The U.T.C.: A Continued Threat to Special Needs Trusts–Part II The Creation of an Enforceable Right in Almost All Discretionary Trusts

By Mark Merric, Douglas Stein, Carl Stevens, Eric Solem, Wayne Stewart and Mark Osborne

Mark Merric, Douglas Stein, Carl Stevens, Eric Solem, Wayne Stewart and Mark Osborne discuss the negative asset protection impact of the Uniform Trust Code's approach to discretionary trusts. This is the second part of a four-part article.

Concerns Expressed Throughout the States Regarding the U.T.C.'s Negative Effect on SNTs

In May 2005 at the Annual Michigan Elder Law Committee, Doug Stein, a member of the Michigan Uniform Trust Code (U.T.C.) Committee, debated another member of the U.T.C. Committee regarding the negative asset protection effect the U.T.C. has on third-party special needs trusts (SNTs). After hearing both sides of the issue, the Michigan Elder Law Committee informally voted 67-0 against supporting the U.T.C. In North Carolina and South Carolina, due to pressure by elder law attorneys as well as estate planning attorneys, both state U.T.C. committees affirmatively rejected the continuum of discretionary trusts. Maine has also affirmatively rejected this new view of trust law adopted by the U.T.C. In Kansas, U.T.C. §§503 and 504 were omitted, and in Oregon U.T.C. §504 was omitted. The official comment under U.T.C. §504 states that it is abolishing the discretionary-support dichotomy. It is this dichotomy which affords or prevents a beneficiary from having an "enforceable right" that is the fundamental cornerstone of protection for a discretionary trust. Tennessee, South Carolina and Alabama also attempted to add specific statutory language protecting SNTs. Even Richard Davis, who is a strong proponent of the U.T.C. and now claims there is no problem with the U.T.C., previously lead an informal vote against the U.T.C. until it was amended with something known as the "Ohio wholly discretionary trust." Unfortunately, the Ohio wholly discretionary trust is substantially weaker than the common law of most states.

Even the National Conference of Commissioners on Uniform State Law (NCCUSL) has made several changes to the U.T.C. that attempt to address some of the issues. After reviewing these changes, Doug

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McLaughlin, one of the primary drafters of the Wyoming U.T.C., noted, "It appears NCCUSL recognizes that they have a major problem in Article 5 and Section 814(a). Unfortunately, the statutory amendments and amended comments appear to be nothing more the window dressing." The authors agree that the NCCUSL amendments fall significantly short of accomplishing the desired objective. While many of the state proposed U.T.C. fixes are much better than the NCCUSL attempt, they also still fall short of the asset protection benefits of common law.

Textbook Example of How Not to Draft a Statute?

Many of the problems stem from fundamental flaws in the design of the U.T.C. and its interrelationship to the Restatement Third. A statute should be able to stand by itself and should not require over 100 pages of comments and references to a 900-page treatise to fully explain its meaning. As a rule-making body, a legislature agrees to the exact wording of a particular statute to enact as law—the references or comments which the statute may include are not part of and were never passed as part of the enacted law. More significantly, references made to a treatise (*i.e.,* the Restatement (Third) of Trusts) that have never been put before the legislature should not be construed as law simply by the enactment of the statute. The statute must contain the entire law it seeks to address, and comments, if any, should be minimal.

Unfortunately, the U.T.C. is built on the exact opposite premise. It is a small code that requires commentary three and one-half times its size to begin to understand it. It then specifically references the Restatement (Third) of Trusts for substantive law. The U.T.C.'s importation of law from sources outside the statutory code is unprecedented. It is not analogous to a building code that details engineering specifications for density, strength, height, length, width, and weight. These engineering specifications are objective and often mathematically based statements, which are easily understood and easily followed. The U.T.C.'s references to sources outside the statute are not to objective statements that have no legal meaning, rather they are to the interpretation of the substantive law itself.

Unfortunately, the references to the Restatement (Third) of Trusts for substantive law create a much greater concern. In the area of creditor's rights, the Restatement Third is simply *not* a restatement of law. In some areas, it creates its own law to support a conclusion, and in many others, it is an aggregation of distinct minority opinions that have been rejected by the vast majority of states. Perhaps, unfortunately, in the area of creditors' rights, the Restatement Third is simply an imaginative and unfounded misconstruction of law by a select group of individuals. Unfortunately, to the detriment of all estate and elder law attorneys that, in good faith, relied on hundreds of years of common law, this wish of a select few may become the law.

A few examples of the poor drafting in the U.T.C. follow. For example, unless one reads the comment under Section 504 of the U.T.C., they would be completely unaware that the U.T.C., like the Restatement Third, abolished the discretionary-support dichotomy, the fundamental basis of asset protection provided by third-party SNTs. The 2004 §504 comment mentioned the following one sentence on the issue:

> This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. *See* Restatement (Third) of Trusts Section 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999).

Many attorneys reviewing the U.T.C. missed this one sentence or were unaware of the massive change to common law created by the Restatement Third and adopted and imposed by the U.T.C. Clarifying that the discretionary-support dichotomy was indeed abolished by the U.T.C., a 2005 amendment added the following language:

> By eliminating this distinction, the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard, or both. Other than for a claim by a child, spouse or former spouse, a beneficiary's creditor may not reach the beneficiary's interest. *Eliminating this distinction affects only the rights of creditors.* [Emphasis added.] The affect of this change is limited to the rights of creditors. It does not affect the rights of a beneficiary to compel a distribution. Whether the trustee has a duty in a given situation to make a distribution depends on factors such as the breadth of the discretion granted and whether the terms of the trust include a support or other standard. See Section 814 comment.

As noted in prior articles, and also further discussed in this article, whether a beneficiary has an "available resource," and thereby most likely disqualified for governmental aid depends upon the beneficiary's right to demand a distribution—not the creditor's right. Further, it is highly questionable if a statute can be changed merely by making a statement in a comment. The 2005 U.T.C. amendment specifically acknowledges that the elimination "does not affect the right of a beneficiary to compel a distribution." Therefore, our concern that the U.T.C. has created an enforceable right to demand a distribution (*i.e.,* an available resource) in many SNTs previously protected under common law remains.

A second example of poor draftsmanship is the use of notes to partially alter statutory interpretation as well as substantive law by merely amending the comments. The 2004 U.T.C. comment to Section 106 stated:

> The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity, *particularly* as articulated in the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. [Emphasis added.]

This comment implies that the Restatement Third has priority over common law in interpreting the U.T.C. This results in considerable concern for attorneys and beneficiaries, because the Restatement (Third) of Trusts creates the new "continuum of discretionary trusts" where, as discussed below, a beneficiary will almost always have an enforceable right to a distribution, thereby creating an available resource issue.[1]

However, after numerous concerns were raised by the estate planning community, NCCUSL amended the comment to Section 106 to address our concern. Now this comment reads as follows:

> The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look *first to prior case law in the state and then to more general sources*, such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. [Emphasis added.]

While such an amendment is a step in the right direction, it still fails to cure the problem. As noted above, legislatures enact statutes; they do not enact comments. The code should stand on its own merits. Comments should not change substantive law, and possibly beneficiary rights when amended by a select group. Also, notably, the amended comment now appears to conflict with U.T.C. §1101 as well as the purpose of a uniform act. U.T.C. §1101 states:

> In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

In other words, a judge in a U.T.C. state is also to consider decisions in other U.T.C. states. Any future "minority discretionary-support line of trust cases" in Ohio, Connecticut, or possibly Pennsylvania (assuming all three states pass the U.T.C.) could now be used to create an available resource in a state that formerly never had one. Further, the comment now conflicts with the "uniformity" purpose of a uniform act. A uniform act sets out to have only one meaning or interpretation to a specific section of the uniform act. Unfortunately, this conflict appears to undermine that goal. Worse yet, it may provide that all beneficiaries hold an enforceable right to force a distribution consistent with the interpretive guide to the U.T.C., the Restatement Third.

Interestingly, this amended comment causes even further confusion. Section 106 states:

> The common law of trusts and principles of equity supplement this [Code], except to the extent modified by this [Code] or another statute of this State.

The comment under 504, creating substantive law, abolishes the 125-year discretionary-support distinction under common law. Therefore, if the distinction has been abolished, the amended comment directing us to look to state law in this area is irrelevant because the U.T.C. abolished the discretionary-support distinction.

