Problems in

Uniform Trust Code States

With SNTs

NAELA – 2006 Conference

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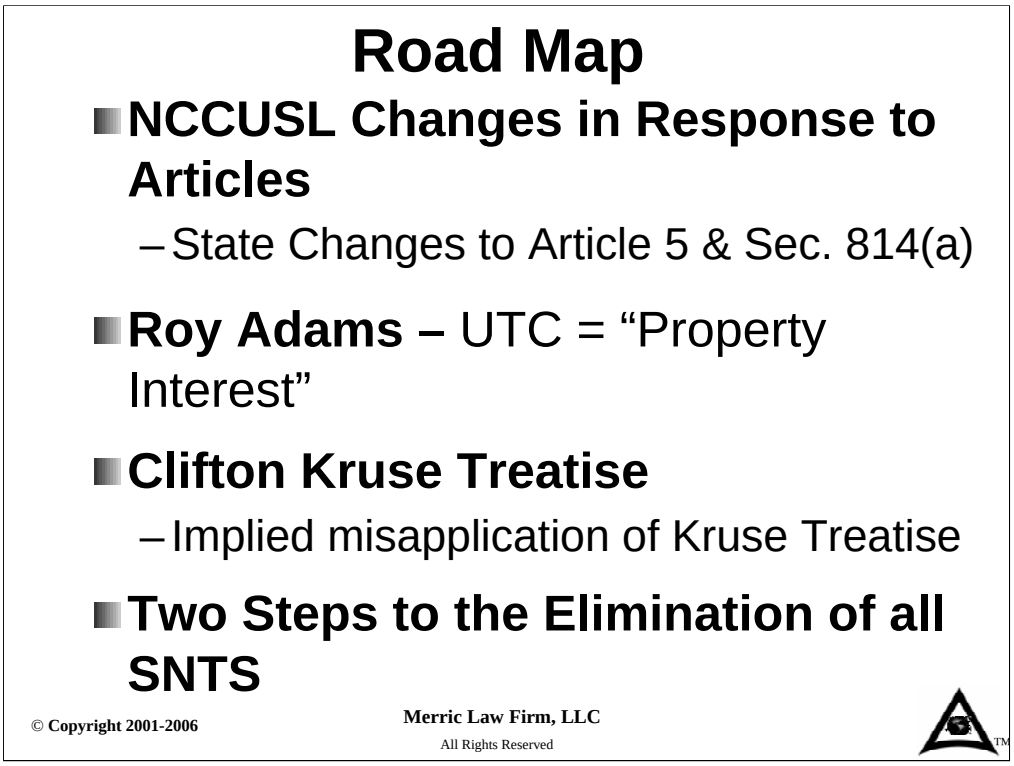
Mark is also a national speaker. He is past President of the Stanford Place Toastmasters with CTM and ATM designations. Mark received one of the highest evaluations that a speaker has ever received from WealthCounsel, the Better Business Bureau, the International Association of Financial Planners, and the Chartered Life Underwriters. In addition to numerous publications on estate planning, asset protection planning, and international law, Mark Merric is also co-author of the following three treatises:

- The Asset Protection Planning Guide: A State-of-the-Art Approach to Integrated Estate Planning, Commerce Clearing House (CCH) treatise
- Asset Protection Strategies, American Bar Association (two chapters)
- Asset Protection Strategies Volume II, American Bar Association to be published Apr. 2005 (MM responsible for 1/5 of the text).



C. What's a Discretionary Trust

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There were primarily three classifications under the *Restatement Second of Trusts*: (1) a support trust; (2) a simple discretionary trust; (3) a typical discretionary trust. A simple discretionary trust was one that gave the trustee distribution discretion but did not have words of uncontrolled discretion such as sole, absolute or uncontrolled discretion.

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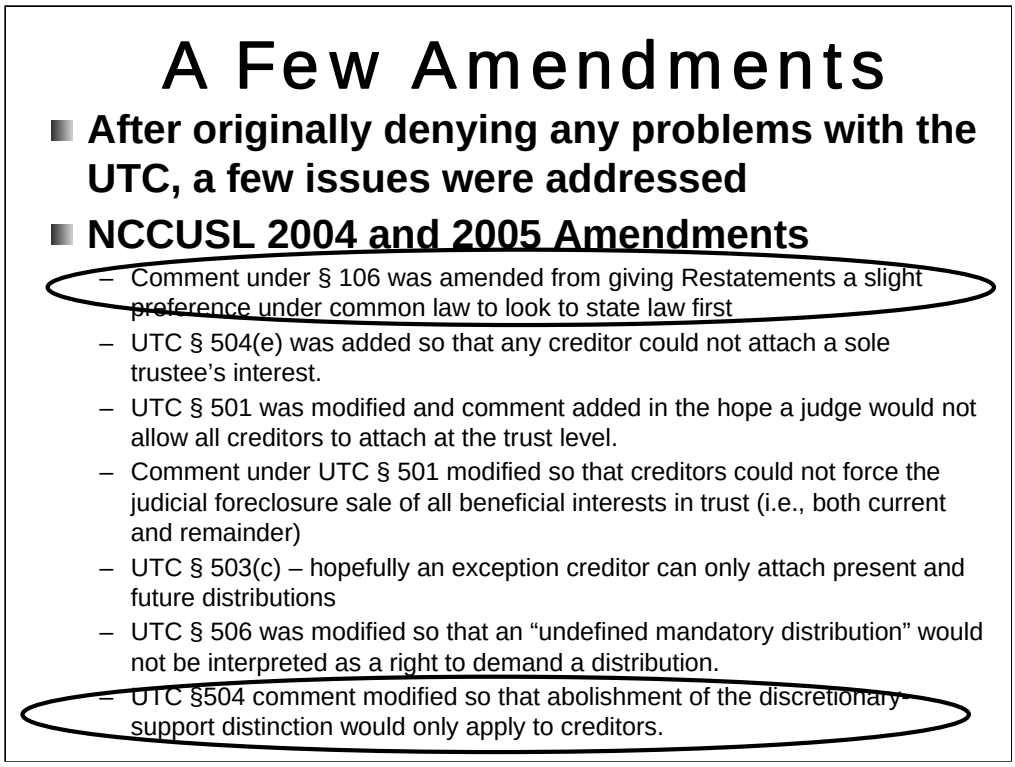

A. A Few UTC Amendments Based on the Concerns Expressed

The authors have received an incredible number of positive comments regarding the articles listed on the last page. As expected, there are differences of opinion voiced by some members of UTC committees. Several Uniform Trust Code ("UTC") committees have made modifications to the UTC in an attempt to resolve some of the issues addressed in these articles.[i] In fact, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") recently proposed changes that were finalized on February 18, 2005. We are honored that many of changes made by NCCUSL's and state UTC commissions attempt to resolve some of the issues that we raised. While these changes appear to be a step in the right direction, these modifications are simply insufficient to resolve the major problems.

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[i] The proposed North Carolina, and South Carolina Uniform Trust Codes have made modifications to Article 5. Ohio has made a weak effort with its wholly discretionary trust. While Virginia has not made significant modifications to Article 5, it has attempted to address some third party SNT issues by adding special needs protective provisions. Similar to the Ohio model, the Virginia model falls drastically short regarding the available resource issues discussed in this article. The Missouri UTC has also met with the Missouri Elder Law Section to also attempt to deal with the many threats to SNTs created by the UTC.

Based on the issues voiced by those of us expressing of the UTC, the following amendments have been made by NCCUSL:

- The original comment under UTC Section 106 implied that Restatements had priority in interpretation over common law. This was modified to state:

  "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* [Emphasis added], such as the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution."

Unfortunately, this comment now appears to conflict with the goal of uniformity and UTC § 1101. Further, legislators do not pass comments as substantive law, and allowing substantive law to be changed by a national committee rewriting a comment is simply very poor drafting.

- UTC § 504(e) was added so that <u>any</u> creditor could not attach a sole trustee's interest. The ability for a creditor to attach a sole trustee's interest in a trust had no basis in common law.
- UTC § 501 was modified and a comment added so that it was hopeful that a judge would not interpret UTC § 501 to mean that all creditors could attach at the trust level.
- The comment under UTC § 501 appeared to allow for the judicial foreclosure sale of current beneficial interests as well as remainder interests. Allowing the judicial foreclosure sale of current beneficial interests is a position that had virtually no legal support in common law. This comment has now been deleted. The UTC committee has added language referring to both the Third Restatement and Second Restatement regarding the judicial foreclosure sale of remainder interests. Regrettably, the UTC comment does not disclose that the Restatement Third has changed the strong presumption against the judicial foreclosure sale of a remainder interest to a presumption of a judicial foreclosure sale in favor of the creditor.
- UTC § 503(c) was added and the comment modified with the hope that the only remedy granted to an exception creditor was the ability to attach present and future distributions. After this amendment, hopefully an exception creditor, such as an estranged spouse, may no longer force the judicial foreclosure sale of a beneficiary's interest. Unfortunately the specific language of the amended UTC does not reflect the intent of the amended comment. The specific language of UTC § 503(c) does not provide that attachment of present and future distributions is the sole remedy.

Some Major State Changes

- **Maine**
  - Section 502 – provides no creditor may reach a distribution until received by the beneficiary
  - Section 503 – provides for no exception creditors
  - Section 504 deletes two sections and the Maine comment states
    - These were deleted to preserve among other things the common law distinction between a discretionary & support trust
- Wyoming's proposed 2007legislation
  - Retains the common law distinction
  - Defines a discretionary and support trust

1. Maine

Realizing the many problems created by abolishing the discretionary-support distinction under common law, Maine's UTC provides for no exception creditors, and the Maine comment explicitly states it is retaining the distinction. Section 502 of the Maine UTC even provides that no creditor may reach a distribution until received from the beneficiary. Please note, while the intent of Section 502 increases asset protection, it directly conflicts with the intent of Section 506, which allows any creditor to attach an overdue mandatory distribution at the trust level.

Unfortunately, the Maine UTC does not define a discretionary trust (i.e., no enforceable right) or a support trust. Maine also has little discretionary trust law. Therefore, will a judge follow common law as defined by the Restatement Second, the implied continuum under Section 814(a), or worse yet the Restatement Third.

2. Wyoming

Wyoming has also realized the many problems with abolishing the discretionary-support distinction for creditor purposes. Doug McLaughlin, the primary drafter of the Wyoming UTC has stated that the NCCUSL changes admit that they realized that there is a problem with Article 5, but unfortunately the changes are "nothing more than window dressing." The proposed 2007 Wyoming corrections to Article 5 will define a discretionary and support trust within the statute and attempt to keep the common law distinction for all purposes.

While the Wyoming UTC defines a discretionary trust, it does not state what the result is. In other words, under the Restatement Third and most likely the UTC, a beneficiary obtains an enforceable right. This would still create an available resource issue.

Some Major State Changes

- **North Carolina & South Carolina**
  - N.C. section 814(a) limits judicial review to "bad faith"
  - Except for child support - N.C. & S.C. Section 501 – attempts to retain
    - Spendthrift Trust
    - Discretionary Trust
    - Or Support Trust
  - S.C. Section 503(c) has an SNT trigger
    - If a judge finds the child support exception creates an enforceable right in the beneficiary for a distribution
    - Then as related to an SNT, the child support exception is eliminated from the Code.

