Discretionary Trusts: An Update

Richard C. Ausness

University of Kentucky College of Law, rausness@uky.edu

Click here to let us know how access to this document benefits you.
Discretionary Trusts: An Update

Richard C. Ausness*

I. INTRODUCTION.

It has been more than fifty years since the late Dean Halbach published his seminal article on discretionary trusts in the Columbia Law Review. Unfortunately, although there have been a number of significant developments in this area since then, very little scholarship has been produced. Hopefully, this Article provides a modest update on this fascinating subject. Specifically, this Article will consider developments during the past half-century, particularly with respect to distributive issues, from the perspective of settlors and courts, beneficiaries and the creditors of such beneficiaries.

In the past, settlors tended to limit a trustee’s discretion by setting forth a specific formula for the distribution of trust assets. For example, a family trust might direct the trustee to distribute the trust income in equal shares to the settlor’s children. After the death of the last child, the trust corpus would be distributed to the settlor’s grandchildren in equal shares or in accordance with some other standard or formula. Nowadays, however, settlors often prefer to vest more discretion in their trustees. This is partly due to the fact that beneficiaries tend to live longer and, therefore, trusts inevitably last longer, thereby requiring trustees to respond to changing conditions. In addition, settlors often believe that vesting increased discretion on the part of trustees will discourage beneficiaries from bringing expensive and disruptive challenges to their decisions.

Nevertheless, the trend toward increased discretion is not without its problems. First of all, there is a need to balance the wishes of the settlor against the duty of the courts to oversee the conduct of trustees and other fiduciaries. In addition, it is also necessary for courts to balance the wishes of the settlor with the right of the beneficiaries to receive fair and impartial treatment. Finally, it is necessary to determine

---

* Associate Dean for Faculty Research and Stites & Harbison Professor of Law, University of Kentucky. B.A. 1966, J.D. 1968, University of Florida; LL.M. 1973, Yale Law School.


2 See id.

3 See RESTATEMENT (THIRD) OF TRUSTS § 50, cmt. c (AM. LAW INST. 2003).
when, if ever, creditors should be able to reach a beneficiary’s interest in a discretionary trust.

Part II begins with a description of the various linguistic formulas that settlors have typically used to describe the scope of a trustee’s discretion. It concludes that no language, however broad, can completely shield a trustee from judicial scrutiny. It then examines some standards courts invoke when they purport to review the exercise of discretion by trustees. These standards can be classified as subjective, objective or some combination of both. However, as Dean Halbach predicted, the trend seems to be moving toward an objective or reasonableness standard and away from the narrower subjective or good faith standard.

Part III examines the rights of beneficiaries and distinguishes between mandatory and discretionary support trusts on one hand, and purely discretionary trusts on the other. In the case of support trusts, whether discretionary or mandatory, courts have often intervened when they thought that the distributions were too parsimonious or when the trustees favored remainder beneficiaries too much. In contrast, in the case of purely discretionary trusts, courts tend to uphold a trustee’s exercise of discretion as long as it is not tainted with bad faith or improper motivation. However, they have required trustees to render accountings and carry out other fiduciary duties no matter how broad the scope of their discretion was.

Part IV is concerned with the rights of creditors. In general, discretionary and support trusts are treated much like spendthrift trusts. Creditors appear to fare better when the trust is a support trust. Providers of necessary goods and services can usually compel the trustee to make disbursements to them and other favored creditors—such as spouses, ex-spouses and minor children—are often allowed to reach a beneficiary’s interest in a trust. On the other hand, creditors usually cannot reach a beneficiary’s interest in a discretionary trust although the Uniform Trust Code and the Restatement approve of Hamilton orders and similar remedies by which creditors can attach distributions before they are transferred to debtor beneficiaries.

Finally, Part V suggests some improvements in certain problem areas. For example, it would helpful to agree on a single test for determining whether an abuse of discretion has occurred. This test should require a finding of either bad faith or unreasonable behavior on the part of the trustee. In addition, words such as “comfort” or “station-in-life” are not necessary to describe a beneficiary’s interest in a support trust and

---

4 See Restatement (Second) of Trusts § 187, cmt. d (incorporating both standards as “factors” for a court to take into account in deciding whether a trustee is guilty of an abuse of discretion).

5 Halbach, supra note 1, at 1431.
should be ignored, although other words, such as “benefit,” “best interests,” or “welfare” are appropriate when the settlor intends to provide the beneficiary with a more upscale lifestyle than mere support. Furthermore, the trustee of a support trust should be allowed to take a beneficiary’s other resources into account in determining how much to distribute unless directed otherwise by the settlor. When reviewing a trustee’s decision in the case of a purely discretionary trust, the courts should apply a reasonableness standard unless the settlor expressly provides that a good faith standard may be used. Lastly, Part V addresses the thorny issue of creditors’ rights and concludes that creditors should normally not be able to compel the trustee of a support trust or a purely discretionary trust to pay a beneficiary’s debts. The only exception to this rule should be for child support and providers of necessities in the case of support trusts.

II. Discretion in the Law of Trusts.

Over the years, appellate courts have exercised the power to review the conduct of lower courts and administrative agencies. This necessarily requires reviewing courts to avoid micro-managing the actions of lower courts and administrative agencies, particularly when the legislature has vested them with extensive discretion. Accordingly, appellate courts have developed standards of review, such as “clearly erroneous,” “de novo” and “abuse of discretion” that reflect the degree of oversight that appellate courts consider to be appropriate. Unfortunately, the standard of review is not so clear where private parties, such as trustees, are concerned.

A. The Meaning of Discretion.

Discretion may be defined as the power or authority to choose among various alternatives. Discretion may be absolute in the sense that a person cannot be compelled to act in a particular way and is not subject to any external standard. However, discretion has a different meaning in the law than it does in ordinary discourse. When used as a


7 See, e.g., Nat’l Ass’n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 668 (2007) (defining discretion as “the power or right to decide or act according to one’s own judgment”); Gilbert St. Developers, LLC v. La Quinta Homes, LLC, 94 Cal. Rptr. 3d 918, 1197 (Ct. App. 2009) (defining discretion as “the action of separating or distinguishing”); Golden Christian Acad. v. Zelman, 760 N.E.2d 889, 896 (Ohio Ct. App. 2001) (defining discretion as the “ability to make responsible decisions”).
legal term of art, discretion is never truly absolute; rather, the term is used to describe the power of various persons to exercise their independent judgment. However, this exercise of judgment will usually be subject to some sort of social or legal accountability.

A number of commentators have written about the nature of discretion in the law and in almost every case, they agree that discretion can never be completely unrestrained. For example, Ronald Dworkin argues that discretion exists only when a person has the power to make decisions but is subject to restrictions that are established by a higher authority. According to Dworkin, “[d]iscretion, like a hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.” Dworkin also distinguishes between discretion in the weak sense and discretion in the strong sense. In the former case, the decision-maker is not bound by standards, while in the latter case, he is bound by standards; however, he has some leeway to interpret these standards and in some cases they may not be enforced by a higher authority.

One form of weak discretion involves situations where the applicable standards are not sufficiently precise, but instead require that the decision-maker exercise judgment. For example, when a superior officer orders a sergeant to select his five most experienced men to go out on patrol, this effectively gives the sergeant the discretion to determine which soldiers in his platoon are the most experienced. Another form of weak discretion exists when the person who has the final authority to make a decision cannot be reviewed or reversed by any higher authority. For example, in baseball, umpires are supposed to call a game according to a set of written rules. However, until recently, their calls were not subject to appeal. Thus, for example, as Dworkin points out, a second base umpire's call as to whether a runner is out or safe at second base is final and cannot be overruled by another official.

Discretion in a strong sense exists when one who exercises such discretion is not bound by standards set by a higher authority. As an

---

9 Id.
10 Id. at 32-34.
12 See Dworkin, supra note 8, at 32.
13 Id.
14 Id.
15 Id. at 33. Nowadays either team's manager can challenge a safe or out call, as well as many other decisions, by members of the officiating crew. See Calandrillo & Davison, supra note 6, at 18-21.
16 Dworkin, supra note 8, at 33.
example of this, Dworkin cites the case of a judge in a dog show who has the discretion to judge Airedales before Boxers or *vice versa*. The judge's decision to judge one breed before the other might be criticized on the basis of rationality, fairness or effectiveness, but no one will have the power to overrule it.17

Maurice Rosenberg distinguishes between primary and secondary forms of discretion.18 Primary discretion exists, at least in the case of members of the judiciary, when a judge has "a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process."19 For example, novel legal issues often involve primary discretion.20 Such issues occur when changes in the law or technological or societal developments give rise to unanticipated situations that are not already addressed by existing statutes or legal precedents.21

Rosenberg's secondary form of discretion occurs when the rules of review substantially insulate a lower court ruling from review by an appellate court.22 An example of this would be a decision of a trial court to deny a motion for a new trial. This particular exercise of secondary discretion may be obviously incorrect, and thus subject to criticism by third parties, but it cannot, or will not, be overruled by a higher authority.23

Another view of discretion appears in the work of Henry Hart and Albert Sacks.24 According to them, discretion may be defined as "the power to choose between two or more courses of action each of which is thought of as permissible."25 According to Hart and Sacks, one who exercises discretion has the power to make a choice, whether that power is based on the inevitability of judgment, the absence of review by a higher authority or an absence of binding standards.26

Finally, George Christie argues that accountability, as well as choice, is essential to the exercise of discretion. According to Christie, "[o]nly where there is accountability can we meaningfully speak of dis-

17 Id. at 33-34.
19 Id.
21 Id. at 420-21.
22 Rosenberg, *supra* note 18, at 637.
23 Id. at 639-40.
25 Id. at 144.
26 Id.; see Kim, *supra* note 20, at 408-09.
cretion in choice. Accountability, not the existence of standards, is the identifying feature of contexts in which discretion is ‘at home.’” 27

Most of these commentators focus on the extent to whether discretionary acts are subject to some sort of review by another entity such as a court or a government agency. However, even when such review is possible, there remains the question of what standard of review will be employed. As we shall see, the scope of an actor’s discretion will be much greater if the standard of review is narrow than if it is very broad.


Although, it is common to classify trusts and mandatory or discretionary, in fact, many trusts are hybrids which contain both mandatory and discretionary provisions. 28 For instance, in Wight v. Mason, 29 the testamentary trust in question directed the trustee to pay $2000 from the net income to Florence Mason for life. 30 This, of course, was a mandatory provision. The trust also directed the trustee to pay the remainder of the income to the testator’s daughter, Winifred Devine, for life. This was also a mandatory provision. However, the trust went on to authorize the trustees to pay “such portion or portions of the principal sum for [Winifred’s] proper maintenance and support as in their judgment may seem wise.” 31 This latter provision was discretionary since the trustees were allowed to decide whether it was appropriate to invade the principal for Winifred’s benefit and, if so, to determine how much of the principal was necessary to provide for her “proper maintenance and support.”

Another example of a hybrid trust can be found in Woodard v. Mordecai. 32 In that case, the testator, Moses Woodard, established a testamentary trust for the benefit of his wife, son and daughter. 33 The will provided that the wife, son and daughter would receive an equal share of the trust income. 34 This provision was mandatory in nature. However, the will also declared,

28 See, e.g., Clarke v. Clarke, 19 So. 2d. 526, 528-29 (Ala. 1944); Straw v. Caffee, 178 So. 430, 430 (Ala. 1938); In re Greenleaf’s Estate, 225 P.2d 945, 946-48 (Cal. Ct. App. 1951); Kemp v. Paterson, 159 N.E.2d 661, 662 (N.Y. 1959); In re Solveson’s Will, 34 N.W.2d 150, 151 (Wis. 1948).
29 180 A. 917 (Me. 1935).
30 Id. at 918.
31 Id.
32 67 S.E.2d 639 (N.C. 1951).
33 Id. at 640.
34 Id. at 641-42. The will further provided that if the son or daughter should die before the testator, the share of deceased child would go to his or her lineal descendants. Id.
The said Trustees (if they in their judgment deem it necessary or best for the welfare of the cestui que trust, and consistent with the welfare of my family and estate) may from time to time, advance, deliver and convey absolutely and in fee simple, free from the trust, to my said wife if unmarried or to my said daughter after she arrives at the age of 21 years or to my son after he arrives at the age of 21 years, any part or all of the share of the corpus of the trust estate above provided for his or her benefit and thus terminate the trust so far as it affects the property so advanced, delivered and conveyed. . . . 35

The court correctly found this provision to be discretionary since the trustees could, if they chose, distribute to an income beneficiary some or all of his or her share of the trust principal. 36


Mandatory provisions may be either administrative or distributive in nature. Administrative provisions deal with the management of the trust and its property. For example, the settlor may specify the types of investments that the trustee is authorized to make, as well as those that he should avoid. The trust instrument may also identify the situs of the trust or the applicable law that will be applied. Other administrative provisions may set forth the schedule and method of making distributions and it may also provide for how and when the trustee will render accountings. Finally, the trust instrument may specify what expenses will be deducted from income and what expenses will be deducted from the trust principal.

A mandatory provision may also require the trustee to distribute income or principal according to an objective formula. A simple example of such a mandatory provision is one that directs the trustee to distribute the net annual income to a particular beneficiary for life. At the death of the income beneficiary, the trust instrument might direct the trustee to transfer the trust corpus to a specified remainder beneficiary free of trust. Of course, it is possible for a settlor to devise more complicated arrangements involving multiple classes of beneficiaries, but the underlying principle is the same, namely that the trustee is not permitted to deviate from the prescribed distributional formula.

