alimony;
(b) for necessary services rendered to the beneficiary or necessary supplies furnished to him;
(c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary;
(d) by the United States or a State to satisfy a claim against the beneficiary.

RESTATEMENT, supra note 2, § 157. The classes of creditors to which the cases discussed hereinafter pertain involve exceptions to the implied spendthrift provision of a support trust. Otherwise, the possibility of creditor access to the beneficiary's interest in the trust would be obviated by means of such a provision. See note 29 supra.

34. See, e.g., Estate of Lackmann, 156 Cal. App. 2d 674, 681, 320 P.2d 186, 190-91 (1958) (abuse of discretion found in order to mandate distribution to state mental hospital); City of Bridgeport v. Reilly, 133 Conn. 31, 39-40, 47 A.2d 865, 867-68 (1946) (trustee's failure to reimburse city for support payments upheld because no abuse of discretion found); Todd's Ex'rs v. Todd, 260 Ky. 611, 614, 86 S.W.2d 168, 170 (1935) (no interest in cestui found that could be the subject of a claim for alimony and child support); First Nat'l Bank v. Department of Health & Mental Hygiene, 284 Md. 720, 726, 399 A.2d 891, 894 (1979) (state mental hospital cannot reach trust in absence of showing that trustees acted dishonestly, arbitrarily, or from improper motive); Town of Randolph v. Roberts, 346 Mass. 578, 579, 195 N.E.2d 72, 73 (1964) (town could not recover welfare payments absent a showing that trustees acted arbitrarily, capriciously, or in bad faith); Ware v. Gulda, 331 Mass. 68, 70, 117 N.E.2d 137, 138 (1954) (when settlor was beneficiary, creditors could reach trust assets despite trustee's failure to exercise discretion); Hanford
One of the most frequently litigated issues in the creditors' rights area is whether a public institution can reach the beneficiary's interest for expenses incurred for the support and maintenance of the beneficiary while he or she is in the care of the institution. In First National Bank v. Department of Health & Mental Hygiene the Maryland Court of Appeals addressed this question in the context of a testamentary trust established by the beneficiary's mother. Under the terms of the testatrix' will, the residue of her estate was placed into a trust that provided in pertinent part:

"My Trustees, accounting from the date of my death, shall pay from time to time the net income and so much of the principal as they, in their absolute and uncontrolled discretion, may determine, to my daughter, Annesley Bond Baugh, or, in their absolute and uncontrolled discretion, may apply the same for her maintenance, comfort and support." The trust instrument also contained an express spendthrift provision.

The trust beneficiary had been confined to a state mental hospital since 1944. Since the inception of the trust in 1968, all her expenses at the institution were paid out of the trust estate. In 1975 the trustees were notified by the hospital of an increase in costs, which would necessitate

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35. E.g., Estate of Lackmann, 156 Cal. App. 2d 674, 678-79, 320 P.2d 186, 189 (1958) (state not reimbursed for support of incompetent beneficiary unless failure of trustee to do so was abuse of discretion). Contra In re Will of Sullivan, 144 Neb. 36, 38-39, 12 N.W.2d 148, 150 (1943) (discretionary support trust could be reached for support of wife and minor child of beneficiary); Bureau of Support v. Kreitzer, 16 Ohio St. 2d 147, 149, 243 N.E.2d 83, 85 (1968) (court of equity may compel trustee to provide minimal support); State v. Rubion, 158 Tex. 43, 49, 308 S.W.2d 4, 8 (1958) (hybrid trust treated like a pure support trust).


37. Id. at 723, 399 A.2d at 892.

38. Id. at 729, 399 A.2d at 896.

39. Initially, the expenses of the beneficiary's care at the state hospital were completely discharged out of the net income generated by the trust. However, by 1973 the income had become insufficient for this purpose. The trustees' practice was to make up any deficiency out of trust principal. Id. at 723-24, 399 A.2d at 893.
an additional invasion of corpus to offset the scheduled increase. The
trustees determined that the contemplated invasion of corpus did not accord
with the testatrix’ intention in establishing the trust. Accordingly, they
notified the hospital of their intention to limit future payments to the
hospital to the net income generated by the trust. The Department of Health
and Mental Hygiene instituted suit to contest the construction that the
trustees placed on their duties under the will. The Department empha-
sized the language of the trust instrument which, it maintained, combined
both support and discretionary trust language. It is, therefore, interesting
to note that the Maryland court was explicitly confronted with the issue
whether the dispositive instrument was effective to create a hybrid trust.

The lower court sustained the Department’s contentions and held
that any deficiency between the cost of the beneficiary’s care and the net
income derived from the investment of trust assets was chargeable to the
trust corpus. On appeal the highest state court reversed, finding that
the terms of the testatrix’ will were effective to create a pure discretionary
trust.

In construing the testamentary trust, the appellate court established
the parameters of its analysis by defining the relevant issues in the follow-
ing manner:

The paramount issue now before us is whether the trust prin-
cipal may be charged with the costs of the care of Annesley Bond
Baugh. The answer to this question, in turn, depends on which
of two commonly recognized types of trusts the testatrix intended
to create, that is, whether, by the fifth item of her will she intended
to establish a support trust or a discretionary trust.

By delineating the issues in this fashion, the court evinced its understand-
ing that this statement constituted an all-inclusive listing of the extant
possibilities. Stated somewhat differently, it appears that the court con-
ceived of the two classifications of trusts as mutually exclusive alternatives.
The court did not even entertain the possibility that a discretionary sup-
port trust was established by the terms of the governing instrument.

40. Specifically, the Department maintained that,
by mixing language that traditionally connotes a discretionary trust with that
often used to establish a support trust, the testatrix in this instance was qualify-
ing her earlier grant of absolute discretion to her trustees and mandating that
they act consistent with the more limited discretion connected with a trust for
support when dealing with matters involving her daughter’s maintenance.

Id. at 727, 399 A.2d at 895.
41. Id. at 724, 399 A.2d at 893.
42. Id. at 730, 399 A.2d at 896.
43. Id. at 724-25, 399 A.2d at 893.
44. The mode of analysis adopted by the court is even more curious when viewed
against the backdrop of previous state court decisions in the independent resources area
in which this dichotomy was expressly recognized. See notes 133-42 infra and accompany-
ing text.
By identifying the conceptual framework for its analysis in this manner, the court placed artificial constraints on the scope of its decision. Although cognizant that the controlling provision of the trust authorized the use of principal in two different contexts, the court’s opinion proceeded to eradicate this distinction. Its analysis is premised on the unsupported assumption that, when a settlor wishes to provide for the support of the primary beneficiary, that intention will be manifested by a provision directing the trustee to make payments to the individual for his or her support. In First National Bank, by way of contrast, the support language was contained in a provision authorizing the trustee to apply trust property for specified purposes.

In addition, the court pointed to language contained in the trust termination provision, under the terms of which a pure support trust for the benefit of the testatrix’ grandchildren was to be established after the death of the life tenant. This provision, according to the court, demonstrated that the testatrix knew how to create a support trust and that, had she intended to provide for her daughter in a similar fashion, she certainly could have done so. Thus, the argument runs, by not so providing, the testatrix must be deemed to have intended a different result, insofar as the provision made for her daughter is concerned. This argument is inapposite. Merely to say that the testatrix did not intend to create a pure support trust for the benefit of her daughter is not tantamount to a finding that she did not intend to create any species of support trust. The court had fallen into the conceptual trap created by the seemingly ironclad classifications that it established at the outset.

Referring to the controlling language of the instrument, the First National Bank opinion went on to state that the testatrix qualified the language of support by adding words describing the discretion her trustees were to exercise as being “absolute and uncontrolled,” an addition negating any suggestion that the testatrix wished to limit her trustees’ power to deal with the principal in matters concerning her daughter’s support and maintenance to the somewhat more restricted authority that is associated with a support trust . . . .

In so stating, we are aware that this interpretation of paragraph one’s language appears to deprive the second half of that paragraph of any independent meaning, because it does not seem to change or add to the trustees’ power . . . .