3 & 4. North Carolina & South Carolina

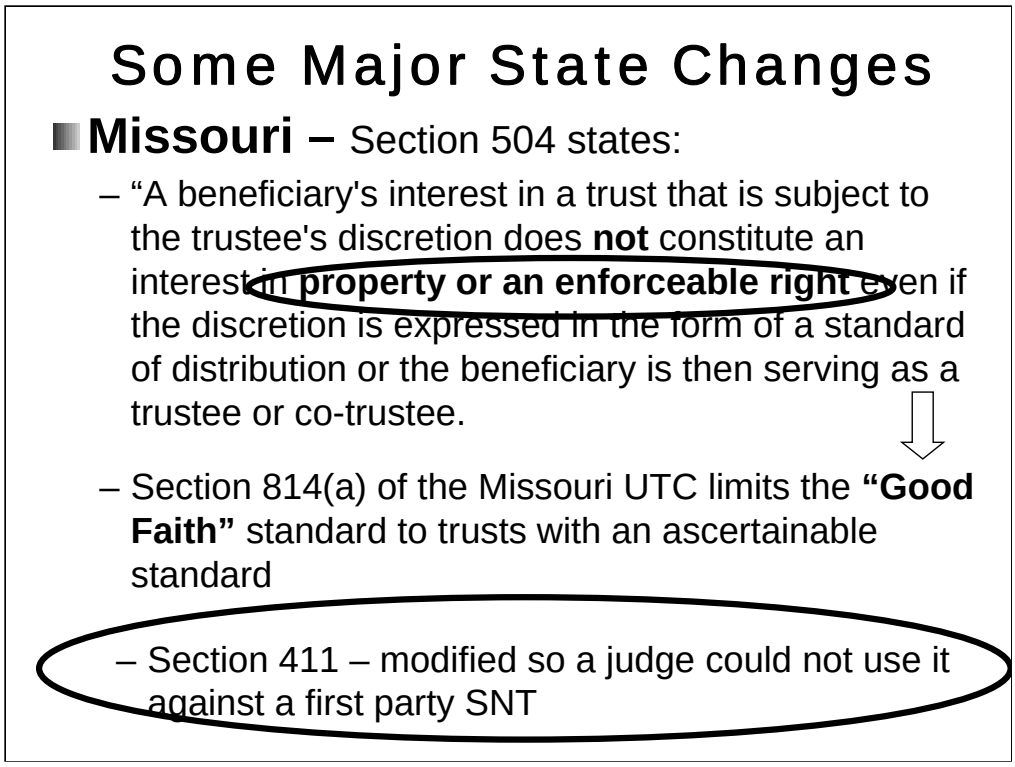
Realizing problems with the "good faith" review standard, the North Carolina UTC limits judicial review to "bad faith." Except for a child support exception under § 504, North Carolina and South Carolina attempt to retain the common law protection of a spendthrift trust, a discretionary trust, and a support trust.

Unfortunately, North Carolina and South Carolina both have a major flaw in 504 that allows a court to order a distribution from a discretionary trust for child support. However, under common law, a typical discretionary trust was is not an enforceable right. Hence, it was impossible to force such a distribution. The question becomes when will a result oriented judge find an enforceable right for child support, and inadvertently create an enforceable right in many special needs trusts?

The South Carolina UTC realized this distinct problem. If a beneficiary of a discretionary trust has an enforceable right for child support, they most likely have "available resource" issues, and would be disqualified. Therefore, section 503(c) of the South Carolina UTC states:

"The [child support]exception in subsection (b) is unenforceable against a special needs trust, supplemental needs trust, or similar trust established for a disabled person if the applicability of such a provision could invalidate such a trust's exemption from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if the applicability of such a provision has the effect or potential effect of rendering such disabled person ineligible for any program of public benefit, including, but not limited to, Medicaid and SSI."

While the authors admire the above language as a novel approach, the authors are uncertain whether such a provision will be upheld by the South Carolina courts or whether it will prevent the "available resource" issue. The provision is essentially a "trigger" in a statute that states if a beneficiary has an enforceable right to a distribution for child support, the child support exception is eliminated. The hope is that by eliminating the child support exception creditor, it would also eliminate the enforceable right issue created under the UTC.



5. Missouri

The Missouri UTC addresses the property interest and enforceable right issues created by stating that if there is any discretion. Presumably, this would mean that the following language would be classified as a discretionary trust:

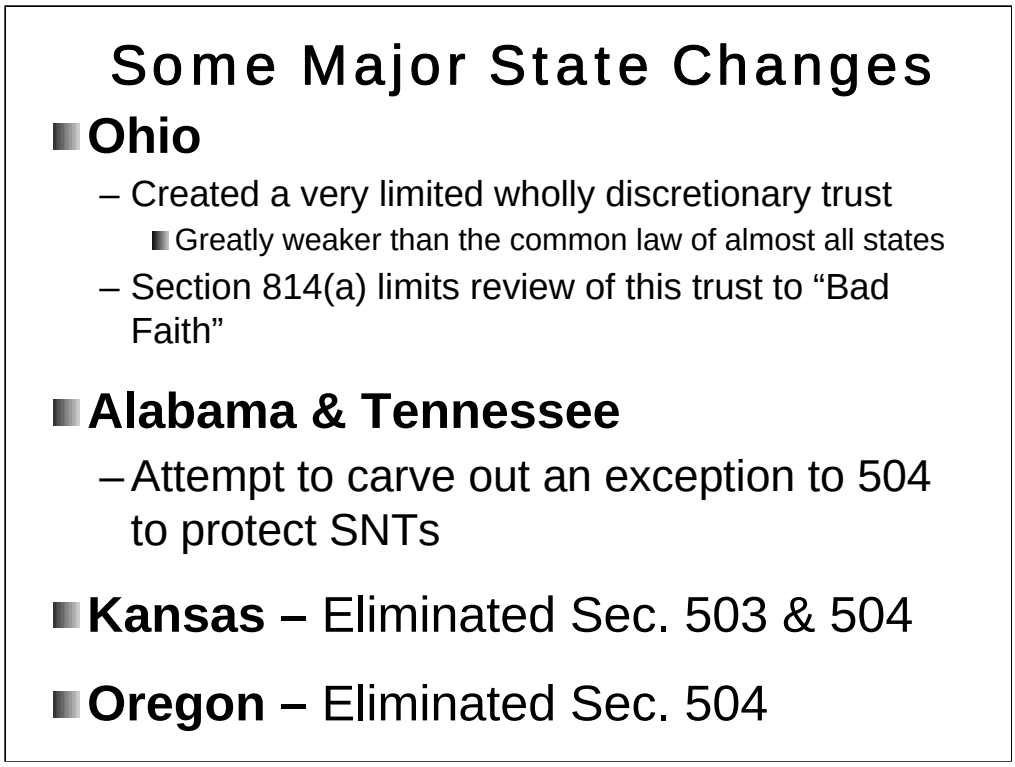
"The trustee may distribute to the beneficiaries listed on schedule 2 for their health, education, support, and maintenance."

However, the review standard for this type of trust would be good faith as defined in UTC §814(a). The problems with the good faith standard were previously discussed by Mark Worthington in his outline. This also brings up the question what is the review standard if a trust does not have an ascertainable standard? Is it (1) improper motive; (2) dishonesty; (3) or failure to act as defined in the Restatement Second of trusts?

It should be noted that Missouri UTC § 504 goes on to say:

Recognizing the potential problem that a judge may order the beneficiary of an SNT (first party) to reform the trust under UTC § 411 and terminate the trust or create an available resource, the proposed technical corrections to the Missouri UTC provide that this provision does not apply to a trust created under 42 U.S.C. section 1396p(d)(4).[i]

[i] This issue was identified by Craig Reeves, one of Missouri's leading SNT attorneys, and was discussed in Merric and Stein, *The UTC: A Threat to All Special Needs Trusts*, Tr. & Est. (Nov. 2004).



6. Ohio

Prior to the UTC, Ohio may have well had the worst discretionary trust law among the states. Ohio had gone substantially toward using a reasonableness standard to review any discretionary trust, with the result if such trust contained a standard, a beneficiary could force a distribution. The Ohio UTC in essence codified their poor discretionary trust law and created a wholly discretionary trust. For a wholly discretionary trust and SNT may contain guidelines but no standards. Unfortunately, even with this weak attempt to fix the UTC in comparison to the common law, the Ohio UTC does not state whether the beneficiary of a wholly discretionary trust has an enforceable right. If a beneficiary has such an enforceable right, the entire classification is meaningless.

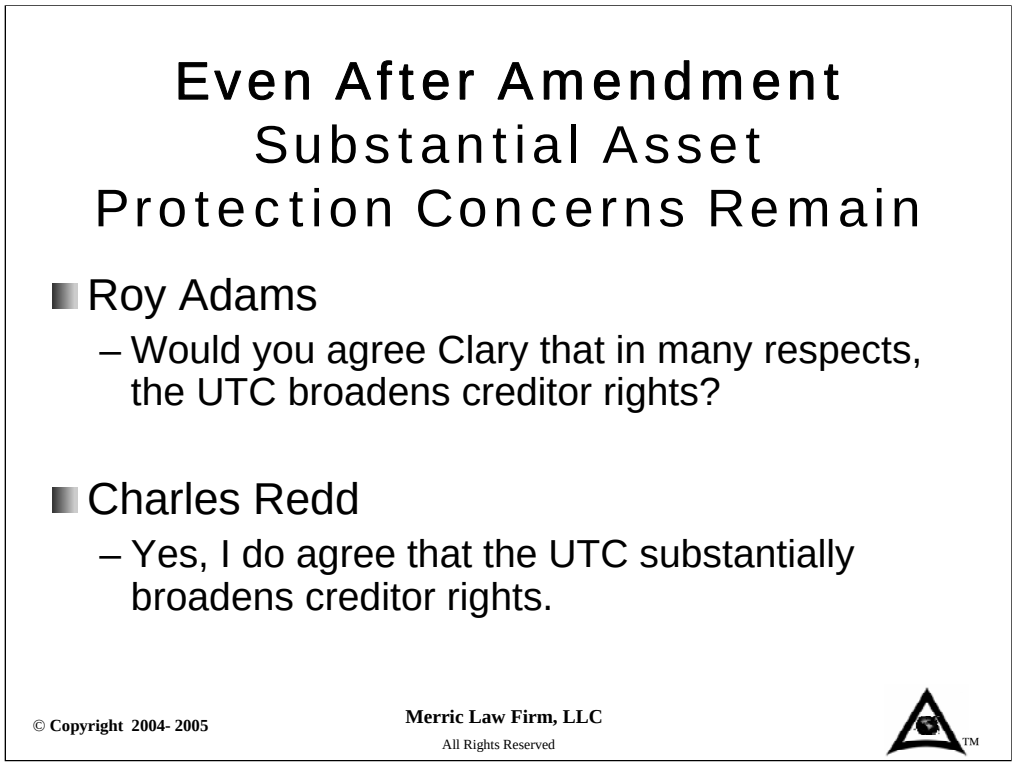
7 & 8. Alabama and Tennessee

Alabama and Tennessee attempt to carve out exceptions to protect SNTs. For example, the Alabama UTC Section 19-3B-1101 states:

"Notwithstanding the provisions of the Alabama Uniform Trust Code that may be otherwise be applicable to a trust, no provision thereof shall apply to any special needs trust, supplemental needs trust, or other similar trust established for a person with a disability as a beneficiary, including without limitation t, any trust established pursuant to the provisions of 42 U.S.C. § 1396(p)(d)(4) A or C, as amended from time to time, or other similar federal or state statute, to the extent such provision would disqualify such trust beneficiary at any time from eligibility for public needs-based assistance benefits for which the beneficiary would otherwise qualify."