The will of Alber Howarth is illustrative of this approach. 37 Alber was survived by a son, Albert, and two sisters, Gertrude and Alice. 38

---

35 Id. at 642.
36 Id. at 642-43.
38 Id. at 230.
Alber devised half of his estate in trust and directed the trustee to pay the entire income to Albert during his life and upon his death to his issue then living.\(^{39}\) If Albert died without issue, the income was to be paid to Gertrude and Alice in equal shares.\(^{40}\) Finally, if at the time of Albert’s death he was not survived by issue or by either sister, Albert was given a general testamentary power of appointment over the trust corpus.\(^{41}\) It can be seen that under this arrangement, unlike Albert, the trustees had no discretion over the distribution of either the income or the corpus of the trust.

2. **Discretionary Provisions.**

Although administrative powers and duties are usually viewed as mandatory in nature, in fact many of them necessarily involve a measure of discretion. For example, the settlor may vest the trustee with broad discretion over the management of trust property or investments. The trust in *Estate of Genung*\(^{42}\) is illustrative. It declared that “[s]aid trustees shall administer said trust as in their judgment and discretion shall seem proper, and are vested with full authority to sell, convey, encumber, mortgage, loan or otherwise transfer or alienate any and all property belonging to such trust. . . .”\(^{43}\)

In addition, modern trust instruments often authorize trustees to exercise discretion over the distribution of trust property to the trust beneficiaries.\(^{44}\) In such cases, the beneficiaries are only entitled to such income or principal that the trustee in the exercise of his discretion chooses to distribute.\(^{45}\) Discretionary trusts take a variety of forms. For example, the trust instrument may authorize the trustee to pay so much of the trust income to a particular beneficiary as the trustee deems to be appropriate and accumulate the rest for distribution, along with the rest of the trust principal, when the beneficiary reaches a certain age.\(^{46}\)

When there are multiple beneficiaries in a class, the settlor may create a trust under which income may be distributed among income beneficiaries or retained as part of the trust principal. In the case of a spray trust, the trustee is required to distribute all of the trust income to

---

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) Id.


\(^{43}\) Id. at 862; see also *In re Greenleaf's Estate*, 225 P.2d 945, 949 (Cal. Ct. App. 1951).

\(^{44}\) See *Unif. Trust Code* §§ 504(b), 506(a) cmt (Unif. Law Comm'n 2010). For example, a trust instrument may direct the trustee to distribute all of the trust income each year to beneficiaries A, B and C in equal shares.


\(^{46}\) See *Caswell v. Lenihan*, 126 N.E.2d 902, 904 (Ohio 1955).
the trust beneficiaries. However, the trustee may also be empowered to decide how much income, if anything, a particular beneficiary will receive during any given distribution period.\textsuperscript{47} In contrast, if the trust is a sprinkle trust, the trustee may be given the power to distribute all of the trust income to the income beneficiaries or to withhold some or all of it and allow it to accumulate.\textsuperscript{48}

Regardless of whether a mandatory or discretionary approach is employed with respect to the distribution of trust income, it is not uncommon for a settlor to authorize the trustee to invade the trust corpus and distribute some or all of the trust corpus to certain beneficiaries.\textsuperscript{49} In some cases, the trustee may even be authorized to transfer the entire trust corpus to a beneficiary and to effectively terminate the trust.\textsuperscript{50} However, the discretionary power to invade is more commonly found in support trusts where the trustee is empowered to provide extra funds from the trust corpus to an income beneficiary in order to cover unforeseen expenses.\textsuperscript{51}

C. Judicial Review of a Trustee’s Exercise of Discretion.

Despite solemn assurances that they will faithfully carry out the settlor’s intent,\textsuperscript{52} courts have not hesitated to review and overturn a trustee’s exercise of discretion. In doing so, the courts have approached claims of abuse of discretion in different ways. Some courts focus on the --


\textsuperscript{49} See Halbach, \textit{supra} note 1, at 1426.


positive side and purport to identify the characteristics of an appropriate exercise of discretion by a trustee. These courts will uphold an exercise of discretion if they conclude that the trustee acted either "in good faith" or "with good faith and with an honest purpose" or with "proper motives, in good faith, with wisdom and reasonable judgment" or "honest judgment in good faith" or "in good faith and within the limits of a sound discretion" or "in the reasonable exercise of . . . discretion" or "fairly and reasonably" or "in good faith and . . . fairly and reasonably" or with "proper motives, in good faith, with wisdom and reasonable judgment" or "fairly and reasonably" or "in good faith, according to their best judgment and uninfluenced by improper motives."

Other courts focus on whether the trustee is guilty of an abuse of discretion. Unfortunately, this term is more of a conclusion than a substantive standard. Perhaps, this is why many courts either add additional verbiage or identify specific factors that they believe are indicative of an abuse of discretion. For example, courts have declared that they will overturn a trustee's exercise of discretion if they find that it involves "fraud, bad faith or an abuse of discretion" or "fraud, misconduct, or clear abuse of discretion" or "abuse of discretion or bad faith" or "acts beyond the bounds of reasonable judgment" or "acts arbitrarily, fraudulently, dishonestly or with an improper motive" or that discretion was "not reasonably exercised."

---

54 Carter v. Young, 137 S.E. 875, 877 (N.C. 1927).
55 Clarke v. Clarke, 19 So. 2d 526, 528-29 ( Ala. 1944).
60 In re Estate of Ternansky, 141 N.E.2d 189, 192 (Ohio Ct. App. 1957).
63 Wight v. Mason, 180 A. 917, 920 (Me. 1935).
68 Cleveland Clinic Found. v. Humphrys, 97 F.2d 849, 858 (6th Cir. 1938).
Whether courts use positive or negative terminology to describe when they will override a trustee’s exercise of discretion, most of them seem to rely on one of two distinct standards. The first standard focuses on the trustee’s motivation or intent. References to “good faith,” “bad faith,” “fraud,” “proper motives” and “improper motives” all involve an inquiry into the trustee’s subjective state of mind. Tomazic v. Rapoport illustrates the standard nicely. In 2009, the testator, David Tomazic, created a revocable trust under which his daughter, Jennine, was to receive a share of the trust corpus when she attained the age of thirty-five. However, the trust instrument also provided that Jennine would receive nothing if the trustee, in the exercise of his “sole and unlimited discretion,” determined that she was not of “sufficiently sound mind and character” at that time. Finally, the settlor named Alan J. Rapoport as the trustee.

David died shortly after executing the trust instrument and Rapoport continued to serve as trustee. In 2011, Rapoport offered to transfer certain trust property, a house in Euclid, Ohio, to Jennine as full satisfaction of the distribution she was entitled to under the trust. Jennine refused Rapoport’s offer and brought suit to remove him as trustee for various breaches of fiduciary duty shortly before reaching the age of thirty-five. Rapoport then informed Jennine that he had concluded that she was not of sufficiently sound mind and character and was terminating her interest in the trust. He then moved to dismiss Jennine’s suit against him for lack of standing.

Finding that Jennine had standing, the court reviewed Rapoport’s decision to terminate Jennine’s interest in the trust. The court observed that “even a grant of absolute discretion will be controlled by the court if the trustee acts in bad faith, dishonestly, or with an improper motive.” In this case, it concluded that Rapoport’s decision to termi-
nate Jennine's interest in the trust was motivated solely by his desire to prevent her from pursuing her claims against him for breach of trust.\(^{85}\) In the court's view, this was an improper motive and, therefore, it held in favor of Jennine and invalidated Rapoport's decision.\(^{86}\)

On the other hand, when a court focuses on whether a trustee's action is "reasonable," "unreasonable," "arbitrary" or "capricious" it is probable that it is applying a more objective standard. In any event, this standard seems to be somewhat less deferential to trustees than the subjective standard, at least if one assumes that a person can fail to act reasonably without necessarily being dishonest or fraudulent. This is illustrated by *Rowe v. Rowe*.\(^{87}\) The case involved two identical testamentary trusts that were created by Enoch and Nellie Peterson for the benefit of Nellie's parents, George and Katherine Rowe.\(^{88}\) Wilbur Rowe, a cousin of Nellie's, was named as trustee.\(^{89}\) Under the terms of the trust, Wilbur was authorized to pay George and Katherine "any or all rent, income and profits [from the trust] and any or all of the principal or corpus thereof entirely according to his own judgment and discretion."\(^{90}\) At the death of George and Katherine, any remaining trust property would be paid to certain named beneficiaries.\(^{91}\)

The testators were killed in a common disaster in 1951 and their residuary estates were conveyed to Wilbur as trustee.\(^{92}\) During the next five years, the trust earned about $7500 in income, but the trustee only distributed $600 to George and Katherine during that time.\(^{93}\) Eventually, George brought suit to have the trustee pay him all of the past and future income from the trust.\(^{94}\) The lower court ruled that the trustee only had discretion to apportion the income between the beneficiaries.\(^{95}\)

On appeal, the Oregon Supreme Court held that the trust was a valid discretionary trust even though the testators failed to set forth a specific standard to guide the trustee.\(^{96}\) According to the court, it should not overrule the trustee's judgment as long as he acts within the bounds of reasonable judgment.\(^{97}\) Applying these principles to the case at hand,

---

\(^{85}\) *Id.* at 1073.
\(^{86}\) *Id.*
\(^{87}\) 347 P.2d 968 (Or. 1959).
\(^{88}\) *Id.* at 970.
\(^{89}\) *Id.*
\(^{90}\) *Id.*
\(^{91}\) *Id.* at 970-71.
\(^{92}\) *Id.* at 971.
\(^{93}\) *Id.*
\(^{94}\) *Id.* at 970.
\(^{95}\) *Id.* Katherine died in 1954. *Id.*
\(^{96}\) *Id.*
\(^{97}\) *Id.*
the court accepted the trustee’s interpretation of the trust instrument, namely that the beneficiaries were not entitled to the trust income as a matter of right, but rather that he should dispense income to them only if they “lacked the essential things in life or were substantially inconvenienced by the lack of money.”

In fact, the trustee had concluded that the beneficiaries were relatively well off because of income that they were receiving from other sources. Finding that the trustee acting in good faith in deciding to limit payments to George and Katherine, the court found that the only question for it to decide was whether the trustee’s judgment was reasonable. In answer to that question, it concluded,

We are permitted to control the trustee only if we can say that no reasonable person vested with the power which was conferred upon the trustee in this case could have exercised that power in the manner in which it was exercised. We cannot say that the trustee’s conduct in the instant case was unreasonable in this sense.

Accordingly, the court reversed the lower court’s decision and held in favor of the trustee.

No trust is completely mandatory. Indeed, an essential purpose of all trusts is to enable someone, either the settlor or a third-party trustee, to exercise judgment with respect to the administration and distribution of the trust’s assets. Furthermore, regardless of the language the settlor chooses to use, a survey of the cases discussed above makes it clear that, whether they apply a good faith or a reasonableness standard of review (or a combination of both), courts will always maintain some control over the exercise of discretion by trustees.

D. The Restatement (Third) of Trusts.

The Restatement (Third) of Trusts section 50(1) declares that “[a] discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee.” This language, standing alone, is a fairly traditional statement of the law. However, some of the comments to this section raise some interesting points. For example, comment b states that “[a]bsent language of extended

---

98 Id. at 973.
99 Id. at 973-74.
100 Id. at 974.
101 Id.
102 Id.
103 See Restatement (Third) of Trusts § 50(1) (Am. Law Inst. 2003).
(e.g., "absolute" or "uncontrolled" discretion . . .) a court will also intervene if it finds the payments made, or not made, to be unreasonable as a means of carrying out the trust provisions.104 This suggests that the default rule for measuring abuse of discretion is objective, that is, reasonableness or unreasonableness, rather than one that turns on the existence of good faith or bad faith. This interpretation dovetails with the language of comment c, which provides that even when the trust instrument uses such words as "absolute" or "unlimited" or "sole and uncontrolled" to describe the trustee’s discretion, "[t]he court will not permit the trustee to act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power."105

If this interpretation is correct, it provides a solution to two problems. First, it sets forth a definition of abuse of discretion by which courts may review the exercise of ordinary discretion under a reasonableness standard, while reviewing the exercise of extended discretion under a less intrusive good faith standard. Second, it strikes a balance between the right of the settlor to define the extent of the trustee’s discretion and the right of the courts to review the trustee’s conduct. In effect, by using such language as "absolute" or "uncontrolled," the settlor may prohibit a court from second-guessing the reasonableness of the trustee’s exercise of discretion, while at the same time making it clear that no language in the trust instrument can permit the trustee to act arbitrarily or in bad faith.

