A Threat to All SNTs

In UTC jurisdictions, government agencies can now tap into supplemental needs trusts that lack special needs language. Ultimately, all SNTs are vulnerable

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Most people haven't noticed, but the Uniform Trust Code (UTC) and the Restatement (Third) of Trusts together abolish the 125-year-old common law distinction between discretionary and support trusts. The immediate effect: In the nine states and District of Columbia that have adopted the UTC in the last three years, state and federal agencies now have a greater ability to deny government benefits when families have created trusts to supplement the care of their elderly and disabled—unless the governing documents for these trusts contain specific "special needs" language. Many of these trusts don't, because drafters relied on the common law of most states that held a discretionary trust qualified as a special needs trust (SNT), even though it didn't have specific special needs language.

Little can be done in UTC jurisdictions. Discretionary trusts that do not have specific language will most likely constitute an "available resource," thereby disqualifying the beneficiary from government aid. Unless the drafter has included provisions that allow the trustee or the protector to modify the "irrevocable" supplemental needs trust, the trust door has been thrown open to the government in Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, Tennessee, Utah, Wyoming and the District of Columbia.

Advisors everywhere should temporarily protect the SNTs they're currently drafting for families by specifically including special needs trust language—just in case their states adopt the UTC. Unfortunately, the key word is "temporarily." While the UTC does not immediately affect third-party SNTs that do contain the special needs language, the elimination of the discretionary-support distinction completes one of two necessary steps for the government to tap into the assets of all third-party SNTs.

Also, those who practice in UTC jurisdictions should consider counseling clients to give their SNTs a running start by establishing them in a state that is unlikely to adopt the UTC. Practically speaking, only the wealthy can afford to operate SNTs long-distance. Clients should consider setting up any SNT with assets of more than $1 million outside UTC jurisdictions, regardless of where the settlors and beneficiaries reside. It may be uneconomical for middle-class and less affluent families to load the cost of an out-of-state corporate trustee onto SNTs that hold assets of $300,000 to $500,000.

Many times, family members are appointed as trustees of these trusts, and they agree to act as a trustee without any compensation. Still, advisors should try to find a lower-priced corporate trustee in a non-UTC state. Most corporate trustees charge a sliding percentage from one-half to two percent of the assets to manage them (meaning a $300,000 trust could be burdened with $6,000 in annual fees). But, in non-UTC states like Delaware, Nevada and Wyoming, some corporate trustees are available for as little as $2,000 to $3,000 a year to manage passive interests.

SPREAD OF THE UTC

All these problems began about three years ago, when the UTC was promulgated. At press time, the UTC had not only been adopted in nine states, but also was on the verge of being introduced or reintroduced in about 15 more. (See "The UTC on the March," p. 41.)

Some states have resisted the UTC. Arizona passed a rather pure version in May 2003; but, after unprecedented protests from the public and estate-planning lawyers, repealed it by a unanimous vote in both the House and Senate in 2004. The UTC also was defeated in the Colorado Senate, laid over in the Virginia Senate and died in Senate committee in Oklahoma. In Minnesota, Indiana and Texas, the act was studied by the bar and for the most part rejected. It appears that the UTC has little chance of being enacted in Alaska, Delaware, Illinois, New York and Nevada.

There are substantial reasons to dislike the UTC. Many observers have recognized that the law creates financial disclosure problems,[1] is likely to spark trust litigation, allows beneficiaries to rewrite a settlor's wishes after the settlor has died and decreases asset protection for spendthrift trusts. But few commentators have pointed out the UTC's devastating effect on SNTs—or its public policy implications. If left unchecked, the UTC could effectively create two Americas: one in which the fabulously wealthy shoulder the entire cost of caring for their disabled and elderly, and another where the middle class and the poor are forced to accept whatever level of care the government deems appropriate.

DRAFTING SNTS

The most immediate problem, though, is how to write supplement needs trusts so that they are less vulnerable.

