STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1458

In the Matter of the Stephanie L. Wilcox Trust
Under Irrevocable Trust Agreement of Craig C. Wilcox
dated December 28, 1994.

Filed May 19, 2009
Affirmed in part and reversed in part
Stoneburner, Judge
Dissenting, Ross, Judge

Hennepin County District Court
File No. 27TRCV07149

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Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant Commissioner of Human Services challenges the order of the district court construing a trust established for the benefit of a young woman who has been diagnosed with moderate-to-severe Down Syndrome to be discretionary concerning distribution of trust principal, making trust principal an unavailable resource for the beneficiary's care and support. Respondent trustees noticed review of the district court's holding that income from the trust is such an available resource. Because we conclude that as a matter of law the beneficiary can compel distribution of both principal and income from the trust for her adequate care and support, we affirm in part and reverse in part.

FACTS

Stephanie Wilcox (S.W.), born June 19, 1989, has been diagnosed with moderate-to-severe Down Syndrome. In December 1994, S.W.'s father established identical trusts for the primary benefit of each of his three children. S.W.'s parents divorced in 2003, and father was ordered to pay $2,500 per month in child support for S.W. until her graduation from high school in May 2008. When S.W. was 18 years old, her mother (guardian) was appointed General Guardian of the Person and General Conservator of the Estate of S.W.

S.W.'s trust, which has assets of approximately two million dollars, is to be administered for S.W.'s primary benefit, and contains the following relevant provisions:

> Income. The net income shall be paid to [S.W.]; provided that if the trustee determines that [S.W.] has adequate other income, the trustee may withhold all or any part of the net income and may distribute all or any part thereof to any one or more of [S.W's] issue as the trustee deems advisable. . . .
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> Principal. The trustee shall pay to any one or more of [S.W.] and [S.W.'s] issue, from any principal not capable of being withdrawn pursuant to any right of withdrawal, such sums of principal (including all thereof) as the trustee deems advisable.
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> . . . .
>
> Payments and Distributions. Any payment of income or principal may be expended for the beneficiary's benefit. . . .
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> Nature of Discretionary Payments. Except as may be limited by other provisions of this agreement, discretionary payments authorized for a beneficiary may include (but shall not be limited to) payments for . . . education; . . . [and] health and medical care.

The general powers provision in the trust gives the trustees the power to "make all required payments of trust income whenever they deem advisable, but not less frequently than quarter-yearly."

In July 2007, guardian began to submit monthly budgets for S.W. to the trustees. On October 11, 2007, guardian obtained court approval of S.W.'s monthly budget of $3,879, which includes the cost of providing for S.W.'s food, shelter, education, 24-hours-per-month personal-care-attendant services, 48-hours-per-month respite care, and medical insurance premiums. On October 23, 2007, the trustees petitioned the district court under Minn. Stat. § 501B.16, stating that guardian had made a demand that the

trustees distribute trust assets to meet the approved budget and seeking a ruling that the trust is a "discretionary trust" and is not an available asset for purposes of Minnesota medical assistance laws.[1] Guardian opposed the trustees' petition and sought an order determining that the trust is available to pay for S.W.'s health, maintenance, and welfare.

In November 2007, at the trustee's request, guardian applied for medical assistance (M.A.) for S.W. The application was denied because S.W.'s net income, which included the $2,500 monthly child support payments, exceeded M.A. limits and S.W. did not have enough medical expenses to meet the required "spenddown."[2] The trustees served the Commissioner of Human Services (commissioner) with the petition. The commissioner and guardian opposed the petition.

In an order filed on March 24, 2008, the district court concluded that because the distribution of trust income is not completely discretionary under the terms of the trust, trust income is an available asset for S.W.'s care and support and for determining S.W.'s eligibility to receive M.A. benefits. On a notice of review, the commissioner, joined by guardian, sought clarification of the order with regard to whether the trust principal as well as trust income is an available asset for determination of M.A. eligibility; the

[1] The trustees also sought a determination that some budget items are not items of support such that distribution of trust assets for such items would jeopardize eligibility for Medical Assistance benefits. This determination has not been appealed.