Reliance Trust Company v. Candler illustrates this approach.106 In that case, Claire Candler established a marital trust in 1996, under which her husband, Buddy, was given an income interest and a limited power of appointment.107 In addition, if the trustee determined that the trust income was not sufficient to provide for Buddy’s proper maintenance and support, “such portion of the corpus of the trust estate as in the discretion of the [t]rustee is deemed appropriate” may be paid to him.108 Prior to his death in 2005, Buddy exercised his power of appointment in favor of his eight grandchildren.109 Between Claire’s death in 1997 and

104 Id. § 50, cmt. b.
105 Id. § 50, cmt. c. The Uniform Trust Code contains similar language. See UNIF. TRUST CODE § 814(a) (UNIF. LAW COMM’N 2010) (“Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as ‘absolute’, ‘sole’, or ‘uncontrolled’, the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”). See also id. § 105(b).
107 Id. at 638.
108 Id. at 639.
109 Id. at 638.
Buddy's death in 2005, the trustee paid Buddy more than $1 million from the trust corpus.\textsuperscript{110} After Buddy's death, his grandchildren sued the trustee, claiming that it had breached its fiduciary duties by invading the corpus of the trust on Buddy's behalf.\textsuperscript{111} The grandchildren prevailed in the lower court and the trustee appealed.\textsuperscript{112}

Relying on the Restatement, the appellate court concluded that the trustee's exercise of discretion was "infected with . . . arbitrariness" and "oppression" with respect to the grandchildren. In particular, the court found that the trustee had treated Buddy's requests for encroachment inconsistently and approved requests for expenses that were beyond Buddy's yearly allotted budget.\textsuperscript{113} In the court's view, these actions constituted an abuse of discretion notwithstanding the broad grant of discretion given to the trustee by Claire in the trust instrument.\textsuperscript{114}

An Illinois appellate court also relied on the Restatement to hold that a trustee abused its discretion in \textit{Peck v. Froehlich}.\textsuperscript{115} In that case, the settlor, Marjorie Sims, created two support trusts.\textsuperscript{116} Each trust authorized the trustee to distribute to her "so much of the net income and principal of the trust as trustee believes necessary to provide for my health, support and maintenance."\textsuperscript{117} After her death, the residue of the first trust, designated as the Illinois Trust, was to be paid to the plaintiff, James Peck, while the residue of the second trust, designated as the Arizona Trust, was to be paid to the defendant, David Froehlich.\textsuperscript{118} Peck and Froehlich were employees of the family business and were regarded by Marjorie and her husband as the sons they never had.\textsuperscript{119} Marjorie subsequently amended the Illinois Trust to make it clear that she expected the expenses of her maintenance and support should be shared equally by the two trusts.\textsuperscript{120}

Peck and Froehlich became the successor trustees of their respective trusts in 2001.\textsuperscript{121} Peck, as trustee for the Illinois Trust, assumed responsibility for Marjorie's health care. Although he sent quarterly bills to Froehlich for one-half of Marjorie's expenses, Froehlich refused to

\textsuperscript{110} Id. at 639.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 638.
\textsuperscript{113} Id. at 641.
\textsuperscript{114} Id.
\textsuperscript{115} 853 N.E.2d 927, 933 (Ill. App. Ct. 2006).
\textsuperscript{116} Id. at 929.
\textsuperscript{117} Id.
\textsuperscript{118} Id. “However, thirty percent of the Arizona Trust was to be paid to the Fairhavens Christian Home.” Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 930.
\textsuperscript{121} Id.
pay his share.\footnote{122}{Id.} After Marjorie’s death, Peck sued to recover one-half of the expenses that were paid for Marjorie’s care by the Illinois Trust.\footnote{123}{Id.} The lower court held for the defendant, declaring that “the defendant had complete and total discretion as trustee in making or not making disbursements from that Trust.”\footnote{124}{Id.} However, on appeal, the Illinois Appeals Court quoted from comment c to section 50 of the Restatement (Third) of Trusts and declared “[e]ven under the broadest grant of fiduciary discretion, a trustee must act honestly and in a state of mind contemplated by the settlor.”\footnote{125}{Id. at 933.} The court went on the state that it would “not permit the trustee to act in bad faith or for some purpose or motive other than to accomplish the purposes of the discretionary power.”\footnote{126}{Id. at 934.} Given the fact that Marjorie had expressly declared that she wanted the two trusts to share the cost of supporting her equally, the court concluded that Froehlich was bound to carry out her wishes.\footnote{127}{Id. at 935.} Accordingly, it reversed the decision of the lower court.\footnote{128}{Id.}

In sum, both the case law and the Restatement seem to agree that while courts will usually defer to a trustee’s judgment in close cases, they will not tolerate conduct that is inconsistent with the purpose of the trust or appears to be unreasonable or motivated by bad faith. Such conduct will always be characterized as an abuse of discretion.\footnote{129}{In contrast, the Uniform Trust Code does not require that the trustee act reasonably, but only that he act in good faith. \textit{See Unif. Trust Code} § 814(a) (Unif. Law Comm’n 2010); \textit{see also} William M. McGovern, Sheldon F. Kurtz & David M. English, \textit{Wills, Trusts and Estates} § 9.7 at 405 (4th ed. 2001).}

\section*{III. Rights of Beneficiaries.}

Conflicts between trustees and beneficiaries over distribution practices are all too common. Although one would expect that a broad grant of discretionary authority would strengthen the trustee’s position in these disputes, many courts have vigorously upheld the rights of beneficiaries even in the face of such expansive language.
A. Support Trusts.

A support trust provides that income from the trust, or part of the principal, is to be used for the "support" of a named beneficiary. Some support trusts are mandatory in the sense that the trustee must distribute funds to the beneficiary if he concludes that the beneficiary is in need of financial assistance. In other cases, the trust instrument allows the trustee to decide whether or not to distribute funds to a beneficiary who qualifies for support from the trust. This latter type of trust is sometimes referred to as a "discretionary support trust." With the first type of trust, the trustee exercises judgment as to whether the beneficiary has demonstrated sufficient need to qualify for support from the trust. Then, the trustee must determine how much support is appropriate. With the second type of trust, the trustee must first decide whether to make any distribution from the trust before deciding the other two questions. In theory, judicial review should be more limited when the second type of support trust is involved.

Sometimes, it is not clear from the trust instrument how much discretion the trustee actually has. For example, in In re Greenleaf's Estate, Mr. Greenleaf's will established a trust for the benefit of his wife, Annie. Annie was to receive $60 per month for life. In addition, the trust declared that if Annie, "by reason of sickness or other good cause," needed additional funds, the trustee was directed to provide her with enough money to ensure for her "support, comfort and needs to the end that she shall be fully and properly cared for and provided for." After Greenleaf's death, Annie petitioned the court to authorize the trustee to raise her allowance to $300 per month and pay her an additional $3000 for various expenses. The court granted this request over the trustee's objections. Two years later, Annie, now 77 years old, sought to obtain an additional $4500 from the trust to pay for home

136 Id. at 946.
137 Id.
138 Id. at 946-47.
139 Id. at 947.
140 Id.
improvements and a new automobile.141 This request was also granted and the trustee again appealed.142

The trustee argued that since the trustee had the discretion to determine how much money should be paid to Annie, the court had no authority to override its finding that $200 per month was sufficient to maintain her in accordance with the standards prescribed by the testator.143 However, the court noted that the testator declared that "I direct my Trustee to use and apply sufficient of the income and principal . . . so that my said wife shall have sufficient money to provide for her support, comfort and needs to the end that she shall be fully and properly cared for and provided for."144 In the court's view, this was not a matter of discretion and the trustee was required to provide additional funds for her support once the widow demonstrated a need for such funds.145

Trust beneficiaries are not shy about turning to the courts for relief when they disagree with a particular exercise of the trustee's discretion. Sometimes they are successful and sometimes they are not. Furthermore, each case is fact specific and it is difficult to identify any pattern in these wins and losses, although it is probably safe to say that courts will generally uphold a trustee's decision unless its conduct is suspicious or manifestly unreasonable.

For example, in Rogers v. Munsey,146 Imogen Cooke created a trust in 1927 for the benefit of her daughter, Alberta, who was insane.147 The original trustee, George Munsey, was authorized to expend trust funds "for the benefit of my said daughter in such manner and at such times as he shall deem proper, using either income or principal for the pleasure, comfort and support of my said daughter."148 Munsey filed periodic accounts until his death in 1954, but no guardian ad litem was ever appointed to represent Alberta's interest during this time.149 However, Munsey also served as Alberta's guardian from 1925 until his death.150 Munsey's son, Everett was appointed successor trustee and Charles Rogers was appointed Alberta's guardian in 1954.151

Shortly after his appointment as Alberta's guardian, Rogers filed a petition requesting the probate court to reopen twenty-three accounts

141 Id.
142 Id.
143 Id.
144 Id. at 949.
145 Id.
146 164 A.2d 554 (N.H. 1960)
147 Id. at 554-55.
148 Id. at 555.
149 See id.
150 See id. at 554-55.
151 See id. at 555.
filed by the elder Munsey between 1927 and 1954. The purpose of this action was to compel the successor trustee to reimburse Alberta for “such sum as is reasonable toward the support” of Alberta from 1927 to 1954. According to Rogers, Alberta would have been able to challenge the trustee’s decision to accumulate income if she had been represented by a guardian ad litem. The validity of this argument, in turn, depended on whether the trustee should have distributed all of the trust’s income to Alberta during this period or whether he was authorized to retain some of it to add to the trust principal.

Finding that Imogen’s will permitted the trustee “hold” trust income as well as to “use” or “expend” it, the court upheld the trustee’s actions:

We conclude that the life beneficiary was entitled to receive only so much of the income or principal as the trustee in the reasonable exercise of his discretion should determine. Fraud or misrepresentation is not alleged in the petition and there is nothing in the record to indicate that Alberta has not received the “pleasure, comfort and support” to which she was entitled under her mother’s will.

Consequently, the court held that the Guardian’s petition should not be granted.

More recently, an Illinois intermediate appellate court also upheld a trustee’s exercise of discretion against a claim by the income beneficiaries that their stepmother, Deborah Alley and J.P. Morgan Chase Bank, the co-trustees of several trusts created by their father, William Alley, had abused their discretion by not distributing more of the trust income to them. Each of the trusts provided that the trustees shall pay “so much of the net income as the trustees shall deem advisable for the proper care, support, maintenance or education of such daughter of the grantor and such daughter’s issue.” The plaintiffs’ trusts were further subdivided into GST exempt and GST non-exempt trusts. After William’s death, the trustees adopted a distribution schedule under

---

152 See id.
153 Id.
154 See id. at 556.
155 Id.
156 See id.
158 Id. at 748.
159 Id. at 747.
which two of the beneficiaries, Patricia Laubner and Pamela Larson, received $11,500 per month or 3.5% of the value of the trust assets.\textsuperscript{160}

In 2007, Patricia and Pamela petitioned the court to modify the trust agreement to allow a distribution to them of 5% of the fair market value of the trust assets.\textsuperscript{161} They subsequently requested the trial court to remove Deborah as trustee and appoint them as trustees of their respective trusts.\textsuperscript{162} The plaintiffs alleged that the trustees had breached their fiduciary duties by showing a preference for the remainder beneficiaries instead of focusing more on their comfortable maintenance and support, by adopting arbitrary distribution standards and by subjecting the plaintiffs’ descendants to potential generation-skipping taxes by not depleting the non-exempt trusts first.\textsuperscript{163}

On appeal, the court considered whether the distribution formula was arbitrary.\textsuperscript{164} The plaintiffs contended that the 3.5% rate was too low because it reflected a desire to preserve the trust principal instead of providing the income beneficiaries with sufficient funds to maintain their current lifestyles.\textsuperscript{165} However, the court held that the plaintiffs had not set forth any facts to show why the amount currently distributed to them was not sufficient for them to maintain a comfortable lifestyle.\textsuperscript{166} Finally, the court declared that the trustees had not breached their duty of impartiality by improperly favoring the remainder beneficiaries.\textsuperscript{167}

A New York appellate court reached a similar conclusion in the case of \textit{In re Trusts for McDonald}.\textsuperscript{168} In that case, two 19-year-old twin sisters attempted to remove their mother as trustee of two testamentary trusts created by their grandfather.\textsuperscript{169} This action was precipitated by the refusal of the trustee to make discretionary distributions from the trusts to pay for their college expenses and the purchase of automobiles for each of them.\textsuperscript{170} The trusts authorized the trustee to “pay or apply to or for the use of each living grandchild of mine so much of the income, accumulated income and principal of such share at any time and from time to time as the Trustee deems advisable in [the Trustee’s] sole discretion not subject to judicial review, to provide for such grandchild’s

\textsuperscript{160} Id. at 748.
\textsuperscript{161} See id. at 748-49.
\textsuperscript{162} Id. at 749.
\textsuperscript{163} Id.
\textsuperscript{164} See id. at 750.
\textsuperscript{165} See id. at 750-51.
\textsuperscript{166} Id. at 752.
\textsuperscript{167} Id. at 751-52.
\textsuperscript{169} Id. at 751.
\textsuperscript{170} Id.
maintenance, support, education, health and welfare, even to the point of exhausting the same."\footnote{171}

The trustee appealed the Surrogate Court’s ruling that she had abused her discretion by rejecting her daughters’ request.\footnote{172} On appeal, the court acknowledged that the testator “manifested a clear intention to grant the trustee the greatest latitude permitted by law in exercising discretionary judgment,”\footnote{173} but nevertheless reversed the lower court.\footnote{174} The court held that its review of the exercise of the trustee’s judgment in making discretionary distributions should be evaluated in light of other resources that might be available to the beneficiaries.\footnote{175} In this case, the court found that college savings accounts were available to pay for the plaintiffs’ college expenses.\footnote{176} Although the court did not specifically address the question of whether the trustee could be required to purchase automobiles for her daughters, it tacitly upheld the trustee’s decision on that issue as well.