45. 284 Md. at 727, 399 A.2d at 894-95.
46. Id. at 727-28, 399 A.2d at 895.
47. Id. at 728, 399 A.2d at 895.
48. Id., 399 A.2d at 895.
49. Id., 399 A.2d at 895 (emphasis added). The court did allude at one point to the hybrid nature of the trust in question. It stated that “the trust, as it related to the principal, was not unqualifiedly for the support of Miss Baugh, but rather could be used for
This is precisely the point. The court was asked to construe a trust clause containing two essentially different provisions concerning the distribution of trust corpus. Rather than seeking to effectuate this linguistic distinction, the court’s opinion has the effect of allowing the first clause to subsume the second. This result hardly accords with the constructional maxim that a court is to construe a dispositive provision so that some meaning and operation is given to every expression contained therein.  

*First National Bank* held that the Department of Health and Mental Hygiene could not reach the beneficiary’s interest in the corpus of the trust because the terms of the instrument were effective to create a pure discretionary trust. The court cited comment d of section 128 of the *Restatement (Second) of Trusts* in support of the proposition that, absent a showing that the trustees were improperly motivated in withholding principal distributions from or on behalf of the primary beneficiary, the trust corpus could not be charged with the costs of the beneficiary’s care. The court further found that the Department failed to adduce any evidence with respect to improper motivation.

The inapplicability of the cited provision of the *Restatement (Second)* to the controlling language of the trust in the principal case can be manifested in two ways. First, under the typology delineated in the definitional section of this Article, it is readily apparent that the species of trust to which such a purpose at the sole discretion of the trustees." *Id.*, 399 A.2d at 895. Except for this one, somewhat oblique, reference to the hybrid nature of the trust involved, the court’s analysis does not appear to have been affected by this particular trust model. Indeed, the court’s clear holding that a pure discretionary trust had been created should be dispositive of this question.

50. See note 30 supra. The court did make a valiant, but unsuccessful, attempt to give effect to the second clause of paragraph one of the trust. Specifically, the court found that this provision was effective to negate the express spendthrift clause contained in the trust, at least to the extent of authorizing the trustees to make payments for support directly to the beneficiary’s creditors. 284 Md. at 729, 399 A.2d at 896. The court’s reasoning is specious. The starting point in the analysis should have been that any species of support trust will be deemed to contain an implied spendthrift restraint. See note 8 supra. In light of this proposition, it is logically inconsistent to conclude that such a trust, in itself, invalidates an express spendthrift provision that was appended to the same instrument.

51. 284 Md. at 730, 399 A.2d at 896. The cited provision of the *Restatement (Second)* reads as follows:

*Discretionary trusts.* By the terms of the trust it may be provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his discretion shall see fit to pay or apply. In such a case it depends upon the manifestation of intention of the settlor to what extent the trustee has discretion to refuse to make such payment or application. If the settlor manifests an intention that the discretion of the trustee shall be uncontrolled, the beneficiary cannot compel the trustee to make any payment to him or application for his benefit, if the trustee does not act dishonestly or arbitrarily or from an improper motive.

52. 284 Md. at 730, 399 A.2d at 896.
this provision pertains is of a purely discretionary nature.\textsuperscript{53} Second, how can it be maintained that the grant of discretion to the trustees under the second clause of paragraph one of the trust was “uncontrolled”? That conclusion would be warranted only in the event that one is willing to excise the support language from the trust provision. In effect, the Maryland court completely failed to accord any efficacy to the support language contained in the second clause of paragraph one of the trust. The notion that the support language should be effective to modify or restrict the scope of the trustees’ absolute discretion did not affect the court’s analysis in any cognizable fashion.\textsuperscript{54}

A similar result obtained in a Massachusetts case, \textit{Town of Randolph v. Roberts}.\textsuperscript{55} In \textit{Roberts} the plaintiff-town attempted to reach the beneficiary’s interest in a testamentary trust in order to obtain reimbursement for public assistance payments made by its welfare department. The will of the beneficiary’s aunt provided, \textit{inter alia}, that in the event of the insufficiency of income from the trust fund

to properly support my said niece, . . . I authorize my said trustees to from time to time use such part of the sum of said trust estate as may be necessary for such purpose, and I give my said trustees the sole power of determining whether or not it is necessary to use a part of the principal sum for such purpose, and [if] it is so determined, what part shall be used and when.\textsuperscript{56}

The beneficiary had been receiving support payments of thirty dollars per month from the trustees; supplemental assistance payments of approximately two hundred dollars per month had been made by the town.\textsuperscript{57}

In rejecting the town’s attempt to compel the trustees to reimburse

\textsuperscript{53} See text accompanying notes 19-21 \textit{supra}.

\textsuperscript{54} A question that the court failed to address, but should have, is whether the inclusion of the word “comfort” in describing those instances in which the fiduciaries could exercise their discretion on behalf of the \textit{cestui} so broadened the scope of their dispositive discretion that an absolute discretionary trust was created. The answer to this question would seem to turn on an inquiry into the beneficiary’s accustomed standard of living. Specifically, if the beneficiary was already accustomed to a comfortable mode of living, it is likely that the comfort of the beneficiary would be comprehended within a support standard in any event. Conversely, the inclusion of the term “comfort” may be effective to enlarge the breadth of the dispositive language in a situation in which the beneficiary had been accustomed to an impecunious style of living. See \textit{Blodget v. Delaney}, 201 F.2d 589, 593 (1st Cir. 1953) (comfort and welfare); \textit{Equitable Trust Co. v. Montgomery}, 28 Del. Ch. 389, 396-97, 44 A.2d 420, 423 (1945) (comfort); \textit{Rock Island Bank & Trust Co. v. Rhoads}, 353 Ill. 131, 141-42, 187 N.E. 139, 143-44 (1933) (comparing comfort and satisfaction). However, as stated at the outset, the court failed even to make this inquiry. See note 88 \textit{infra} for a discussion of cases in which the scope of the trustee’s dispositive discretion was defined by reference to such terms as “benefit,” “happiness,” or “welfare.”


\textsuperscript{56} \textit{Id.} at 579, 195 N.E.2d at 73.

\textsuperscript{57} \textit{Id.}, 195 N.E.2d at 73.
it from the corpus of the trust, the court adopted a pure discretionary
trust model. The Massachusetts Supreme Court stated that

[t]he trust confided exclusively to the discretion of the trustees
the decision whether any principal should be used for the sup-
port of the defendant Roberts. She has no absolute right to the
use of any part of the principal, and could herself compel prin-
cipal payments only by showing that the trustees had abused
their discretion by acting arbitrarily, capriciously, or in bad faith.
Her creditors would have no greater rights.58

Just as in First National Bank, the Roberts court had, in substance, adopted
the Restatement (Second) position with respect to a pure discretionary trust.59

In ascertaining whether creditors should be afforded access to the
debtor-beneficiaries’ equitable interests, the courts in these two representa-
tive cases failed to make any inquiry into the beneficiaries’ accustomed
standard of living. To place this issue in a slightly different perspective,
suppose that, instead of arising within the framework of a creditor’s access
issue, the beneficiary personally, or through a guardian ad litem,60 had peti-
tioned the court to increase the amount of the trust distributions to that
beneficiary. Presumably, given the parsimonious nature of the distribu-
tions that were made in First National Bank and Roberts, had the primary
beneficiaries of these trusts been accustomed to a substantial standard of
living, the beneficiaries would have been entitled to apply to a court for
relief. The relief may have taken the form of an order directing the fiduciary
to pay an amount that was reasonably necessary for the support of the
beneficiary.61 There is even authority for the proposition that a court could,
under extreme circumstances, determine the amount of the beneficiary’s
support allowance itself.62 And, as the court in Roberts correctly noted,