For these reasons and many others, the U.T.C. is not a model of clarity or an example of how a statute should be drafted.

Where Is the Bright Line in the U.T.C.?

In Part I of this three-part series, we compared the U.T.C. to the Titanic. On the surface it appears solid and is touted as the greatest ship ever built. However, after scratching the surface, it is apparent that there are major flaws in the underlying structure.

Also noted in our prior article, in the area of asset protection of beneficial interests, both the Restatement Third and the U.T.C. rewrite trust law on an unprecedented scale. While proponents of the U.T.C. self-proclaim the unsupported proposition that the "continuum of discretionary trusts" is the modern view of trust law, this statement remains unsupported by case law. Rather, in over 44 years since the Reporter of the Restatement Third first espoused this theory, only one and possibly two appellate cases have followed this new view of trust law in any meaningful way. If this is the case, the continuum of discretionary trusts is not even an emerging trend, let alone the so-called "modern view." Rather, the continuum of discretionary trusts is a view that appears to have been rejected by the wisdom of almost every appellate court.

This theory never would have gained judicial acceptance because it is fundamentally flawed. Practitioners require definite guidelines so they can draft trusts to achieve a stated goal. Elder law attorneys require certainty to ensure that their clients do not have an enforceable right,[2] thus precluding the trust assets from being an "available resource" and disqualifying the client from governmental benefits.

Now that the structural flaws in the "continuum of discretionary trust" theory are being published, NCCUSL has begun to make small changes. Interestingly, proponents of the U.T.C. remain unable to answer the lynch pin question, what is the specific distribution language that protects a beneficiary from having an enforceable right or an available resource under the U.T.C.? Under the Restatement Third, there is no language that a practitioner can use to ensure this result. The Restatement Third finds any such guidelines "arbitrary and artificial."

What about the U.T.C.? What is the specific distribution language that protects a beneficiary from having an enforceable right? Unfortunately, the Uniform Trust Code specifically references Sections 50 and 60(a) of the Restatement Third. These are the sections that adopt the "continuum of discretionary trusts," and this is where the Restatement Third specifically states any such guidelines are "arbitrary and artificial." Therefore, does the U.T.C. adopt the Restatement Third's view? The answer to this question will be explored in this and the next part of this article. However, first we must begin an analysis under common law, and then explore the divergence taken from common law by the Restatement Third and the U.T.C.

Three Levels of Protection Under Common Law

Prior to the U.T.C. and Restatement Third, there were three common law principles of trusts where asset protection was recognized, *to wit*: (1) discretionary trusts; (2) support trusts; and (3) protective trusts.

Discretionary Trust

Under the discretionary-support dichotomy, a trust was classified as either a discretionary or a support trust. Key to this entire analysis is the definition of the term "discretionary trust." Factors that a court considered in determining whether the settlor intended to create a common law discretionary trust follow:

- Words stating that the trustee had "uncontrolled discretion"
- The use of the permissive word "may" instead of "shall"
- The ability of the trustee to discriminate between beneficiaries
- The use of no standard or a standard incapable of judicial interpretation[3]

An example of a discretionary distribution standard was, "The Trustee *may* distribute as much or more of the net income and principal as the Trustee, *in its sole and absolute discretion*, deems appropriate to or among any beneficiary or beneficiaries." While some elder law attorneys use no standard in their SNTs,[4] most estate planning attorneys use a standard that is either capable or incapable of judicial interpretation.

Some proponents of the U.T.C. focus on only one of the four major factors above to the exclusion of the others,[5] and at the same time, ignore the fact that both the U.T.C. and the Restatement Third abolish the discretionary-support dichotomy. They attempt to direct our attention solely to the element of "uncontrolled discretion." They argue that there were "discretionary trusts" and "discretionary trusts with extended discretion" under common law. This argument deflects their readers from the real issue that has been presented. The key issue is that the Restatement Second set forth a "bright line" where planners could plan and decide what type of trust they wanted.[6]

As stated in SCOTT ON TRUSTS, citing the RESTATEMENT (SECOND) OF TRUSTS, a creditor cannot reach the assets of a discretionary trust, because a beneficiary has no enforceable right:

> "An assignee of the interest of the beneficiary cannot compel the trustee to pay to him or to apply for his use any part of the trust property. In such a case, an assignee of the interest of the beneficiary cannot compel the trustee to pay any part of the trust property, nor can creditors of the beneficiary reach any part of the trust property." The trust is purely discretionary where the trustee may withhold income and principal altogether form the beneficiary, but not where he has discretion only as to the time or method of making payments to the beneficiary or applying the trust fund for his benefit.[7]

Spendthrift Trust

A second form of protection is spendthrift protection. Originally, spendthrift protection was absolute—there were no exceptions. However, over time, certain exception creditors developed, and the protection afforded by spendthrift trusts in states adopting these exception creditors were significantly reduced.[8]

The RESTATEMENT SECOND defined the following four exceptions:

1. Alimony or child support
2. Necessary services or supplies rendered to the beneficiary
3. Services rendered and materials furnished that preserve or benefit the beneficial interest in the trust
4. A claim by the United States or a state to satisfy a claim against a beneficiary[9]

Under the discretionary-support dichotomy, a discretionary trust almost always included a spendthrift provision. However, it did not rely on spendthrift protection for asset protection purposes. On the one hand, the superior asset protection feature of a discretionary trust is that a beneficiary did not have an enforceable right and that meant that no creditor could step in the shoes of a beneficiary. On the other hand, a support trust always relied solely on spendthrift protection.

Protective Trust

As illustrated in common law, there are many times that a third layer of asset protection for a beneficial interest in a trust is needed. This type of beneficial interest is sometimes referred to as a "protective trust." With this type of trust, "a creditor cannot compel the trustee to pay anything to him or her, because the beneficiary could not compel payment ... in any way except for the restricted purposes set out in the terms of the trust."[10] The RESTATEMENT SECOND refers to this type of trust as a trust for the beneficiary's education or support.[11]

The RESTATEMENT SECOND limitation to "education or support" is probably overly restrictive. The concept is that a trustee can only make distributions for what has been authorized by the settlor. "Luxury" or "special needs" language stems from this concept. The following language illustrates a protective trust combined with a discretionary trust:

> The trustee may make distributions to the SNT beneficiary in the trustee's sole and absolute discretion for health, education, maintenance, support, comfort, general welfare, and happiness. However, the trustee's discretion in the previous sentence shall be limited to providing a distribution that will not cause the SNT beneficiary to be ineligible for governmental financial assistance benefits, in the event the SNT beneficiary is receiving such benefits. Any undistributed income shall be added to principal. The trustee's discretion in the first sentence of this paragraph is also limited to making discretionary distributions to or for the benefit of SNT beneficiary for those special needs not otherwise provided by governmental financial assistance and benefits, or by the providers of services.

With the above language, if a beneficiary is receiving governmental benefits, the protective language prevents the trustee from making any distributions that would either create an available resource or be covered by governmental benefits. A protective trust provides some measure of asset protection because a trustee may not exceed its distribution authority. However, the RESTATEMENT SECOND provides that an exception creditor can still pierce a protective trust.[12]

The New "Properly Drafted" Theory or a Massive Change in Trust Law

As discussed in *The Uniform Trust Code: A Threat to All Special Needs Trusts,*[13] there are primarily two

methods of drafting special needs trusts. One method is to draft a discretionary trust that also includes "special needs" or "luxury language." The second method is to draft a pure discretionary trust under state law. Since publication of this article, some proponents of the U.T.C. have asserted that the U.T.C. does not harm SNTs if they are "properly drafted." This response begs the question, what do the proponents define as "properly drafted"? A couple proponents of the U.T.C. claim a properly drafted SNT is one with a "purely discretionary standard without a support standard or a discretionary trust that states its purpose as being to supplement rather than to supplant public benefits."[14]

In most states, a trust that qualifies as a discretionary trust permits the trust to be coupled with a standard trust without creating an enforceable right with a beneficiary. Thus, there is no available resource issue. For example, a prominent California estate planning attorney sent one of the authors the following e-mail after reading the article, *The Uniform Trust Code: A Threat to All SNTs*:

> Congratulations on your article in T&E. I just spotted it. In fact, I have a client who died recently, not knowing that her missing daughter was living outside the state on public benefits. We had a provision in the document for her that went into effect only if she were found within five years of client's death. We found her, but had not inserted any special needs language in the document. Working with [a prominent and recognized expert in special needs trusts], we asserted that the discretionary language of our trust was sufficient for it to serve as a special needs trust for the disabled beneficiary. The regulatory department agreed with us.