While courts are often inclined to dismiss challenges to the exercise of discretion by a trustee, this is not always the case. Thus, in Conlin v. Murdock,\footnote{177} the New Jersey Chancery Court upheld the claim of a beneficiary.\footnote{178} In the Conlin case, John Armstrong’s will left his residuary estate in trust and authorized his trustees to pay over the income from the trust, together with such portions of the principal as the trustees “in their, his or its absolute discretion think proper” to Armstrong’s sisters, Georgina, Eva and Elizabeth, and to his brother, Wilfred, “in such respective shares and proportions, whether equal or unequal, as my said trustees may in their, his or its discretion think proper, for their support and maintenance.”\footnote{179} There was also a remainder to Armstrong’s nieces at the death of the last income beneficiary.\footnote{180} The testator named Wilfred and Eva as executors and trustees.\footnote{181}

The plaintiff, Georgina, alleged that she was “seventy-three years of age, crippled, destitute, without means of support” and in need of constant medical care and attention.\footnote{182} Furthermore, Georgina claimed that she was wholly dependent on her daughter, Hazel, who earned a
modest salary. She also contended that the trustees only paid her $50 per month from the trust, the same amount that Eva and Wilfred received. In response, Frank Gordon, one of the trustees, admitted that the monthly allowance was not sufficient to provide Georgina with adequate support. Nevertheless, he argued that the $50 per month payment to Georgina was justified because that was the amount Wilfred and Eva received.1

The court was not impressed with Frank's reasoning. Instead, it declared that even the use of such terms as “absolute” or “uncontrolled” would not give a trustee unlimited discretion. Instead, a trustee would be guilty of an abuse of discretion if the court concludes that he is “paying less than a reasonable person could think necessary for the beneficiary’s support.”

Applying this standard, the court determined,

Considering Georgina's circumstances, the monthly allowance to her is entirely inadequate for her support and manifestly not in accord with the testator's clear intent. It is just a mere pittance that will not meet the cost of the bare necessities of life. The complainant Georgina must not only have food, be clothed and housed, but her condition is such that she requires constant medical attention. These absolute requirements entail a cost very much in excess of the amount the executor-trustees advance.

The court then ruled that the parties could try to agree upon a reasonable monthly allowance for Georgina; if they failed to do so, the court declared that it would appoint a master to decide the issue.

Stallard v. Johnson provides another example of judicial overruling of parsimonious trustees. In that case, Frederick Stallard's will declared,

I direct my trustee to expend from time to time so much of the income and of the principal of said trust estate as shall seem meet and proper for the comfort, maintenance and support of my beloved wife, Sadie E. Stallard, and my beloved sister, Ella Stallard Johnson, for and during the period of their natural lives, with full power and authority to sell and dispose of so

183 Id.
184 Id.
185 Id.
186 Id.
187 Id.
188 Id. at 220 (quoting 2 Scott on Trusts § 187-2, at 993).
189 Id.
190 Id.
191 116 P.2d 965 (Okla. 1941).
much of my estate, both real and personal, as is necessary if the income therefrom is not sufficient to properly care, support and provide for my said wife and sister during their lifetime in a manner which my trustee shall deem suitable. . . . 192

The trustee maintained that this language gave him the absolute power to determine how much, and in what manner, maintenance and care should be provided on behalf of the beneficiaries.193 Accordingly, the trustee limited the plaintiff’s allowance to $15 per month and refused to pay for any other expenses such as board, lodging, medical care, medicine, clothing or incidental expenses.194 For her part, the plaintiff alleged without contradiction, that she was more than seventy-two years old and suffered from the infirmities of age and from a heart condition that required medical attention and treatment.195 She claimed that the amount provided to her by the trustee “was wholly inadequate to meet the reasonable and ordinary expenses of the plaintiff or to provide her with common necessities of life.”196 According to the plaintiff, a reasonable allowance would have been $75 per month.197

The trial court ruled that the trustee had abused his discretion and directed him to pay the plaintiff $60 per month.198 On appeal, the court rejected the trustee’s assertion that any interference by the court with his discretion was not permissible.199 Instead, the court declared that “the discretion vested in a trustee must be fairly and reasonably exercised and if not the same will be compelled by a court of equity.”200 In other words, “courts in the exercise of their equitable jurisdiction have the power and duty of safeguarding the rights of the cestui que trust and of compelling the performance by the trustee of the duties of his trust.”201 In this case, the court concluded that where the trust had sufficient assets to carry out the testator’s avowed purpose of providing his wife and sister with suitable care and maintenance, the manifestly inadequate allowance provided by the trustee “constituted an exercise of the discretion vested in the defendant as trustee [that] would constitute travesty upon justice and be cause for righteous reproach of the

192 Id. at 966.
193 Id.
194 Id.
195 Id.
196 Id.
197 Id.
198 Id.
199 Id. at 967.
200 Id.
201 Id. (citing Hull v. Holloway, 20 A. 445 (Conn. 1889)).
Accordingly, the court affirmed the judgment of the lower court. Accordingly, the court affirmed the judgment of the lower court.

It is worth noting that not all "support" trusts are concerned with providing maintenance or support. In some cases, the trust purpose may be expressed in broader terms, such as "benefit," "happiness" or "welfare," leaving the trustee to determine exactly what these words mean. On the other hand, settlors sometimes seek to limit payments from the trust to such purposes as educational expenses or providing for casualties or other emergencies. Because these terms are inherently vague, trustees must often exercise discretion when administering trusts of this nature. Educational trusts provide some interesting examples of this.

In Wolf's Estate, the decedent's will authorized the trustee to "apply the income or as much of the principal as the said trustee in his opinion he shall deem necessary, for the proper education of my brother, Daniel B. Wolf." The decedent's widow was named as the residuary legatee. A question arose as to whether a "proper education" was limited to a formal education, which would normally end upon graduation from college, or whether it referred to education in the broad sense, a process that might continue throughout Daniel's lifetime. The court concluded that the decedent used the term "education" in its broader sense and ruled that the widow would have to wait until Daniel died before she could get possession of the trust property.

In contrast, the court in Epstein v. Kuvin viewed the concept of education more narrowly. In that case, Fannie Kuvin's will directed that her sons Samuel and Herbert were to contribute $600 and $400 a year

---

202 Id.
203 Id.
208 See, e.g., In re Tone's Estate, 39 N.W.2d 401, 403 (Iowa 1949); Lyter v. Vestal, 196 S.W.2d 769, 770 (Mo. 1946); In re Shiel's Will, 120 N.Y.S.2d 632, 635 (Sur. Ct. 1953).
209 299 N.Y.S. at 99.
210 Id. at 100.
211 Id.
212 Id. at 100-02.
213 Id. at 101-02.
respectively toward the expenses of a college education for her grandson, Sanford Kuvin. On appeal, the court reversed the trial court and declared,

[W]e believe that the great majority of people, when they say that this member of the family or that acquaintance had a college education or has a college degree, mean that he has taken a regular course of study on the undergraduate level that is open to students coming directly from high school; and that he has been awarded the bachelor's degree to which the course leads, and so completed his college education. Accordingly, the court held that Fannie did not mean the term "college education" to include medical school.

B. Pure Discretionary Trusts.

A pure discretionary trust exists when the trustee's power to distribute trust assets is not subject to any sort of objective standard. Since there is no standard by which a trustee's decision can be evaluated, beneficiaries are often said to have a mere expectancy rather than a specific legal interest in the trust assets. For this reason, it is often said that a beneficiary cannot compel the trustee to exercise his discretion in any particular way.

As the Ternansky case demonstrates, courts tend to uphold the trustee's judgment in such cases. In her will, Rose Ternansky left two-thirds of her residuary estate outright to two of her three children and directed that the remaining third be held in trust for the benefit of her third child, William. The trustee, William's sister, Florence, was authorized to pay over to William "the whole or any part of the corpus . . . at such time or times, and in such amount or amounts, as said trustee may deem advisable." Although an Ohio appeals court found that

215 Id. at 753.
216 Id.
217 Id. at 754.
218 Id.
221 See In re Estate of Ternansky, 141 N.E.2d 189, 193 (Ohio Ct. App. 1957).
222 Id. at 190.
223 Id.
William was the sole equitable owner of the trust assets, it rejected William's claim that he was entitled to the trust corpus. In the court's view,

Trustees must always act in good faith and always act fairly and reasonably, and a court of equity will and can require such [behavior]. Where a trustee is given uncontrolled discretion, as here, he acts much as a judicial officer and is duty bound to exercise sound discretion under the circumstances.

In addition, the court declared that,

Generally, such a power is limited to the extent at least that a trustee is bound to act in good faith and with due care, diligence and skill. The discretion of trustees may be likened to that of judges. It is not an arbitrary discretion and does not include the unrestrained power to do what the trustee pleases.

Accordingly, the court held that, subject to the standard set forth above, Florence could determine when and whether William should receive any disbursements from the trust. However, since there was no remainderman, any funds remaining in the trust at William's death would become part of his estate.

A similar decision was also upheld by a Minnesota appeals court in Hurtig v. Gabrielson. That case involved a pourover trust established by the beneficiary's father. The trust provided that the trustee, the beneficiary's brother, could distribute any part of the net income from the trust "to or among the donor's children in any proportion deemed advisable by the Trustee." The trustee made distributions each year to the testator's children, but deducted from Joan Hurtig's share the interest on a $50,000 bank loan which her father had cosigned and which the bank had collected from his estate. As a result, Joan received virtually nothing. Joan contended that the trustee's action was improper because her debt to the estate had been discharged by bankruptcy.

Reversing the lower court, the appellate court concluded that the "trustee has absolute discretion to make or withhold . . . distributions;
his decision to apply respondent's distributions . . . to her debt to the estate was also within his discretion.”

Finding that there was no abuse of discretion, the court upheld the trustee's discretion to offset distributions to Joan by the interest owed on her debt to the estate.

On the other hand, a court is more likely to intervene when a trustee flatly refuses to consider making a distribution to a beneficiary. Thus, in *Rinker's Administrator v. Simpson*, Ella Rinker created a testamentary trust for the benefit of Nina Garrison, naming her sister Lillian White and Lillian's husband, Brock White, as trustees. In her will, Ella authorized the Whites to hold $1000 in trust for Nina, using both principal and interest "entirely as they deem best for her." Despite the fact that Nina alleged that "she was in the hospital, physically helpless, and without means to meet her necessary expenses for maintenance and medical and hospital attention," the trustees steadfastly refused to distribute trust funds to her. The lower court overruled the trustees' demurrer and they appealed. The Virginia Supreme Court acknowledged that the trustees had "wide discretion" to determine when and in what amounts they would make payments to Nina. Nevertheless, this discretion was not unlimited. According to the court,

The discretion given to them by the will is not the uncontrolled right to choose whether they will or will not expend any part of the trust for her benefit, but the right to decide in the exercise of an honest judgment when and to what extent they shall make payments to or for [Nina] to accomplish the purpose of the trust, i.e., promote her best interest.

The court concluded by declaring that the will imposed upon the trustees a positive duty to exercise their discretion in good faith in order to achieve the testator's purpose.

When a trustee is given the discretion to invade the corpus of the trust, the question sometimes arises as to whether he may distribute the entire corpus to a beneficiary and thereby terminate the trust in response to a request from a beneficiary. Clearly, the trustee can do so if

---

234 *Id.* at 614.
235 *Id.*
236 166 S.E. 546 (Va. 1932).
237 *Id.* at 547-48.
238 *Id.* at 547.
239 *Id.* at 548.
240 *Id.*
241 *Id.* at 549.
242 *Id.*
243 *Id.*
the trust instrument expressly empowers him to do so.\textsuperscript{244} However, while a trustee may be given the power to transfer the entire corpus of the trust to one of the beneficiaries, it is clear that a beneficiary cannot compel him to do so when the power is discretionary.\textsuperscript{245} \textit{Woodard v. Mordecai}\textsuperscript{246} provides a good illustration of this principle. \textit{Woodard} involved a testamentary trust for the benefit of the testator's wife, son and daughter.\textsuperscript{247} Each of the three beneficiaries was entitled to receive the income from the trust.\textsuperscript{248} In addition, the will provided that the trustees

\begin{quote}
(if they in their judgment deem it necessary or best for the welfare of the cestui que trust, and consistent with the welfare of my family and estate) may from time to time, advance, deliver and convey absolutely and in fee simple, free from the trust, [to the beneficiaries] any part or all of the share of the corpus of the trust estate above provided for his or her benefit and thus terminate the trust so far as it affects the property so advanced, delivered or conveyed. . . \textsuperscript{249}
\end{quote}

The testator's widow, Elizabeth, and his daughter, Bessie, requested the trustees to transfer their respective shares to them free of trust.\textsuperscript{250} The corporate trustee was willing to comply with this request but the individual trustee refused to do so.\textsuperscript{251} Thereupon, the widow and daughter brought an action against the individual trustee to compel him to consent to the termination of their interests in the trust.\textsuperscript{252} The trial court ruled in favor of the defendant trustee.\textsuperscript{253} On appeal, the North Carolina court acknowledged that while a court could compel a trustee to exercise a mandatory power, it could not intervene in the exercise of a discretionary power except to prevent an abuse of discretion.\textsuperscript{254} According to the court, a trustee would only abuse his discretion "if he acts dishonestly, or if he acts with an improper motive even though not a

\begin{footnotes}
\item[246] 67 S.E.2d 639 (N.C. 1951).
\item[247] See \textit{id.} at 640.
\item[248] \textit{id.} at 641.
\item[249] \textit{id.} at 642.
\item[250] \textit{id.} at 643.
\item[251] \textit{id.}
\item[252] \textit{id.}
\item[253] \textit{id.} at 644.
\item[254] \textit{id.}
\end{footnotes}
dishonest motive, or if he fails to use his judgment, or if he acts beyond
the bounds of reasonable judgment."255

In this case, the widow contended that the trustee should terminate
the trust in order to “free her from ‘court struggles’ and restore her
piece of mind.”256 The individual trustee apparently did not consider
this to be a sufficient reason for terminating the trust. The appeals court
agreed and affirmed the trial court’s decision, while pointing out that its
judgment did not preclude the trustees from complying with the benefi-
ciaries’ wishes at some later time.257