58. Id. at 579-80, 195 N.E.2d at 73-74 (citations omitted).
59. See note 51 supra. It would appear that this application has been made in a context
that is readily distinguishable from that envisioned by the drafters of the Restatement (Second).
60. The necessity for the appointment of a guardian ad litem is occasioned when, as
in many of these cases, the beneficiary has been committed to a public institution.
court’s determination that there were no grounds for removal of trustee, lower court was
correct in assuming authority to increase plaintiff’s allowance in accordance with
terms and conditions of trust); Old Colony Trust Co. v. Rodd, 356 Mass. 584, 588-89,
254 N.E.2d 886, 889-90 (1970) (direction given to modify payments when, “whether due
to misuse of discretion or to misconception of the purpose of the trust on the part of the
trustee,” payments to elderly, low-income beneficiaries did not reflect purpose of trust);
Conlin v. Murdock, 137 N.J. Eq. 12, 15-16, 43 A.2d 218, 220 (Ch. 1945) (although there
was no “fixed standard,” trustee was guilty of abuse of discretion by not paying enough
to meet necessities of life).
62. Thompson v. Dunlap, 244 Ark. 178, 181-82, 424 S.W.2d 360, 362-63 (1968)
(chancery court had power to determine as a question of fact the extent to which economic
inflation necessitated an increase in monthly payments to testator’s widow); In re True’s
Trust, 158 So. 2d 571, 572 (Fla. Dist. Ct. App. 1963) (cause remanded for the “taking
of testimony upon the needs of the appellant-beneficiary and the determination of a proper
amount to be paid to her”); Buck v. Cavett, 353 P.2d 475, 478 (Okla. 1960) (in view
the beneficiary's creditors should accede to the same rights as the beneficiary in the trust fund.\textsuperscript{63}

This discussion is predicated on the supposition that, absent an effective spendthrift restriction, there is or should be an exact parallelism between the rights of the \textit{cestui} in and to the trust estate and the rights of his or her creditors to reach the \textit{cestui}'s equitable interest therein. The question, therefore, becomes whether, if a comparable case were to arise in which the \textit{cestui} sought to compel the trustee to increase the amount of the distributions, the court would adopt a pure discretionary trust model and hold, in effect, that the \textit{cestui} lacked an "enforceable interest" in the trust.\textsuperscript{64} To put this question most starkly, suppose that the primary beneficiary of a hybrid trust and the beneficiary's family had been accustomed to a style of living made possible by an average annual income of $100,000, but that, due to business reverses, adverse employment factors, or the like, the family's annual earnings declined precipitously to $15,000. Assume further that the trustee has chosen to exercise its discretion by withholding distributions from the beneficiary and that the beneficiary seeks judicial relief. If the reasoning of the two principal cases were to be applied to the factual situation posited, a court should hold that, absent a showing that the trustee's distributive decisions were improperly motivated, the trustee's exercise of its discretionary powers should not be disturbed.\textsuperscript{65} However, it certainly seems that a court, when confronted with this onerous fact pattern, might elect to utilize a pure support trust model in order that some relief could be fashioned. This mode of analysis is conceptually flawed as well. The courts should not simply be able to choose between a pure support trust or a pure discretionary trust analysis depending on which model is better adapted to the fashioning of appropriate relief. The dictates of conceptual logic mandate that the two cases be treated exactly alike.

If the above analysis is appropriate when a beneficiary seeks to compel the trustee to increase the amount of trust distributions, then should it not be equally applicable when a creditor seeks to reach the debtor-beneficiary's interest in a discretionary support trust? This question should be answered in the affirmative. The courts that have adopted a pure discretionary trust model for hybrid trusts\textsuperscript{66} have erred in failing to make any inquiry into the beneficiary's accustomed standard of living. The inclusion of a support standard in a discretionary support trust should be effec-

\begin{footnotes}
\footnote{of the medical testimony, trustee directed "to make reasonable provision for suitable living quarters in the amount of $50 to $60 per month, and a reasonable weekly allowance of $18 to $20 for food, medical care and other necessities."\textsuperscript{63}}
\footnote{346 Mass. at 580, 195 N.E.2d at 74.\textsuperscript{64}}
\footnote{See Louisville Tobacco Warehouse Co. v. Thompson, 172 Ky. 350, 355, 189 S.W. 245, 247-48 (1916) (beneficiary of a discretionary trust has no enforceable interest in trust property and thus no interest that can be subjected to payment of debts).\textsuperscript{65}}
\footnote{See notes 51-52 supra and accompanying text.\textsuperscript{66}}
\footnote{See note 34 supra.}
\end{footnotes}
tive to establish a minimum level of distributions that the trustee could be required to make. Accordingly, the beneficiary’s interest in the trust should be reachable by an attaching creditor to the same extent. Obviously, in order for the express grant of trustee discretion to be made effective, the permissibility of the trustee’s distributive decisions must be judged by a more flexible standard than would be applied in the absence of the discretionary language. Thus, in the case of a hybrid trust, the trustee should be afforded more leeway in defining the beneficiary’s support standard, and the likelihood of judicial intervention in overturning the trustee’s decisions should be reduced.

A necessary corollary of these principles is illustrated by the decision rendered in Ware v. Gulda. This Massachusetts case raised the question of the rights of creditors of the settlor-beneficiary to reach her retained interest in a hybrid trust. The plaintiff in Ware had represented the settlor in prior litigation involving the validity of the trust, and, thereafter, sought to reach her interest in the trust as a means of obtaining payment for the professional services he had rendered. In allowing the creditor to obtain full and immediate satisfaction of the outstanding indebtedness from the trust fund, the court adopted a pure discretionary trust model. The

67. The need for increased liberality in evaluating the trustee’s performance arises because, as previously indicated, even in the case of a pure support trust, the trustee is vested with considerable dispositive discretion. See notes 23-25 supra and accompanying text.

68. What this means in the context of the instant discussion is that the principle enunciated in the text, that the support language should be operative to establish a distribution floor, may be somewhat more elusive than would appear at first glance. For example, it would seem that the trustee of a hybrid trust should be protected in establishing the permissible amount of minimum distributions at a level that is substantially lower than that which would be allowed in the case of a pure support trust. As a corollary, the class of cases in which the trustee of a hybrid trust will be found to have abused its discretion in establishing the distribution floor should be significantly smaller than the comparable class of cases in the context of a pure support trust.


70. The trust provided that, during the lifetime of the settlor, “the income and/or principal of this trust fund shall be expended for her support and maintenance.” Id. at 69, 117 N.E.2d at 138. In addition, the trust specified that, “[w]herever it is provided herein that any payments shall be made or monies expended for the support and maintenance of any person, such payments or expenditures are to be in the sole discretion of the trustee or trustees for the time being.” Id., 117 N.E.2d at 138. Upon the life tenant’s death, the trust made various provisions for her children, depending on which of several contingencies occurred. Id., 117 N.E.2d at 138. Accordingly, under the typology delineated in the definitional section of this Article, the trust instrument should have been effective to create a discretionary support trust. See text accompanying notes 19-28 supra.

71. In Gulda v. Second Nat’l Bank, 323 Mass. 100, 80 N.E.2d 12 (1948), the settlor tried unsuccessfully to have the trust set aside on the basis of fraud. Id. at 105, 80 N.E.2d at 16.

72. The amount of the outstanding indebtedness totalled approximately $4800. 331 Mass. at 69, 117 N.E.2d at 137.

73. The court stated that “[t]he plaintiff here prevails because the policy of our law does not protect the creator of a discretionary trust against the payment of a creditor in the circumstances of this case.” Id. at 72, 117 N.E.2d at 139.
court cited paragraph two of section 156 of the Restatement (Second) in support of the proposition that, when the settlor retains a beneficial interest in a pure support or a pure discretionary trust, the settlor’s creditors can compel the trustee to distribute to them the maximum amount that the trustee could have distributed to the settlor during the course of administering the trust. The court concluded that its decision was not injurious to the remaindersmen, because their interest was expressly made subject to the exercise of trustee discretion in favor of the creator of the trust.