9 & 10. Kansas & Oregon

Recognizing that there were problems with UTC §§ 503 and 504, Kansas omitted these sections from the Kansas UTC. Oregon also did likewise with respect to § 504.



B. Substantial Asset Protection Issues Remain

While some changes were made to address some of the many asset protection concerns expressed by the UTC, many substantial asset protection concerns remain. At their July 18, 2006 Estate Planning teleconference, Roy Adams and Charles Redd both agreed that the UTC substantially broadened the rights of creditors. In addition to the above statements, the following concerns were also expressed:

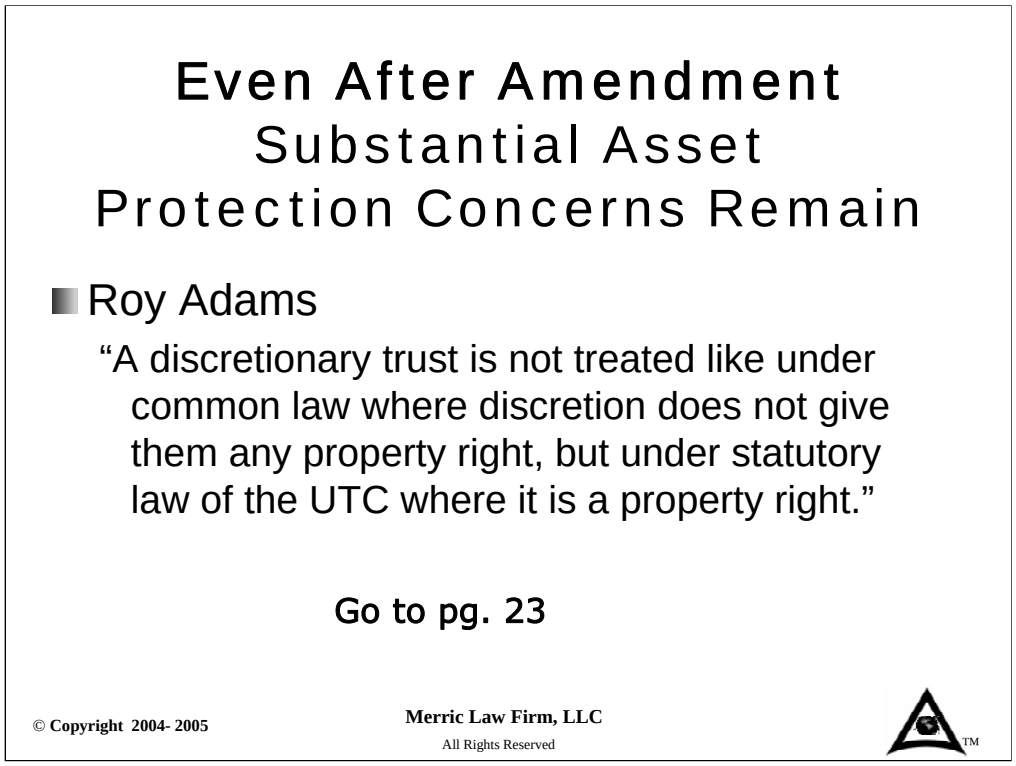
Roy Adams:

"Trusts are used so often on a spendthrift reason alone Clarry, at least I see in my practice the children receive certain property outright at a certain point in time, but something is held back that others can't reach – third parties, and those rules have been substantially weakened."

"A discretionary trust is not treated like under common law where discretion does not give them any property right, but under statutory law of the UTC where it is a property right."

Charles Redd:

"Everyone in our state [Missouri] believed that before we enacted the UTC in our estate, which became effective January 1, 2005, that there was a huge distinction with regard to creditor's rights between discretionary and support trusts. [The UTC eliminates the advantage of discretionary trusts.]"



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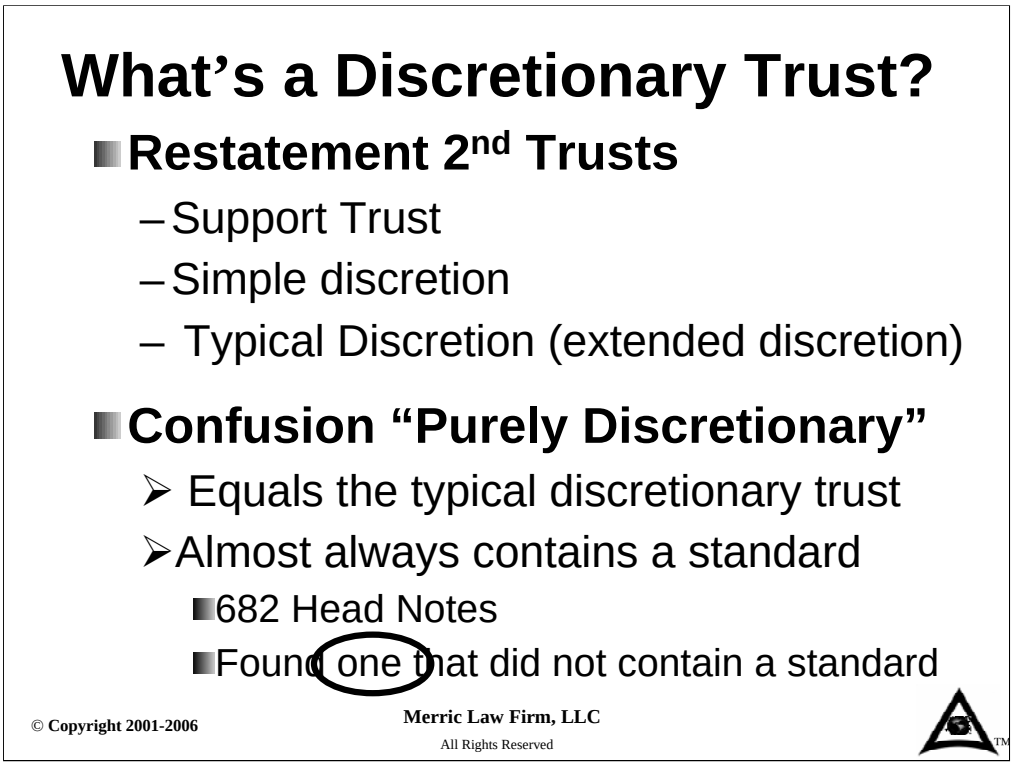

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3. Elements of a Common Law Discretionary Trust

Courts have emphasized four factors when classifying a trust as a "discretionary trust" under common law.

a. Uncontrolled Discretion

The Restatement (Second) and most court holdings agree that the most important of these factors is granting the trustee uncontrolled discretion. *Restatement (Second) Sec. 187 comment j.*

b. Permissive Language

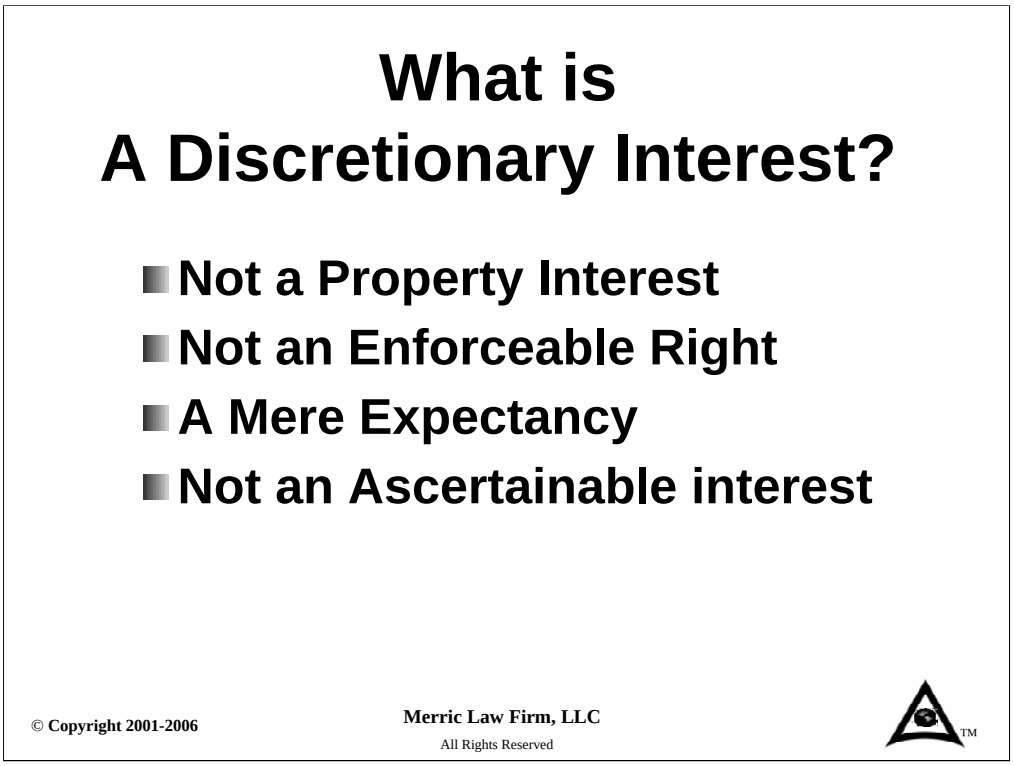
Generally, a discretionary trust uses permissive language: the word "may" instead of the word "shall." *State ex. rel. Secretary of SRS v. Jackson*, 822 P2d 1033 (KS 1991). Some courts have placed greater emphasis on the discretionary nature of the trust with words such as "may" v. "shall." *Tidrow v. Director, Division of Family Services*, 668 S.W. 2d 912 (Mo. Ct. App. 1985); *Matter of Henry's Estate*, 565 P.2d 1166 (Wash 1977); *Lineback by Hutchens v. Stout*, 339 S.E.2d 103 (N.C. App. 1986); *LaSalle National Bank v. U.S.*, 636 F.Supp. 874 (Dist Ct. Ill. 1986).

c. No Requirement of Equality

Other courts have noted that when the uncontrolled discretion is combined with the ability to discriminate among beneficiaries, there is little if any question that the settlor intended to create a discretionary trust. *Dryfoos v. Dryfoos*, 2000 WL 1196339 (Conn. Super. 2000) unreported case; *McNiff v. Olhstead County Welfare Dept.*, 176 N.W.2d 888 (Minn. 1970); *First NorthWestern Trust Company of South Dakota v. IRS*, 622 F.2d 387 (8th Cir. 1980); *Hamilton v. Drogo*, 150 N.E. 496 (Ct. App. NY 1926).

d. Nebulous Distribution Standard or Not Ascertainable

Some courts have noted that words such as "comfort and general welfare" may not be capable of judicial determination, and that this language may remove a trust from being classified as a support trust. *Bohac v. Graham*, 424 NW 2d. 144 (ND 1988). New York requires that no ascertainable distribution standard be used. *Estate of Escher*, 420 N.E. 91 (Ct. App. NY 1981).



D. What's A Discretionary Interest

The typical or purely discretionary trust allows the trustee complete and uncontrolled discretion to make allocations of trust funds if and when it deems appropriate.[i] If the beneficiary does not have a property interest or an enforceable right[ii] a creditor cannot stand in the shoes of the beneficiary and has no right of recovery.[iii], A beneficiary has nothing more than a mere expectancy.[iv]

An "expectancy is the bare hope of succession to the property of another, such as may be entertained by an heir apparent. Such a hope is inchoate. It has no attribute of property, and the interest to which it relates is at the time nonexistent and may never exist." *Dryfoos v. Dryfoos,* 2000 WL 1196339 (Conn. Super. 2000) unreported case.