Notwithstanding the fact that the beneficiaries of a purely discre-
tionary trust cannot compel the trustee to make a distribution of trust
funds to them, they may compel the trustee to render an accounting258
and they also have standing to request a court to surcharge or remove
the trustee for breach of fiduciary duty.259 The right to an accounting is
illustrated by Goodpasteur v. Fried.260 The plaintiff, Ralph Goodpaste-
teur, one of four income beneficiaries of a discretionary trust established
under the will of Reverend Clarence Cobbs, brought suit to require the
trustees to provide an accounting of the trust assets.261 The trial court
dismissed the suit because the plaintiff failed to allege misconduct on
the part of the trustees.262 On appeal, the court observed that Section 11
of the Trust and Trustees Act of Illinois required a trustee to provide
annually an accounting to all beneficiaries “then entitled to receive or
eligible to have the benefit” of any income from the trust.263 The trust-
ees maintained that the plaintiff’s interest in the trust was a mere expec-
tancy and only the First Church of Deliverance, the remainder
beneficiary, was entitled to an accounting.264 However, the court held
that Ralph was an eligible beneficiary even though the trust was discre-
tionary and, therefore, was entitled to demand an accounting.265

Moreover, as Scanlan v. Eisenberg266 points out, the beneficiary of
a discretionary trust also has standing to seek relief against a trustee for

255 Id.
256 Id. at 646.
257 Id.
258 See Goodpasteur v. Fried, 539 N.E.2d 207, 210 (Ill. App. Ct. 1989); Rinker’s Admin-
259 See Scanlan v. Eisenberg, 669 F.3d 838, 843 (7th Cir. 2012); Fortune v. First Union
Nat’l Bank, 371 S.E.2d 483, 485 (N.C. 1988); see also In re Jacobs, 370 S.E.2d 860, 863
261 Id. at 208.
262 Id.
263 Id. at 209.
264 Id. at 210.
265 Id.
266 669 F.3d 838 (7th Cir. 2012).
breach of fiduciary duty. The plaintiff in that case, Mary Scanlan, was the principal beneficiary of six trusts established by her father and uncle.267 Each of the trusts authorized the trustee to distribute “all or as much of the net income or principal, or both” to Mary “as the Trustee deems to be necessary for her support” or “in her best interests.”268 Mary’s children were the trust’s contingent remainder beneficiaries.269 Mary brought suit, alleging that the corporate trustee, General Trust Co. and its majority owner, Marshall Eisenberg, failed to properly diversify the trust’s assets, which largely consisted of General Growth Properties (GGP) stock, and, in fact, purchased even more GGP stock in 2007 and 2008.270 As a result, the trusts incurred more than $200 million in losses when GGP declared bankruptcy in 2009.271 She also claimed that trustees’ actions were tainted by a conflict of interest.272

Finding that the trusts’ assets totaled approximately $800 million,273 the trial court ruled that Mary lacked standing because she failed to allege “facts showing a likelihood that the corpus of the trusts would ever be insufficient to pay all of her discretionary distributions to which [she] might become entitled during her lifetime.”274 Reversing the trial court’s decision, the federal appeals court relied on section 94(1) of the Third Restatement of Trusts, which provides,

A suit against a trustee of a private trust to enjoin or redress a breach of trust or otherwise to enforce the trust may be maintained only by a beneficiary or by a co-trustee, successor trustee, or other person acting on behalf of one or more beneficiaries.275

In addition, the court observed that comment b to section 94 declared,

A suit to enforce a private trust ordinarily . . . may be maintained by any beneficiary whose rights are or may be adversely affected by the matter(s) at issue. The beneficiaries of a trust include any person who holds a beneficial, present or future, vested or contingent [interest]. . . . This includes a person who is eligible to receive a discretionary distribution. . . .276

267 Id. at 840.
268 Id.
269 Id.
270 Id.
271 Id. at 840-41.
272 Id. at 841.
273 Id. at 842.
274 Id. at 841.
275 See RESTATEMENT (THIRD) OF TRUSTS § 94(1) (AM. LAW INST. 2003).
276 Id. § 94, cmt. b.
Based on its interpretation of the Restatement, as well as other authorities, the court concluded that Mary had an equitable interest in the trust and, therefore, had standing to enforce the trust.

C. The Restatement (Third) of Trusts.

The Restatement (Third) of Trusts sets forth the rights of the trust beneficiaries and the power of the courts to grant relief against the abuse of a trustee’s discretion. Section 50(2) provides,

"The benefits to which a beneficiary of a discretionary interest is entitled, and what may constitute an abuse of discretion by the trustee, depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor’s purposes in granting discretionary power and in creating the trust."

This formulation is not particularly novel or controversial. However, several comments to section 50(2) provide some additional context, at least where support trusts are concerned. For example, comment d, which discusses the meaning of frequently used standards, points out that the terms “maintenance” and “support” mean essentially the same thing. In addition, these terms usually imply a level of support from the trust sufficient to enable the beneficiary to maintain his or her accustomed standard of living. Comment d also declares that distributions appropriate to the beneficiary’s present lifestyle may require an increase from the trustee, not only to compensate for inflation, but also to prevent the beneficiary’s standard of living from deteriorating due to medical expenses or the expense of providing for the needs of others. Furthermore, in the absence of language suggesting a broader standard of support, the terms “support” and “maintenance” would not include payments that are unrelated to support but merely contribute to other aspects of the beneficiary’s contentment or happiness.

Comment d also considers the effect of such terms as “comfort,” “welfare” or “happiness” on the size of a distribution to the beneficiary of a support trust. It concludes that the term “comfort” does not

---

277 See In re Marriage of Jones, 812 P.2d 1152, 1157 (Colo. 1991); United States v. O'Shaughnessy, 517 N.W.2d 574, 577 (Minn. 1994); Paulson v. Paulson, 783 N.W.2d 262, 272 (N.D. 2010).
278 Scanlan v. Eisenberg, 669 F.3d 838, 843 (7th Cir. 2012).
279 See RESTATEMENT (THIRD) OF TRUSTS § 50(2).
280 Id. § 50(2), cmt. d.
281 Id.
282 Id.
283 Id.
284 Id.
change the meaning of maintenance and support for a beneficiary whose lifestyle is already reasonably comfortable, although it might be interpreted to raise the level of support for a beneficiary whose lifestyle is more modest. On the other hand, comment d also suggests that a provision that authorizes distributions for the “benefit,” “best interests” or “welfare” of a beneficiary might be construed to allow the trustee to make distributions that exceed a purely support-related standard. Finally, comment d states that use of the term “happiness” indicates an intent provide even more generously for the beneficiary.

Comment e is concerned with the issue of whether a trustee may or must take other resources available to a beneficiary into account when making a distribution from a support trust. Comment e creates a presumption, subject to certain qualifications, that the trustee should take these resources into account in determining whether, and in what amounts, a distribution is to be made. That being said, comment e also notes that this presumption should not apply when the settlor expresses a contrary intent or where such a presumption would be contrary to the purposes or terms of the trust. In addition, the Reporter’s Notes acknowledge that this presumption is a departure from previous Restatements, but point out that it appears to be consistent with the modern trend of judicial decisions.

Finally, comment f sets forth a number of inferences and constructional preferences to aid the trustee when there are multiple beneficiaries or groups who may be entitled to discretionary distributions. For example, the beneficiary’s relationship to the settlor may be relevant. In addition, where multiple lines of descent are involved, it may be appropriate to make distributions on a per stirpes basis. Finally, where the beneficiaries are of the same generation, such as children following the death of one or both parents, comment f suggests that the distribution scheme reflect a preference for a common standard of living.

285 Id.
286 Id.
287 Id.
288 Id. § 50(2), cmt. e.
289 Id.
290 Id.
291 See Restatement (Second) of Trusts § 128 cmt. e (Am. Law Inst. 1959).
293 Id. sec. 50, cmt. f.
294 Id.
295 Id.
and similarity of opportunity, assuming similar needs, capacities and interests.\textsuperscript{296}

IV. RIGHTS OF CREDITORS.

Creditors include children and ex-spouses of a beneficiary seeking child support or alimony, providers of necessary goods and services like physicians or hospitals, ordinary business creditors like banks or credit card companies, tort claimants and government agencies seeking payment for back taxes or government services. While these creditors can always seek to recover directly against the beneficiary, they often prefer to force the trustee to pay their claims from the trust assets rather than taking their chances with wily deadbeats. The ability of such creditors to recover against the trust itself depends on the status of the claimant and the nature of the beneficiary's interest in the trust.\textsuperscript{297}

A. Support Trusts.

In theory, most creditors should not be able to force the trustee of a support trust to pay them because this would not ordinarily be consistent with the purposes of the trust. However, most courts will allow certain creditors to seek payment from the trust. This includes ex-spouses and minor children of the beneficiary as well as government health care providers.

1. Ordinary Creditors.

Since the trustee of a support trust is only authorized to distribute funds to provide a beneficiary with funds for maintenance and support, neither the beneficiary nor creditors of the beneficiary can compel the trustee to make distributions for other purposes since such payments would be contrary to the purposes of the trust.\textsuperscript{298} On the other hand, it may be possible for a provider of necessary goods and services to seek compensation from the trustee of a support trust.\textsuperscript{299} The Estate of Dodge case provides a good example of this principle.\textsuperscript{300} In that case, Eleanor Paine brought suit against the trustee of a support trust for re-

\textsuperscript{296} Id.
\textsuperscript{297} Creditors may also be defeated by the presence of a spendthrift provision. A spendthrift provision is a restraint on a beneficiary's power to alienate his interest in the trust, either voluntarily or involuntarily. See Schreiber v. Kellogg, 50 F.3d 264, 267 (3d Cir. 1995); First Nw. Tr. Co. of S.D. v. Internal Revenue Serv., 622 F.2d 387, 391 (8th Cir. 1980); In re Watts, 162 P.2d 82, 87 (Kan. 1945).
\textsuperscript{298} See George T. Bogert, Trusts § 42 (6th ed.1987).
\textsuperscript{300} 281 N.W.2d 447 (Iowa 1979).
imbursement for nursing home care, medical bills, hospital expenses and other expenses that she had paid on behalf of her sister, Margaret Bow-
ers, who suffered from mental illness and required full-time care in a rest home.  

The trust in question was established by their aunt, Carolyn Dodge, and was administered by their brother, Hunter Scott. The trust granted Hunter "the right to disburse or use any portion of the principal for the care and maintenance" of the beneficiary, Margaret. When Hunter refused to invade the trust corpus in order to repay Eleanor, she brought suit to force him to do so.

The lower court ruled that the trust must reimburse Eleanor for the expenditures she made for Margaret's care prior to her death in 1976. This decision was affirmed on appeal. The appeals court first concluded that the trust was a support trust, not a purely discretionary one. Furthermore, relying on section 157 of the Restatement (Second) of Trusts, the court agreed that the interest of the beneficiary could be reached to satisfy a claim in the case of a support trust. Accordingly, the court held that Eleanor could recover from the trust if "the claim is for necessary goods or services, not officiously rendered, which the settlor intended to be provided the beneficiary by trust funds; and (2) the withholding of payment for the goods and services is not properly within the discretion granted the trustee by the instrument." The court offered the following rationale to support its conclusion:

To bar this claim for necessary services rendered the deceased beneficiary would unjustly enrich the trust corpus at the expense of the creditor, a result contrary to the intent of the testator which would effectively vest the trustee with greater discretion than that granted by the trust instrument.

2. Spouses and Minor Children.

A number of courts have held that the needs of a current spouse may be taken into account where support trusts are concerned. The

---

301 Id. at 449.
302 Id. at 448.
303 Id.
304 Id. at 449.
305 Id.
306 Id. at 452.
307 Id. at 450.
308 Id.
309 Id. at 451.
310 Id. at 452.
rationale for these decisions is that the spouse stands in the trust beneficiary's shoes because the beneficiary has a legal duty to support the spouse.\textsuperscript{312} However, courts have shown less willingness to allow ex-spouses to seek payment from a former spouse's interest in a support trust. For example, in \textit{Culver v. Culver},\textsuperscript{313} Betty Culver requested a court to order a trustee to pay back alimony payments from a support trust established by her former husband, Knight Culver.\textsuperscript{314} The trust permitted the trustee "in its absolute and uncontrolled discretion, to pay to or for the benefit of [Knight] . . . parts of the principal of this trust, from time to time in the event of an emergency effecting him, his wife or children."\textsuperscript{315} On appeal, the court upheld the right of the trustee to determine whether an emergency existed and refused to overrule the trustee's finding that an emergency did not exist.\textsuperscript{316}

Courts seem to have taken the same approach in child support cases as well. For example, in \textit{Matthews v. Matthews},\textsuperscript{317} the plaintiff sought to collect child support payments from a testamentary trust created by the beneficiary's father.\textsuperscript{318} The will authorized the trustee to pay the testator's son, William Matthews, "such part of the income derived from such trust fund as the trustee in his sole discretion shall deem necessary for his reasonable support, maintenance and health, or for any extraordinary expense caused by his illness, accident or other emergency."\textsuperscript{319} On appeal, the court observed that the trust was neither purely a discretionary trust nor a support trust.\textsuperscript{320} Therefore, it concluded that William had an interest in the trust, at least as far as his support needs were concerned.\textsuperscript{321} Furthermore, the court reasoned that the child of the beneficiary of such a trust, in the absence of an express exclusion in the trust, should be able to recover from it.\textsuperscript{322} The court concluded that the child should be able to recover from the trust, declaring that "the beneficiary should not be allowed to enjoy his interest while neglecting to support his children."\textsuperscript{323} Accordingly, the appeals court reversed the ruling of the lower court and held that the plaintiff

\textsuperscript{935} (N.H. 1912) (holding that the trustee of discretionary support trust required to take into account the needs of beneficiary's wife and children).