The court may have been wrong in so concluding. The trust established by the settlor in Ware was a discretionary support trust and, therefore, should have been distinguished from an absolute discretionary trust. Even though the support standard is flexible, particularly when explicit discretionary language is used, the limit to the amount of distributions that the fiduciary could permissibly make to the beneficiary of a hybrid trust would be reached before it would be with an absolute discretionary trust. Accordingly, depending on such variables as the settlor’s accustomed standard of living and whether the beneficiary’s independent resources are to be considered by the trustee, it would be possible that, notwithstanding the court’s protestations to the contrary, the effect of the decision was to infringe upon the interests of the remaindersmen.

The prior discussion should not be taken to suggest that there has been no judicial recognition of the hybrid nature of the discretionary support trust. There have, indeed, been a few decisions in which the courts have attempted to come to grips with the distinctions among the various classes of trust. For example, in Bureau of Support v. Kreitzer the Ohio court was cognizant, albeit mistakenly, of the possible hybrid

74. Id. at 70, 117 N.E.2d at 138. The Restatement (Second) position with respect to creditor access to the settlor’s equitable interest in support and discretionary trusts parallels that accorded to retained interests in spendthrift trusts generally. Specifically, the policy preference embodied in the Restatement is that a property owner should not be able to transfer his or her property in such a way as to retain the beneficial enjoyment thereof, while, at the same time, shielding the transferred assets from the reach of his or her creditors.

75. 331 Mass. at 71, 117 N.E.2d at 138.
76. See note 70 supra.
77. See notes 23-25 supra and accompanying text.
78. See notes 91-142 infra and accompanying text.
79. The reason for the equivocation in the textual discussion is as follows. Given the relatively small sum of money at issue, it is not improbable that this sum would fit within the lower dollar maximum of a discretionary support trust as well. However, inasmuch as the court’s opinion failed even to consider the settlor-beneficiary’s accustomed standard of living, it is not possible to definitively resolve this question.
81. 16 Ohio St. 2d 147, 243 N.E.2d 83 (1968).
82. A very persuasive argument can be made in support of the contention that the controlling language of the instrument in question was sufficiently broad to create a pure discretionary trust. See note 88 infra.
characteristics of the trust that it construed. The Department of Mental Hygiene and Correction brought an action for reimbursement from the trust estate for expenses incurred for the support and maintenance of the trust beneficiary, a mentally incompetent individual who resided in a state hospital.\textsuperscript{83} The trustees resisted the Department's attempt to reach the beneficiary's equitable interest, on the ground that no trust distribution was necessary because the beneficiary was already being adequately maintained by the state pursuant to the state's statutory obligation.\textsuperscript{84}

Although the court's decision requiring the trustees to reimburse the state for services furnished to the trust beneficiary ultimately hinged on the allocation of primary and secondary liability,\textsuperscript{85} the court did expressly address the difficult definitional question of what species of trust the instrument was effective to create. In resolving this question, the court made reference to the following trust provision:

\begin{quote}
[I]n the event a share is established upon my death for the benefit of my daughter, Naomi M. Swallow, the trustee shall distribute, in its sole and absolute discretion, so much of the income and the principal of her share as it, in its sole and absolute discretion, determines to be necessary for her care, comfort, maintenance and general well-being for and during her lifetime. Any income from her share of the trust estate not distributed by the trustee as hereinabove provided for her benefit shall be divided equally among the other shares of the trust.\textsuperscript{86}
\end{quote}

The Department maintained that this language was effective to create a pure support trust. Conversely, the trustees contended that the testator intended to confer on them uncontrolled discretion in the distribution of the trust fund.\textsuperscript{87} The Kreitzer court rejected the contentions of both parties. Instead, it adopted a discretionary support trust model:

The trust is equivocal. It confers upon the trustees "absolute and sole discretion," but defines the standard by which that discretion is to be employed. It can, therefore, be characterized

\textsuperscript{83} 16 Ohio St. 2d at 148, 243 N.E.2d at 84.
\textsuperscript{84} Pursuant to § 5121.01, the state is obligated to provide minimal maintenance for patients confined to hospitals and institutions under the Department's jurisdiction. OHIO REV CODE ANN. § 5121.01 (Page 1981).
\textsuperscript{85} The court found that the duty imposed on the state to furnish support to mentally incompetent patients under § 5121.01 is not unqualified but rather is modified by the provisions of § 5121.04(B)(1) of the Ohio Code. Under this latter provision a patient with no dependents is required to assume financial responsibility for the cost of his or her maintenance. Id. § 5121.04(B)(1). Accordingly, the court ruled that, under the facts of the case, "the state's liability is secondary, and the primary liability for support in such case reposes upon the patient himself, or upon his estate." 16 Ohio St. 2d at 149, 243 N.E.2d at 85. Applying ordinary subrogation principles, the court held that the state, having discharged its support obligation in its position as a surety, was entitled to accede to the beneficiary's rights in and to the trust fund. Id. at 151-52, 243 N.E.2d at 86.
\textsuperscript{86} 16 Ohio St. 2d at 148, 243 N.E.2d at 84 (emphasis original).
\textsuperscript{87} See id. at 149-50, 243 N.E.2d at 83.
neither as a purely discretionary trust nor as a strict support trust.\textsuperscript{88}

The court then held that, notwithstanding the express grant of trustee discretion, the controlling language of the instrument would be deemed to create an ascertainable standard against which the fiduciary’s distributive decisions could be gauged. The trust language required the trustee to distribute sufficient sums to the beneficiary in order that she be maintained at a minimum subsistence level of income.\textsuperscript{89} The parties stipulated that the institutional care furnished to the beneficiary was minimal and hence the trust estate was reachable to that extent.\textsuperscript{90}

\textbf{B. Application of Discretionary Support Trusts in Beneficiary’s Independent Resources Cases}

One of the most frequently litigated issues involving support trusts

\textsuperscript{88} Id. at 150, 243 N.E.2d at 85. \textit{See also} \textit{In re} Will of Sullivan, 144 Neb. 36, 39-40, 12 N.W.2d 148, 150 (1943). As previously indicated, the court’s utilization of a hybrid trust analysis may be inappropriate, given the breadth of the dispositive language employed by the testator. \textit{See note 82 supra}. The terms “maintenance” and “care” are usually considered to be synonymous with a support standard. \textit{See}, e.g., Hart v. Connors, 85 Ill. App. 2d 50, 53-54, 228 N.E.2d 273, 275 (1967) (maintenance); \textit{In re} Kelly’s Will, 166 Misc. 774, 779, 3 N.Y.S.2d 51, 55-56 (Sur. Ct. 1938) (care); \textit{In re} Carlson Trust, 82 N.D. 631, 634-35, 152 N.W.2d 434, 436-37 (1967) (care and maintenance).

However, when, as here, the language used in the trust is significantly broader than a support standard, the language approaches an absolute discretionary trust and should be construed accordingly. Some examples of dispositive language not deemed to create an ascertainable standard include authorizations to trustees to make distributions for the “benefit,” “happiness,” or “welfare” of a designated individual. \textit{See}, e.g., Merchants Nat’l Bank v. Commissioner, 320 U.S. 256, 261-62 (1943) (happiness); Strawn v. Caffee, 235 Ala. 218, 222, 178 So. 430, 433 (1938) (benefit); Lord v. Roberts, 84 N.H. 517, 522, 153 A. 1, 4 (1931) (welfare). \textit{But see} Blodget v. Delaney, 201 F.2d 589, 593 (1st Cir. 1953) (in Massachusetts the term “welfare” does not connote absolute discretion); \textit{In re} Estate of Harris, 17 Misc. 2d 800, 801, 187 N.Y.S.2d 700, 701 (Sur. Ct. 1959) (welfare equated with support). Judged in light of this analysis, the inclusion of language in the instrument authorizing the trustee to distribute both income and principal for, among other things, the “general well-being” of the testator’s daughter should have resulted in a finding that a pure discretionary trust had been established.

Given the court’s holding that a destitute beneficiary has an enforceable claim to minimal support, a question arises whether, if the court had found that the instrument was effective to create a pure discretionary trust, the same result would have obtained. This question should be answered in the affirmative. As previously indicated, the beneficiary of a pure discretionary trust could compel the trustee to make distributions sufficient to maintain him or her at a subsistence level of income. \textit{See note 32 supra}. Stated somewhat differently, there is an implied standard of subsistence inherent in even a pure discretionary trust. In short, the notion is not conceptually compelled that, in order for the beneficiary’s creditors to have access to the trust fund under the facts of \textit{Bureau of Support v. Kreitzer}, there needs to be a support element to the trust.