There have been two theories on the drafting of SNTs. One was to include language that specifically precluded the use of the trust assets to provide any support that would displace public or private financial assistance.[2] This is frequently referred to as "special needs language"; it also can be called "secondary" or "luxury" language. (See "Special Needs Language," p. 44.)

The second theory is to keep the language as broad as possible and limit the trustee's discretion as little as possible, because, the thinking goes, a beneficiary may have many unforeseen needs or may actually recover from the disability.[3] Proponents of this approach reason that, if common law or government agencies do not require restrictive special needs language, why include such limiting language in the SNT? Discretionary language that would qualify as an SNT, if the beneficiary is not a spouse, reads something like this: "The trustee may distribute as much

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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 and support. The trustee, in its sole and absolute discretion, at any time or times, may exclude any of the beneficiaries or may make unequal distributions among them."

Those who relied on the second theory are in immediate danger in the UTC jurisdictions. Followers of the first theory will most likely see a gradual demise and eventual extinction of their SNTs, primarily because the UTC abolishes the distinction between a discretionary and a support trust.

THIRD PARTY SNTS

Supplemental needs trusts that include special needs language evolved from discretionary trusts. Generally, a discretionary trust is defined as one over which only the trustee has discretion to make distributions to beneficiaries. The trustee may make unequal distributions among the beneficiaries or even exclude a beneficiary. Under the Second Restatement of Trusts, promulgated in 1958, and almost all case law to date, a discretionary beneficiary has virtually no contractual or enforceable right to any income or principal from the trust.[4] Because no creditor (including a federal or state government agency) can receive greater rights to a trust than the beneficiary has, and because the beneficiary had no right to force a distribution from a discretionary trust, no creditor (including a federal or state government agency) can attach or force a distribution either.[5] The assets are virtually untouchable. This is why a discretionary trust functions as an SNT, and why one school of thought holds that nothing more is needed.

In this regard, the asset protection afforded by a discretionary trust is completely independent of spendthrift protection.[6] Asset protection of a discretionary trust stems from the limited review by courts for abuse. Under common law, a court reviews the exercise of a trustee's discretion with a discretionary trust only when the trustee acts (1) dishonestly, (2) with an improper purpose, or (3) fails to act (which may include acting arbitrarily and capriciously).[7] There is no reasonableness standard for a court to review a discretionary trust. In fact, Section 187, p. 408, of the Second Restatement states that qualifying adjectives such as "sole," "absolute," or "unfettered" discretion dispense with the standard of reasonableness.[8] Further, the discretionary interest is not assignable.[9] In this respect, a discretionary beneficiary's interest is generally not classified as an enforceable property interest (sometimes referred to as "nothing more than a mere expectancy").[10] As an expectancy, a discretionary interest is not an available resource for Medicaid or other government benefits.

AVAILABLE RESOURCE?

As if all this weren't bad enough, there's more. Not only did the UTC wipe out the advantage of a discretionary versus a support trust, but, along with the Third Restatement, it also lowered the standard necessary before a judge can review a trustee's actions regarding a discretionary trust. Now, under the UTC, a court can step in and review the trustee's distribution decisions to determine whether they were made in good faith[11] and, under the Third Restatement, a court can step in and review the trustee's distribution decisions for reasonableness.[12] While this may appear to be a minor change, the high standard of review by a court was the cornerstone for the creditor protection provided by a discretionary trust. The UTC has changed this in several ways.

First, under the UTC, a beneficiary of a discretionary trust has an enforceable right to sue the trustee pursuant to the distribution standard.[13] Even if the trust does not include a distribution standard, the court will infer a distribution standard based upon "the extent of the trustee's discretion, the various beneficial interests created, the beneficiaries' circumstances and the relationships to the settlor, and the general purposes of the trust."[14] Once the beneficiary has an enforceable right, he can force a distribution pursuant to the standard (therefore, most likely he has a "property interest"[15]). In other words, the creation of an enforceable right by the beneficiary under the UTC and Third Restatement results in the beneficiary having a resource, which in turn renders the beneficiary ineligible for Medicaid or other government benefits.