\textsuperscript{312} See \textit{Reynolds v. Reynolds}, 180 S.E. 70, 77 (N.C. 1935).


\textsuperscript{314} \textit{Id.} at 487.

\textsuperscript{315} \textit{Id.} at 488.

\textsuperscript{316} \textit{Id.} at 489-90.


\textsuperscript{318} \textit{Id.} at 279.

\textsuperscript{319} \textit{Id.} at 280.

\textsuperscript{320} \textit{Id.} at 281.

\textsuperscript{321} \textit{Id.}

\textsuperscript{322} \textit{Id.}

\textsuperscript{323} \textit{Id.}
could recover any surplus income each year for back child support payments that was not required for other obligations of the trust.324


If the trust is a mandatory support trust, the trustee can usually be compelled to distribute trust assets to reimburse the suppliers of necessary goods and services when the trust directs the trustee to distribute such trust income or principal as is necessary to meet the support and maintenance needs of the beneficiary.325 Thus, providers of housing, medical services and other welfare benefits can force the trustee to pay for these services.326 However, there is less agreement when the trustee has the discretion to provide, or not to provide, for the beneficiary’s maintenance and support.327 In such cases, many courts have rejected claims against the trust.328

_Pohlmann ex rel. Pohlmann v. Nebraska Department of Health & Human Services_ is illustrative.329 _Pohlmann_ involved an appeal from a lower court decision affirming the state’s denial of Ruth Pohlmann’s application for Medicaid benefits based on the alleged availability of funds in a marital trust established by her husband.330 In his will, Ruth’s husband, Herman, established a trust which provided that Ruth was to receive all of the income “and such portion of the principal as [the trustee] may, from time to time, deem appropriate for her health, education, support or maintenance.”331 Herman died in 2000 and three years later Ruth applied to the Department of Health and Human Services (DHHS) for Medicaid benefits.332 However, the Department denied her

324 Id. at 282.
329 710 N.W.2d at 645.
330 Id. at 641.
331 Id.
332 Id.
application in part because it concluded that resources were available to Ruth from the trust.\textsuperscript{333}

On appeal, the Nebraska court declared that in order to determine whether the corpus of a trust is a resource that is "available" to a Medicaid applicant, it should distinguish between discretionary trusts and support trusts.\textsuperscript{334} According to the court, because a beneficiary can compel the trustee to distribute principal or income as necessary for the beneficiary's support, the Department could take the trust assets into account when deciding questions of eligibility.\textsuperscript{335} However, the court reasoned, since the beneficiary of a discretionary trust cannot compel the trustee to make distributions, the Department can only consider those distributions of income or principal that the trustee actually makes as available assets when evaluating the beneficiary's eligibility for Medicaid assistance.\textsuperscript{336} In this case, the court held that because Ruth could not compel the trustee of the trust to make a distribution to her, the Department could not take it into account in determining her eligibility for Medicaid benefits.\textsuperscript{337}

However, a few decisions, such as \textit{State v. Rubion},\textsuperscript{338} have upheld a government demand that the trustee distribute trust funds for the beneficiary's support.\textsuperscript{339} The trust in that case was created by the beneficiary's grandmother and declared that the "trustee shall, at his discretion, and by the exercise of his own judgment, provide a means for the support and maintenance of my grand-daughter and adopted daughter, Ella Hansley, who, at this time is unable to provide for herself."\textsuperscript{340} The state brought a suit to require the trust to reimburse it for the cost of providing support to Ella at the Abilene State Hospital from 1945 to 1953.\textsuperscript{341} It appears that Ella was an epileptic who was cared for by her grandmother before being admitted to the state hospital in 1945.\textsuperscript{342} The lower courts held in favor of the trustee,\textsuperscript{343} but the Texas Supreme Court reversed on appeal, concluding, notwithstanding the trust's discretionary language, that the testator intended that the trust property should be used solely for Ella's present and future support.\textsuperscript{344} Consequently, the

\begin{itemize}
\item \textsuperscript{333} Id. at 641-42.
\item \textsuperscript{334} Id. at 645.
\item \textsuperscript{335} Id.
\item \textsuperscript{336} Id.
\item \textsuperscript{337} Id. at 646.
\item \textsuperscript{338} 308 S.W.2d 4 (Tex. 1957).
\item \textsuperscript{339} Id. at 9.
\item \textsuperscript{340} Id. at 7.
\item \textsuperscript{341} Id. at 5.
\item \textsuperscript{342} Id. at 6.
\item \textsuperscript{343} Id. at 4.
\item \textsuperscript{344} Id. at 8-9, 11.
\end{itemize}
court determined that the trustee’s refusal to make any payments to the state was an abuse of discretion.\textsuperscript{345}

An Iowa reached a similar conclusion in \textit{Strojek v. Hardin County Board of Supervisors.}\textsuperscript{346} Marie Strojek was a mentally handicapped 63-year-old woman who had resided at an institution for the mentally disabled since 1981.\textsuperscript{347} The County paid almost $22,000 per year for her care.\textsuperscript{348} Marie’s father created a trust for Marie and her sister, Caroline, who acted as trustee, which declared that “[m]y trustee shall from time to time, pay or apply for the benefit of my daughter, Marie Helen Strojek, such sums from the income and principal as my trustee in the exercise of her sole discretion deems necessary or advisable, to provide for her proper care, support, maintenance and education.”\textsuperscript{349} The trust paid the County $10,000 per year to help defray the cost of Marie’s care.\textsuperscript{350} However, in 1997, the County informed Caroline that Marie would no longer qualify for assistance because the trust assets exceeded the allowable minimum.\textsuperscript{351} The lower court upheld the County’s decision.\textsuperscript{352}

On appeal, the court distinguished between discretionary and support trusts and pointed out that providers of necessary goods and services could seek reimbursement from the trustee of a support trust.\textsuperscript{353} In contrast, creditors of the beneficiary ordinarily could not reach the assets of a discretionary trust.\textsuperscript{354} At the same time, the court observed that some trusts had features of both discretionary and support trusts and that it was difficult to decide which rule to apply in such cases.\textsuperscript{355} The court resolved this dilemma by adopting the concept of a “discretionary support trust,” from Nebraska.\textsuperscript{356} According to the court, “[a] discretionary support trust is created when the settlor combines explicit discretionary language ‘with language that, in itself, would be deemed to create a pure support trust.’”\textsuperscript{357} In such cases, the court held, the trust would establish minimal distributions that the trustee must make in order to comply with the settlor’s intent to provide the beneficiary with

\begin{itemize}
\item \textsuperscript{345} \textit{Id.} at 9.
\item \textsuperscript{346} 602 N.W.2d 566 (Iowa Ct. App. 1999).
\item \textsuperscript{347} \textit{Id.} at 568.
\item \textsuperscript{348} \textit{Id.}
\item \textsuperscript{349} \textit{Id.}
\item \textsuperscript{350} \textit{Id.}
\item \textsuperscript{351} \textit{Id.}
\item \textsuperscript{352} \textit{Id.}
\item \textsuperscript{353} \textit{Id.} at 568-69.
\item \textsuperscript{354} \textit{Id.} at 569.
\item \textsuperscript{355} \textit{Id.}
\item \textsuperscript{356} \textit{Id.}
\item \textsuperscript{357} \textit{Id.} at 570.
\end{itemize}
basic support while retaining broad discretionary power.\textsuperscript{358} Therefore, the court concluded that either Marie or the County could reach those trust assets that were necessary to satisfy Marie’s basic needs.\textsuperscript{359} Furthermore, the County could take Marie’s interest in the trust into account when determining her eligibility for government support.\textsuperscript{360}

B. Discretionary Trusts.

1. \textit{Ordinary Creditors}.

According to the traditional view, general creditors of the beneficiary of a discretionary trust were not able to reach the assets of the trust until the trustee exercised his discretion to distribute them to the beneficiary.\textsuperscript{361} The rationale for this rule was the familiar one that since the beneficiary of a discretionary trust cannot compel the trustee to distribute funds to himself from the trust, the creditor of such a beneficiary cannot compel a distribution either.\textsuperscript{362} For example, in \textit{Calloway v. Smith},\textsuperscript{363} two judgment creditors sought to reach the beneficial interest in a testamentary trust established for the debtor, Latta Smith, by his mother, Rose Smith.\textsuperscript{364} The lower court ruled that Latta’s creditors could not reach any of the trust’s assets.\textsuperscript{365} On appeal, the Kentucky court reasoned that the creditor’s rights against the trustee could be no better than the beneficiary’s.\textsuperscript{366} According to the court, “[i]t is obvious that the exercise of the discretion of giving to Latta is not subject to control by Latta, and conferred upon him no right which he could enforce.”\textsuperscript{367} Therefore, the judgment of the lower court was affirmed.\textsuperscript{368}

2. \textit{Spouses and Minor Children}.

Some courts refuse to take a beneficiary’s interest in a discretionary trust into account in calculating the parties’ respective marital interests

\textsuperscript{358} \textit{Id.}
\textsuperscript{359} \textit{Id.} at 571.
\textsuperscript{360} \textit{Id.}
\textsuperscript{361} \textit{See, e.g., In re Tone’s Estates, 39 N.W.2d 401, 405-06 (Iowa 1949); Calloway v. Smith, 186 S.W.2d 642, 643-44 (Ky. 1945).}
\textsuperscript{362} \textit{See Mooney, supra note 327, at 943-44.}
\textsuperscript{363} 186 S.W.2d 642.
\textsuperscript{364} \textit{Id.} at 642.
\textsuperscript{365} \textit{Id.}
\textsuperscript{366} \textit{Id.} at 643.
\textsuperscript{367} \textit{Id.} at 644.
\textsuperscript{368} \textit{Id.}
in divorce cases.\textsuperscript{369} In re Marriage of Guinn\textsuperscript{370} illustrates this approach. In that case, the wife challenged the trial court’s decision that her husband’s interest in an irrevocable trust did not constitute a property interest.\textsuperscript{371} The trust was established by the husband's parents in 1990 and provided that the trustees, the husband’s parents, could distribute income to him.\textsuperscript{372} After the husband’s death, the trust was to continue for the benefit of the husband’s descendants.\textsuperscript{373} Although, the court found that the obligation to distribute income to the husband was mandatory, it also concluded that the trustees did not have to invest the trust principal in a way to generate income, but could pursue an investment strategy to maximize growth.\textsuperscript{374} The appellate court affirmed the lower court’s decision, declaring that “when the beneficiary has no interest in the corpus, and no right to control how the corpus is invested, we conclude that the income is a mere gratuity deriving from the beneficence of the settlors.”\textsuperscript{375}

A Massachusetts appellate court reached a similar result in D.L. v. G.L.\textsuperscript{376} This case involved seven trusts, with assets of more than $100 million, that were created by members of the husband’s family between 1921 and 1963.\textsuperscript{377} When the beneficiary and his wife were divorced, the trial court refused to include the trust property in the marital estate for purposes of equitable division and the wife appealed.\textsuperscript{378} The appeals court observed that the husband’s interest in three of the trusts was either contingent or subject to divestment, and for that reason, were prop-

\textsuperscript{369} See, e.g., In re Marriage of Jones, 812 P.2d 1152, 1156-57 (Colo. 1991); In re Marriage of Guinn, 93 P.3d 568, 571-72 (Colo. App. 2004); In re Marriage of Rosenblum, 602 P.2d 892, 894 (Colo. App. 1979); Loeb v. Loeb, 301 N.E.2d 349, 357-58 (Ind. 1973). However, while refusing to treat such trusts as part of the couple's marital estate, some courts will take them into account as an “economic circumstance” when dividing up marital property or determining alimony or child support. See, e.g., Athorne v. Athorne, 128 A.2d 910, 914 (N.H. 1957); In re Marriage of Balanson, 25 P.3d 28, 33, 43 (Colo. 2001); Jones, 812 P.2d at 1158.

\textsuperscript{370} 93 P.3d at 571.

\textsuperscript{371} Id. at 569.

\textsuperscript{372} Id. at 570.

\textsuperscript{373} Id.

\textsuperscript{374} Id.

\textsuperscript{375} Id. at 572.


\textsuperscript{377} Id. at 1021-29. The court referred to these as the (1) Children’s Trust, (2) 1922 Trust, (3) Great-Grandfather Trust, (4) 1921 Trust, (5) 1934 Trust, (6) 1962 G.L., Sr. Trust, and (7) Employees’ Trust. Id.

