

**DRAFTING SUPPORT AND DISCRETIONARY
TRUSTS:
NAVIGATING THE PERILS AND
POSSIBILITIES**

Timothy P. O'Sullivan
FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway, Suite 100
Wichita Kansas 67206
316.267.6371
tosullivan@foulston.com

Kent A. Meyerhoff
FLEESON, GOOING, COULSON & KITCH L.L.C.
1900 Epic Center, 301 N. Main
Wichita, Kansas 67202
316.771.8636
kmeyerhoff@fleeson.com

Prepared for Seminars for the Kansas Bar Association and
Wichita Bar Association

TABLE OF CONTENTS

	<u>Page</u>
Types of Distribution Standards	3
Pure Discretionary Trusts	4
Support Trusts	6
Hybrid Trusts	8
Considerations in Choosing a Distribution Standard	14
Client Intent	14
Medicaid Qualification Considerations	18
Creditor Protection Considerations	21
Spousal Claims Considerations	31
Drafting Considerations	31
Hypothetical #1 – Mary	35
Hypothetical #2 – Howard and Evelyn	38
Conclusion	40

Drafting Support and Discretionary Trusts: Navigating the Perils and Possibilities

As estate planning attorneys are well aware, there has been a greatly reduced need for estate and other transfer tax planning in recent years as a result of historically unprecedented increases in the federal “applicable exclusion amount” and related generation-skipping tax exemption. Most commentators expect this situation, in which only a small percentage of the population will likely be exposed to federal transfer taxation, to continue into the foreseeable future and for Congress to act to avoid the impending reversion to prior transfer tax law in 2013.

This situation has helped spark a sharp change in focus on the purposes of long-term third party trusts (i.e., trusts created for a beneficiary other than the grantor), which traditionally have been used primarily in an estate tax planning context. As a consequence, there has been an increased usage of such trusts to provide an economic benefit often of much greater magnitude, and clearly of much wider impact, on the vast majority of estate and trust beneficiaries -- that of asset protection. Included under the penumbra of asset protection are protection from creditor claims (whether contract, tort, or governmental in nature) against a trust beneficiary, protection from a claim of a spouse incident to a marital dissolution or forced inheritance claim, and protection from the trust estate either being considered a disqualifying resource for purposes of determining eligibility for governmental benefits such as Medicaid and Supplemental Security Income (SSI) or being subject to an estate recovery claim by the state for benefits paid to a trust beneficiary. In order for such asset protection to be afforded throughout a beneficiary’s lifetime and at death, it is axiomatic that the trust must have a term that extends throughout the beneficiary’s lifetime.

Such expanded usage of long-term trusts for asset protection purposes is in addition to their centuries-old employment as an asset management vehicle to protect spendthrift or disabled beneficiaries from themselves and holding assets in trust for younger beneficiaries for a term ending at an age in adulthood the grantor or testator has predetermined will enable the beneficiary to gain sufficient emotional and financial maturity to prudently manage the trust estate. To achieve the foregoing goals, all such trusts typically do not provide for mandatory distributions to such beneficiaries but instead give the trustee some discretion in making distributions based upon a need-based support standard.

As advisors, attorneys should be expected to have an extended discussion with their clients on the various pros and cons, including the impact on family harmony, of the selection of an appropriate trustee to carry out their estate plans. Unfortunately, most attorneys probably don’t devote nearly enough time discussing with their clients, or even fully considering themselves, another multi-faceted question that normally is of much greater economic and personal consequence on trust beneficiaries. That question is: “What should be the applicable trust distribution standard and accompanying factors to be considered by the trustee in both making a trust distribution and the amount thereof, as

well as the degree of discretion to be accorded the trustee in making such determination, and what legal ability will the current and remainder beneficiaries have under such provisions to either compel or challenge such determination of the trustee so as to ensure the intent of the grantor or testator is effectuated in its administration?”

Learned trust commentator and educator Professor Edward C. Halbach, Jr., stated more than a half century ago, “too frequently the trust instruments provide no guidance as to the purpose and scope of [the discretionary power reposed in a trustee]. [The trustee] should be informed of the purposes of the trust, the factors he is to consider, and the general frame of mind in which the settlor wishes him to act.” Professor Halbach went on to conclude that this failure on the part of estate planning attorneys “is one of the most neglected aspects of estate planning.” Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts*, Col. L. Rev. Vol. 61, p. 1425 (1961). Despite his critical observation, there has been a continuing paucity of articles, writings and seminar presentations on this topic. Moreover, there appears to have been little improvement in the practice of estate planning attorneys in the ensuing decades in addressing this issue.