Unfortunately, we're not speculating about what might happen; we're reporting what is already taking place.

In Ohio, courts have held that virtually any time a discretionary trust is accompanied by any support standard, it is abuse for a trustee not to make a distribution to a destitute beneficiary.[16] Some planners refer to this type of trust as a "discretionary-support trust." While almost all states classify a discretionary-support trust as a "discretionary trust," which does not constitute an available resource, Ohio concluded that a beneficiary has an enforceable right to a minimal distribution—because the judicial standard of review has been lowered. A court in Ohio is now able to review a trustee's discretion to at least determine whatever a "minimal distribution amount is," and a beneficiary, as well as an exception creditor standing in the beneficiary's shoes, has the right to demand such a distribution.

Iowa has followed Ohio in this interpretation.[17] And, within the past five years, using a slightly different analysis, Pennsylvania courts have generally held that, if a discretionary-support trust was for one beneficiary and that sole beneficiary was not receiving

government benefits at the time the trust was created, then the settlor intended the principal of the trust to be an available resource for the beneficiary.[18] In other words, under the same fact pattern, regardless of the discretionary nature of the trust, a discretionary beneficiary in Pennsylvania had an enforceable right to demand a distribution.

Using a similar analysis, a Florida court in a divorce case[19] and a Connecticut court—in which a beneficiary sued for a distribution under a standard of "comfortable, maintenance, support, and education"[20]—came to the same conclusion.

The thread running through the court holdings in Ohio, Iowa, Pennsylvania, Florida and Connecticut is that a beneficiary has a right to force a distribution once the common law judicial threshold of review is lowered below an examination of whether a trustee acted (1) dishonestly, (2) with an improper motive, or (3) simply failed to act. To the extent that a beneficiary has such a right, the trust assets become an "available resource," which often will disqualify the beneficiary from government benefits.[21]

While the positions taken by the Ohio, Iowa and Pennsylvania courts is still in the minority,[22] rather than correct these aberrational results, the UTC codifies and expands them by reducing the threshold for judicial review to "good faith."[23] The most likely result, unless specific SNT language is included, is that the SNT beneficiary of a discretionary trust under the UTC and Restatement Third now has an available resource, and those beneficiaries most likely will not qualify for government benefits.[24]

DEATH OF THE SNT

On the horizon is nothing less than the demise of all SNTs, even those drafted with supplemental needs language. This is because the UTC and Restatement Third complete the most fundamental of two steps necessary to completely eliminate SNTs: they abolish the discretionary-support trust dichotomy.

Under common law, when presented with attempts to penetrate a trust and reach its assets, almost all courts[25] will look at the trust's distribution language (as well as other possible intent manifested in the trust document) to decide whether the trust is either a discretionary or a support trust. Support trusts[26] rely on spendthrift provisions for their asset protection, and the standard for court review is reasonableness.[27] This gives a beneficiary an enforceable right to sue the trustee for failing to make distributions pursuant to the standard. Once a beneficiary has an enforceable right, the first question is whether a creditor may stand in the shoes of the beneficiary. If he can, the trust offers no protection. Because the UTC abolishes the discretionary-support distinction, now all trusts, including all SNTs, must rely solely on spendthrift protection.[28]