\textsuperscript{89} The \textit{Kreitzer} court stated that “the words ‘care, comfort, maintenance and general well-being’ are to be deemed an enforceable standard of a fiduciary’s conduct to the extent of providing minimal support for a destitute \textit{cestui que trust}.” 16 Ohio St. 2d at 150, 243 N.E.2d at 86.

\textsuperscript{90} Id. at 152, 243 N.E.2d at 86-87.
is whether the private resources of the beneficiary must be considered by
the trustee in ascertaining the amount properly payable to the beneficiary
for support and maintenance.91 Cases that have addressed this question
in the context of a pure support trust are in irreconcilable conflict;92 beyond
a rather simplistic statement that the results turn on the peculiar language
of the instrument in question, little in the way of predictive utility is to
be derived from a detailed examination of the individual cases.93 Not-
withstanding this confusion in the decisional literature, the Restatement (Second)
has adopted the position that ‘‘[i]t is a question of interpretation whether
the beneficiary is entitled to support out of the trust fund even though
he has other resources. The inference is that he is so entitled.’’94 The per-
tinent question for this Article is whether this same analytic approach is
appropriate within the framework of a discretionary support trust. The
question posited should be answered in the negative. When a settlor
superimposes discretionary language on a support standard, the trustee
is not violating a rule of law if he chooses to consider other sources of
the beneficiary’s income in determining whether to make a distribution
to that beneficiary. If the grant of express trustee discretion in the context
of a hybrid trust is to be afforded any scope, the trustee should be at liberty
to consider or not to consider outside sources of the beneficiary’s income.95

91. Indeed, the relative frequency with which this issue arises may be seen as a source
of reproach to the practicing bar. As will appear hereinafter, the law has created an inference
to the effect that a beneficiary is entitled to receive support payments from the trust,
notwithstanding the fact that he or she has other sources of income available. See note
94 infra and accompanying text. However, there is no room for this inference to operate
when, as in a properly drafted dispositive writing, the property owner has specified whether
the beneficiary’s independent resources are to be taken into account by the fiduciary.
In this connection Professor Halbach stated that ‘‘[n]o trust involving dispositive discre-
tion in the trustee should be drafted without providing at least a basic answer to this inevi-
table question.’’ Halbach, Problems of Discretion in Discretionary Trusts, 61 COLUM. L.
REV. 1425, 1442 (1961). One of the primary reasons why this question has produced so much
litigation is that the draftsperson has failed to address this issue by means of a specific
provision to that effect.

92. Professor Halbach has written that ‘‘whether the beneficiary’s other means of sup-
port should be considered depends on the settlor’s intent, but agreement among the cases
goes little further.’’ Halbach, Problems of Discretion in Discretionary Trusts, 61 COLUM. L.
REV. 1425, 1442 (1961). Cases holding that, if the instrument is silent, the beneficiary’s
other income is not to be considered, include: Hart v. Connors, 85 Ill. App. 2d 250,
253-54, 228 N.E.2d 273, 275 (1967); Renner v. Castellano, 21 N.J. Super. 331, 337-38,
91 A.2d 176, 179-80 (Ch. Div. 1952); Kuykendall v. Proctor, 270 N.C. 510, 515, 155
S.E.2d 293, 298 (1967); In re Carlson Trust, 82 S.D. 631, 635-36, 152 N.W.2d 434, 436
Bridgeport-City Trust Co. v. Beach, 119 Conn. 131, 139-40, 174 A. 308, 312 (1934);
Devine v. Cote, 109 N.H. 235, 238, 248 A.2d 77, 80 (1968); In re Martin’s Will, 269
N.Y. 305, 312, 199 N.E. 491, 494 (1936).

93. For a thoughtful and detailed analysis of the extant decisional literature in the
area, see Halbach, Problems of Discretion in Discretionary Trusts, 61 COLUM. L. REV. 1425,

94. RESTATEMENT, supra note 2, § 128 comment c.

95. This proposition follows from the notion that, as previously indicated, even the
Unfortunately, cases that have addressed this question do not reflect this learning. Instead, the courts have almost uniformly and, in the view of this writer, erroneously adopted a pure support trust model in construing discretionary support trusts in cases involving the issue of the beneficiary’s independent resources. Almost no consideration has been given to language in the trust instrument seeking to vest the trustee with discretion relative to the distribution of the trust fund. A few illustrations will clarify this point.

The New York case of *Holden v. Strong* is one of the earliest reported decisions pertaining to the duty of the trustee to consider the beneficiary’s independent resources. In *Holden* the testator established a trust of his residuary estate and designated his son as the life beneficiary. The testator conferred on the trustee “full power and authority to use so much of the trust fund, either interest or principal, as shall, in his judgment and discretion, be necessary for the proper care, comfort and maintenance of the beneficiary so long as he should live.” The trust was to terminate upon the death of the life beneficiary, with the proceeds of the trust estate to be distributed to the heirs of the testator.

trustee of a pure support trust is vested with considerable dispositive discretion. See notes 22-25 *supra* and accompanying text. If the addition of explicit discretionary language to a support trust is to have any meaning within the context of the present inquiry, some expansion in the breadth of the fiduciary’s dispositive discretion would have to result.


97. 116 N.Y. 471, 22 N.E. 960 (1889).

98. The lower court found that the life beneficiary had been periodically employed as a repairman and as a tailor, although he was in poor physical and mental health. *Id.* at 473, 22 N.E. at 961. 99. *Id.*, 22 N.E. at 961.

100. As a matter of proper drafting, the will should have specified the date as of which the testator’s heirs were to be determined. Two options are possible. One construction of the heirship language would be that a testator’s heirs are to be determined as, in the normal course, of the date of his death. An alternate construction would be that the testator’s heirs are to be determined as though the testator had died intestate immediately following the death of the life beneficiary. This latter construction is preferable because the life beneficiary was, in all probability, one of the testator’s heirs; it, therefore, avoids the difficulty that would otherwise result from having the trust fund pass through one or more deceased persons’ estates. However, in the absence of language in the instrument altering the manner in which heirship is to be determined, the preferred construction of such a trust termination clause is that a testator’s heirs are to be determined as of the date of
In a proceeding instituted by the beneficiary to obtain a construction of the will and to recover sums spent by the beneficiary for his own past support and maintenance, it appeared that the amount of the trust estate was approximately $9300. It further appeared that, in the seven years that had elapsed since the commencement of the trust, the trustee had distributed to, or applied on behalf of, the primary beneficiary a sum less than $100 per annum. The lower court found that the trustee had not abused his discretion in failing to provide properly for the support of the life beneficiary, although the court found proper support to be $400 per year, because the beneficiary had refused to allow the trustee to pay for all expenses incident to his support. The beneficiary appealed from the adverse judgment rendered by the trial court.

The New York Court of Appeals affirmed the judgment of the trial court that the trustee had not been guilty of an abuse of discretion. The court further found that the plaintiff was entitled to distributions from the trust fund for his support and maintenance even though he might be able to support himself through his own exertions. The court stated:

We do not understand that in order to receive the benefit of the provisions of the will it is necessary for him to remain idle and refrain from all personal exertion, neither does the fact that he is frugal and saving and has accumulated a fund which he has deposited in the bank deprive him of the right to the support provided for him.

his death, except in those cases in which the prior interest holders were the decedent's sole heirs. See 5 AMERICAN LAW OF PROPERTY § 22.60, at 441-46 (A.J. Casner ed. 1952).

101. 116 N.Y. at 473, 22 N.E. at 961. In fact, more than half of the amount expended on the beneficiary's behalf had been distributed by the trustee pursuant to court order.