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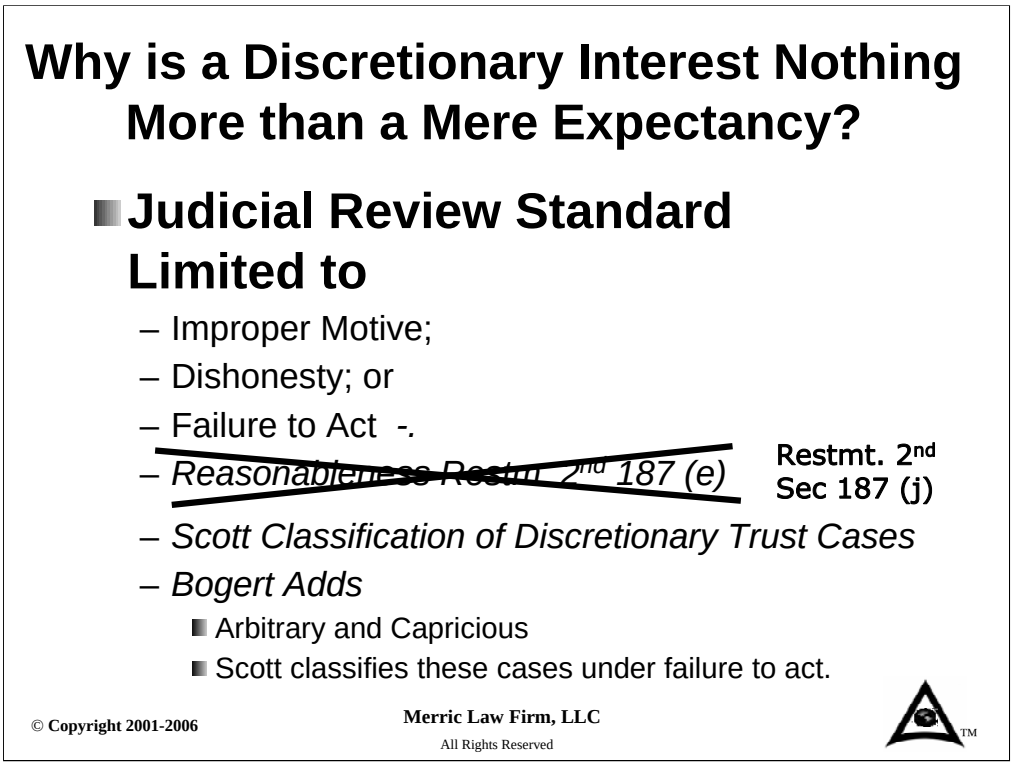
i *First National Bank of Maryland v. Dept. of Health and Mental Hygiene,* 399 A.2d 891 (Md. 1979).

ii *In re Horton,* 668 N.W. 2d 208 (Minn. App. 2003) (noting no property interest or enforceable right; *Carlisle v. Carlisle,* 194 WL 592243 (Superior Ct. Connecticut 1994); *Lauricella v. Lauricella*, 565 N.E. 2d 436 (Mass. 1991); *Baltrusis v Baltrusis,* 2002 WL 31058635 (Wash. App 2002) unreported case.; *In Re Jones*, 812 P.2d 1152 (Colo. 1991); *State v. Rubion,* 308 S.W. 2d 4 (Texas 1957).

iii Rather than using a property analysis, some courts will find that 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 BR 584 (D. Idaho 1984); *First Northwestern Trust Company of South Dakota v. IRS,* 622 F.2d 387 (8th Cir. 1980). In essence, the analysis is the same - there is no interest or enforceable right that a creditor may attach because under this analysis the beneficial interest has no value.

iv *U.S. v. O'Shaughnessy*, 517 N.W. 2d 574 (Minn. 1994); *In re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991); *Medical Park Hosp. v. Bancorpsouth,* 2004 wl 965927(Ark. 2004); *In re Horton,* 668 N.W. 2d 208 (Minn. App. 2003); *Estate of Johnson,* 198 Cal. App. 2d 503 (Cal. App. 1961); *In re Canfield's Estate*, 181 P.2d 732 (Cal. App. 1947)



E. Why is a Discretionary Interest Nothing More Than A Mere Expectancy

Restatement (Second) Section 187 – "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion."

Comment e – "… the court will not interfere unless the trustee in exercising or failing to exercise the powers acts **dishonestly,** or with an **improper** even though not dishonest motive, or **fails to use his judgment,** or **acts beyond the bounds of a reasonable judgment.**"

Comment j. – "The mere fact that the trustee is given discretion does not authorize him to act beyond the bounds of a reasonable judgment. **The settlor may, may however, manifest an intention that the trustee's judgment need not be exercised reasonably, even when there is a standard by which the reasonableness of the trustee's conduct can be judged.** This shall be indicated by a provision in the trust instrument that the trustee shall have "absolute" or "unlimited" or "uncontrolled" discretion. **These words are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness.**

When comment e and comment j are combined, the judicial review standard for a discretionary trust becomes (1) dishonesty; (2) improper motive; or (3) failure to act. In fact, this is the classification system used by *Scott on Trusts.*

Also see the detailed analysis of *Scott on Trusts*, Section 187 at Page 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*, 2nd Edition 1980, Supplement through 2003. Section 560 of the Supplement at Page 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 Page 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.

The Restatement (Second) of Trusts three tier classification that was followed by *Scott* of (1) dishonesty; (2) improper motive; and (3) failure to act is also supported by many cases.[i]

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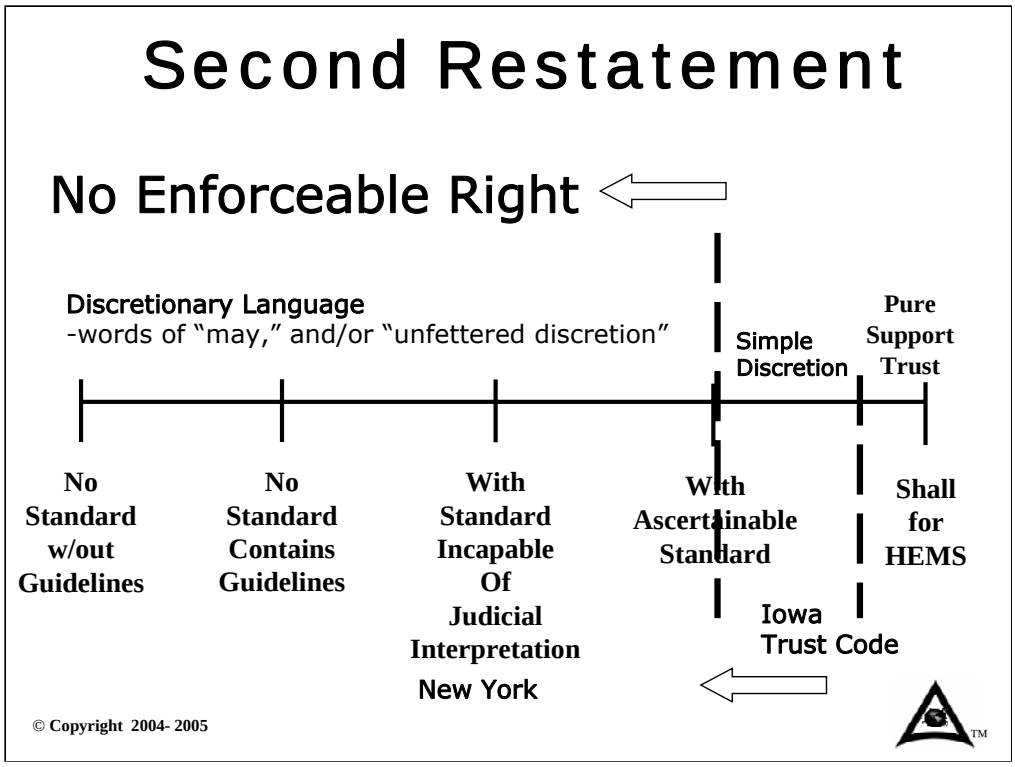
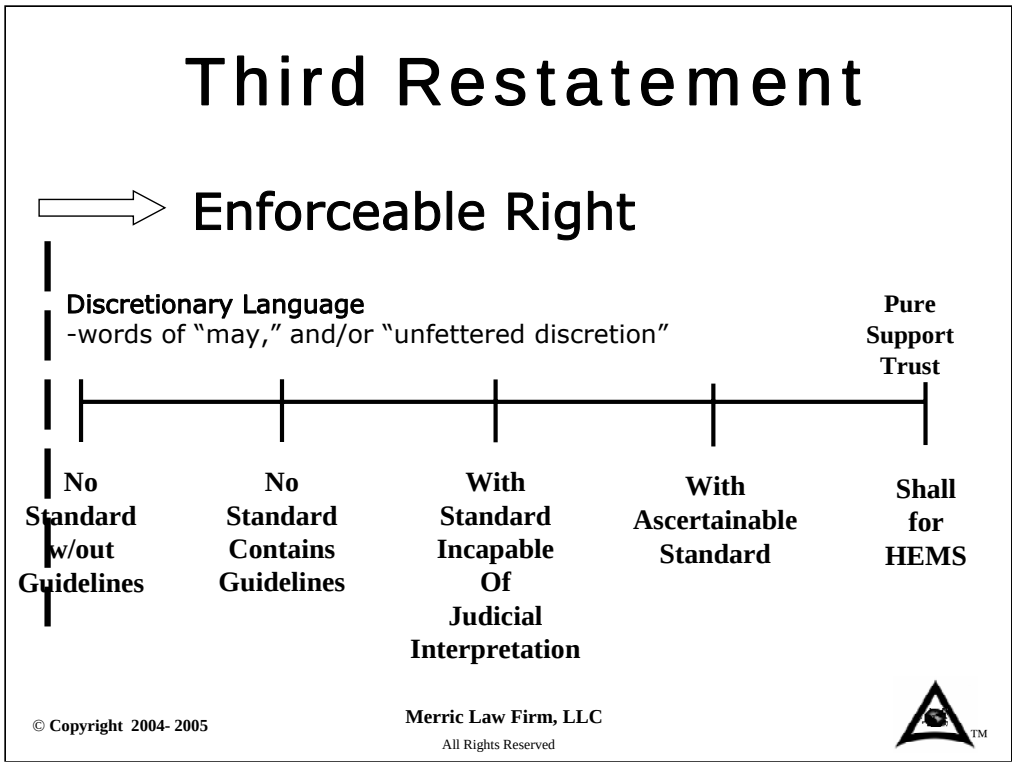
[i] *In Re Jones*, 812 P.2d 1152 (Colo. 1991); *Ridgell v. Ridgell*, 960 S. W. 2d 144 (Tex. App. 1997); *Kansas Dept. of Social and Rehabilitation Services*, 866 P.2d 1052 (KS 1994); *Simpson v. State, Dept. of Social and Rehabilitation Services*, 906 P.2d 174 (Kan.App.,1995); *Wright v. Wright*, 2002 WL 1071934 (Iowa App. 2002) – not cited for publication. (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*, 399 A.2d 891 (Md. 1979); In re Tone's Estates**,** , 39 N.W.2d 401, (Iowa 1949); *Town of Randolph v. Roberts*, 195 N.E.2d 72 (Mass. 1964).