The proponent's conclusion that SNTs that contain no standard are protected under the U.T.C. is at best misleading. Once the Restatement Third and most likely the U.T.C. rewrite common law, no one can be certain that protective, luxury or supplemental needs language will, in fact, protect the interest. The fallacious assumptions made by the proponents will be discussed in detail in Part III of this article.

Finally, contrary to one of the proponent's current positions, the Ohio Elder Law Committee on an informal vote unanimously rejected the U.T.C. Interestingly, this same proponent led the charge against the U.T.C. until Ohio added a "wholly discretionary trust." While the Ohio wholly discretionary trust is a small step in the right direction, it does not approach the benefits available under common law. The Ohio approach and the approach by other states to rectify the U.T.C. errors will be more thoroughly discussed in Part IV of this article.

The Undefined Continuum of Discretionary Trusts Nothing More Than a Continuum of Support Trusts

Proponents of the U.T.C. admit the so called "continuum of discretionary trusts" is nothing more than a continuum of support trusts, thus all trusts under the U.T.C. must rely exclusively on spendthrift protection. As noted above, the 2005 amended comment under Section 504 to the U.T.C. states:

> By eliminating this distinction [the discretionary-support distinction], the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard, or both.

Unfortunately, when rewriting over 100 years of American trust law and hundreds of years of English trust law, it appears that this new theory of trust law has missed several key creditor issues. Some creditor issues do not depend on whether the creditor has an enforceable right to force a distribution, but rather whether the beneficiary holds such right. For example, regarding third-party SNTs, the issue is whether or not a beneficiary has an enforceable right to a distribution. If a beneficiary has an enforceable right, he or she most likely will be disqualified from any governmental benefits.

The Undefined Continuum

As discussed below, common law provided a bright line to determine whether a beneficiary had an enforceable right. The purported "continuum of discretionary trusts" contains no such bright line; it is undefined with the following exception provided by the Restatement Third[15]:

> The fact of the matter is that there is a continuum of discretionary trusts, with the terms of discretionary trusts, with the terms of the distributive powers ranging from the most objective (or "ascertainable," IRC 2041) of standards (pure sup-

port) to the most open ended (e.g. "happiness") or vague ("benefit") or standards, or even with no standards *(for which a court will probably apply a general standard of reasonableness).*

Unlike the RESTATEMENT SECOND OF TRUSTS, under the U.T.C., there are no bright lines of where distribution standards will be classified. Further, there is no definition of what type of rights a beneficiary has to a distribution. Does he or she have an enforceable right or an available resource? Does he or she have a right to force a minimal distribution, which would be an available resource? Does he or she have a right to force a distribution pursuant to a standard incapable of judicial interpretation? Does he or she have a right to force a distribution in a discretionary trust when there is an ascertainable standard?

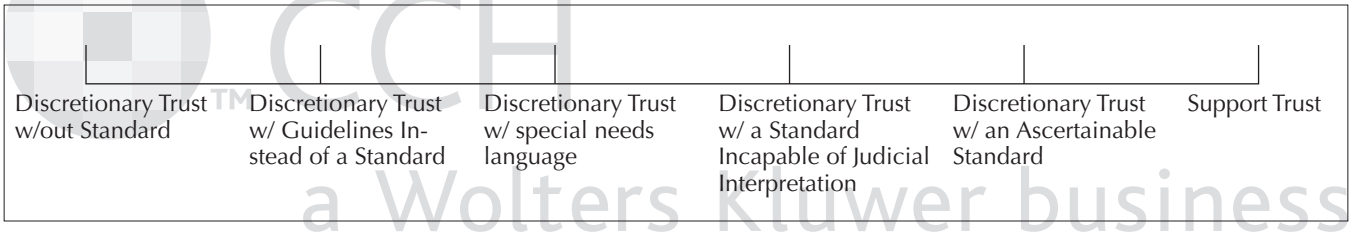
In order to further discuss the enforceable right and available resource issue for third-party SNTs under the RESTATEMENT THIRD and the U.T.C., the various distribution methods that SNT attorneys use must be analyzed. Cynthia Barrett, in her article, *Distribution Standards for the Special and Supplemental Needs Trust,* uses six classifications.[16] We have modified Cynthia Barrett's six classification system by subdividing one category into two categories: (1) those discretionary support trusts that have a support standard that is limited by an ascertainable standard; and (2) those discretionary support trusts that are incapable of judicial interpretation.

1. Mandatory Support = Shall make distributions HEMS
2. Discretionary trust with an ascertainable standard such as HEMS
3. Discretionary trust with a standard incapable of judicial interpretation
4. Discretionary trust with special needs language
5. Discretionary trust with no standard, and with guidelines
6. Discretionary trust with no standard and no guidelines
7. Strict SNT—prohibiting distributions for food, clothing, or shelter

Cynthia Barrett notes that most SNT planners find the last method of drafting much too restrictive; thus, few planners use it. However, we will analyze this method of drafting separate from the new undefined continuum of discretionary trusts. We have proposed the continuum below for purposes of analysis, where the first six types of these trusts are analyzed from the discretionary nature of the interest. Part III of this article will further analyze whether the "protective language" provides any or possibly how much additional protection for an SNT.

It should be noted, that while we have proposed the below classification, many attorneys will not entirely agree with such a classification, and they have different opinions of how the classifications should be made. It should also be noted that since attorneys have differences of opinion regarding the continuum of discretionary trusts, one cannot expect that judges within and between U.T.C. states will be any different. Hence the term "continuum of continuing litigation" may be much more appropriate than the term "continuum of discretionary trusts."[17]

Chart 1



Examples of Distribution Language on a Continuum

Below each subtitle is an example of the type of language a drafting attorney might use.

Discretionary Trust Without Standards

The trustee *may*, in the trustee's *sole and absolute discretion,* make distributions to the beneficiaries on schedule 2. The trustee, in its sole and absolute discretion, at any time or times, may exclude any of the beneficiaries or make *unequal distributions among them.*"

Discretionary Trust with Guidelines Instead of a Standard

The trustee *may*, in the trustee's *sole and absolute discretion,* make distributions to the beneficiaries on schedule 2. The trustee, in its sole and absolute discretion, at any time or times, may exclude any of the beneficiaries or make *unequal distributions among them*." However, it is the Settlor's wish, although it is not required, that the trustee make distributions for health and any family emergencies.

Discretionary Trust with Precatory Guidelines

Trustee may pay to or apply for the benefit of the Beneficiary's lifetime, such amounts from the principal or income as Trustee in Trustee's sole discretion may from time to time deem necessary or advisable for the support, maintenance, health, education, comfort and welfare of Beneficiary.

It is the settlor's intent for purposes of determining Beneficiary's eligibility for governmental benefits, that no part of the principal or income of the trust estate shall be considered available to Beneficiary. It is also the settlor's intent that no part of the corpus of the trust created herein may be used to supplant or replace public assistance benefits of any local, state, federal or governmental agency. The purpose of this trust is to provide Beneficiary with goods, services and other items that are not provided or reimbursed by agencies of government. The instructions in this paragraph are precatory, and nothing contained herein shall be construed to limit the absolute discretion of the Trustee.

Discretionary Trust with Special Needs Language

The trustee may make distributions to the SNT beneficiary in the trustee's sole and absolute discretion for health, education, maintenance, support, comfort, general welfare, and happiness. However, the trustee's discretion in the previous sentence shall be limited to providing distribution that will not cause the SNT beneficiary to be ineligible for governmental financial assistance benefits, in the event the SNT beneficiary is receiving such benefits. Any undistributed income shall be added to principal. The trustee's discretion in the first sentence of this paragraph is also limited to making discretionary distributions to or for the benefit of an SNT beneficiary for those special needs not otherwise provided by governmental financial assistance and benefits, or by the providers of services.