\textsuperscript{378} Id. at 1016. However, the court did determine that it could take into account in calculating alimony and child support income that the husband regularly received from four of these discretionary trusts. Id. at 1019.
DISCRETIONARY TRUSTS

erly excluded from the marital estate.\textsuperscript{379} The court concluded that the remaining trusts were discretionary in nature.\textsuperscript{380} For example, the Children's Trust, established by the husband's grandmother, provided that the trustees were authorized to pay to each grandchild, including the husband, "such amount or amounts from the net income and principal as the disinterested trustees, in their uncontrolled discretion, think advisable."\textsuperscript{381} The other trusts contained similar language.\textsuperscript{382} Although the court in \textit{D.L.} acknowledged that a judge was "not necessarily precluded from including within the marital estate . . . a party's beneficial interest in a discretionary trust," it concluded in this case that the husband's interest in the trust assets was "too remote or speculative" to be included within the marital estate.\textsuperscript{383}

Another issue is whether a divorced spouse can reach the assets of a discretionary trust to satisfy an alimony or maintenance award. \textit{In re Watts}\textsuperscript{384} involved a testamentary trust which provided that the decedent's son, Corwin Grant Watts, was to receive from the trust "such sums of money as shall in [the judgment of the trustees] be necessary for the proper maintenance, support and education of said Corwin Grant Watts."\textsuperscript{385} The trust also declared that when Corwin reached the age of twenty-one, the trustees were authorized to transfer the trust corpus to him if in the judgment and discretion [of the trustees], said Corwin Grant Watts has attained sufficient business judgment and otherwise shows himself to be capable of handling such property, but the trustees are directed to hold and invest such property as herein provided until they have determined said Corwin Grant Watts to be a suitable person to handle same.\textsuperscript{386}

Corwin married Nellie Watts in 1924 and a child, Imogene, was born to them in 1926.\textsuperscript{387} In 1931, a local court ordered the trustee to distribute certain amounts from the trust for Corwin and his family's support.\textsuperscript{388} Nellie obtained a divorce in 1944 and was awarded ali-

\textsuperscript{379} \textit{Id.} at 1024-27. That is, the 1922 Trust, the Great-Grandfather Trust, and the 1921 Trust. \textit{Id.}
\textsuperscript{380} \textit{Id.} at 1021-24, 1027-29. That is, the Children's Trust, the 1934 Trust, the 1962 G.L., Sr. Trust, and the Employees' Trust. \textit{Id.}
\textsuperscript{381} \textit{Id.} at 1021 n.10.
\textsuperscript{382} \textit{Id.} at 1027-29.
\textsuperscript{383} \textit{Id.} at 1023-24.
\textsuperscript{384} 162 P.2d 82 (Kan. 1945).
\textsuperscript{385} \textit{Id.} at 84.
\textsuperscript{386} \textit{Id.}
\textsuperscript{387} \textit{Id.}
\textsuperscript{388} \textit{Id.}
When Corwin failed to make the required alimony payments, Nellie requested the court to order the trustee to make the payments directly to her. Although Corwin did not contest this ruling, the trustee did, arguing that there was not likely to be sufficient income from the trust to make the required alimony payments and it would probably have to invade the corpus of the trust to comply with the court's ruling. On appeal, the Kansas Supreme Court observed,

[I]n the exercise of his discretion, [the trustee] has determined and is of the opinion that said Corwin Grant Watts will never "attain sufficient business judgment and otherwise show himself to be capable of handling such property," and that said Watts is and always will be a spendthrift and utterly incapable of handling said property or of supporting himself and that it will be necessary to support said Watts out of said trust property for the remainder of his lifetime.

Since the trustee had determined that Corwin should not have access to the trust principal, it followed that his ex-wife had no right to it either. Therefore, the court concluded that Nellie was not entitled to a court order to compel the trustee to pay her alimony claim.

On the other hand, the Florida Supreme Court in *Bacardi v. White* declared that a court could issue a writ of garnishment with respect to disbursements made to the beneficiary of a discretionary trust. In *Bacardi*, when Luis and Adriana Bacardi divorced, Luis agreed to pay Adriana $2000 per month until the death of either of them or until she remarried. When Luis stopped making alimony payments, Adriana obtained a writ of garnishment against the trustee of a trust created by Luis's father for the benefit of his son. The Florida court upheld the garnishment order, notwithstanding the existence of a spendthrift clause. However, the court distinguished between mandatory and discretionary disbursements, declaring,

If, under the terms of the trust, disbursement of corpus or income is due to the debtor-beneficiary, such disbursement may be subject to garnishment. If disbursements are wholly within

---

389 *Id.*
390 *Id.* at 85.
391 *Id.*
392 *Id.* at 88.
393 *Id.*
394 463 So.2d 218 (Fla. 1985).
395 *Id.* at 222.
396 *Id.* at 220.
397 *Id.*
398 *Id.* at 222.
the trustee’s discretion, the court may not order the trustee to make such disbursements. However, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to a writ of garnishment.\(^\text{399}\)

The court held that a continuing garnishment order was valid and also ruled that a garnishment order could also be issued to collect the wife’s attorney’s fees.\(^\text{400}\)

In *Berlinger v. Casselberry*,\(^\text{401}\) Bruce Berlinger’s former wife, Roberta Casselberry, obtained a continuing writ of garnishment over any present and future disbursements made by Sun Trust, the trustee of the Berlinger Discretionary Trusts, to Berlinger or for his benefit in order to pay the alimony obligations that were due to her.\(^\text{402}\) When their marriage ended in 2007, Bruce agreed to pay his ex-wife $16,000 a month as part of their settlement agreement, but stopped making payments in May 2011.\(^\text{403}\) During the ensuing litigation, it was discovered that Bruce received substantial amounts of money from the Berlinger Discretionary Trusts.\(^\text{404}\) On appeal, the court affirmed the lower court’s grant of a writ of garnishment against discretionary distributions by the trustee, but also pointed out that the ex-spouse could not compel the trustee to make distributions.\(^\text{405}\)

Under the traditional rule, courts have refused to enforce child-support claims against the trustee of a discretionary trust.\(^\text{406}\) For example, in *Southeast Bank*,\(^\text{407}\) Sandra Stone, the ex-wife of Harry Mundy, brought suit against the trustee of a trust established by Harry’s grandfather in order to force it to pay her ex-husband’s child-support obligations.\(^\text{408}\) The trust instrument declared that all disbursements from the trust to Harry were to be made at the sole discretion of the trustee.\(^\text{409}\) The lower court ordered the trustee to deduct Harry’s child support

---

\(^\text{399}\) *Id.*

\(^\text{400}\) *Id.* at 223.

\(^\text{401}\) 133 So.3d 961 (Fla. Dist. Ct. App. 2013).

\(^\text{402}\) *Id.* at 962.

\(^\text{403}\) *Id.*

\(^\text{404}\) *Id.* at 963. The Trusts did not pay Bruce directly, but provided him with a Visa card on which the Trusts paid the balance each month. *Id.* Bruce and his new wife charged expenses to the credit card for such things as travel, entertainment, clothing, medical care, grooming, and gifts. *Id.* He also made cash advances on the credit card to provide cash to his current wife and to pay their maid. *Id.* at 964-65.

\(^\text{405}\) *Id.* at 966.


\(^\text{407}\) 500 So. 2d 737.

\(^\text{408}\) *Id.* at 737-38.

\(^\text{409}\) *Id.* at 737.
payments from his trust account and the trustee appealed. However, the intermediate appellate court ruled that the state child support statute, which authorized a court to order child support to be deducted from all money "due and payable" to the parent, did not apply to trusts where distributions were wholly within the discretion of the trustee.

A Texas intermediate appellate court in Kolpack v. Torres also refused to allow the mother of a minor child to recover back child-support payments from the beneficiary of a discretionary trust. The court ruled that the plaintiff stood in the shoes of the trust beneficiary and did not have an independent claim against the trust. Consequently, she couldn't proceed against the trust until she had first obtained a judgment against the beneficiary.


Suits against trust beneficiaries by government entities fall into two major categories: claims by the federal government to recover back taxes and suits involving eligibility for welfare benefits. Most of these cases involve attempts by the federal government to reach the assets of a trust in order to recover back taxes from a delinquent taxpayer. Such attempts will usually be successful if the trust is mandatory or if taxpayer has power over the trust, such as a general power of appointment or the right to terminate the trust. On the other hand, as the O'Shaughnessy case illustrates, the federal government stands in no better position than other creditors when a trust is purely discretionary.

O'Shaughnessy involved two trusts created by the taxpayer's grandparents in 1951. The beneficiaries were the settlors' seventeen grandchildren, including the delinquent taxpayer, Lawrence O'Shaughnessy. The trust instruments, which were identical, declared that the trustees "in their discretion may pay to [Lawrence] . . . all or

410 Id. at 738.
411 Id. (quoting FLA. STAT. § 61.1301).
413 Id. at 915.
414 Id.
415 Id. at 916.
417 Magavern, 550 F.2d at 801.
418 See Delano, 182 F. Supp. 2d at 1023.
419 517 N.W.2d 574.
420 Id. at 577.
421 Id. at 576.
422 Id.
part of the principal or annual net income of the trust estate as they shall see fit during his lifetime." The trust instrument also gave Lawrence a special (or limited) testamentary power of appointment.

In 1989, the government assessed a federal income tax deficiency of more than $400,000 against Lawrence and sought to levy upon the trust property to satisfy the deficiency. Later, in 1993, the government filed suit in federal court to enforce the levy and the trustee moved to dismiss the suit. Thereupon, the federal court certified to the Minnesota Supreme Court the question of whether the beneficiary of a discretionary trust has a property interest in undistributed principal or income prior to any exercise of discretion by the trustee.

The Minnesota court acknowledged that Lawrence had a sufficient beneficial interest in the trust to compel the trustees to perform their duties and to enjoin them from committing a breach of trust. However, the court also observed that the trustees "were not required in the exercise of their absolute discretion to distribute any of the trust assets to Lawrence..." Consequently, it concluded that Lawrence did not have any "property" or "right to property" in the trust assets prior to the time the trustees saw fit to distribute them to him.

Most claims by and against state and local governmental entities involve eligibility for Medicaid and other welfare benefits. In some cases, the government has sought to recoup a beneficiary's welfare costs from a trust or charge the trust for future care, and in others a beneficiary who has been denied such benefits has argued that trust assets should not be taken into account in determining eligibility. However, regardless of whether the beneficiary (or the trust) is the plaintiff or the defendant, the issue in all of these cases is whether the beneficiary has a

423 Id.
424 Id.
425 Id.
426 Id.
427 Id.
428 Id. at 577.
429 Id. at 578.
430 Id.
431 See In re Estate of Lackmann, 320 P.2d 186 (Cal. Ct. App. 1958); City of Bridgeport v. Reilly, 47 A.2d 865 (Conn. 1946); First Nat'l Bank of Md. v. Dep't of Health & Mental Hygiene, 399 A.2d 891 (Md. 1979); Town of Randolph v. Roberts, 195 N.E.2d 72 (Mass. 1964); State v. Rubion, 308 S.W.2d 4 (Tex. 1957).
sufficient property interest in a discretionary trust to affect the state’s obligation to provide for his welfare.

This issue occasionally arises in connection with discretionary trusts. For example, in Chenot v. Bordeleau,\textsuperscript{433} the state Department of Human Services (DHS) terminated medical assistance benefits to Edward Chenot, a mildly retarded adult, when it learned that he was the beneficiary of a testamentary trust established by his father.\textsuperscript{434} The trust provided that

the trustee may at any time or times pay all or any portion of the net income or principal or both net income or principal of the trust to or for the benefit of my son, Edward A. Chenot, as the said trustee, in its sole and uncontrolled discretion, shall deem necessary or advisable for his comfort, support and welfare.\textsuperscript{435}

The DHS terminated Edward’s benefits when the trustee refused to reimburse it for the cost of his care in a treatment facility for mentally retarded persons.\textsuperscript{436} When Edward brought suit to restore his benefits, the lower court held in his favor and the DHS appealed.\textsuperscript{437}

The Rhode Island Supreme Court distinguished between support trusts and discretionary trusts and declared that assets in a support trust would usually be considered resources of an applicant who applies for welfare benefits.\textsuperscript{438} However, the court observed that government health care providers could not take assets in a wholly discretionary trust into account when determining eligibility because the beneficiary could not compel the trustee to distribute any funds to him from the trust unless there was an abuse of discretion.\textsuperscript{439} Unfortunately, the trust in question was an amalgamation of the two.\textsuperscript{440} The court rejected the DHS’s argument that the trust was a support trust and instead concluded that it was discretionary:

The language relied upon by DHS merely directs the trustee to exercise its discretion on Edward’s behalf. The trustee is in no way required to provide a specific type of support to Edward. The trustee is only required to make disbursements of trust assets that it deems “necessary or advisable for [Edward’s] comfort, support and welfare.” Since we find this language to be an

\textsuperscript{433} 561 A.2d 891.
\textsuperscript{434} See id. at 892.
\textsuperscript{435} Id.
\textsuperscript{436} Id. at 893.
\textsuperscript{437} Id.
\textsuperscript{438} Id. at 894.
\textsuperscript{439} Id.
\textsuperscript{440} Id.
insignificant limitation on the trustee’s discretionary powers, we hold that the father’s words created a discretionary trust.\textsuperscript{441}

Accordingly, the court held that DHS should not have treated the trust assets as resources of Edward when considering his eligibility for continued health care benefits.\textsuperscript{442}

A Minnesota court reached a similar result in the \textit{Leona Carlisle} case.\textsuperscript{443} James Carlisle, the beneficiary in that case, was 56 years old and had been afflicted with severe cerebral palsy since birth.\textsuperscript{444} Although James ran his own accounting business, he lived with his mother, Leona, until she was no longer able to care for him.\textsuperscript{445} In 1979, James began to receive medical assistance from the County Human Services agency and in 1985, Leona created a trust for him.\textsuperscript{446} The trust authorized the trustee to distribute such funds to James for entertainment, education, travel, comfort, convenience and reasonable luxuries “as the trustee in its full discretion deems advisable.”\textsuperscript{447} At the same time, the trust prohibited the trustee from making any distributions for James’ “food, shelter, clothing, medical care or other basic necessities as provided or to be provided by any governmental unit.”\textsuperscript{448} In 1992, the County concluded that the trust was an available asset for purposes of determining James’ eligibility for medical assistance and terminated his benefits because his assets exceeded the allowable limit for eligibility.\textsuperscript{449}