F. Comparison of Restatements

1. Second Restatement of Trusts

The Second Restatement of Trusts focuses on the grant of extended discretion to determine whether a beneficiary has an enforceable right. Absent clear settlor intent to the contrary, the use of the words "sole," "absolute," or "unfettered" discretion will almost always result in the classification of the trust as a discretionary trust. In this respect, regardless of whether a trust contained a standard capable of judicial interpretation or incapable of judicial interpretation, the trust would be classified as a discretionary trust, and a beneficiary would not have an enforceable right.



2. Restatement Third Position

As detailed in the following quotations it appears the Restatement Third takes almost the opposite position than the Second Restatement of Trusts:

- 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."[i] However, the sentence immediately following the above sentence, for almost all purposes negates the above sentence. It state, "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."[ii]

- "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." [iii] 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.

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i *Restatement (Third) of Trusts*, Section 60, comment e.

ii Id.

iii *Restatement (Third) of Trusts*, Section 50, comment on Subsection (2): d. first paragraph.

- Even if a trust does not include a standard, under the Restatement Third the beneficiary is <u>not</u> 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."[i] The Restatement Third goes further to the most likely imputation of 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."[ii]

- Reporter Comment under Section 60(a) that states, "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."*{Emphasis added}. In other words, it is the Third Restatement 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 see to challenge what might otherwise be excessively generous decisions by a trustee."[iii]

After reviewing the above quotations as well as reading Sections 50 and 60 (including comments and reporter comments), it becomes quite 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. Remember, as demonstrated by the minority line of discretionary-support cases, such minimal distribution disqualified the beneficiary rom governmental assistance.

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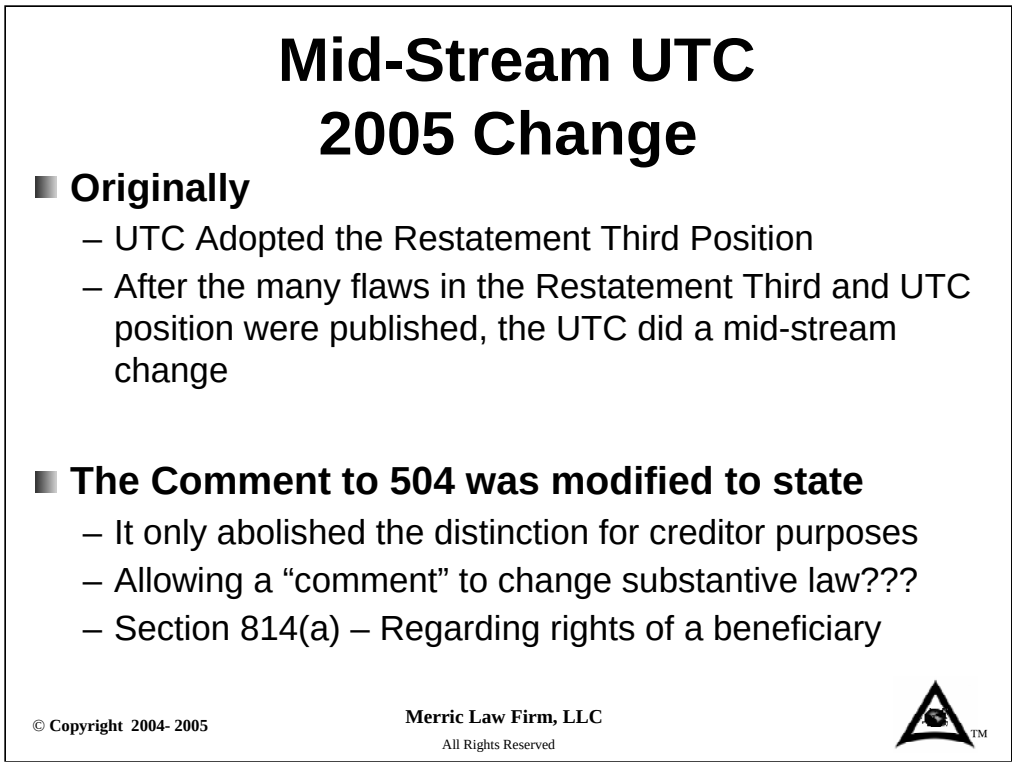
[i] *Restatement (Third) of Trusts,* Section 50, comment on Subsection (1): b., third paragraph last line.



G. UTC's Mid-Stream Change

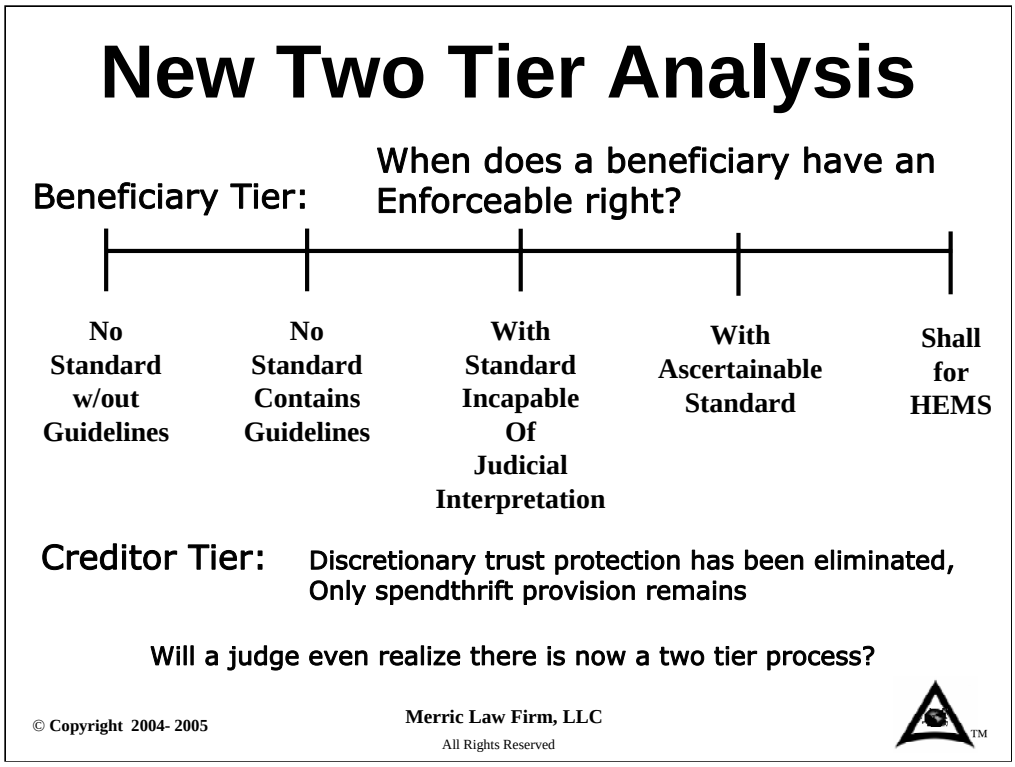
1. UTC Comment Section 504 Until 2005

"This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. *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).*

2. Amended 2005 Comment

"This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. 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).

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. 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. [2005 amended language in italics.]



H. Two Tier Analysis

The UTC creates a two tier analysis for creditor rights. The first tier is does the beneficiary have an enforceable right, and one should look to Section 814(a) to determine whether this is the case. The second tier is that any exception creditor may now attach present and future distributions. UTC § 503.

1. Will a Judge Realize There is a Two Tier Analysis?

Legislators pass statutes, not comments. Most trial court judges have little, if any knowledge, regarding trust law. Will a judge even read a comment and realize that for the first time in history there is now a two tier system: one that delineates creditor rights, and another that delineates beneficiary's rights to a distribution.

Will A Judge?

- Recognize that there is a two tier system?
  - – *Pohlmann,* 710 N.W.2d 639 (Neb. 2006)
  - – Not argued, not recognized, missed comment
- Follow the Restatement Third, which is almost always equals an enforceable right
  - – *Pohlmann* – miscites Rest. Third Sec. 60
  - – Restmt. Third abolishes discretionary-support
- Implied continuum of discretionary trusts under the UTC comment?
  - – *Pohlmann* – not discussed or argued
- Follow common law?

2. Will A Judge Find an Enforceable Right in a Discretionary Trust?

A statute should be clear on its face. Unfortunately, in the area of creditor's rights, the UTC requires reading the comments to divine several possible meanings. In this respect, there is considerable uncertainty whether a judge will recognize that there is a two tier system?

If so, how many trial judges are well versed in trust law? Unfortunately, the answer is very few. How many of these judges will pick up the Restatement Third and not realize that it is a great deviation from common law in the are of creditor rights.

A judge may not look to the Restatement Third, rather the judge may imply that an enforceable right to a distribution exists because of the UTC § 814(a) comment endorsing the Restatement view.

A judge could also follow common law.

Analysis of Kruse Treatise

Possible Problems With A Standard

- 54 Cases from 19 States
  - May be a problem if a support standard is included in an SNT
  - 24/54 cases cited = 45%???
  - Incorrect statistic must look at whether this is a state issue.
- 11 states having problems???
  - 22%???

I. Analysis of Kruse Treatise

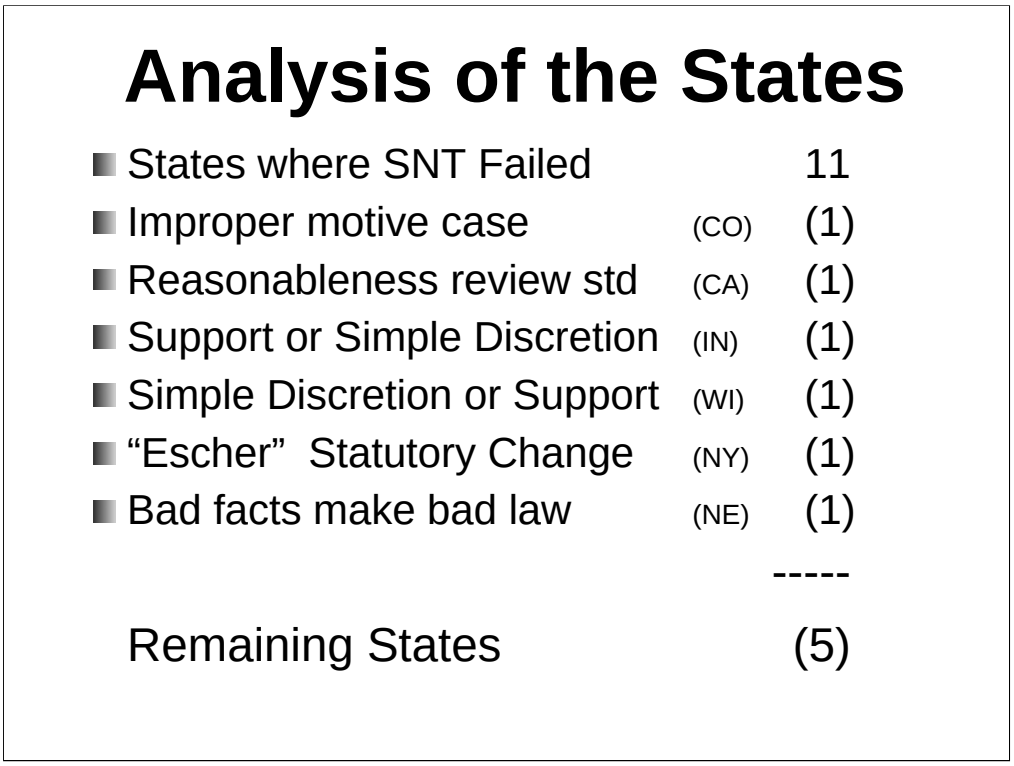
In his treatise, *Third-Party and Self-Created Trusts, Planning for the Disabled Client*, Section of the Real Property Probate and Trust Law, 2002**,** Cliff Kruse identified that sometimes an SNT would fail when a discretionary trust contained a support standard. Kruse as well as many others refers to such trust as a "discretionary support trust." Some UTC proponents seem to have taken Kruse's table greatly out of statistical proportion implying conclusions that are not supported as a matter of law or fact.