Discretionary Trust with a Standard Incapable of Judicial Determination

The trustee *may* distribute as much or more of the net income and principal as the trustee, *in its sole and absolute discretion,* deems appropriate to or among any beneficiary or beneficiaries for their health, education, maintenance, support, comfort, general welfare, joy and happiness. The trustee, in its sole and absolute discretion, at any time or times, may exclude any of the beneficiaries or make *unequal distributions among them.*

Discretionary Trust with an Ascertainable Standard

The trustee *may* distribute as much or more of the net income and principal as the trustee, *in its sole and absolute discretion,* deems appropriate to or among any beneficiary or beneficiaries for their health, education, maintenance, support. The trustee, in its sole and absolute discretion, at any time or times, may exclude any of the beneficiaries or make *unequal distributions among them.*

Support Trust

The trustee shall distribute as much or more of the net income and principal as the trustee deems appropriate to or among any beneficiary or beneficiaries for their health, education, maintenance, support.

Where Was the Bright Line Under Common Law?

Most states followed the RESTATEMENT SECOND, which gave a strong preference to finding a discretionary trust anytime the trustee was given unfettered discretion in making distributions. RESTATEMENT SECOND §155 states:

> Except for self-settled trusts, "if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary so much of the income and principal or either as *the trustee in his uncontrolled discretion shall see fit to pay or to apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal.*"[18]

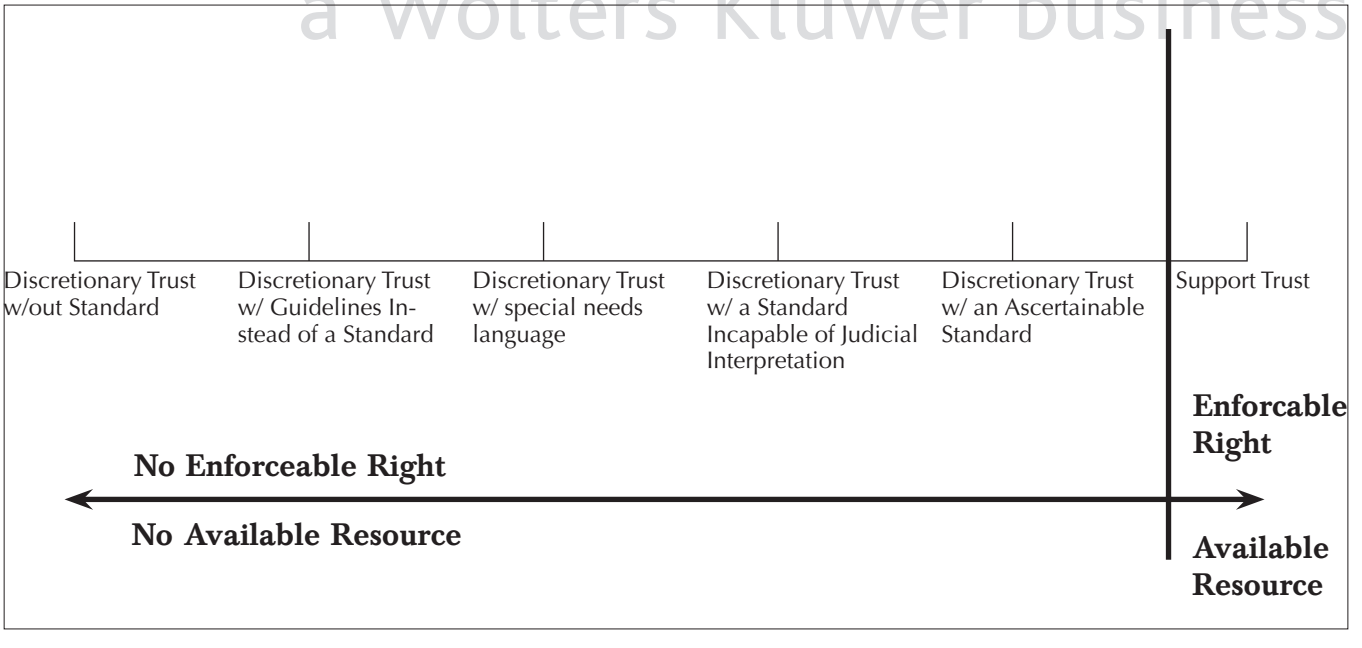
When determining whether a trust would be classified as a discretionary trust, most courts agree that the unfettered language would take precedence over any standard, even an ascertainable standard. Other factors, such as the making of unequal distributions when combined with sole and absolute discretion would make the issue almost conclusive that the settlor intended to draft a discretionary trust. Further, with some courts, a support trust that included a standard incapable of judicial determination could actually indicate that the settlor wished to create a discretionary trust, where the beneficiary would not have any enforceable right to a distribution.

Maximizing Tax and the Special Needs Benefits

As noted above, following the RESTATEMENT SECOND, it appears most state courts that have ruled on the issue will allow a discretionary trust with an ascertainable standard not to create an enforceable right. Some estate planning attorneys/elder law attorneys use such state law to maximize both the estate tax objectives and asset protection objectives of a client. For example, some estate planning attorneys sometimes use the following planning model where the adult child without a disability is the trustee of a special needs trust created by one of the parents for a disabled child. The trustee is given the power to make discretionary distributions in his or her sole and absolute discretion limited by an ascertainable standard.

If there are no estate tax inclusion issues with the above model,[19] in most states, the elder law attorney has achieved the greatest amount of control and benefit at the lowest cost. First, rather than using a corporate trustee, a family member (other than the settlor's spouse) is used, thereby saving annual trustee fees. Second, the disabled child is not limited to receiving distributions only for supplemental needs. Rather, the trustee has wide discretion only limited by the ceiling of health, education, maintenance and support. As noted above, this appears to be the majority position that is also adopted by the Colorado

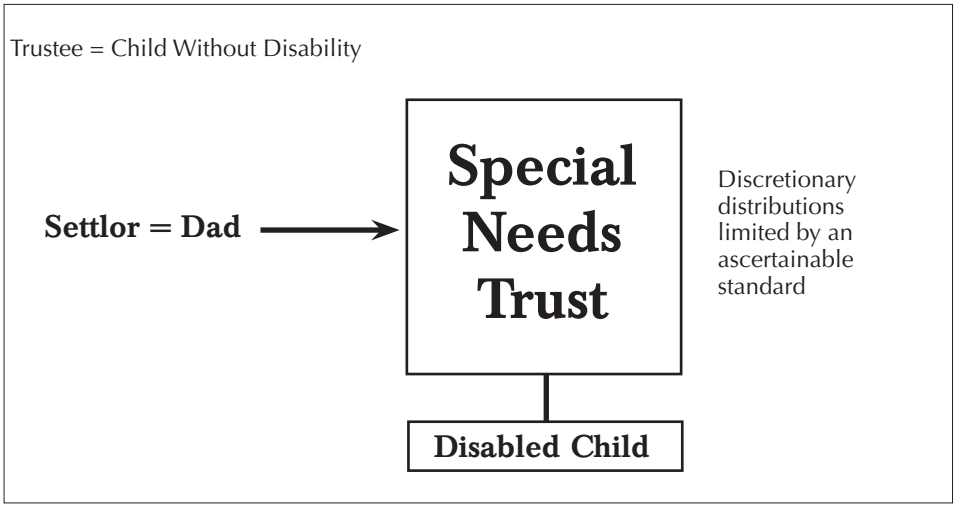
Chart 2



courts in the following line of cases: *In re Jones, Seidenberg v. Weil*, No. 95-WY-2191-WD (D. Colo. 1996), as well as the Colorado Department of Health Care Policy and Financing's explicit adoption of this approach in 10 CCR 2505-10, §8.110.52(D)(2)(d).

Some elder law attorneys will disagree with such a model. They will point to Cliff Kruse's book, THIRD PARTY SNTs and the list of discretionary-support cases where many times a court classified a discretionary-support trust as a support trust allowing the governmental agency to attach the benefits. When one reconciles the court holdings in this book as well as other cases, for the most part, one finds out that the discretionary-support line of cases is a minority line of discretionary-support cases that we discussed in Part I of our article—currently held by two to possibly three states (Ohio, Connecticut, and, with some additional factors, Pennsylvania). Therefore, unless the state Department of Health Care Policy adopted a position that was similar to the discretionary-support line of cases,[20] this form of drafting was a "proper" form of drafting prior to the RESTATEMENT THIRD or U.T.C.

Chart 3



Where Do Many Banks Want the Bright Line?