[2] Minnesota's income limit for an 18 year old is 150% of the Federal Poverty Guidelines (FPG). Minn. Dep't of Human Servs., *Health Care Programs Manual*, § 03.25.15 (2008). The income limit for 19–20 year olds is 100% of FPG. *Id.* There is no asset eligibility limit for children under the age of 21. *Id.* However, Minnesota's current asset limit for a disabled adult's M.A. eligibility is $3,000. Minn. Stat. § 256B.056, subd. 3 (2008).

trustees sought reversal of the determination that distribution of income is not wholly within the trustee's discretion.

In June 2008, the district court issued an order affirming that trust income is an available asset for purposes of determining S.W.'s eligibility for M.A. but construing the trust to preclude S.W. from compelling any distribution of trust principal and holding that because distribution of trust principal is within the discretion of the trustees, trust principal is not an available resource for S.W.'s care and support. The commissioner appealed the holding that distribution of trust principal is solely discretionary, and the trustees noticed review of the holding that distribution of trust income is not solely discretionary.

D E C I S I O N

I. Justiciability

For the first time on appeal, the commissioner asserts that the district court's order regarding the trustees' discretion to distribute trust principal should be vacated and this appeal dismissed for lack of a justiciable controversy. The commissioner argues that there is no current case or controversy regarding the distribution of trust principal or availability of trust principal for determination of S.W.'s M.A. eligibility because S.W.'s assets cannot be considered in determining M.A. eligibility until June 2010, on S.W.'s 21st birthday. And the commissioner argues that trust principal may never become an issue with regard to M.A. eligibility if trust income continues to preclude her eligibility for M.A. The commissioner also asserts that because denial of S.W.'s application for

M.A. was not appealed, there is no current question about M.A. eligibility, making the district court's opinion purely advisory.

"The concept of justiciability forms a threshold for judicial action and requires, in addition to adverse interests and concrete assertions of rights, a controversy that allows for specific relief by a decree or judgment of a specific character as distinguished from an advisory opinion predicated on hypothetical facts." *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007) (citing *Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n of Minneapolis*, 271 N.W.2d 445, 447 (Minn. 1978)). "[J]udicial function does not comprehend the giving of advisory opinions," because the nature of judicial decision-making is to resolve disputes. *Id.* (citing *Izaak Walton League of Am. Endowment, Inc. v. Minn. Dep't of Natural Res.*, 312 Minn. 587, 589, 252 N.W.2d 852, 854 (1977)).

Trustees urge this court to adopt the doctrine of judicial estoppel to prevent the commissioner from raising justiciability of the very issue that the commissioner asked the district court to decide: availability of trust principal for determination of S.W.'s M.A. eligibility. The Minnesota Supreme Court declined to recognize the doctrine of judicial estoppel in *State v. Pendleton*, 706 N.W.2d 500, 507 (Minn. 2005), after concluding that the doctrine of judicial estoppel had no application to the facts before it. Because the existence of a justiciable controversy can be asserted at any stage of a proceeding, we conclude that the doctrine of judicial estoppel has no application to the determination of justiciability, and we decline the trustees' invitation to adopt the doctrine of judicial estoppel in this case. *See Izaak Walton League*, 312 Minn. at 589, 252 N.W.2d at 854

(stating that "[b]ecause the existence of a justiciable controversy is essential to [the supreme court's] exercise of jurisdiction, it may always raise the issue on its own motion").

In Minnesota, whether a trust is an available asset for determining M.A. eligibility depends on whether the trust is a support trust or a discretionary trust, an issue of law generally determined de novo by examining the "four corners" of the trust instrument. *In re Flygare*, 725 N.W.2d 114, 118–20 (Minn. App. 2006), *review denied* (Minn. Feb. 28, 2007) (describing a support trust as one that "directs the trustee to distribute trust income or principal as necessary for the support and maintenance of the beneficiary" and a discretionary trust as one in which the "trustee [has] complete discretion to distribute all, some, or none of the trust income or principal to the beneficiary as the trustee sees fit," *id.* at 120). Trustees assert that Minn. Stat. § 501B.16, explicitly grants jurisdiction to the district court to determine whether S.W.'s trust is a discretionary trust or a support trust. We agree.

The statute provides in relevant part:

> A trustee of an express trust . . . or a person interested in the trust may petition the district court for an order:
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> . . . .
>
> (3) to determine the persons having an interest in the income or principal of the trust and the nature and extent of their interests;
>
> (4) to construe, interpret, or reform the terms of a trust . . .
>
> . . . .