102. Id. at 474, 22 N.E. at 961.

103. Id. at 475, 22 N.E. at 961.

104. Id., 22 N.E. at 961. Although the court of appeals affirmed the judgment of the trial court that the trustee had not been guilty of an abuse of discretion, it did utilize the opportunity presented by the case to chastise the trustee for the small distributions that had been made. Id., 22 N.E. at 961.

If this case had arisen subsequent to the seminal case of In re Martin, 269 N.Y. 305, 199 N.E. 491 (1936), a case involving a pure support trust, it is likely that a different result would have obtained. In Martin the highest court of New York established what has become the litmus test for determining whether the beneficiary's independent resources are to be taken into account by the fiduciary. That test was stated by the court in the following language:

The primary question in this class of cases always is, does the will constitute an absolute gift of support and maintenance which it makes a charge upon the income from the estate and upon principal? If so, then the private income of the beneficiary cannot be considered. If, however, the gift is of income coupled with a provision that the principal may be invaded in case of need, the private income of the beneficiary must be considered in determining whether such need exists.

Id. at 312, 199 N.E. at 494. Judged in light of the test enunciated in Martin, it appears that the inclusion of the word "necessary" in the description of those instances in which the trustee in Holden might choose to exercise its discretion in favor of the beneficiary brings
Similarly, in a California case, *Estate of Ferrall*, the guardian of an incompetent beneficiary brought suit to compel the trustees of a testamentary trust to exercise their discretion to invade principal on behalf of the life income beneficiary. Under the terms of his will, the testator created a trust of his residuary estate and named his daughter as the income beneficiary. It was further provided:

If at any time the income from the corpus of the trust herein created is insufficient to meet the needs of my daughter ..., then and in that event, in the sole discretion of the trustees herein, the trustees may pay to my said daughter ... such amounts from the principal or corpus of the trust sufficient to meet her needs, care and comforts.

The trust was to terminate upon the happening of any of the following events: (1) the death of the income beneficiary; (2) the death of the beneficiary’s husband; or (3) the divorce of the beneficiary from her spouse.

In the event that the trust terminated by reason of the death of the case within the needs portion of the *Martin* test. *E.g.*, *Stempel v. Middletown Trust Co.*, 127 Conn. 206, 220, 15 A.2d 305, 311 (1940) (under testamentary trust providing for use of income and so much principal “as is necessary” to provide for support of mentally deficient daughter, other sources of income must be taken into account); *In re Murray*, 142 Me. 24, 27-28, 45 A.2d 636, 637 (1946) (when invasion of principal allowed as “may be needed for the comfortable support and maintenance of my said wife,” income from other sources is to be considered in assessing need); *Sibson v. First Nat’l Bank & Trust Co.*, 64 N.J. Super. 225, 230-31, 165 A.2d 800, 803 (App. Div. 1960) (language instructing trustee to pay “in its sole discretion” as much principal as “necessary for wife’s support, health and maintenance” construed to mean that decedent wanted all other income considered before a corpus distribution could be made).

105. 41 Cal. 2d 166, 258 P.2d 1009 (1953).
106. The trial was conducted under an agreed statement of facts in which the parties stipulated that the testator knew that his daughter was afflicted with a progressive disease at the time he executed his will ... and at the time he died ...; that [subsequent to the testator’s death] the condition of the beneficiary was such that she had to be placed in a sanitarium; [and] that she had required medical and nursing care ever since.

107. *Id.* at 171, 258 P.2d at 1011.
108. *Id.* at 168, 258 P.2d at 1010.

In previous litigation involving the validity of this trust, the beneficiary, through her guardian, had contended that, by reason of the inclusion of the trust termination provision relative to the divorce of the beneficiary from her spouse, the trust was void as against public policy. *Hamilton v. Ferrall*, 92 Cal. App. 2d 277, 279, 206 P.2d 663, 664 (1949). Specifically, the beneficiary asserted that the trust served as an improper inducement to divorce in that the beneficiary’s right to reach the corpus of the trust was conditioned upon the dissolution of her marriage. *Id.*, 206 P.2d at 664. The court rejected the beneficiary’s contentions. It held that the trust termination provision was valid because it could be explained on grounds other than to encourage divorce. That is, the testator created this trust to ensure his daughter adequate support while she was single. *Id.* at 281, 206 P.2d at 665. This result accords with the weight of authority that when a woman is involved, the type of clause at issue in the *Ferrall* litigation is typically regarded as being related to a provision for adequate support. *RESTATEMENT, supra* note
of the primary beneficiary, the trust estate was to be distributed to designated remaindermen, all of whom were issue of the testator. Otherwise, the trust property was to pass, discharged of trust, to the primary beneficiary.109

During the course of administering the trust estate, the trustees had limited distributions to the primary beneficiary to the net income derived from the investment of the trust corpus.110 Finding that the beneficiary’s current needs were being adequately discharged, the trustees failed to make a requested corpus invasion.111 The guardian brought suit, contending that the trustees had abused their discretion in refusing to make the requested invasion. The lower court sustained the guardian’s contentions. It premised its finding of an abuse of discretion on the inclusion of language in the trust conditioning the exercise of the trustees’ discretionary power to invade corpus on behalf of the income beneficiary to a single factor: the insufficiency of the net income to satisfy the beneficiary’s support needs.112 Given the trustees’ finding that the net income was insuffi-

2, § 62 comment d. It is, therefore, interesting to note that, in cases involving substantially parallel fact patterns, a contrary result usually obtains when the beneficiary is a man. Davidson v. Wilmington Trust Co., 22 Del. Ch. 1, 10, 2 A.2d 285, 289 (1938) (court attributed disparity in treatment between husband and wife beneficiaries to wife’s state of dependence and her greater need for support in husband’s absence); In re Estate of Gerbing, 61 Ill. 2d 503, 509, 337 N.E.2d 29, 34 (1975) (when gift was conditioned on death of or divorce from wife, both conditions invalidated because to uphold the former, albeit valid, condition under these circumstances would generate hostility and tend to encourage divorce). But see In re Rininger’s Estate, 305 Pa. 203, 206, 157 A. 488, 488 (1931) (will provision directing trust fund to be paid absolutely to income beneficiary’s married son, if son becomes single, held valid).

109. 41 Cal. 2d at 168-69, 258 P.2d at 1010.

110. The parties stipulated that during the relevant time period, those distributions amounted to approximately $80 per month. Id. at 171, 258 P.2d at 1011-12.

111. Id. at 170, 258 P.2d at 1011. The guardian had caused a demand to be served on the trustees in which he recited, inter alia, that the beneficiary’s monthly support requirements equaled $475. He, therefore, requested the trustees to exercise their discretion in the beneficiary’s favor in order to compensate for the deficiency between the net income generated by the trust and the beneficiary’s support needs. Id. at 170-71, 258 P.2d at 1010-11.

112. Id. at 172, 252 P.2d at 1012. The lower court’s holding, at least in this particular, follows the overwhelming weight of authority in this country. Courts construing substantially identical trust provisions have almost uniformly held that the inclusion of this language was effective to preclude the trustee from considering the beneficiary’s independent resources in defining his or her support requirements. See, e.g., Hoops v. Stephan, 131 Conn. 138, 141, 149, 38 A.2d 588, 589, 592 (1944) (codicil authorized trustees to invade corpus if income “shall be insufficient to provide for the comfortable support and maintenance” of testator’s wife and incompetent son; right to invade trust principal was not contingent on prior exhaustion of beneficiaries’ property); Pearce v. Marcellus, 137 N.J. Eq. 599, 602, 45 A.2d 889, 890 (Ct. Err. & App. 1946) (invasion of principal ordered despite beneficiary’s separate estate when will provided that trustees were authorized to use as much of the principal as they deemed necessary, “if the net income from my said estate is not sufficient . . . to properly support and maintain my said wife in complete comfort”); In re Clark’s Will, 280 N.Y. 155, 159, 161, 19 N.E.2d 1001-03 (1939) (will provided
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cient to discharge this obligation, the court ruled that, by refusing to exercise their discretion, the trustees had not acted in the state of mind that the testator had contemplated they would act in administering the trust.113