Where an individual trustee may have had personal knowledge of the settlor's wishes, a corporate trustee usually has little knowledge of the beneficiaries, morals and background of the settlor. Corporate trustees must look to the trust instrument to determine the settlor's intent. In this respect, Bruce Talen of Commerce Trust Company in Missouri notes that many corporate trustees are reluctant to administer a discretionary trust that does not contain any standards or guidelines. Further, many corporate trustees prefer standards instead of guidelines, because a standard must be followed where a guideline allows for greater controversy between beneficiaries. In other words, corporate trustees are able to easily work within the common law definition of a discretionary trust, which includes a distribution standard. However, many corporate trustees find a discretionary trust without any standards or guidelines somewhat unacceptable, sometimes to the point of declining trust business.

Iowa Trust Code

Iowa was one of the states that followed the minority line of discretionary support trust cases. In other words, with any Iowa discretionary trust coupled with a standard, the trustee could be compelled to make a minimum distribution on behalf of the beneficiary—hence, the creation of an available resource.

The primary drafter of the Iowa Trust Code, Professor Martin Begleiter, concurs with the authors that the minority discretionary trust cases are an aberrational line of cases. Therefore, in early 2004, the Iowa Trust Code was amended with the following language to hopefully eliminate this line of cases, and allow elder law attorneys to draft SNTs that contain a standard for distribution:

> In the absence of clear and convincing evidence to the contrary, language in a governing instrument granting a trustee discretion to make or withhold a distribution shall prevail over any language in the governing instrument indicating that the beneficiary may have a legally enforceable right to distributions or indicating a standard for payment of distributions.[21]

While the intent behind the Iowa Trust Code amendment is laudable, it is unclear why the Iowa Supreme Court did not comment why it did not follow the strong statutory presumption against the discretionary support trust *In the Matter of George G. Barkema Trust.*[22]

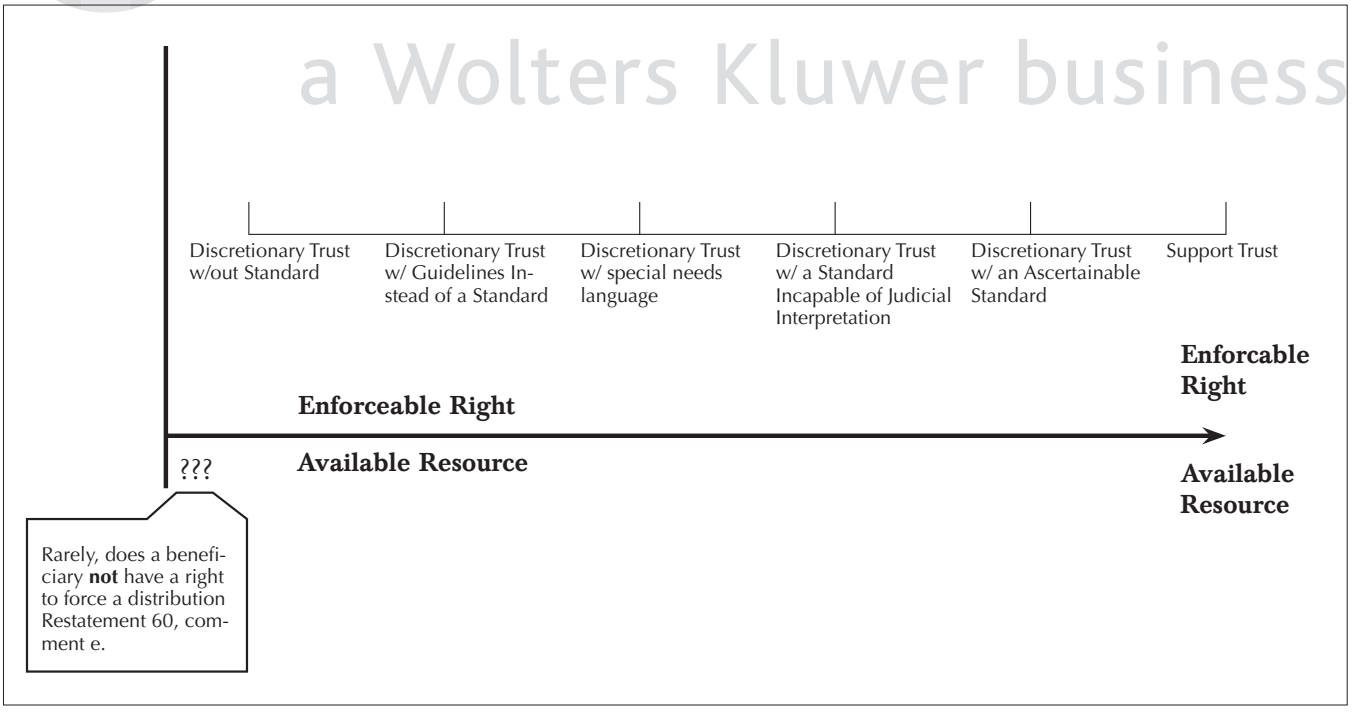
Where Is The Bright Line Under the RESTATEMENT THIRD?

Where the RESTATEMENT SECOND §155 has a strong propensity to classify a trust as a discretionary interest,

and consequentially the beneficiary does not have an enforceable right, the RESTATEMENT THIRD takes the exact opposite approach. In almost all cases, regardless of how discretionary the distribution language, a beneficiary of a discretionary trust will have the right to force at least a minimal distribution. The following provisions out of the RESTATEMENT THIRD are directly on point that a beneficiary of a discretionary trust has the power to force a minimal distribution:

- At first blush, it appears the RESTATEMENT THIRD follows the common law discretionary trust view when it states, "A transferee or creditor of a trust beneficiary cannot compel the trustee to make discretionary distributions if the beneficiary personally could not do so."[23] However, the following sentence negates the above sentence. It states, "It is rare, however, that the beneficiary's circumstances, the terms of the discretionary power, and the purposes of the trust leave the beneficiary so powerless."[24]
- "Reasonably definite or objective standards serve to assure a beneficiary some minimum level of benefits, even when other standards are included to grant broad latitude with respect to additional benefits."[25] In other words, similar to the aberrational line of discretionary-support trust cases in Ohio, Connecticut and to a lesser extent Pennsylvania, the RESTATEMENT THIRD adopts this distinct minority position line of cases where a discretionary trust with a standard creates an enforceable right.
- Contrary to our wishful U.T.C. proponent's view, even if a trust does not include a standard, under the RESTATEMENT THIRD, the SNT beneficiary is not safe. "It is not necessary, however, that the terms of the trust provide specific standards in order for the trustee's good-faith decision to be found unreasonable and thus constitute an abuse of discretion."[26] The RESTATEMENT THIRD goes further and imputes a distribution standard if there is no standard or guideline when it states, "Sometimes trust terms express no standards or other clear guidance concerning the purpose of a discretionary power, or about the relative priority intended among the various beneficiaries. Even then a general standard of reasonableness or at least good-faith judgment will apply to the trustee (Comment b), based on the extent of the trustee's discretion, the various beneficial interests created, the beneficiaries' circumstances and relationships to the setttlor, and the general purposes of the trust."[27]
- Also, contrary to the comments made by some U.T.C. proponents, the Comment under Section 60(a) states that, "The fact of the matter is that there is a continuum of discretionary trusts, with the terms of the distributive powers ranging from the most objective (or "ascertainable," IRC 2041 of standards (pure "support") to the most open ended (*e.g.*, "happiness") or vague ("benefit") of standards, or even with no standards manifested (for which a court will probably apply "a general standard of reasonableness."

Chart 4



(Emphasis added.) In other words, it is the RESTATEMENT THIRD's view that a "reasonableness standard" of review should be applied to most discretionary trusts, regardless of whether or not the trustee is granted "sole," "absolute" or "unfettered" discretion.

- Regarding rights between remainder beneficiaries, the RESTATEMENT THIRD takes issue with common law that all (or none) of the trust could be distributed to a discretionary beneficiary. Referring to common law, "This "one-sided" liberalization of the discretionary authority, where a court finds the settlor's language was intended to assure generosity in favor of a life beneficiary, would thus tend to encumber the efforts of remainder beneficiaries who seek to challenge what might otherwise be excessively generous decisions by a trustee."[28]

After reviewing the above quotations as well as reading Sections 50 and 60 (including comments and reporter comments), it is apparent that "it is rare, however, that the beneficiary's circumstances, the terms of the discretionary power, and the purposes of the trust leave the beneficiary so powerless" that such beneficiary cannot force a minimal distribution. As demonstrated by the minority line of discretionary-support cases, this creates a right to a minimal distribution, and many times disqualifies the beneficiary from governmental assistance. A graph of the seismic changes to the common law taken by the RESTATEMENT THIRD is detailed in Chart 4.