EXCEPTION CREDITORS

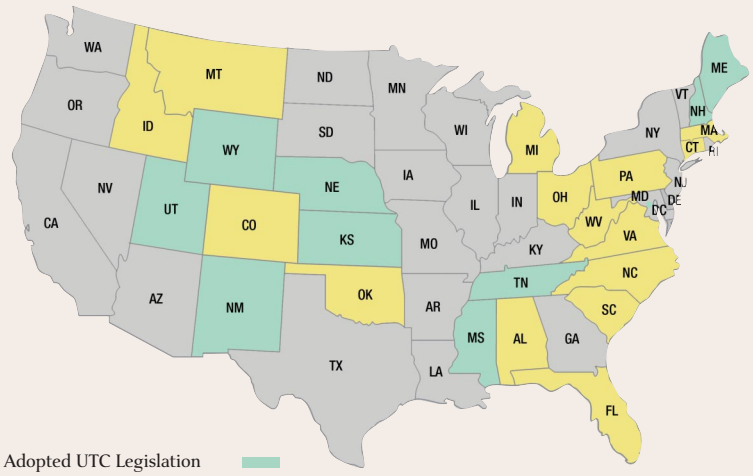
So who are these privileged creditors? Under common law, only what's called an "exception creditor" can reach a beneficial interest in a support trust. The Second Restatement provides for the following four categories of exception creditors:[29]

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; and
4. a claim by the United States or a state agency.

Many states have adopted all but number three on this list of exception creditors. And number two includes any federal or state aid provided to a beneficiary. Therefore, support interests in trusts are generally considered an available resource. A government creditor can attach the beneficiary's interest. Naturally, families have traditionally selected discretionary trusts when they've wanted to create third-party SNTs that would provide their elderly or disabled members with funds over and above what they are receiving from federal and state agencies, so that a government agency could not attach under the second exception.

THE UTC ON THE MARCH

This coming year, expect to see more state legislatures consider adopting the Uniform Trust Code



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SPENDTHRIFT CLAUSES

At first blush it would seem disastrous that the UTC and Third Restatement wipe out the common law distinction between discretionary and support trusts—thereby forcing all trusts to rely on spendthrift protection to shield their assets.[30] All SNTs would immediately be subject to government attachment—because in most states, government agencies may recover as an exception creditor under the necessary expenses of a beneficiary exception. But Section 503 of the UTC does list the following exception creditors as immune to spendthrift clauses:

- "a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance";
- "a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary";
- "a spendthrift provision is unenforceable against a claim of this State or the United States to the extent a statute of this State or federal law so provides."[31]

The exception creditor of "necessary expenses of a beneficiary" has been deleted. But a careful reading of the UTC makes clear that any government agency may recover necessary expenses of a beneficiary under the third exemption—once a federal or state statute authorizes recovery. Promoters of the UTC take comfort in noting that it'll take a second step to curtail or eliminate special needs trusts as a planning tool. Federal or state lawmakers need to enact legislation authorizing the government to attach the beneficiary's interest.

We belong to a less optimistic group that sees the UTC as the beginning of the end for all SNTs. Given how the costs of care for the elderly are rising, the elderly population is ballooning, and all government budgets are being squeezed, we believe it is not a question of "if" federal or state government agencies will pass such legislation, the only question is "when?" In many north eastern states, such as Ohio, Pennsylvania and New York, budgetary pressures are already forcing government agencies to look at tapping into special needs trusts. The UTC accomplishes the first, and by far the most monumental, step of allowing the federal and state governments to do so. It will not take long for the feds and most, if not all, states to pass laws allowing them to tap into the assets of all SNTs.

OTHER CONCERNS

In many cases, if a beneficiary received a distribution from an SNT, such a distribution would be used in computing the beneficiary's available resources. This was true regardless of whether the SNT did or did not contain special needs language. To avoid

this result, trustees would directly pay the expenses of the beneficiary of the trust or permit the beneficiary to use property owned by the trust. Unfortunately, both the UTC and Third Restatement also eliminate this planning option. Once a trustee becomes aware of a government claim, Section 501 of the UTC provides that "the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means." The "for the benefit" language, in essence, significantly curtails or eliminates the trustee from directly paying an SNT beneficiary's expenses.