> (23) to instruct the trustee, beneficiaries, and any other interested parties in any matter relating to the administration of the trust and the discharge of the trustee's duties.

Minn. Stat. § 501B.16 (2008).

Although the issue of S.W.'s eligibility for M.A. is not currently in controversy, the guardian's demand for distribution of trust assets to meet S.W.'s approved budget created a dispute about whether the trust is a support trust or a discretionary trust. Minn. Stat. § 501B.16 confers jurisdiction on the district court to instruct trustees who are in reasonable doubt as to their official duties or powers. *See In re Atwood's Trust*, 227 Minn. 495, 500, 35 N.W.2d 736, 739 (1949) (stating that it is "well established that when trustees are in reasonable doubt as to their official duties or powers, they are entitled to instructions of the court in respect to such matters as the proper construction of the trust instrument [and] the extent of their powers and duties . . .").

While cases categorizing trusts as discretionary or support trusts arise primarily out of disputes over the availability of trust assets for determination of M.A. eligibility, the effect of categorizing a trust as discretionary or support is not limited to M.A. eligibility. The categorization also determines whether a beneficiary can compel the trustee to distribute trust assets for the beneficiary's support. *Matter of Carlisle Trust*, 498 N.W.2d 260, 264 (Minn. App. 1993) (citing Restatement (Second) of Trusts § 128 cmts. d, e (1959)). In this case, S.W.'s ability to compel distribution of trust assets was put in controversy by the guardian's demand for such distribution. Availability of trust assets for the purpose of determining M.A. eligibility is incidental to a determination of

that controversy.[3] Because a controversy exists to support the district court's jurisdiction over this matter under Minn. Stat. § 501B.16, we do not reach the trustees' argument that the district court had jurisdiction under a "ripening seeds inquiry."

II. Categorization of trust as discretionary or support trust

"The issue of whether a trust is a support trust or a discretionary trust is generally an issue of law that we can determine de novo by examining the 'four corners of the [trust] instrument.'"[4] *Flygare*, 725 N.W.2d at 119–20.

> A support trust directs the trustee to distribute trust income or principal as necessary for the support and maintenance of the beneficiary; a discretionary trust . . . gives the trustee complete discretion to distribute all, some, or none of the trust income or principal to the beneficiary as the trustee sees fit.

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[3] The parties agree that the commissioner is an "interested person" in the determination of whether the trust is a discretionary or a support trust, and therefore has standing to participate in a proceeding to determine whether a trust is a support or discretionary trust. *See In re Horton*, 668 N.W.2d 208, 213 (Minn. App. 2003) (holding that county social services agency was an "interested person" for purposes of Minn. Stat. § 501B.16 and had standing to petition the district court for an order determining the availability of trust assets for the beneficiary's medical care).

[4] The trustees provided the affidavit of S.W.'s father stating that he intended to "allow the Trustees complete discretion in the distribution of the income and principal" in order to preserve the trust assets for as long as possible, and asserting father's belief that trust assets should not be distributed to S.W. unless government benefits to which she is "entitled" are not sufficient to provide adequately for her needs. But the trust language, while sufficient to address father's concerns that trust assets not be unnecessarily dissipated, is inconsistent with his recent expression of intent that trust assets be withheld to qualify S.W. as "entitled" to public assistance. And Minn. Stat. § 501B.89, subd. 1 (2008), voids trust provisions that allow for limitation or suspension of payments if a beneficiary applies for or is determined eligible for public assistance as against public policy. Furthermore, neither S.W.'s father nor the trustees contend that this trust is a supplemental trust under Minn. Stat. § 501B.89, subd. 3 (2008), that would shield trust assets from consideration for public-assistance eligibility. We conclude that the unambiguous language of the trust rather than father's affidavit controls the determination of whether it is a discretionary or support trust.

Id. at 120 (citing *Carlisle Trust*, 498 N.W.2d at 264).