1. First Possible Misleading Statistic

If one counted the 54 cases, one would note that 24 of the DST cases failed and the beneficiary was either denied benefits or the creditor could reach the assets of the trust. (Please note that there are two clerical errors in the Kruse treatise – both *In re Johnson's Estate,* 17 Cal. Rprt. 909 (1962); *Estate of Escher*, 407 N.Y.S.2d 106 (Sur Bronx 1978) actually protected the beneficiary). This might lead someone to the gravely erroneous conclusion that 45% of the time a discretionary trust fails if it contains a standard.

2. Second Possible Misleading Statistic

Reviewing the list of states, one might conclude that in 11 states a discretionary trust with a standard has failed. However, unless one analyzes these cases as well as statutory changes, this also would result in a gravely misleading conclusion.



3. Analysis of Kruse Treatise

After reviewing the individual cases, there is actually less than a handful of states that hold that when a support standard is coupled with discretionary language, a beneficiary has an enforceable right.

a. *Improper Motive*

Estate of McCart, 847 P.2d 184 (Colo. App. 1993) is where a trustee who was also a remainder beneficiary refused to make discretionary distributions to the income beneficiary. The Court properly characterized the trustee's failure to make distributions as an exception to the judicial review standard for a discretionary trust – such failure to make distributions was an improper motive. In this respect, the case has little, if anything, to do with a discretionary trust with a support standard creates any problem. In fact Colorado Supreme Court, Appellate Court and District decisions clearly hold that a discretionary support trust is not an enforceable right. *In Re Jones*, 812 P.2d 1152 (Colo. 1991); *In re Marriage of Rosenblum,* 602 P.2d 892 (Colo. App. 1979); *Siedenberg v. Weil – Director Colorado Department of Health,* No. 95-WY-2191-WD (D. Ct. 1996).

b. Reasonableness Review Standard

In *Lackmann v. Department of Mental Hygiene,* 320 P.2d 186 (Cal. App. 1958) the court used a "reasonableness" standard of review instead of "bad faith." The logical result was that the court found that the beneficiary had an available resource. *Lackmann* has since been distinguished by *Hinkley v. Blackstock,* 195 Cal. App. 2d. 164 (Cal. App. 1961); *Estate of Johnson,* 198 Cal. App. 2d. 503 (Cal. App. 1961); and *Siegel v. Kizer* 15 Cal. App. 4th 397 (Cal. App. 1993) not published. It should be noted that California Probate Code § 16081 change the judicial review standard for a trust with "sole and absolute" discretion to bad faith as of January 1, 1997.

c. Support Trust or Simple Discretionary Trust - Wisconsin

In Matter of Ralph Holmquist Trust, 357 N.W.2d 7 (Ct. App. WI), the specific distribution language is not stated in the court's opinion. However, it is most likely that this trust is nothing more than a correctly classified support trust. Nowhere in its one page opinion does the court mention the word "discretionary" or even discuss any discretionary nature. Rather, the only clue regarding the distribution language is the following three statements:

(1) "Sophie is entitled to $300 a month from the trust."

(2) The creating instrument, Ralph's will, did not prohibit the use of the trust principal for Sophie's support.

(3) "In fact, Ralph specifically authorized Bennett to use principal, <u>if needed</u>, for Sophie's comfortable support."

In this respect, if these are the only statements in Ralph's will regarding the distribution standards, settlor intent is clear, and this is nothing more than a support trust under the law of any state. Further, evidence that this type of trust would be classified as a support trust derived from the Supreme Court case of *In re Doe's Will,* 285 N.W. 764 (Wis. 1939). In this case, a court held that the following language was imperative (i.e., a support trust), rather than discretionary language:

"My trustee is also authorized and directed that if in his judgment the net income from the trust estate is insufficient for the proper support and maintenance of my wife, either due to an emergency or sickness, accident, or otherwise, he may pay to her in addition to the net income, such proportion of the principal of the trust estate as he shall determine."

In the Supreme Court case of *In re Doe's Will,* the court noted that the above words do not of themselves expressly or by clear implication designate the power as purely discretionary. Under the *Restatement Second of Trusts,* the trust created in *Doe's will* would be classified as either a support trust or one with simple discretion. In either case, the review standard would be reasonableness, and the beneficiary would have an enforceable right to a distribution.

d. Support Trust or Simple Discretionary Trust – Indiana

Also, in *Sisters of Mercy Health Corp. v. First Bank of Whiting,* 624 N.E.2d 520 (Ct. App. IN 1994), the court does not state the distribution language of the trust. Looking to a different proceeding regarding the same trust referenced by the case, *First Bank of Whiting v. Sisters of Mercy Health Corporation,* 545 N.E. 2d 1134 (Ct. App. IN 1989), the only clue regarding the distribution language is where the court states, "The Trust Article III, Section 2B provides that the Trustee is to pay the sums 'required for her health, maintenance, and support.'" From the above, it appears that there is no mention of uncontrolled or discretion, and it is uncertain whether the trustee discretionary power was couched in the terms of "may" or "shall." However, both courts held that the trust was one for support.

Probably, a much more representative case of Indiana law would be the case of *U.S. v. Grimm,* 865 F.Supp. 1303, (ND IN 1994). In this case, the following language was classified as a support trust:

"The trustee shall apply payment in its discretion an in such a manner as shall contribute to the maintenance, comfort, and necessities of the beneficiary."

The above language lacks the "sole and absolute" discretion as required by the Restatement Second of trusts for the higher judicial review standard of a discretionary trust. Note: under the Restatement Second, regardless of whether the trust was classified as a support trust or a simple discretionary trust, the review standard is reasonableness. Further, from the dictum in *Loeb v. Loeb,* 301 N.E.2d 349 (IN 1973), the court cites Section 155 noting the "uncontrolled discretion" required for the higher standard of review.

d. Escher Trust & EPTL §7-1.12, New York

Prior to the SNT favorable legislation of Estate Powers and Trust Law §7-1.12, case law, discretionary trusts law in New York for special needs trusts was unclear. *Practice Commentary* to McKinney's annotations 2002 by Margaret Valentine Turano. However, after this statute and *Matter of Escher,* 420 N.E.2d 91 (Ct. of App. 1981) there are two ways to created a discretionary trust with a standard in New York:

i. Discretionary trust that includes sole and absolute discretion combined with any standard plus the SNT language required by the statute;

ii. Discretionary trust however the standard must not contain any single ascertainable standard such as support, health, education, maintenance, etc.

Escher and EPTL § 7-1.12 reconcile all but one of the New York cases cited in Kruse's treatise**.** The one remaining case, *Estate of Doris E. McNab,* 163 A.D.2d 790, (NY 3rd Appellate Div. 1990) appears has been classified as an enforceable right due to the specific language indicating a settlor intent to support the beneficiary. The trust stated, "so such additional payments, if any, from the trust fund he will be enabled to continue to live in the manner to which he is accustomed a the time of my death." It should be noted that in *McNab,* the trustee had sole discretion, so this was not the focal distinguishing point preventing the creation of an enforceable right.

It should also be noted that the third factor of a discretionary trust that would allow unequal distributions. *Hamilton v. Drogo,* 150 N.E. 496 (Ct. of App. 1926); *Will of Duncan,* 362 N.Y.S.2d 788 (Surr. Ct. 1974). *But See U.S. v. Magavern,* 550 F.2d 797 (2nd Cir. 1977) where the Federal Court did not follow the state court property law of *Will of Duncan,* under the principal of *Bosch* (i.e., the surrogate court is not the highest in the state) and overruled *Will of Duncan.* The Second Circuit further held that *Hamilton v Drogo* was distinguished because the *Hamilton* distribution language provided that all of the assets could be distributed to one beneficiary, and Duncan's will only allowed unequal distributions between the beneficiaries..

e. Bad Facts Make Bad Law

In re Sullivan's Will, 144 Neb. 36 (NE 1943) may be cited for the old cliché that "bad facts make bad law." The Court held the following language constituted an enforceable right taking into account the husband had not paid support or maintenance for a wife and two children. The court concluded the wife was unable to support herself, and one of the children that had a physical deformity requiring constant medical attention.

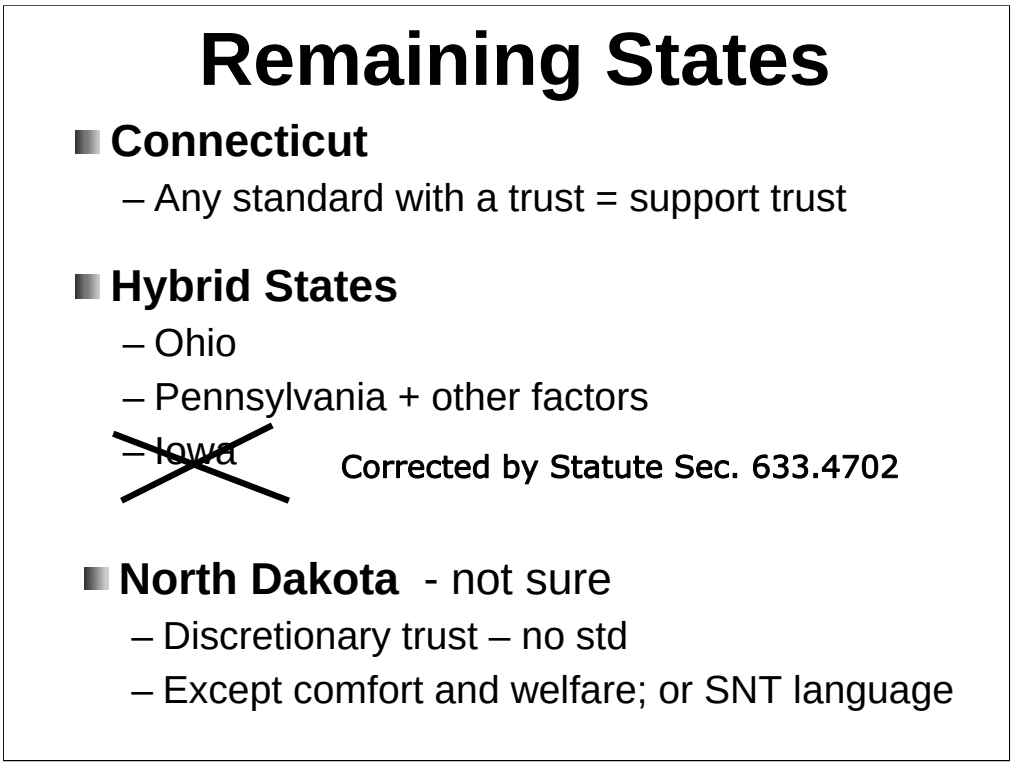
The trust stated, "they shall apply the proceeds or income therefrom for proper use, support and maintenance of said son, Lawrence P. Sullivan [Husband], as the same is received by them or as his needs may require or necessitate, and for that purpose may use and apply any part or portion of the principal of said trust estate from time to time as in their judgment may be required or necessary therefore, they being the sole judges of such necessity without applying to the courts for authority so to do, and I declare that said executors shall have full and uncontrolled discretion as to the application of said income and trust estate for the uses aforesaid."