The UTC also changes common law so that the beneficiaries and/or the trustee can make substantive changes in the trust, despite the grantor's express wishes to the contrary, through an application to the court.[32] Besides being anathema to clients and most estate-planning and elder law attorneys, this provision also poses a serious threat to the viability of first-party SNTs. While it may be wise to allow the settlor, with the consent of all beneficiaries, to modify or revoke a trust (only while the settlor is alive), leaving such power in the hands of a beneficiary who may be acting under duress from creditors should be viewed as an extreme measure.[33] For example, a beneficiary of an SNT may be required to exhaust all legal remedies to seek collection from a trust prior to receiving government benefits.[34] In other states, the beneficiary turns over all rights to recover assets to the government agency that is in charge of pursuing those assets. Under either scenario, the government or the beneficiary may seek to reform the trust in an effort to reach the underlying assets.

While courts have historically allowed certain types of reforms, usually for tax purposes or because of a mistake, they have refused wholesale changes to trusts, such as changing the beneficiaries, the method by which they receive their inheritance, and the removal of spendthrift clauses. The UTC explicitly authorizes wholesale changes to a trust even if those changes are contrary to the settlor's expressed intent.[35]

Historically, if the trust's purpose could be discharged, a court would not terminate the trust. While most practitioners believe that the inclusion of a spendthrift provision is, by itself, a valid purpose for a trust, the UTC expressly disagrees.[36] This provision cripples the protection of first party SNTs. Under federal law, a disabled person under 65 who transfers his property to a trust in which the government is named a remainder beneficiary, to the extent the beneficiary receives government benefits, will be eligible for government benefits.[37] Even if an SNT beneficiary could somehow find refuge from all of the provisions discussed above, a state can now petition a court to change the terms of a first party SNT as a qualified beneficiary. At a time when the Medicaid budget of every state is being strained beyond its limits, it is reasonable to assume that the government may seek to reform SNTs to access all its funds to pay for the beneficiary's care.

LONG-TERM EFFECTS

Legal theory aside, the bottom line is a new age is dawning in which there are two levels of care for the most vulnerable members of our society; one for the extremely rich (and generous); another for everybody else. All U.S. families will have a choice: Let the government decide exactly how their elderly or disabled will be cared for and live, or pay the entire cost of that loved one's care themselves. The super rich can afford to go private, however reluctant they may be to shoulder the hundreds of thou-

SPECIAL NEEDS LANGUAGE

Here's the kind of wording needed to save supplemental needs trusts

Consider adding this kind of special needs language to all supplemental needs trusts:

"A. The property shall be held in trust for the Beneficiary during his lifetime, and the Trustee shall collect income and, after deducting all charges and expenses attributed thereto, shall apply for the benefit of the Beneficiary so much of the income and principal (even to the extent of the whole) as the Trustee deems advisable in its sole and absolute discretion subject to the limitations set forth below. The Trustee shall add the balance of net income not paid or applied to the principal of the Trust.

B. Consistent with the Trust's purpose, the Trustee shall consider the availability of all benefits from government or private assistance programs for which the Beneficiary may be eligible before expending any amount from the net income and/or principal of this Trust. The Trustee, where appropriate and to the extent possible, shall endeavor to maximize the collection and facilitate the distribution of these benefits for the benefit of the Beneficiary.

C. None of the income or principal of this Trust shall be applied in such a manner as to supplant, impair, or diminish any government benefits or assistance for which the Beneficiary may be eligible or which the Beneficiary may be receiving during the term of this Trust."

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sands of dollars this kind of care can cost. Everybody else, though, will be brought to the lowest common denominator. The middle class will get hit the hardest; their elderly and disabled will be forced into a lower standard of living.

For now, some of this damage might be mitigated for trusts being created today by moving to a non-UTC state and always including special needs trust language. But the best solution is to fight your state's adoption of the UTC. Also, as it happened in Texas, state bars should consider drafting anti-Third Restatement statutory provisions; otherwise, uninformed judges might mistake many parts of it for common law.