A. Trust principal

The commissioner and guardian argue that the district court erroneously concluded that the trust gives the trustees complete discretion over distribution of trust principal. We agree. The district court's conclusion is based in part on its finding[5] that "nothing in the trust requires the trustee[s] to determine the needs of the beneficiary or insure that those needs are met, which is one factor to consider in determining whether a trust is a support or discretionary trust." But the trust mandates distribution of trust income absent a determination by the trustees that S.W. has "adequate other income," requiring the trustees to determine what is "adequate" income for S.W., and distribute trust income absent "adequate" other income. Therefore the district court's finding that nothing in the trust requires that the trustees consider S.W.'s needs or insure that her needs are met is clearly erroneous.

The requirement that the trustees "shall pay . . . such sums of principal . . . as the trustee[s] deem[] advisable" follows the language requiring that S.W. have "adequate" income. The trustees and the district court would have us read the provision for payment from principal without regard to the purpose of the trust and the intent expressed that S.W. have "adequate" income. But caselaw directs us to look at the "four corners of the trust" to determine whether a trust is a support or discretionary trust. *See McNiff v. State*

[5] This finding is stated as a conclusion in the district court's order. *See Bissell v. Bissell*, 291 Minn. 348, 351 n.1, 191 N.W.2d 425, 427, n.1 (1971) (stating that a fact found by the district court, although expressed as a conclusion of law, will be treated on appeal as a finding of fact).

Dep't of Pub. Welfare, 287 Minn. 40, 43, 176 N.W.2d 888, 891 (1970) (stating that the intention of the settlor "is to be gathered from everything contained within the four corners of the instrument, read in light of surrounding circumstances"). *McNiff* involved a trust created for the maintenance, care, support, and education of a testator's wife and daughter. *Id.* at 42, 176 N.W.2d at 891. The issue in *McNiff* was whether the trust could be considered in connection with the widow's eligibility for medical assistance. *Id.* at 43, 176 N.W.2d at 891. The supreme court rejected the trustee's argument that the testator intended for his daughter to receive the major portion of the trust property as long as medical assistance was available to his widow, stating: "[The trustee's] contention implies that the testator intended his widow to be a public charge. It is not proper to say that the testator wanted the benevolence of the state to be used as the vehicle for preserving the trust estate for the benefit of his daughter." *Id.* at 44, 176 N.W.2d 891. We conclude that it is similarly improper to infer from the mandate in S.W.'s trust that she have adequate income, an intent that S.W. become a public charge solely to preserve trust principal.

The use of "may" rather than "shall" is significant in determining whether a trust is a support or a discretionary trust. In *U.S. v. O'Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994), the supreme court rejected a claim that the involved trusts were not discretionary. The trusts provided that trustees "in their discretion *may* pay" principal or income to the beneficiary "as they shall see fit," and "in their sole discretion *may* pay" to the beneficiary principal and income "in such amounts as they deem advisable." *Id.* at 576 (emphasis added). Focusing on the word "may," the supreme court stated that "[t]his

use of precatory language reveals the settlors' intent to create a discretionary trust." *Id.* at 577.

Use of "shall" in S.W.'s trust does not support a finding that payment of principal is discretionary even though "such [amounts] as the trustee[s] deem[] advisable" signals that the *amount* of such payments is discretionary, consistent with the purpose of the trust to provide "adequate" income to S.W.

In *Flygare*, a trust provided that the trustee "may in his sole and exclusive discretion . . . withdraw installments of principal from this trust from time to time and pay the same to or for the benefit of [beneficiary] as [trustee] deems necessary and advisable *in order to provide for the proper support and maintenance of [beneficiary]* . . . ." 725 N.W.2d at 119 (emphasis added). Notwithstanding the use of "may" and the reference to "sole and exclusive discretion," this court concluded that as a matter of law, the *Flygare* trust was a support trust, giving the beneficiary the ability to bring an action to compel the trustee to make payments as necessary to provide for her proper support and maintenance. *Id.* at 116, 120 (noting that the "clear purpose of th[e] trust was to insure that [beneficiary's] basic needs are met," and citing *O'Shaughnessy*, 517 N.W.2d at 577, for the proposition that even where trustees have complete discretion, any attempt to violate the trust's purpose is considered an abuse of that discretion).

In this case, the express intent that S.W. have "adequate" income leads us to conclude that while the trustees maintain broad discretion regarding the amount of principal that shall be paid, S.W. has the ability to compel distribution of trust principal in amounts deemed advisable by the trustees for her adequate support. The district court

erred in determining that distribution of trust principal is solely discretionary and is not an available resource for S.W.'s care and support.