On appeal the highest California court reversed, finding that the terms of the testator’s will, when construed in light of all the relevant circumstances, did require the fiduciaries to consider the beneficiary’s other resources in deciding whether to exercise their discretion on her behalf.114 The court’s analysis was predicated, for the most part, on what it discerned to be the testator’s intention: to preclude his son-in-law from deriving any conceivable benefits from the administration of the trust fund. The court reasoned that the trust termination provisions clearly demonstrated the testator’s intent that no part of the trust property should pass to the beneficiary’s husband.115 To effectuate this intent, it was incumbent upon the trustees to take into account all the beneficiary’s personal means, even to the extent of including her husband’s resources. A contrary ruling, according to the majority’s analysis, would result in relieving the husband of his obligation to support his spouse, at least to the extent of the actual disbursements that were made, in clear contravention of the testator’s intention.116

The New Jersey Superior Court reached a similar result in Sibson v. First National Bank & Trust Co.117 The testator left his residuary estate in trust and provided that his wife was entitled to receive the net income generated by the trust fund during her natural life. A discretionary support trust was created with respect to the income beneficiary’s right to receive trust principal.118 Upon the termination of the widow’s equitable

that, in the event that the income “shall, in the judgment of my trustee, be insufficient for her every comfort and support,” trustee was authorized to exhaust entire corpus without taking into consideration the personal income of the beneficiary from any other source). But see In re Estate of Messer, 34 Misc. 2d 416, 419-20, 231 N.Y.S.2d 201, 204-05 (Sur. Ct. 1962) (under testamentary trust in which trustees could invade principal, if net income of trust at any time was insufficient to support beneficiaries, the sole surviving income beneficiary was entitled to have portion of principal applied for her maintenance only in event that income from trust, supplemented by her independent income and resources, was insufficient). It is, therefore, somewhat remarkable that the appellate court in Ferrall, in reversing the decision below, failed even to consider the import of this language on the question that it was called on to decide.

113. 41 Cal. 2d at 172, 258 P.2d at 1012.
114. Id. at 175-76, 258 P.2d at 1014.
115. Id. at 174-75, 258 P.2d at 1013-14.
116. Id. at 175-76, 258 P.2d at 1014. The dissenting justice would have adopted the Restatement (Second) position and held that the beneficiary’s independent resources, including those of her husband, could not be considered by the fiduciaries. Id. at 178-79, 258 P.2d at 1015-16 (Carter, J., dissenting).
118. Id. at 89-90, 160 A.2d at 77. Specifically, the testator’s will provided, in pertinent part, that the corporate fiduciary was “to pay to my said wife, freed and discharged from all trusts and uses, as much of the principal as my Trustee in its sole discretion shall determine necessary for her support, health and maintenance.” Id. at 90, 160 A.2d at 77.
life interest, the trust corpus was to be distributed to designated remaindermen.119 The life tenant instituted a constructional proceeding, contending that she was entitled to support payments from principal without regard to either her separate income or the income derived from the investment of the trust fund.120 The remaindermen, on the other hand, maintained that the trust corpus was usable only to the extent that the life tenant was in actual need.121

The trial court rejected the contentions of both parties. Instead, it charted a middle course and held that, although the beneficiary’s independent income was not to be considered by the trustee in ascertaining the amount of her support distributions, the income derived from the investment of the trust fund was to be considered.122 In so holding, the trial court placed primary emphasis on the use of the phrase “if any” in the trust termination clause in describing that portion of the corpus to which the remaindermen were ultimately entitled.123 In addition, the court invoked a rule of construction to the effect that beneficial provisions made for a surviving spouse should be liberally construed.124

The appellate court modified the trial court’s decision, holding that the widow’s separate income had to be taken into account by the

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119. The trust termination provision stated that, upon the life tenant’s death, the “remaining principal, if any,” was to be distributed to certain collateral relatives of the testator. Id. at 92, 160 A.2d at 78.
120. Id., 160 A.2d at 78.
121. Id., 160 A.2d at 78. The remaindermen’s contention was predicated, in part, on the inclusion of the word “necessary” in defining those instances in which the trust corpus was usable on behalf of the life beneficiary. The court’s opinion gave only cursory treatment to this issue. It simply stated that the utilization of this term created “a substantial ambiguity as to the intention of the testator,” thereby necessitating resort to the provisions of the will as a whole. Id. at 94-95, 160 A.2d at 78-80.
122. 61 N.J. Super. at 93, 160 A.2d at 78.
123. Id. at 92, 160 A.2d at 78. The court stated:

The fact that the testator contemplated the very real possibility that there might be no corpus left for the remaindermen, the gift over being qualified by the words “if any,” and that there is no contrary expression in the will of a concern that something be left for the remaindermen, indicates that the primary object of his bounty in the use of the corpus was his wife. The intention manifested is that the use of the corpus is to be liberal and not just a stopgap against the vicissitudes of life.

124. Id. at 93, 160 A.2d at 79. The court went on to hold that the widow was entitled to corpus distributions only to the extent that the trust income was insufficient to adequately provide for her support and maintenance. Id. at 94-95, 160 A.2d at 79-80.
fiduciary. The appellate court predicated its holding, in part, on the inclusion of the word "necessary" in defining those instances in which the trust corpus was usable on behalf of the life beneficiary. Two additional factors were deemed to militate in favor of this decision. First, a substantial part of the testator's estate was derived from testamentary dispositions that he had received from family members. Inasmuch as the testator had no descendants of his own, his desire to return the property to his parents' blood lines after the expiration of his widow's life enjoyment interest was entirely natural. Obviously, to the extent that the trust corpus was usable for the widow's benefit without consideration of her separate income, this utilization would enlarge the portion of the corpus that was permanently diverted from those blood lines. Second, the bulk of the widow's separate estate was the product of various *inter vivos* transfers and will substitutes that the testator had made for her benefit. The court conceived of the lifetime and death transfers as part of a unified plan by the husband to provide for the adequate support of his spouse. In effect, the court decided that the income derived from those sources should be treated the same as the trust income insofar as defining the beneficiary's support requirements was concerned.

The cases discussed above are illustrative of the vast majority of decisions pertaining to the question whether, in the context of a hybrid trust, the beneficiary's independent resources are to be taken into account by the fiduciary. The decisions are absolutely devoid of any recognition that the express grant of trustee discretion should alter the analytical framework from that which is applicable in the context of a pure support trust. Stated somewhat differently, the courts have not accorded the trustee of a discretionary support trust a greater degree of flexibility in defining the beneficiary's support requirements than they have accorded to the trustee.

125. Sibson v. First Nat'l Bank & Trust Co., 64 N.J. Super. 225, 232, 165 A.2d 800, 803-04 (App. Div. 1960). In addition, the court held that the beneficiary did not have to exhaust her separate estate before recourse could be had to the principal of the trust. *Id.*, 165 A.2d at 804.
126. *Id.* at 231, 165 A.2d at 803.
127. *Id.* at 230, 165 A.2d at 802.
128. *Id.*, 165 A.2d at 802-03.
129. The term "will substitutes," as used herein, is intended to refer to various property arrangements by means of which a prospective decedent will ultimately be able to dispose of property on his or her death without having it pass through probate administration. For example, in *Sibson* the testator availed himself of a number of will substitutes in providing for his wife. She succeeded to sole ownership of the family residence, the title to which had formerly been held by the couple as tenants by the entirety. She also received the proceeds of various life insurance policies on the testator's life. *Id.* at 228, 165 A.2d at 801-02.
130. *Id.* at 230-31, 165 A.2d at 803.
131. *Id.*, 165 A.2d at 803.
132. See note 95 *supra.*
of a pure support trust. The courts have effectively excised the discretionary language contained in a discretionary support trust. The logical or, it is contended, illogical result of this constructional pattern is the establishment of a complete synonymity of interpretation between a hybrid trust, on the one hand, and a pure support trust, on the other.