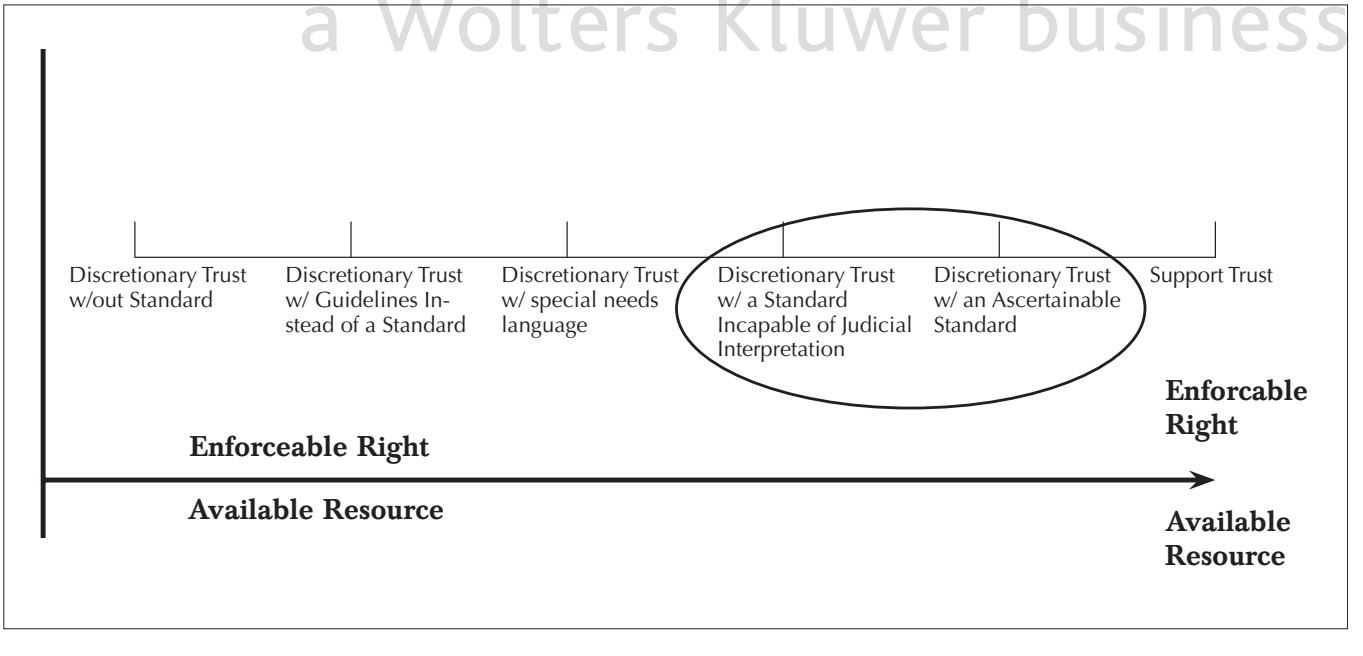
Because Chart 4 is for discussion purposes only, estate and special needs planning attorneys may define the graph or the level of discretion differently. In fact, even the authors disagree between themselves. For example, one author believes that since the RESTATEMENT THIRD now imputes a standard for all trusts that do not include one, and that the review standard may be reasonableness instead of the common law review standard of (1) improper motive; (2) dishonesty; or (3) failure to act, that a discretionary trust with specific guidelines regarding creditors would now be more protective than a discretionary trust with no standard and no guidelines. Another argues that a discretionary trust, which includes a standard but uses a spigot (*i.e.,* a toggle) to prevent distributions if the beneficiary is disabled is more protective. The use of guidelines, triggers, spigots (*i.e.,* toggles), as well as protective special needs language will be discussed in Part III of this article. However, it appears that some proponents as well as the authors' concerns are in agreement that the U.T.C. and RESTATEMENT THIRD currently threaten SNTs that rely on discretionary trust protection under common law.

Although two U.T.C. proponents claim that these trusts are improperly drafted for SNT purposes, we beg to differ. The only reason that these trusts are in immediate threat of danger is the massive change in common law under the RESTATEMENT THIRD and U.T.C. abolishing the discretionary-support distinction in favor of a continuum of discretionary trusts.

Many SNT Attorneys Ask, "Why Change Common Law?"

It appears that one of the primary reasons for the change is that an Associate Professor in 1961, who is now the Reporter for the RESTATEMENT THIRD, disagreed with the

Chart 5



rule adopted by both the First and Second Restatement of Trusts, §187, comment j. that the words "absolute," "unlimited" or "uncontrolled" discretion dispensed with the standard of reasonableness, leaving the beneficiary powerless to force a minimal distribution. It is the Reporter's view that rarely will a beneficiary of a discretionary trust not have at least some right to force a minimal distribution. This reason, as well as some others that are articulated in the RESTATEMENT THIRD, is discussed below:

- Settlor intended that destitute beneficiaries have an enforceable right to force a distribution from a discretionary trust.
- Apparently, as a rule (rather than an exception), drafting attorneys may be unknowledgeable when drafting discretionary trusts.
- Most, if not all, state courts created "artificial and arbitrary" law when creating the discretionary-support distinction.
- There has been much costly litigation, because of the discretionary-support distinction, so the "bright-line standard should be replaced with a "fact and circumstance" test.

The Destitute Discretionary Beneficiary Argument

On the one hand, when the RESTATEMENT THIRD and the U.T.C. abolished this bright line, the Reporter for the RESTATEMENT THIRD as well as the proponents of the U.T.C. brought up less than a dozen destitute discretionary beneficiary cases. These cases focused on the rare situations where a destitute beneficiary was denied distributions and also could not meet the judicial review standard for a common law discretionary trust: A trustee (1) acted with an improper motive; (2) acted dishonestly; or (3) failed to act.[29] In these discretionary trust cases, the court used its equitable powers to look into extrinsic evidence and determine that the settlor intended that the trust beneficiary actually held a right to force a minimal distribution. Some proponents take note that since judges rewrote the distribution language to aid the destitute beneficiary, there is rarely a situation where a beneficiary does not have an enforceable right to a distribution. Hence, the abolishment of the discretionary-support distinction, and the creation of the continuum of discretionary trusts (or more properly titled—continuum of support trusts).

On the other hand, those expressing concerns with the U.T.C. do *not* rely on less than a dozen cases where "bad facts" may have created the RESTATEMENT THIRD's position of law. Instead, they rely on hundreds of cases where whether a beneficiary would be denied governmental aid or the government would be able to reach the trust assets depended on whether the beneficiary had a right to force a distribution. Hundreds of cases cited under Westlaw key cite 390K280, the entire issue of whether the trust would protect an SNT beneficiary depended upon the beneficiary not having an enforceable right, and these trusts were classified as "discretionary trusts" under the discretionary-support trust dichotomy. Had a court rewritten the settlor's intent for these trusts as in the case of the destitute beneficiary discussed above, almost all of these trusts would have failed the SNT beneficiary.

Implied Assumption That Many Drafting Attorneys Are Not Knowledgeable

In 1961, the reporter for the RESTATEMENT THIRD also took the position that the average drafting attorney did not know whether or not he or she wished to create an enforceable right in a beneficiary when drafting a discretionary trust. Therefore, the Reporter assumes drafting planners mistakenly draft discretionary trusts when they actually want the beneficiary to have an enforceable right or in essence a support trust. For this reason, the Reporter argues that when standards or guidelines are included in a discretionary trust, the RESTATEMENT SECOND's position that the terms "sole and absolute" discretion dispense with the standard of reasonableness should not be followed. Rather, a beneficiary should always have a right to at least a minimal distribution[30] and the amount of such distribution should be determined on a continuum of discretionary trusts.