B. Trust income

Trustees challenge the district court's determination that they do not have complete discretion with regard to distribution of trust income. But the trust language mandates that trust income shall be paid to S.W. not less frequently than quarter-yearly, subject only to the discretion to withhold all or part of the net income if the trustees determine that S.W. has "adequate other income." *Flygare*, 725 N.W.2d 114, is again instructive and leads us to conclude that the trustees have no discretion to withhold trust income necessary to meet S.W.'s needs. The district court did not err in holding that trust income is available for S.W.'s adequate care and support.

Affirmed in part and reversed in part.

ROSS, Judge (concurring in part, dissenting in part)

I respectfully dissent in part. I believe that the language directing disbursement of the trust principal vests sole disbursement discretion in the trustee.

Our fundamental question is whether the settlor intended the trust's income or principal to be distributed as a matter of the trustee's sole discretion. (Like the parties, the district court, and the majority, I will assume without commenting further that the question may be divided so that the trust's income and principal may be characterized separately and treated differently either as "discretionary" or "support.")[6] A trust is discretionary if it entitles a beneficiary "only to so much of the income or principal as the trustee in his uncontrolled discretion shall see fit to distribute," giving "the trustee complete discretion to distribute all, some, or none of the trust assets." *United States v. O'Shaughnessy*, 517 N.W.2d 574, 577 (Minn. 1994) (quotation omitted).

On that definition, I agree with the majority that the trustee lacks sole discretion to distribute all, some, or none of the trust's *income*. The trustee's lack of sole discretion in his income-distribution decision results from the language of paragraph 4.01(2) of the trust, which requires the trustee to pay "[t]he net income . . . to [S.W. unless] the trustee determines that [S.W.] has adequate other income." Because the trustee lacks discretion

[6] The cases relied upon by the parties and the majority uniformly discuss the nature of *entire* trusts as either support or discretionary. *United States v. O'Shaughnessy*, 517 N.W.2d 574, 578 (Minn. 1994), *McNiff v. State*, 287 Minn. 40, 43, 176 N.W.2d 888, 891 (1970), *In re Flygare*, 725 N.W.2d 114, 120 (Minn. App. 2006), *In re Carlisle Trust*, 498 N.W.2d 260, 264 (Minn. App. 1993). Because no party challenges the district court's assignment of a different nature to the separate provisions of the same trust, my analysis does not consider any potential arguments that might contest that apparently novel approach.

to withhold trust income from S.W. when S.W.'s other income is inadequate, the income portion of the trust may be defined as a support trust.

But I reach a different conclusion regarding the trust's *principal*. The trust language that withholds complete discretion from the trustee's income-distribution decision does not exist in paragraph 4.01(3) in the description of the trustee's principal-distribution decision. To the contrary, the operative language allows the trustee to distribute as much of the principal as the trustee sees fit to distribute, with complete discretion to distribute all, some, or none of the principal with no factor purporting to control or limit that discretion. That provision states that "[t]he trustee shall pay to any one or more of my child and my child's issue, from any principal not capable of being withdrawn pursuant to any right of withdrawal, such sums of principal (including all thereof) as the trustee deems advisable." The only controlling language—"as the trustee deems advisable"—may logically and fairly be restated, "*if* the trustee deems it to be advisable."

The principal-distribution language is unrestrictive on its face. The payment of trust principal that has not been withdrawn as a matter of right depends entirely on the trustee "deeming" payment to S.W. to be "advisable," because there is no restriction on the trustee's decision as to what may constitute an "advisable" circumstance. The settlor knew how to restrict the trustee's discretion, as he did with specific income-distribution language by conditioning the payment of trust income on inadequacy of other income. But the settlor chose not to include any restrictive language regarding principal, and our interpretation of intent must give effect to that choice.