The Court noted that *Restatement Section 187(j)* applied regarding extended discretion. However, the court also noted that failure to distribute in the above circumstance was a failure to act, and such trustee behavior was also arbitrary.

At first blush, *In re Will of Sullivan* might lead to the erroneous conclusion in Nebraska that whenever a standard is coupled with discretion, a beneficiary has an enforceable right. However, *Doksansky v. Norwest Bank Nebraska, N.A.,* 615 N.W.2d 104 (Neb. 2004) held that a discretionary support trust did not create an enforceable right. The distribution language in *Doksansky* was as follows:

"The trustee shall pay over to, or for the benefit of, any one or more of the living members of a class composed of my son Richard and his issue, so much of the net income and principal of the trust as the trustee shall deem to be in the best interests of such person, from time to time. Such distributions need not be made equally and to all members of the class. In determining the amount and frequency of such distributions, the trustee shall consider that: (1) The primary purpose of the trust is to provide for health, support, care, and maintenance of my son Richard during his lifetime."

The language in *Doksansky* is strikingly similar to *In re Sullivan's Will.* Both claims were for child support. However, the *Dokansky* court held that the beneficiary of a typical discretionary trust did not have an enforceable right or property interest, and no creditor can stand in his shoes.



4. Remaining States

a. Connecticut

The Supreme Court concluded that when a discretionary trust was coupled with any standard, the trust was classified as a support trust. A support trust is by definition an available resource. *Corcoran v. Department of Social Services*, 859 A.2d 533 (Conn. 2004).

b. Ohio

Metz v. Ohio Dept. of Human Services, 762 N.E. 2d 1032 (OH App. 2001); *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 governmental 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 governmental claim). In the above SNT cases, the government was able to attach the beneficiary's interest and force a distribution pursuant to the standard.

c. Pennsylvania

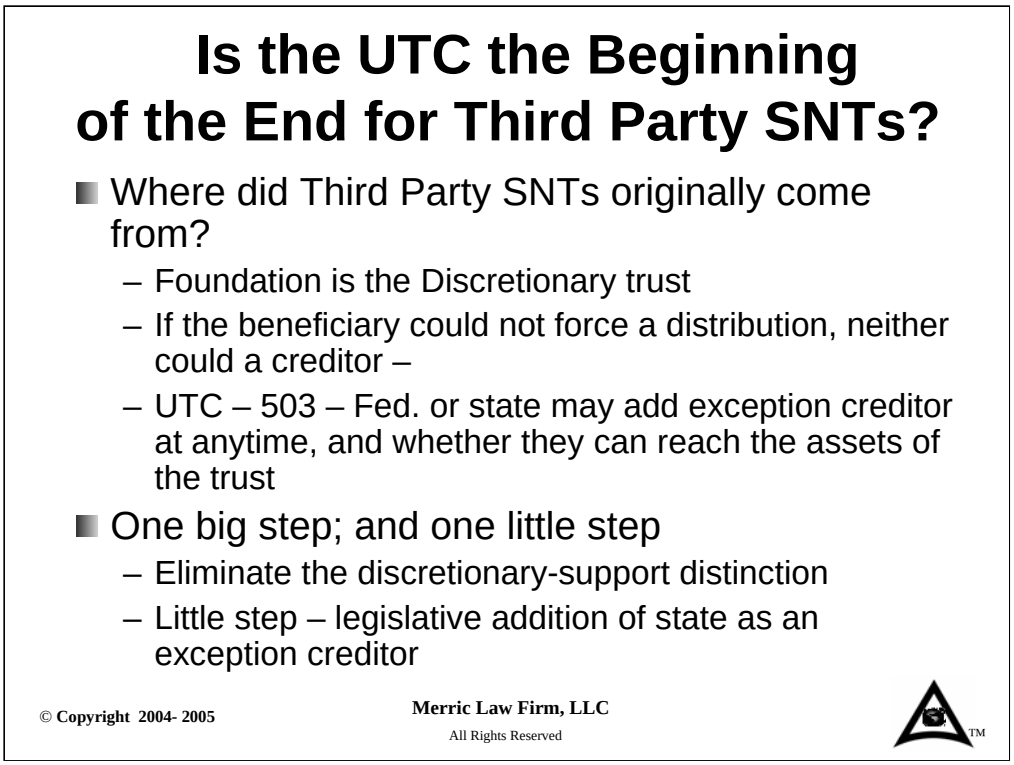
Using a slightly different analysis, Pennsylvania courts have generally held that if a discretionary support trust was for one beneficiary and such sole beneficiary was not receiving governmental benefits at the time of creating the trust, then the settlor intended that the principal of the trust as an available resource to the beneficiary. *Estate of Taylor v. Department of Public Welfare,* 825 A.2d 763 (Penn. 2003); *Shaak v. Pennsylvania Department of Public Welfare,* 747 A.2d 883 (Penn. 2000); *Estate of Rosenberg v. Department of Public Welfare,* 679 A.2d 767 (Penn. 1996); *Commonwealth Bank and Trust Co.,* 598 A.2d 1279 (Penn. 1991).

d. Iowa

Iowa use to be a hybrid state. However, it was corrected by the Iowa Code § 633.4702 in 2004. **So the following cases no longer apply**. *Strojek v. Hardin County Board of Supervisors,* 602 N.W. 2d 566 (Iowa 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 App. 2002); *Also see McCabe v. McKinnon,* 2002 WL 31757533 (Iowa App. 2002) an unpublished decision.

c. North Dakota

The trust law in North Dakota may be leaning to requiring supplemental needs language in a third party trust. See *In Hecker v. Stark County Social Service Bd.,* 527 N.W.2d 226 (N.D. 1994); *Kryzsko v. Ramsey County Soc. Services,* 607 N.W.2d 237 (N.D. 200); and *Eckes v. Richland County Social Services¸*621 N.W. 2d 851 (N.D. 2001). Also, it is uncertain under North Dakota law whether any support standard may be included in a discretionary trust – with or without SNT language in the trust.



5. Beginning of the End of SNTs?

a. Where Did Third Party SNTs Originally Come From?

With the earlier cases and currently in many states, a discretionary trust serves as a SNT. The analysis is simple, since the beneficiary has no right to reach the assets of the trust, then neither does a creditor – including the government. In other words a discretionary interest in a trust was neither a property interest or an enforceable right.

b. *Beginning of the End of Third Party SNTs?*

For states that pass the UTC, the author suggests that it is only a short period of time before third party Medicaid or special needs type planning will be eliminated in these states. A third party Medicaid or special needs trust is a trust where the parents or grandparents have created the trust for the benefit of a child.

In order to gradually reduce or eliminate third party Medicaid or special needs trusts two steps must be accomplished:

(1) the discretionary/support distinction must be eliminated so that all trusts rely on spendthrift protection; and

(2) after that, all the federal government or state legislature needs to do to pierce any trust (discretionary or support trust) is to provide in a statute that the government may attach the beneficiary's interest and most likely reach some or all of the trust assets.

With the rising costs to care for the elderly, it is only a matter of time before most, if not all, states will do this, as well as the federal government. Remember, prior to the UTC or Third Restatement, states determined property law rights, and a discretionary trust was not a property interest. As previously noted, both third party Medicaid trust planning and special needs trust planning depend on the dichotomy analysis between discretionary and support trusts related to this property issue.

c. Proponent's Preemption Argument

Proponents of the UTC dismiss the two step approach argument as irrelevant, because the federal government can pass a comprehensive amendment accomplishing both steps in one act. They contend that federal law automatically preempts state law. With this argument, the proponents of the UTC have, accepted a broadening of the authority of the federal government, which is not justified as a matter of policy and may well involve constitutional issues regarding due process, state's rights, and impairment of contract, particularly since these provisions are made retroactive.[i]

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[i] As noted in In Re Wilson, 140 B. R. 400 (N. D. Texas 1992). "Spendthrift and similar protective trusts are not sustained out of consideration for the beneficiary; their justification is found in the right of the settlor to control his or her bounty and secure its application according to his or her pleasure." and "To allow the IRS to reach any part of the trust in question would frustrate Mrs. Huval's intentions and deprive the residual beneficiaries of what is rightfully theirs." But see, *U.S. v. Craft,* 122 S.Ct. 1414 (2002), In *Craft* the federal government was allowed to attach tenancy-by-entirety property contrary to Michigan state law. However, *Craft* may be distinguished from a discretionary trust interest under state law. In *Craft,* there is no question that the debtor held an interest in property. With a discretionary trust under common law the beneficiary holds no property interest under state law – until the UTC created one.

The UTC concedes this undue expansion of power of the federal government in the official comments to UTC Code § 503(c) that states that "federal preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this code might say." Under common law, a discretionary interest in trust is not a property interest under state law nor as discussed in the following pages under Federal law. Therefore federal preemption has not been applicable with respect to discretionary trusts.[i] Absent the UTC creating a property interest in almost all, if not all, discretionary trust interests, not even the Internal Revenue Service with its expansive powers has been able to force a distribution from any common law discretionary trust.[ii] After the UTC concedes the Constitutional issues to the federal government, all that the federal government need do is make reference in any statute that it is an exception creditor under the UTC.

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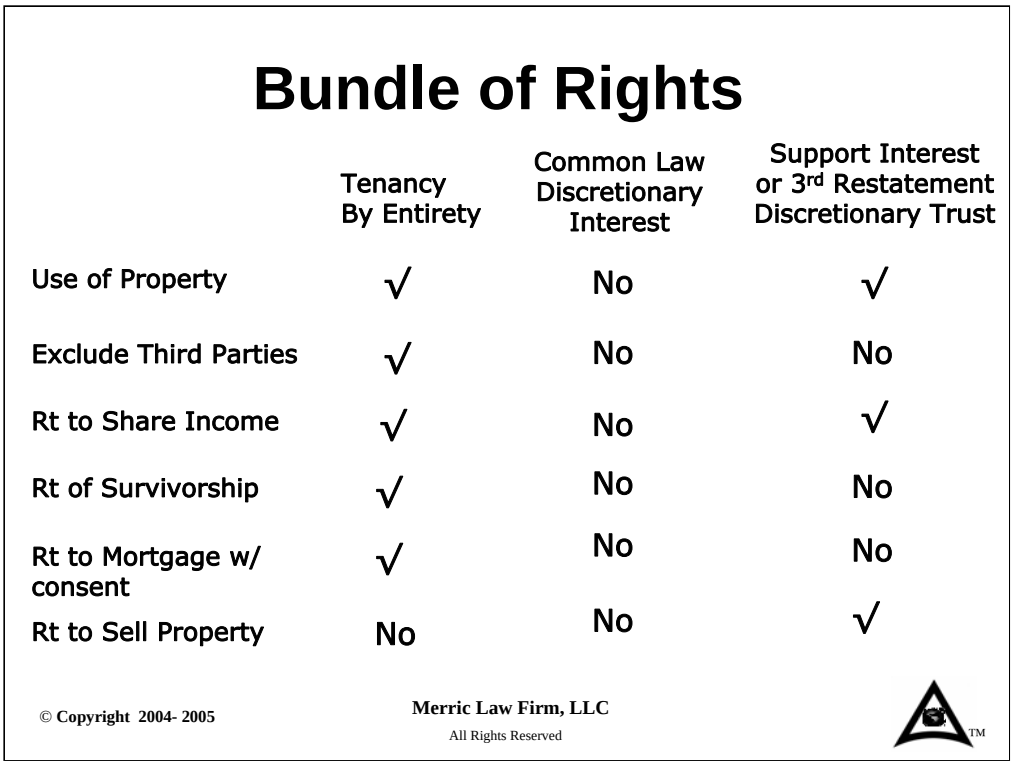
[i] *U.S. v. Taylor*, 254 F.Supp. 752 (D.C.Cal. 1966) stating "On the other hand, the Supreme Court has only recently reemphasized the importance of the role played by the states in creating and defining property interests; a federal tax lien cannot attach to property in which, under state law, the taxpayer has no property interest at all. *Citing Aquilino v. United States*, *supra*, 363 U.S. at p. 513, n. 3, 80 S.Ct. 1277.