By way of contrast, a few jurisdictions have recognized the concept that the hybrid nature of the discretionary support trust does change the analytical framework in the independent resources area from that which is appropriate within the context of a pure support trust. For example, in a Connecticut case, \textit{Auchincloss v. City Bank Farmers Trust Co.},\textsuperscript{134} the testatrix established a trust of her residuary estate and directed that the trust fund be divided into equal shares for the benefit of her three children. With respect to one such share, the will provided that it was to be further divided into subshares for the benefit of any children born to her son.\textsuperscript{135} As to each subshare created for the benefit of a grandchild of the testatrix, it was provided that, prior to the beneficiary’s attainment of the age of majority, the trustees were to apply to the use of such grandchild so much of the net income from such subshare as [the] Trustees shall in their absolute discretion deem advisable for the support, maintenance and education of such grandchild and shall accumulate any portion of the net income of such subshare not so applied and add such accumulated income to the principal of such subshare. . . .\textsuperscript{136}

During the course of administering the trust estate, the trustees failed to make any distributions to or on behalf of the two grandchildren.\textsuperscript{137} The grandchildren brought a declaratory judgment action, seeking a determination of their rights in the income generated by their respective shares of the trust. They contended, in part, that the trustees had erred in taking into account the beneficiaries’ separate resources in determining whether to expend the trust income for their benefit.\textsuperscript{138} The Supreme Court of

\begin{itemize}
  \item \textsuperscript{133} See \textit{Brennan v. Russell}, 133 Conn. 442, 445-46, 52 A.2d 308, 309-10 (1947); \textit{City of Bridgeport v. Reilly}, 133 Conn. 31, 38-39, 47 A.2d 865, 868 (1946); \textit{Bregel v. Julier}, 253 Md. 103, 112, 251 A.2d 891, 896 (1969) (with discretionary support trust, trustee has discretion to decide whether beneficiary’s needs are being satisfied and to use trust corpus as trustee decides is necessary); \textit{Offutt v. Offutt}, 204 Md. 101, 111, 102 A.2d 554, 559 (1954) (with discretionary support trust, trustee has discretion to consider beneficiary’s resources in determining amount of monthly allowance); \textit{see also note 142 infra.}
  \item \textsuperscript{134} 136 Conn. 266, 70 A.2d 105 (1949).
  \item \textsuperscript{135} \textit{Id.} at 268, 70 A.2d at 106. With respect to the funding of each subshare so created, the trustees were directed to set aside from the corpus of the son’s share a sum that, when placed at interest, would yield a distributable income of $7500 per annum. \textit{Id.}, 70 A.2d at 106.
  \item \textsuperscript{136} \textit{Id.}, 70 A.2d at 106.
  \item \textsuperscript{137} The trustees’ actions had resulted in substantial accumulations of income for both shareholders. \textit{Id.}, 70 A.2d at 106.
  \item \textsuperscript{138} \textit{Id.} at 268-69, 70 A.2d at 106. They also maintained that the dispositive discretion vested in the trustees by the terms of the will did not extend far enough to permit them
Connecticut rejected the plaintiffs' contentions. After reviewing the relevant decisional literature, the court made the following pronouncement regarding its earlier decision in *Brennan v. Russell*:\(^{139}\)

[W]e held . . . that the trust fell within that class of cases where the trustee might properly take into account, in determining whether to expend the income or the principal for the beneficiary, other means of support available to him. While the opinion does not discuss the rationale of that ruling, it was that, under the will, the trustee had complete discretion to determine whether or not to make such expenditures, and in the exercise of that discretion, he might, if he chose, consider any other source of income the beneficiary had.\(^{140}\)

Applying the *Brennan* rationale, the court went on to hold that, under the facts of the instant case, the fiduciaries could properly consider the beneficiaries' alternate means of support.\(^{141}\) Thus, the court clearly recognized that the explicit grant of trustee discretion was effective to enlarge the scope of the fiduciaries' dispositive discretion in determining the beneficiaries' support standard.\(^{142}\)

\(^{139}\) 133 Conn. 442, 52 A.2d 308 (1947). In *Brennan* the testatrix placed her residuary estate in a discretionary support trust with respect to distributions of both principal and income. The remainder interest in the trust estate was given to the heirs of the life tenant. In a declaratory judgment action brought by the life tenant, the court, without benefit of discussion and in reliance on its earlier decision in *City of Bridgeport v. Reilly*, 133 Conn. 31, 47 A.2d 865 (1946), held that the trustee of a hybrid trust could properly consider the beneficiary's independent income. 133 Conn. at 446, 52 A.2d at 310. In *Reilly* the Connecticut Supreme Court had explicitly recognized the existence of a hybrid trust. In referring to the trust, the court stated that "[t]he situation falls within the principle that a trustee, in determining whether to make expenditures under a discretionary trust for support, is entitled to take into consideration other means of support available to the beneficiary." 133 Conn. at 39, 47 A.2d at 868.

\(^{140}\) 136 Conn. at 272, 70 A.2d at 108 (emphasis added) (footnote omitted).

\(^{141}\) *Id.*, 70 A.2d at 108.

\(^{142}\) Accord *In re Watson's Will*, 286 A.D. 950, 142 N.Y.S.2d 731 (1955). In *Watson* the testator established a trust under the terms of which his daughter was entitled to receive so much of the income generated by the trust fund as the trustee "in its absolute discretion" deemed necessary for her "suitable comfort and support." *Id.* at 950-51, 142 N.Y.S.2d at 732. In a proceeding for the judicial settlement of the trustee's accounts, the Surrogate's Court had ruled that, in exercising the discretion conferred upon it by the terms of the testator's will, the fiduciary was required to consider the beneficiary's independent income. *Id.*, 142 N.Y.S.2d at 732. On appeal the Appellate Division modified the decree rendered below. The appellate court found that the trial court's determination was effective to "unduly and unnecessarily circumscribe the 'absolute discretion' given to the trustee by the will," in that it required the trustee to define the beneficiary's support requirements by taking into account her separate income. *Id.* at 951, 142 N.Y.S.2d at 732-33. Therefore, it held that the fiduciary could, if it chose to do so, take that factor into account in determining the beneficiary's support needs. *Id.*, 142 N.Y.S.2d at 733.
III. CONCLUSION

The two case studies reveal that judicial decisionmaking in the area of hybrid trusts consists of little more than a labelling exercise in which the court appends either a pure support or a pure discretionary trust label to the dispositive instrument that it has been called on to construe. Indeed, it is almost as though the courts have tacitly agreed to adopt conceptual blinders that preclude them from even contemplating the possibility that a discretionary support trust had been created by the terms of the governing instrument.

The costs inherent in this mode of decisionmaking to a system premised on the notion of effectuating the donative intention of the property owner are potentially enormous. The courts’ decisions constitute, in effect, selective enforcement of the grantor’s intent. This constructional device results in the judicial creation of beneficial interests in a trust that are at variance with those interests that were sought to be created in the first place. This difficulty is further compounded by the hardening effect of precedent in that it serves to limit the permissible scope of future decisions.\textsuperscript{143}

The issue, therefore, is one of defining the task that the judiciary must ultimately confront in seeking to ensure that greater efficacy is accorded to the settlor’s intent. It is necessary for the courts to do that which, as a matter of theory, they have always held themselves out as accomplishing. First, in the area of construing dispositive instruments, the judiciary must be constantly wary of attaching disproportionate significance to prior decisions. Second, there needs to be greater compliance with the constructional maxim that the whole context of the instrument must be considered, and force and effect must be given, if possible, to every material word contained therein. If the judiciary would return to first principles in this manner, the distinction between a discretionary support trust and the individual elements of which it is composed would become abundantly clear.

\textsuperscript{143} The traditional dogma suggests that, in construing the grantor’s intention, precedent is of only secondary importance. See T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 146 (2d ed. 1953). A review of the relevant decisional literature may leave the reader with the opposite impression. In fact, it often appears as though decisions are reached without any detailed inquiry having been made in the first instance regarding the species of trust that the instrument was effective to create. Instead, given the fact that the case law is seemingly so well settled, the tendency of the courts is apparently to decide each case by merely plugging it in to the network of prior decisions.