The *O'Shaughnessy* case is a useful guide by comparison. The supreme court in *O'Shaughnessy* found the following language to "reveal[] the settlor's intent to create a discretionary trust": "[The trustees] *may* pay . . . all or such part of the principal or the annual net income of the trust estate as they shall see fit during his lifetime." *O'Shaughnessy*, 517 N.W.2d at 577 (emphasis in *O'Shaughnessy*). The effect of this language in the *O'Shaughnessy* trusts has the same effect as the language controlling the trustee's decision regarding unclaimed trust principal here. The infinitesimal difference between "as [the trustee] shall see fit" in *O'Shaughnessy* and "as the trustee deems advisable" in this case is too slight to be measured with the naked eye. Both phrases vest full discretion solely in the trustee. I recognize that the *O'Shaughnessy* trusts also contained language regarding the trustees' "sole discretion" and describing the trustees' decisions as "absolutely binding." *Id*. But the supreme court's holding of a discretionary trust relied instead on the trust language discussed above, and *that* language effectively mirrors the disputed language in the presently contested Wilcox trust in all material respects. The absence of the additional language that existed in the *O'Shaughnessy* trusts therefore does not alter my opinion.

The majority highlights the term "shall." The difference between the term "may" in the *O'Shaughnessy* trusts and the term "shall" in the paragraph regarding trust-principal in this case should prompt only a short pause. The words that follow "shall" instantly tranquilize its presumed force. The term depends on its context. As one well-recognized commentator on legal terms puts it, "courts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts,

and vice-versa." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 939 (2d ed.). The proposition is easily demonstrated: Imagine two trusts, one that states, "The trustee *may pay* the principal as the trustee sees fit," and another that states, "The trustee *shall pay* the principal as the trustee sees fit." Any apparent difference between the verbs *may* and *shall* is rendered meaningless by their context because each declares complete trustee discretion to pay any amount (including *no* amount). So it is here, because the trustee "shall pay" any amount that the trustee "deems advisable."

The supreme court best described the often over-rated force given to "shall" in a case dealing with statutory construction:

> Ordinarily, the word 'may' is directory and 'shall' is mandatory in meaning, but not always so.
>
> * * * *
>
> Provisions which are mandatory in form are often held to be directory and those which are directory in form are often held to be mandatory because such words as "may," "shall," "must," and "will" are often used without discrimination. All of them are elastic and frequently treated as interchangeable.

In re Trusteeship Under Will of Jones v. First Minneapolis Trust Co., 202 Minn. 187, 190–92, 277 N.W. 899, 901–02 (1938). I would read the verb phrase "shall pay" in context with precisely what it is that the trustee supposedly "shall pay." Roughly paraphrased, the trustee "shall pay whatever the trustee thinks the trustee should pay." This contextual reading leads me to conclude that the provision is discretionary despite its leading with the word "shall."

The majority accurately notes that the trust's directive to pay "such sums of principal . . . as the trustee deems advisable" *follows* the language that requires the trust to afford S.W. with adequate income. But I think that the ordering of these provisions is irrelevant, however, because they appear in separate paragraphs and control different aspects of the trust property. The adequate-income restriction expressly controls the trustee in decisions only concerning trust income, but the restriction is not included by specific reference, by implication, or by inference in the separately numbered and separately titled paragraph that regards only trust principal. That the "Principal" paragraph *follows* the "Income" paragraph seems to have no bearing on the settlor's intent concerning the breadth of the trustee's discretion to direct payments from trust principal.

I agree with the majority that the intent of the overall trust is to benefit S.W.; but this general intent to benefit the trust's beneficiary exists in every trust and does not address trustee discretion to make payments from the unallocated portion of the trust's principal. The supreme court considered and resolved this same concern in *O'Shaughnessy*. The *O'Shaughnessy* court specifically explained that a trust will not be deemed a support trust merely because the trust's overall intent imposes *general* implied restrictions on a trustee's discretion. After the *O'Shaughnessy* court held the challenged trusts to be discretionary, it added, "While the trustees cannot exercise their discretion in a way that defeats the intent of the settlors or the purpose of the 1951 Trusts, this fact does not change the nature of the [trusts from discretionary to support]." 517 N.W.2d at 577. Similarly here, while the trustee cannot abuse his discretion by defeating the

settlor's intent that the trust provide support for S.W., this general limit to discretion does not change the clearly discretionary nature of the trust as it regards principal.

I disagree with the majority's decision on this issue only. I would conclude that allocation of the trust principal relies on the trustee's sole discretion whether the payment of available principal is advisable or inadvisable. I would therefore affirm the district court's treatment of the principal-distribution portion of the instrument as a discretionary trust.