[ii] *U.S. v. O'Shaughnessy*, 517 N.W. 2d 574 (Minn. 1994); *First Northwestern Trust Co. of South Dakota v. Internal Revenue Service*, 622 F.2d 387 (D. Ct. 1980); *First of America Trust Co. v. U.S.*, 72 A.F.T.R.2d 93-5296, 93-2 USTC P 50,507 (C.D.Ill.,1993 (where the income interest was a support trust, but the principal was a discretionary trust). At first blush, it looks like the *Restatement (Third) of Trusts*, § 60, Reporter comment e and e(1) made an incredible blunder when it states the Internal Revenue Service could recover from a discretionary trust in *Magavern v. U.S.*, 550 F.2d 797 (2d Cir. 1977). The first thing to note is that Magavern is a support case under common law, and the federal government was an exception creditor. The second point to note is that the Third Restatement has redefined the term discretionary trust to mean all trusts including support trusts. Only when read in light of the new definition of a discretionary trust does this citation in the Third Restatement make any sense.



6. Craft and State Property Rights

In *U.S. v. Craft*, 122 S.Ct. 1414 (2002), the U.S. Supreme Court held that "This Court looks initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach and then to federal law to determine whether such state-delineated rights qualify as property or rights to property under IRC Code § 6321."

a. Tenancy By Entirety

The U.S. Supreme Court used the "bundle of sticks" analogy, and then concluded that the taxpayer held all but one of the sticks listed above. Therefore, the Court concluded that the taxpayer had a sufficient bundle of rights for federal purposes to constitute an enforceable right.

b. Compared to a Common Law Discretionary Trust

When this is compared to a common law discretionary trust, the beneficiary holds none of the sticks of property identified *Craft.* Therefore, under the *Craft* factors, it is highly unlikely that a common law discretionary rust would ever be a property interest that a federal claim could attach. As noted in the footnote on the prior page, to date there has never been a case where a federal claim has attached a common law discretionary trust interest.

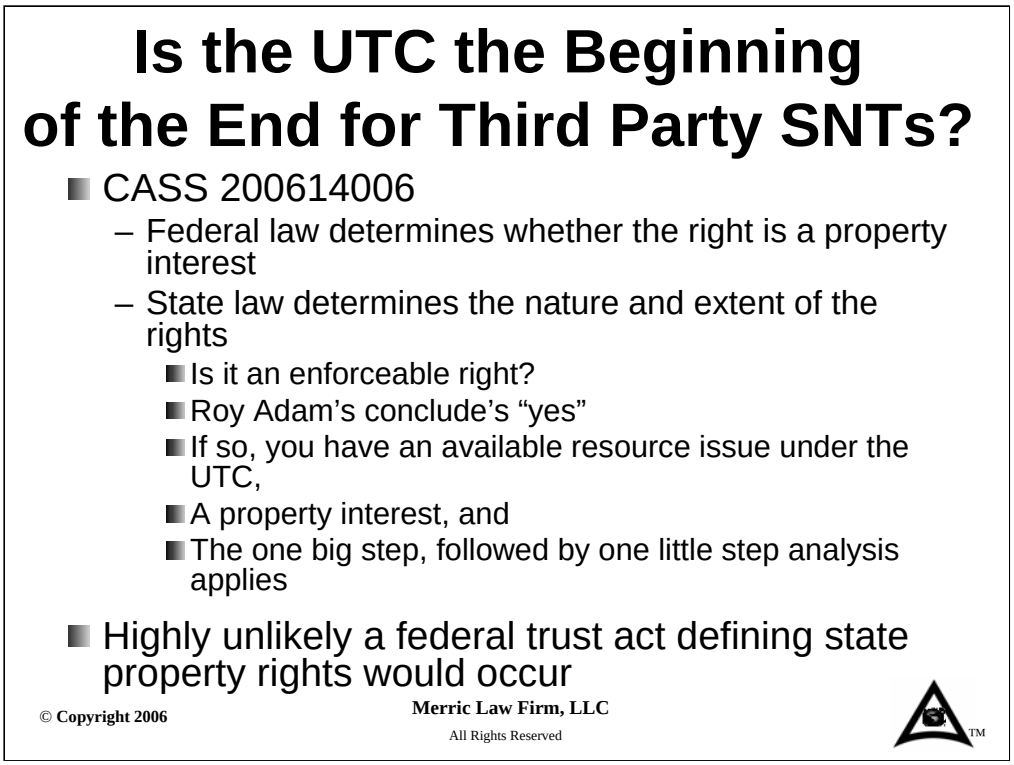
c. Support Interest or Restatement Third Discretionary Trust

With a support interest, a beneficiary has an enforceable right. Relying almost exclusively on the enforceable right issue (use of property or the right to force a distribution), the following cases hold that for federal purposes the support interest is a property right. *LaSalle National Bank v. U.S.*, 636 F.Supp. 874 (Dist. Ct. Ill. 1986); *First of America Trust Company v. U.S.*, 1993 WL 326784 (C.Dist. Ill. 1993) not reported; *Pulizzotto v. U.S.*, 1990 WL 120670 (Dist. N.J. 1990) not reported; *Magavern v. U.S.*, 415 F.Supp. 217 (W.D.N.Y. 1976).

Since the Restatement Third creates an enforceable right in almost all discretionary trusts, and since it is most likely that the UTC will have similar results, it does appear that there is considerable support for the following statement by Roy Adam's:

"A discretionary trust is not treated like under common law where discretion does not give them any property right, but under statutory law of the UTC where it is a property right."

July 18, 2006 Estate Planning teleconference, Roy Adams and Charles Redd



7. CCA 200614006

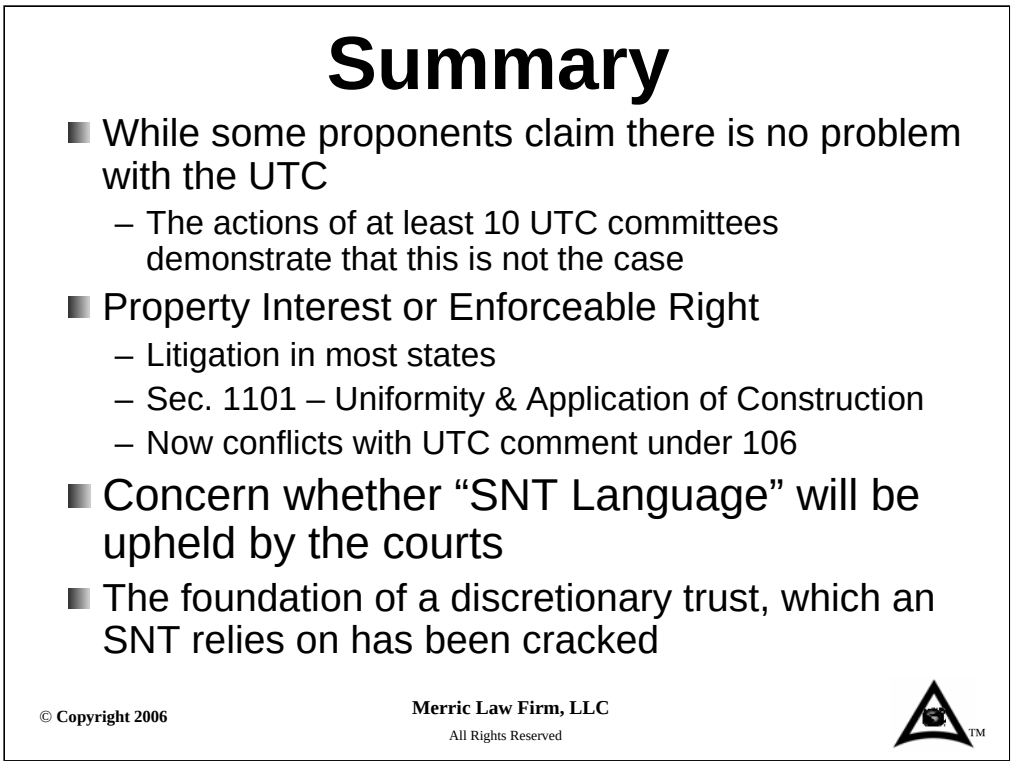
In its latest pronouncement regarding its levy and attachment powers as applied to a trust, the IRC confirm the property principles discussed in this outline.

- "The question of whether a state law right constitutes property or rights to property under IRC 6321 is a matter of federal law."
- However, "the "Codes prescriptions are most sensibly read to look to **state law for delineation of the taxpayer's rights or interest in the property** the Government seeks to reach, but federal law the determination of whether those rights or interests constitute property under 6321." CCA 200614006 citing *Drye v. U.S.*, 528 U.S. 56 (1999).

Again, the key comes back to the question whether the beneficiary has an enforceable right to demand a discretionary distribution under state law. If so, the beneficiary has a property interest.

8. What is the Chance of a Federal Trust Statute

Even if the federal government could overcome the Constitutional issues of defining the scope of a beneficiary's rights under property law, there are non-legal practical issues involved. It is believed that a one-step approach where the federal government redefines a discretionary trust to be a property interest and then allows attachment and possibly judicial foreclosure of beneficial interests is highly unlikely to occur. Such a sweeping change in common law protection of the poor would not go unnoticed. Lobby groups, bar associations, and handicapped persons would strongly oppose such legislation. In addition, an overhaul of established trust law is unprecedented. In sum this third point appears to be an area where opinion, not legal analysis, is the source of disagreement with some proponents of the UTC.



Summary

The actions of at least 10 UTC committees speak for themselves. These state UTC proponents have realized that there are asset protection concerns, and have attempted to correct them.

Roy Adams has mentioned that the UTC creates a property interest in discretionary trusts. Many others have concluded that this is most likely the result. At best, the UTC creates a massive amount of litigation as we watch various state judges decide whether they follow the common law of discretionary-support trusts (assuming the state has such case law); whether the state follows the Restatement (Third) view that almost always creates an enforceable right; or whether they follow the implied continuum of trusts in the NCCUSL comment under Section 814(a). Then, under UTC § 1101, "Uniformity of Application and Construction**.** 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."

Mark Worthington's outline has pointed out that there is concern whether special needs or luxury language will protect SNT in the long run. For almost all but three or four states, the protection of an SNT first primarily depended upon the trust not being an enforceable right under state law. Second, and developed later in SNT history, protection was provided by special needs and luxury language.

Unfortunately, the UTC, particularly when interpreted in light of the Restatement Third's unsupported views (or minority opinions) of trust law, have cracked the foundation of a third party SNT.