On appeal from a judgment for the County, the appellate court first determined that the trust was discretionary because “the trustee had complete discretion to distribute trust assets to [James].”\textsuperscript{450} Next, the court considered the settlor’s intent in creating the trust and concluded that Leona intended for the trust to supplement rather than supplant any public assistance that James might be entitled to receive.\textsuperscript{451} Finally, the court declared that as a matter of public policy, “settlers attempting to provide for a handicapped person should not be required to either bankrupt estates or leave the disadvantaged party to the vagaries of public assistance programs.”\textsuperscript{452} Accordingly, it held that the County

\begin{itemize}
\item \textsuperscript{441} \textit{Id.}
\item \textsuperscript{442} \textit{Id.}
\item \textsuperscript{443} \textit{In re Leona Carlisle Tr.}, 498 N.W.2d 260 (Minn. Ct. App. 1993).
\item \textsuperscript{444} \textit{Id.} at 262.
\item \textsuperscript{445} \textit{Id.}
\item \textsuperscript{446} \textit{Id.}
\item \textsuperscript{447} \textit{Id.}
\item \textsuperscript{448} \textit{Id.}
\item \textsuperscript{449} \textit{Id.} at 263.
\item \textsuperscript{450} \textit{Id.} at 265.
\item \textsuperscript{451} \textit{Id.}
\item \textsuperscript{452} \textit{Id.} (quoting Trust Co. of Okla. v. State ex rel. Dept. of Human Servs., 825 P.2d 1295, 1303 (Okla. 1991)).
\end{itemize}
should not treat the trust as an available asset for purposes of determining James’ eligibility for medical assistance.453

C. The Restatement (Third) of Trusts and the Uniform Trust Code.

Both the Restatement and the Uniform Trust Code have addressed the issue of creditors’ rights. Section 60 of the Restatement declares,

'[s]ubject to the rules stated in § 58 and § 59 (on spendthrift trusts), if the terms of a trust provide for a beneficiary to receive distributions in the trustee’s discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion after the trustee has knowledge of the transfer or attachment. The amounts a creditor can reach may be limited to provide for the beneficiary’s needs (Comment c), or the amounts may be increased where the beneficiary either is the settlor (Comment f) or holds the discretionary power to determine his or her own distributions (Comment g).454

Various comments flesh out this section significantly. Some of these comments merely restate existing law. For example, comment f states that creditors of a self-settled discretionary trust are entitled to reach the maximum amount that the trustee could pay to or on behalf of the settlor-beneficiary.455 Comment g applies the same principle to the situation where the trustee of a discretionary trust is also a beneficiary and has the power to determine his or her own benefits.456 On the other hand, comment c declares that “the creditors of the beneficiary of a discretionary interest may attach that interest and may subject it to the satisfaction of enforceable claims by appropriate process...”457 The effect of this provision on creditors’ rights is further addressed in comment e. Comment c also introduces the concept of equitable discretion under which a court, in the case of a support trust, may take account of a beneficiary’s actual needs when deciding how much a creditor is entitled to obtain from the trustee.458

Comment e deals with the critical question of when a creditor can compel a trustee to exercise its discretion in favor of making a distribution to a debtor-beneficiary. The comment first sets forth the traditional

453 Id. at 266.
454 RESTATEMENT (THIRD) OF TRUSTS § 60 (AM. LAW INST. 2003).
455 Id. § 60, cmt. f.
456 Id. § 60, cmt. g.
457 Id. § 60, cmt. c.
458 Id.
rule that "[a] transferee or creditor of a trust beneficiary cannot compel the trustee to make discretionary distributions if the beneficiary personally could not do so."\textsuperscript{459} However, comment e goes on to declare that "[i]t 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."\textsuperscript{460} Furthermore, the comment states that the exercise or nonexercise of fiduciary discretion is always subject to judicial review to prevent abuse and the rights of a creditor are also entitled to judicial protection from abuse of discretion by the trustee.\textsuperscript{461} This suggests that courts might routinely compel a trustee to make distributions even when they go directly to a creditor. However, comment e seemingly qualifies this interpretation by declaring,

\[\text{on the other hand, a trustee's refusal to make distributions might not constitute an abuse as against an assignee or creditor even when, under the standards applicable to the power, a decision to refuse distributions to the beneficiary might have constituted an abuse in the absence of the assignment or attachment.}\textsuperscript{462}

Finally, comment e concludes by providing that a court might allow a creditor to compel distributions if it concludes that the trustee would be guilty of an abuse of discretion if it withheld or severely limited distributions that would normally be required under the terms of the trust.\textsuperscript{463}

The Uniform Trust Code also considers whether creditors may compel the trustee of a discretionary trust to distribute trust funds to them.\textsuperscript{464} Like comment e to section 60 of the Restatement, section 504(b) of the Code states that "a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion. . . ."\textsuperscript{465} However, the Code creates an exception to this general principle for children, spouses and former spouses in section 504(c)(1), which declares that "a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse or former spouse."\textsuperscript{466} Finally, section 504(e) enables other creditors to compel a distribution from the trust if

\textsuperscript{459} Id. § 60, cmt. e.
\textsuperscript{460} Id.
\textsuperscript{461} Id.
\textsuperscript{462} Id.
\textsuperscript{463} Id.
\textsuperscript{465} See UNIF. TRUST CODE § 504(b) (UNIF. LAW COMM'N 2010).
\textsuperscript{466} Id. § 504(c)(1).
the trustee is also a beneficiary and the trustee’s discretion is limited by an ascertainable standard.\textsuperscript{467}

V. SUGGESTIONS FOR IMPROVEMENT.

This portion of the Article will offer some suggestions for improvement. These might be implemented by statute, by judicial decision or by modifications to the Restatement of Trusts or the Uniform Trust Code.

A. Discretion and Judicial Review.

Settlors often wish to exercise control over “their” property long after they have departed from the scene. While courts are willing to defer to a settlor’s wishes up to a point, this deference is not unlimited. One area of potential conflict involves the scope of a trustee’s discretion in both support and discretionary trusts. As discussed in the Article, settlors have attempted to compel courts to accept an expanded scope of discretion by adding various words and phrases, such as “sole,” “absolute,” or “unfettered.” However, it is doubtful that this tactic has been very successful. Despite the efforts of settlors to exempt their trustees from judicial scrutiny, courts have continued to oversee the conduct of trustees.

This raises the question of what standard courts should apply when reviewing the exercise of discretion by a trustee. Over the years, courts have employed a variety of unhelpful words and phrases to identify the sort of conduct that will or will not pass muster. A better approach, embodied in the Restatement and the Uniform Trust Code, is to use “abuse of discretion” as the sole standard to use for reviewing a trustee’s exercise of discretion. In order to determine whether a trustee was guilty of an abuse of discretion, the court would have to find that the trustee acted either unreasonably or in bad faith. The Restatement has adopted a reasonableness standard, while the Uniform Trust Code has chosen a good faith standard.\textsuperscript{468}

B. Rights of Beneficiaries.

1. Support Trusts.

There are certain issues that are common to support trusts whether they are “mandatory” or discretionary in nature. Specifically, once a trustee has ascertained that a particular beneficiary is entitled to support, he must decide what level of support to provide and whether or not to take into account the availability of other sources of support.

\textsuperscript{467} Id. § 504(e).

\textsuperscript{468} See McGovern et al., \textit{supra} note 129, at 405.
Comments \(d, e\) and \(f\) to the Restatement (Third) of Trusts section 50 provide some useful guidance on these questions.

For example, comment \(d\) sets forth the common-sense dictum that "support" and "maintenance" mean the same thing so that courts should not try to differentiate between them. Likewise, additional words like "comfort" add little to the support standard, although comment \(d\) suggests that the addition of certain other words, such as "benefit," "best interests" or "welfare," may authorize the trustee to provide for luxuries that go beyond mere support.

Finally, comment \(d\) correctly provides that it should not be necessary to refer to the beneficiary's station in life in order to authorize the trustee to increase distributions when necessary to offset inflation and pay for increased expenses. Another beneficial feature found in comment \(e\) is the presumption that the trustee should be able to take a beneficiary's other resources into account when determining how much is needed to provide for his support. Of course, these should be treated as default rules which the settlor is at liberty to override.

2. Discretionary Trusts.

It would be desirable to abandon the practice of characterizing the interest of the beneficiary of a pure discretionary trust as an "expectancy." This terminology obscures the fact that the trustees of discretionary trusts owe fiduciary duties to the beneficiaries and these beneficiaries have the legal right to hold trustees accountable when they violate their fiduciary duties.

Another issue involves the proper standard of review for a court to utilize when a beneficiary challenges a trustee's exercise of discretion. It was suggested above that courts should not grant relief in such cases unless they determine that an abuse of discretion has occurred. But this prompts the question of what constitutes an abuse of discretion. There are a number of possibilities, such as unreasonableness, bad faith or a combination of other factors.\(^{469}\)

There is much to be said for adopting a single standard, either good faith or reasonableness, for determining whether a trustee is guilty of an abuse of discretion. This approach, if nothing else, has the virtue of simplicity. On the other hand, it does affect the right of settlors to decide how much discretion to place in their trustees. However, assuming that this concern can be overcome, the question remains of what should be

\(^{469}\) See Restatement (Third) of Trusts § 50(2) (AM. Law Inst. 2003), which declares that what may constitute an abuse of discretion by the trustee depends on "the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purpose in granting the discretionary power and in creating the trust."
the proper standard. The trend seems to be moving in favor of a reason- ablness standard and, notwithstanding the position of the Uniform Trust Code, this appears to be the better choice.

C. Rights of Creditors.

1. Support Trusts.

The traditional approach, based on the notion that a husband was legally obligated to support his wife and children,\textsuperscript{470} is probably still effective (when gender stereotypes are ignored) to authorize the trustee of a support trust to provide for a beneficiary's existing spouse and minor children. Arguably, this same principle would apply after a divorce to a beneficiary's minor children. Unlike a former spouse, who has severed his or her legal relationship with the beneficiary, children are related to the beneficiary by blood and divorce does not change this relationship. Therefore, the trustee of a support trust, regardless of the presence or absence of a spendthrift clause, should be allowed, or even required, to provide support for these minor children as long as there are sufficient funds available in the trust for this purpose.\textsuperscript{471}

Although the existence of a spendthrift clause does not bar claims against a trust by a former spouse, one can argue that a former spouse should not be able to compel the trustee of a support trust to provide alimony or maintenance payments even though a number of courts,\textsuperscript{472} along with Uniform Trust Code,\textsuperscript{473} protect the interests of ex-spouses in this manner. Even so, the case for requiring a trust to provide support for an ex-spouse is not very persuasive since the purpose of a support trust is to provide support for the beneficiary and not for other people who are not related to the settlor.

As far as other creditors are concerned, it is important to distinguish between ordinary creditors and providers of necessary goods and services. If one believes that the sole purpose of a support trust is to provide support for the beneficiary (and possibly children of the beneficiary), it is inconsistent with the settlor’s intent to allow ordinary creditors to reach the trust's assets even if there was plenty of money left to support the beneficiary. However, payments for necessary goods and services for the beneficiary's support promote the objectives of the trust and, therefore, should be allowed.\textsuperscript{474} This reasoning would also appear

\textsuperscript{470} See Reynolds v. Reynolds, 180 S.E. 70, 77 (N.C. 1935).
\textsuperscript{472} See supra Part IV(A)(2).
\textsuperscript{473} UNIF. TRUST CODE. § 404(c)(1) (UNIF. LAW. COMM’N 2010).
\textsuperscript{474} See In re Estate of Dodge, 281 N.W.2d 447, 452 (Iowa 1979).
to justify the right of government health care providers to recover for the costs of care and treatment.475

2. Discretionary Trusts.

Purely discretionary trusts, as well as discretionary support trusts, are quite different from ordinary support trusts because, in theory, the trustee may refuse to make distributions even though the beneficiary is otherwise eligible. Reasoning that creditors stand in the shoes of beneficiaries, most courts have correctly held that ordinary creditors cannot compel the trustee of a discretionary trust or a discretionary support trust to pay them.476 However, there seems to be a split of authority as far as former spouses and children are concerned.477 Given the nature of discretionary trusts, the better approach seems to be to deny ex-spouses and children the right to compel distributions to themselves from such trusts. The same rationale supports the traditional rule that forecloses suits by government creditors to recover back taxes, as well as past or future welfare benefits, from purely discretionary trusts. This approach also seems preferable to the Restatement’s suggestion that a court might allow a creditor to compel a distribution if it concludes that the trustee would be guilty of an abuse of discretion if it unreasonably withheld distributions to the beneficiary.478

VI. Conclusion.

Discretionary trusts are an important and useful aspect of property management and estate planning. As trusts continue to grow in length and complexity, trustees will undoubtedly be vested in increased discretion over the administration and distribution of trust assets. For this reason, they are worthy of continuing study by legal scholars and practitioners.

476 See Calloway v. Smith, 186 S.W.2d 642, 644 (Ky. 1945); see also UNIF. TRUST CODE § 504(b).
477 Compare Bacardi v. White, 463 So. 2d 218, 222 (Fla. 1985) (allowing ex-spouse to recover from discretionary trust), with Belinger v. Casselberry, 133 So. 3d 961, 966 (Fla. Dist. Ct. App. 2014) (allowing payments to be made but declaring that ex-spouse could not compel trustee of discretionary trust to make payments). See also Doksansky v. Norwest Bank of Neb., N.A., 615 N.W.2d 104, 109-10 (Neb. 2000) (holding that discretionary trust was not liable for child support obligations of beneficiary).
478 See RESTATEMENT (THIRD) OF TRUSTS § 50, cmt. e (AM. LAW INST. 2003).
COMMENTARY AND DIALOGUE