Another option is to pray that your state UTC committee will completely rewrite Article 5, Section 814(a) of the UTC, and within the body of the state statute affirmatively reject at least Sections 50 and 56 through 60 of the Restatement Third.

Unfortunately, unless you take affirmative action and there is significant foresight by the state, your prayers will likely go unanswered. Except for a weak attempt by the Ohio UTC committee that falls substantially short of the current benefits provided to SNTs under the common law of almost every state,[38] the authors are unaware of any state UTC statute or proposed UTC statute that begins to address the SNT problems.[39] It will not work to leave out sections of the UTC, such as 501, 503 and 504 or all of Article 5. The interpretive guide to the UTC, the Restatement Third, then leaps out of the darkness with the same horrid result. Instead, we recommend that you contact your state UTC committee and advise them to take steps to rewrite Article 5 and affirmatively, within the proposed state UTC statute, reject specific sections of the Restatement Third for interpretation. ❙

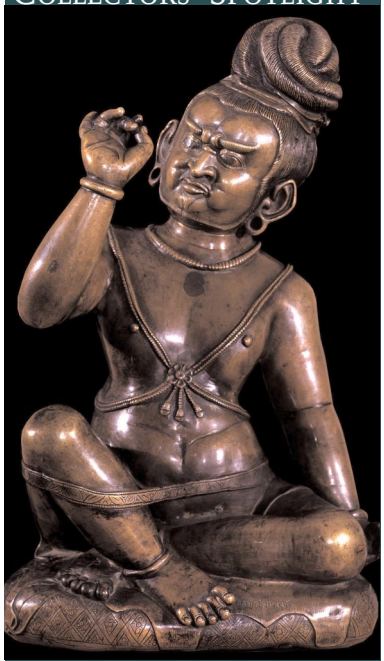
Endnotes

1. Donald Kozucsko and Richard Harris, "The Quiet Trust," *Trusts & Estates*, (March 2004) at p. 20.
2. Clifton B. Kruse, Jr., *Third Party and Self-Created Trusts*, 2d ed., (ABA 1998) at pp. 61-62.
3. Bernard A. Poskus, "Medicaid Planning," outline presented to the Centennial Estate Planning Counsel on Jan. 8, 2004, Denver, Colo. at p. 20. *See also In re Jones*, 812 P.2d 1152, 1157 (Colo. 1991); *Seidenberg v. Weil* (D. Colo., No. 95-WY-2191-WD, Nov. 1, 1996); DHCPR 8.110.52(D)(2)(d).
4. *In re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991); G. Bogert, *Trusts and Trustees*, Section 228 (2d ed. 1979).
5. *McDonald v. Evatt*, 62 N.E.2d 164 (Ohio 1945).
6. While the asset protection for a discretionary trust is independent of spendthrift provisions, all drafters of discretionary trusts should include a spendthrift provision. This is particularly true if a state adopts the UTC or follows the Third Restatement.
7. *In Re Jones*, 812 P.2d 1152 (Colo. 1991). *See Scott on Trusts*, Section 187, p. 15, where it notes 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," with the exceptions of (1) acting dishonestly, (2) improper motive and (3) failure to act. *See also* George T. Bogert, *The Law of Trusts and Trustees*, (2d ed. 1979, Supp. 2003). Section 560 of the supplement, at p. 183, states that if a settlor gives a discretionary power, the court is reluctant to interfere with the trustee's use of the power except where a trustee (1) fails to use his judgment; (2) abuses his or her discretion; (3) acts in bad faith; (4) is dishonest; or (5) takes an arbitrary action.