To support its underlying assumption that most estate planning attorneys are unknowledgeable with respect to this drafting issue, the Reporter notes that many drafting attorneys use form books without knowing that the terms "sole and absolute" dispense with the standard of reasonableness in a discretionary trust. There are three points to note. First, your authors doubt attorney lack of knowledge was a major issue in 1961. However, if there was a problem in 1961, today, the authors would strongly disagree with the implied assumption that most drafting attorneys are not knowledgeable. Today, there are professional organizations such as ACTEC, WealthCounsel, National Network of Estate Planners, the National Association of Elder Law Attorneys, State Bar Associations and many others that constantly train attorneys regarding drafting issues. In addition, there are readily available treatises, which describe the differences in the terms. Further, attorneys rely on a "bright line" test so that certain beneficiaries do not have an enforceable right in order to protect the beneficiaries from the claims of certain creditors.

Second, even if in 1961 the problem was overstated, one had to be more than slightly unknowledgeable. When one was drafting the distribution standard, an unknowledgeable attorney needed to make usually two to three drafting mistakes, rather than just one. As noted above, the drafting attorney needed to use either the permissive word "may," instead of the mandatory word "shall." Most discretionary trusts included a distribution standard that was incapable of judicial interpretation such as "the trustee may in the trustee's discretion make distributions for health, education, maintenance, support, comfort, general welfare, and happiness." In this case, the drafting estate planning attorney would need to have deliberately chosen not to limit the distribution powers of the trustee to an ascertainable standard.

Third, as an analogy, drafting a trust so that certain family members may serve as a trustee or co-trustee without an estate inclusion or drafting a trust so that it is or is not a grantor trust under Code Sec. 671, requires much more competency than drafting a trust to be a discretionary or support trust under state law. If estate planning attorneys are expected to meet the Internal Revenue Code standards, they may easily be expected to be knowledgeable enough to correctly draft discretionary or support trusts under common law.

Arbitrary and Artificial Argument

The Reporter of the Restatement Third and some proponents of the U.T.C. complain that the discretionary-support distinction is "arbitrary and artificial." First, one must note that this is a strong statement, because it literally questions the wisdom of almost every court in the nation that has ruled on this issue as well as both the rules adopted by the Restatement (First) of Trusts and the Restatement (Second) of Trusts. Second, the Restatement Third takes the position that it is not possible to draw lines between discretionary and support trusts. It states:

> Attempting to do so [distinguishing between discretionary and support trusts] tends to produce dubious categorizations and almost inevitably different results (based on fortuitous differences in wording or maybe a "fireside" sense of equity) from case to case for beneficiaries who appear, realistically, to be similarly situated as objects of similar settlor intentions.[31]

We respectfully disagree with the Reporter of the Restatement Third. Admittedly, there will always be cases where, due to budgetary constraints, a governmental agency will aggressively try to recover from a discretionary trust. There will also be many cases where an attorney drafted a "support trust" for a beneficiary, and now that the beneficiary is disabled wishes the trust could be interpreted as a discretionary trust. There is also the issue that different states have chosen to use slightly different discretionary and support trusts factors discussed above, resulting in different classification of trusts for beneficiaries, who appear to be similarly situated. Therefore, it appears that the simple solution to the problem is to define the discretionary-support distinction, with examples of safe harbors, by statute. This way, drafting attorneys will know whether they have created an enforceable right (*i.e.,* an available resource) or not. Unfortunately, the Restatement Third takes the opposite approach.

The Costly Litigation Argument

After complaining about the purported "arbitrary and artificial" distinctions created by almost every American court ruling on the discretionary-support issue, the Reporter complains about the costs of litigation regarding these cases:

> Not only is the supposed distinction between support and discretionary trusts "arbitrary and artificial," but the lines are also a difficult and costly to attempt. ... The price of the supposed distinction in litigation costs and the general goal of equitable treatment seems particularly noticeable in those of Medicaid and public-benefit cases that have succumbed to this deceptively simple appearing distinction [referring to the discretionary-support distinction].[32]

While there may have been more than a bit of litigation in this area, the simple solution is to define the bright lines, and have uniformity between the states. Instead, the Restatement Third provides a solution that is many times more problematic than the original problem—an undefined continuum of discretionary trusts, which is nothing more than a facts and circumstances test. Now each state that adopts the U.T.C. can define whether or not there is a bright line and what type of language would constitute a bright line (if there is one). In making this decision, under U.T.C. §1101, the forum state is suppose to give credence to out-of-state U.T.C. decisions, which would include the minority discretionary-support trust cases. Further, SNTs that do not contain a standard or a guideline may be imputed one based on a reasonableness judicial standard of review. In essence, few trusts are safe under the Restatement Third until this new continuum is defined and planners can determine what language, if any, will not create an enforceable right to a distribution. Litigation will be the norm on a scale many times greater than the common law solution. The authors are perplexed how a "facts and circumstances test" could

possibly result in less litigation than a "bright line test," particularly when the continuum and related rights are undefined, the RESTATEMENT THIRD reverses common law in this area, and all states may offer drastically different interpretations regarding a uniform act.

The U.T.C. View to Be Continued in Part III

The U.T.C. specifically references all of Sections 50 and 60(a) of the RESTATEMENT THIRD. How much of the RESTATEMENT THIRD is incorporated by reference? This will be discussed in Part III of this article.

Further, the 2005 amended comment to U.T.C. §814(a) attempts to provide some assurance that SNTs are not threatened when it states, "For example, distilling the results of scores of cases, the Restatement (Third) of Trusts concludes that there is a presumption that the trustee's discretion should be exercised in a manner that will avoid either disqualifying the beneficiary for other benefits or expending trust funds for purposes for which public funds would otherwise be available." On its face, this statement appears to be false. If there was a presumption, the hundreds of Medicaid discretionary-support distinction cases would never have existed. As will be discussed in Part III of this article, there are not scores of cases that have this holding, rather it is just another distinct minority position in the RESTATEMENT THIRD and the U.T.C. But even more troubling is the assumption under this distinct minority SNT presumption that is based on a reversal of common law rule regarding whether a trustee has a duty to look to a beneficiary's resources to determine whether a distribution should be made. At common law, absent specific trust language, a trustee did not have a duty to look to the beneficiary's other resources to determine whether a distribution should be made. As noted in the RESTATEMENT THIRD §50, comment e, "This comment adopts a position different from that stated in prior Trusts Restatements, and one that seems more realistic [in the Reporter's opinion] as a reflection of probable settlor objectives, and therefore one that is more practical help to the courts and trustees." Whether U.T.C. states will adopt this reversal of common law is completely uncertain. However, as explained in Part III of this article, the distinctly minority presumption that a trustee will not make distributions to an SNT beneficiary depends on it.

Conclusion

It does not appear that those expressing concerns regarding the U.T.C. and those proponents of the U.T.C. have much in common. We believe as the Pennsylvania Supreme Court stated:

> A settlor should not be required to either bankrupt his family or run the risk of leaving a handicapped member destitute or in want because of vagaries in the requirements for public assistance or in the level of funding for such assistance. Nor should he be required to place blind faith in the uncontrolled discretion of an individual trustee, whom the beneficiary may survive, or in a corporate trustee whose ownership, management and policies may change. We believe a settlor is entitled to maintain some control by means of a support standard, and at the same time reasonable flexibility through a grant of considerable discretion to the trustee(s), to ensure his purpose of providing reasonable care to the beneficiary who is or may be institutionalized without effectively disinheriting the other members of his family.[33]

We, therefore, respectfully disagree that a discretionary trust under common law that contains a support standard is improperly drafted. It is only when the Restatement Third and the U.T.C. follow the aberrational discretionary-support line of cases, are these trusts now in immediate threat of danger.

We also believe that SNT attorneys should be able to draft with the greatest tax efficiency and most economical administration of a trust, which allows the classification of a trust as lacking an enforceable right, even though the discretionary trust was coupled with an ascertainable standard. Finally, the idea that a judge is required to create a distribution standard when no standard was stated in common law, based on a reasonableness standard of review, is abhorrent to the common law as well as to the opinions of almost any practicing attorney.

ENDNOTES

* Mark Merric and Douglas Stein, *The UTC: A Threat to All Special Needs Trusts,* TR. & EST. (Nov. 2004); Mark Merric and Richard Oshins, *The Effect of the UTC on Spendthrift Trusts,* 31 ETPL 375 (Aug. 2004); Mark Merric and Richard Oshins, *UTC May Reduce Asset Protection on Non-Self Settled Trusts,* 31 ETPL 411 (Sept. 2004); Mark Merric and Richard Oshins, *How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC,* 31 EPTL 478 (Oct. 2004); Mark Merric, Carl Stevens and Jane Freeman, *The Uniform Trust Code—A Divorce Attorney's Dream,* J. PRAC. EST. PLAN., Oct.–Nov. 2004, at 33; Mark Merric, Douglas Stein and Jane Freeman, *The Uniform Trust Code: A Continuum of Discretionary Trusts or a Continuum of Continuing Litigation?* J. PRAC. EST. PLAN., Dec.–Jan. 2004, at 33; Mark Merric, Robert Gillen, Jane Freeman, *Malpractice Issues and the Uniform Trust Code,* 31 EPTL 586 (Dec. 2004); Mark Merric and Dan Collins, *Can the Uniform Trust*

Code be Fixed?, Lawyers Weekly—Heckerling Edition, Jan. 3, 2005; Mark Merric and Douglas Stein, *The UTC.: A Continuuing Threat to Estate Planning,* Estate Planning Review (CCH Interview), Jan. 21, 2005; Mark Merric and Douglas Stein, *The Uniform Trust Code and Asset Protection in Non-Self Settled Trusts,* Steve Leimberg's Asset Protection Newsletter #53, and Mark Merric, Douglas Stein, and Robert Gillen, *The Effect of the UTC on ILITs,* Steve Leimberg's Estate Planning Newsletter #733 at *www. leimbergservices.com*, Leimberg Information Services, Inc. (LISI); Mark Merric, II Asset Protection Strategies, at Ch. 3 (Alexander A. Bove, Jr., ed. 2005), published by the American Bar Association. For more information about this book, please contact the American Bar Association at *www.ababooksorg/* or (800) 285-2221. To download a copy of any of these articles on the U.T.C., please go to *www. InternationalCounselor.com*, then to "Publications" and to "Articles."

[1] Mark Merric, Carl Stevens and Jane Freeman, *The Uniform Trust Code—A Divorce Attorney's Dream,* J. Prac. Est. Plan., Oct.–Nov. 2004, at 33

[2] For purposes of this article, the term "enforceable right" means anything above "the mere expectancy of a distribution."

[3] Mark Merric and Richard Oshins, *The Effect of the UTC on Spendthrift Trusts,* 31 ETPL 375 (Aug. 2004); Mark Merric and Richard Oshins, *UTC May Reduce Asset Protection on Non-Self Settled Trusts,* 31 ETPL 411 (Sept. 2004); Mark Merric and Richard Oshins, *How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC,* 31 EPTL 478 (Oct. 2004).

[4] Many elder law attorneys are aware of the aberrational line of discretionary-support trust cases in Ohio, Iowa, and to a lesser extent Pennsylvania.

[5] Walsh, Davis, Kent, & Newman, *What is the Status of Creditors Under the Uniform Trust Code?* Estate Planning, Feb. 2005.

[6] With the exception of the two to possibly three aberrational holdings of the minority discretionary-support states, most states "bright line" are extremely close.

[7] Scott on Trusts, §155.

[8] It should be noted that while almost all discretionary trusts include a spendthrift provision, creditors are unable to access trust assets by the discretionary nature of the interest.

[9] Restatement (Second) of Trusts, §157.

[10] Restatement (Second) of Trusts, §154, comment b.

[11] *Id.,* §154.

[12] *Id.,* Section 154 refers to Section 157 as an exception. Section 157 lists the Restatement (Second) of Trusts four exception creditors.

[13] Mark Merric and Douglas Stein, *The UTC: A Threat to All Special Needs Trusts,* Tr. & Est. (Nov. 2004)

[14] Richard Davis and Kent Stanton, *The Impact of the Uniform Trust Code on Special Needs Trusts,* National Association of Elder Law Attorneys J., Fall–Winter 2005.

[15] Restatement (Third) of Trusts, §60, Reporter Comment a, at 416, second column, first full paragraph.

[16] Mark Merric, Douglas Stein and Jane Freeman, *The Uniform Trust Code: A Continuum of Discretionary Trusts or a Continuum of Continuuing Litigation?* J. Prac. Est. Plan., Dec.–Jan. 2004, at 33

[17] *Id.*

[18] Restatement (Second) of Trusts, §155(1).

[19] Code Sec. 2041 states that a donee does not hold a power of appointment if it is limited by an ascertainable standard. This appears to be the strong majority view. However, there is at least one case that argues that a ceiling limit may still result in estate inclusion. *R.H. Carpenter, Est.,* DC-Wis., 80-1 ustc ¶13,339; *Independence Bk. Waukesha (N.A),* CA-7, 85-1 ustc ¶13,613, 761 F2d 442, tangential reference to "without court approval"; analogy—LTR 9118017 (Feb. 1, 1991); *but see K.A. Best,* DC-Neb., 96-1 ustc ¶60,223, 902 FSupp 1023, where "sole and absolute" language was not argued by the IRS.

[20] For example in Virginia, it appears that the Department of Health has adopted this line even though Virginia case law has not.

[21] Iowa Trust Code 633.4702.

[22] *In the Matter of George G. Barkema Trust,* 690 N.W.2d 50 (Iowa 2004)

[23] Restatement (Third) of Trusts, §60, comment e.

[24] *Id.*

[25] Restatement (Third) of Trusts, §50, comment on subsection (2): d., first paragraph.

[26] Restatement (Third) of Trusts, §50, comment on subsection (1): b., third paragraph, last line.

[27] Restatement (Third) of Trusts, §50, comment on subsection (2): d., second paragraph.

[28] Restatement (Third) of Trusts, §50, comment c, last sentence.

[29] *In Re Jones,* 812 P.2d 1152 (Colo. 1991) (citing Scott on Trusts, §130 at 409 (4th ed. 1989); *Kansas Dept. of Social and Rehabilitation Services,* 254 Kan. 467, 866 P.2d 1052 (1994); *Simpson v. State, Dept. of Social and Rehabilitation Services,* 21 Kan. App. 2d 680, 906 P.2d 174 (1995); *Wright v. Wright,* 2002 WL 1071934 (not cited for publication) (Iowa App. 2002) (However, this is an excellent case of a psychotic child attempting to sue the parent trustees on a discretionary trust. Had the psychotic child had an enforceable right, the result would be more than problematic.); *First Nat. Bank of Maryland v. Department of Health and Mental Hygiene,* 284 Md. 720, 399 A.2d 891 (1979); *In re Tone's Estates,* 240 Iowa 1315, 39 N.W.2d 401 (1949); *Town of Randolph v. Roberts,* 346 Mass. 578, 195 N.E.2d 72 (1964). *Also see* the detailed analysis of Scott on Trusts, §187, at 15, where it is noted that if the distribution standard includes enlarged or qualifying adjectives such as "sole and absolute discretion" combined with "no fixed standard by which the trustee can be determined is abusing his discretion … the trustee's discretion would generally be deemed final." Furthermore, Section 187.2 provides, "[e]ven though there is no standard by which it can be judged whether the trustee is acting reasonably or not, or though by the terms of the trust he is not required to act reasonably, the court will interfere where he acts dishonestly or in bad faith, or where he acts from an improper motive." This analysis by Scott on Trusts remains consistent through the 2003 supplemental volume.

George Taylor Bogert also seems to hold relatively the same definitional analysis as Scott in The Law of Trusts and Trustees, 2d ed. 1980, supp. through 2003. Section 560 of the Supplement at 183 provides that if a settlor has given a discretionary power (without qualification), the court is reluctant to interfere with the trustee's use of the power. Hence, in the absence of one or more of the special circumstances mentioned hereinafter, the court will not upset the decision of the trustee. These special circumstances (at 196) are (1) a trustee fails to use his judgment; (2) an abuse of discretion; (3) bad faith; (4) dishonesty; (5) an arbitrary action. Regarding the issue of "arbitrary action," Bogert provides, "[i]f the trustee has gone through the formality of using his discretion, but has not deliberately considered the arguments pro and con, and thus has made a decision for no reason at all, his conduct may be characterized as arbitrary and capricious, as amounting to a failure to use his discretion." In this respect, Bogert suggests that the "arbitrary" action is a subset of a trustee failing to act.

[30] *Id.,* at 1428.

[31] Restatement (Third) of Trusts, §60, comment a.

[32] Restatement (Third) of Trusts, Reporter Comment a., second full paragraph on page 415.

[33] *Lang v. Com., Dept. of Public Welfare,* 515 Pa. 428, 528 A.2d 1335 (1987).