8. Restatement (Second) Trusts, Section 187 (1959) at p. 409.
9. *Ibid.*
10. Some courts use a property interest analysis that is usually defined as an enforceable right under state law. *In re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991); A property interest, *Balanson v. Balanson*, 25 P.3d 28 (Colo. 2001). Other courts find the beneficiary's interest has no ascertainable value. *Miller v. Department of Mental Health*, 442 N.W.2d 617 (Mich. 1989); *Henderson v. Collins*, 267 S.E.2d 202 (Ga. 1980); *In re Dias*, 37 B.R. 584 (D. Idaho 1984). In essence, the analysis is the same: There is no interest or enforceable right that a creditor may attach, because there is no value to the beneficial interest. *U.S. v. O'Shaughnessy*, 517 N.W.2d 574 (Minn. 1994).
11. UTC Section 814(a).
12. Restatement (Third) of Trusts, Section 50, comment (c).
13. UTC Sections 504(d), 814(a), and 105(b)(2).
14. Restatement (Third) of Trusts, Section 50, comment d.
15. For a further analysis for many of the problems created when a current beneficial interest is classified as a property interest, *see* Mark Merric and Steve Oshins, "The Effect of the Uniform Trust Code on Spendthrift Trusts," *Estate Planning* (August, September and October 2004).
16. *Bureau of Support in the Department of Mental Hygiene and Correction v. Kreitzer*, 243 N.E.2d 83 (Ohio 1968); *Matter of Gantz*, 1986 WL 12960; *Samson v. Bertok*, 1986 WL 14819 (the creditor did not recover because it was not a government claim); *Matter of Trust of Stum*, 1987 WL 26246; *Schierer v. Ostafin*, 1999 WL 493940 (the creditor did not recover because it was not a government claim). In the above SNT cases, the government was able to attach the beneficiary's interest and force a distribution pursuant to the standard.
17. *Strojek v. Hardin County Board of Supervisors*, 602 N.W.2d 566 (Iowa Ct. App. 1999). Also, see the follow up unpublished opinion where the Iowa Appellate Court expanded the definition of the distribution language as much broader than "basic needs." *Strojek v. Hardin County Board of Supervisors*, 2002 WL 180377 (Iowa Ct. App. 2002); *see also* the unpublished opinion of *McCabe v. McKinnon*, 2002 WL 31757533 (Iowa Ct. App. 2002).
18. *Estate of Taylor v. Department of Public Welfare*, 825 A.2d 763 (Pa. 2003); *Shaak v. Pennsylvania*

Department of Public Welfare, 747 A.2d883 (Pa. 2000); *Estate of Rosenberg v. Department of Public Welfare*, 679 A.2d 767 (Pa. 1996); *Commonwealth Bank and Trust Co., N.A., v. Commonwealth of Pennsylvania, Dept. of Public Welfare,* 598 A.2d 1279 (Pa. 1991).

19. *Mason v. Mason*, 798 So.2d 895 (D. Ct. Fla. 2001).
20. *Kolodney v Kolodney*, 503 A.2d 625 (Conn. App. Ct. 1986).
21. In *Metz v. Ohio Dept. of Human Services*, 762 N.E.2d 1032 (Ohio Ct. App. 2001), the trust was considered an available resource because the beneficiary had an enforceable right. Therefore, the beneficiary was denied government benefits.
22. *Kolodney v. Kolodney*, 503 A.2d 625 (Conn. App. Ct. 1986). Under Pennsylvania law, unless SNT language is included the court will determine the settlor's intent from all the factors surrounding the trust, including whether there are other lifetime beneficiaries. *Commonwealth Bank and Trust Co. v. Department of Public Welfare,* 598 A.2d 1279 (Pa. 1991); *Estate of Rosenberg v. Department of Public Welfare*, 679 A.2d 767 (Pa. 1996); *Snyder v. Commonwealth, Department of Public Welfare*, 598 A.2d 1283 (Pa. 1991).
23. UTC Section 814(a).
24. *In Metz v. Ohio Dept. of Human Services*, 762 N.E.2d 1032 (Ohio Ct. App. 2001), the trust was considered an available resource because the beneficiary had an enforceable right. Therefore, the beneficiary was denied government benefits.
25. When drafters mix elements of a discretionary and a support trust, Iowa, Nebraska, North Dakota, and possibly Pennsylvania have created a third category: a hybrid trust. *See In Strojek ex re. Mills v. Hardin County Bd. of Supervisors*, 602 N.W.2d 566 (Iowa Ct. App. 1999); *In re Sullivan's Will,* 12 N.W.2d 148 (Neb. 1943); *Lang v. Comm., Dept. of Public Welfare*, 528 A.2d 1335 (Pa. 1987); *Kryzsko v. Ramsey County Soc. Services*, 607 N.W.2d 237 (N.D. 2000); Evelyn Ginsberg Abravanel, "Discretionary Support Trusts," 68 *Iowa L. Rev.* 273, 290 (1983); Lawrence A Forlik, "Discretionary Trusts for a Disabled Beneficiary: A Solution or a Trap For the Unwary?" 46 *U. Pitt L. Rev.* 335, 342 (1985); Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts*, Section 187 (4th ed. 1988) at p. 15.
26. A support trust is a trust where the distribution language includes two components: (1) a command that the trustee "shall" make distributions, and (2) a standard that is capable of judicial interpretation under the circumstances (in other words, health, education, maintenance, and welfare). *Lineback by Hutchens v. Stout*, 339 S.E.2d 103 (N.C. Ct. App. 1986); *McElrath v. Citizens and Southern Nat. Bank*, 189 S.E.2d 49 (Ga. 1972); *In re Carlson's Trust*, 152 N.W.2d 434 (S.D. 1967); *McNiff v. Olmsted County Welfare Dept.*, 176 N.W.2d 888 (Minn. 1970).
27. Restatement (Second) of Trusts, Section 187 (1959).
28. Restatement (Third) of Trusts, Section 60, Reporter's Notes, comment a.; Restatement (Third) of Trusts, Section 50, Reporter's Notes, comment e, p. 309; UTC Section 504 and the comments thereunder.
29. Restatement (Second) of Trusts, Section 157 (1959).
30. Restatement (Third) of Trusts, Section 60, Reporter's Notes, comment a. Restatement (Third) of Trusts, Section 50, Reporter's Notes, comment e. p. 309; UTC Section 504 and the comments thereunder.
31. UTC Section 503, National Conference of Commissioners on Uniform State Laws 2001.
32. UTC Section 410(b).
33. Such a power vested in the grantor with the consent of the beneficiaries will not be a general power since it can only be exercised with the approval of adverse parties. In addition, no Internal Revenue Code Section 2036 issue is implicated since the grantor has retained nothing.
34. In Ohio HB 85, enacted in 2004, receiving government benefits requires that either a statute must specifically provide that the trust is not an available resource or the beneficiary must sue the trustee and prove that he or she is not entitled to a distribution.
35. UTC Section 410.
36. UTC Section 411(c).
37. U.S.C. Section 1396(p)(d)(4).
38. Ohio set the foundation for bad case law regarding discretionary trusts and the creation of available resources in SNTs. The UTC codified and expanded this aberration. The Ohio UTC committee is currently trying to correct some of Ohio's bad case law by taking the opposite approach of the UTC. Unfortunately, the latest version falls incredibly short of the rewrite needed to preserve the favorable SNT common law of almost all states, other than Ohio.
39. The North Carolina UTC attempts to address the SNT issues in the North Carolina comments. But the statute in essence does the opposite by abolishing the common law discretionary-support distinction and relying on the Restatement Third for interpretation. As the North Carolina comments are in conflict with the state's statute, and its interpretive guide the Restatement Third, it is most likely that North Carolina SNTs will meet the same anticipated long term demise of SNTs as all other UTC states.

Collectors' Spotlight



Himalayan Art from The Rubin Museum: An intricately carved 15th Century "Kanha of the East" metal sculpture of a relaxed "Indian Yogi" or ascetic, with his long hair in twisted locks, large looped earlobes and crossed necklaces.