The foregoing question clearly has less import in situations where the principal beneficiary is to serve as his or her own trustee, for it is the beneficiary who is thereby able to exercise any trustee discretion in his or her own favor without having to be dependent in any respect upon its exercise by a third-party trustee. In such situations, the intent of the grantor or testator is not to protect the beneficiary from making imprudent decisions regarding the management of the trust estate. If that was the intent, obviously the beneficiary would not be named as trustee. Instead, the sole intent is to protect the beneficiary from third-party claims. Thus, grantors and testators normally desire to give the trustee/beneficiary in that context the greatest amount of flexibility and control in making distributions and other aspects of trust administration without compromising the desired asset protection. However, it must be kept in mind that a third party may well be called upon to displace the beneficiary as trustee should the beneficiary suffer a disability that prevents the beneficiary from serving as trustee. Thus, such question nonetheless has substantial relevance in trustee/beneficiary situations as well.

Most estate planning attorneys have several “boilerplate” provisions that touch upon some of the issues attendant to this complex question. However, due to the typical modicum of time devoted to the issues involved, most estate planning attorneys don’t sufficiently consider how such provisions will be impacted by governing legal principles in their implementation and construction or the various factors in their implementation that could merit a more precise crafting in order to both more closely define the client’s intent and provide the desired degree of legal redress in trust beneficiaries. This frequently results in amorphous distribution standards engendering contentious and costly disagreements among competing beneficiaries or between beneficiaries and the trustee as to the grantor’s or testator’s dispositive intent, as well as issues regarding whether beneficiaries are left with any legal redress. When such arguments involve family members, family harmony frequently will be a collateral casualty.

In addition to the above administrative and family harmony considerations, trust provisions should also address the client's asset protection goals so as to not unnecessarily expose the trust estate to third party creditor or spousal claims or expose the trust estate to being considered a resource with respect to a beneficiary's qualification for "need based" governmental benefits such as Medicaid and SSI.

With the foregoing context in mind, this article examines three basic categories of non-mandatory distribution trusts and the distribution standards and discretion of the trustee associated with each: discretionary trusts, support trusts, and hybrid trusts (often referred to as "discretionary support trusts"). Hybrid trusts combine aspects of both discretionary trust and support trust distribution standards. The authors then discuss how such different distribution standards affect the rights and liabilities of trustees and beneficiaries, as well as third-party claims and "need based" government benefits. The article concludes by examining drafting considerations and examples attorneys and their clients should consider in choosing a distribution standard.

As a prefatory disclaimer, the authors wish to note that drafting considerations and suggestions related to any transfer tax planning, such as federal estate tax, will not be addressed on more than a parenthetical basis in the ensuing discussion. Estate planning attorneys desiring to avoid the inclusion of the trust estate in a beneficiary's taxable estate must avoid reposing a general power of appointment in a beneficiary under Section 2041 of the Internal Revenue Code. This typically means that if the beneficiary is serving as trustee and the exercise of such authority is not predicated upon the approval of a beneficiary who has an adverse interest, distributions to such beneficiary must be pursuant to an ascertainable standard relating to the beneficiary's health, education, maintenance and support, and the trustee must not possess the authority to make distributions that would satisfy a duty of support or other legal obligation of the trustee owing to another beneficiary. 26 U.S.C. 2041(b)(1); Reg. § 20.2041-1(c)(1); Bittker & Lokken, *Federal Taxation of Income, Estates, and Gifts* § 128.2. In addition, under Section 2042 of the Internal Revenue Code the beneficiary also must not have an incident of ownership in a life insurance policy (e.g., by serving as trustee) on the life of the beneficiary and which is part of the trust estate. Notwithstanding such omission, it should suffice to simply point out that the avoidance of inclusion of the trust estate under the foregoing Code provisions normally can be effectuated through appropriate drafting rather easily without significantly compromising any of the other goals addressed in this article, even where a beneficiary is to serve as sole trustee. In any event, as above noted, with the current "applicable exclusion amount" for estate taxes and concomitant generation-skipping tax exemption both being quite high, and likely to remain so for the foreseeable future, estate and other transfer tax planning through long-term trusts is not likely to impact more than a small percentage of planning situations.

Types of Distribution Standards

Before one can decide what type of distribution standard, including the discretion reposed in a trustee with regard thereto, is appropriate in a particular trust, an

understanding must be gained of the various standards that are available and how they differ in their legal import. These standards create three basic categories of trusts: discretionary trusts, support trusts and hybrid trusts.

Moreover, such disparate distribution standards may relate to a trust having a single current beneficiary or one having multiple current beneficiaries, the latter being often referenced as a “blended trust.” An example of a blended trust would be a trust that provides for trust distributions both to the grantor’s child and such child's issue. Another example is a “pot trust” that authorizes trust distributions for all of the grantor’s children, typically until there is no child under a certain age, say age 22, upon which event the trust usually divides into separate shares for each child. It is not a “blended trust” if there are separate trust shares for each beneficiary or definable interests of each beneficiary within a single trust such that distributions to any one beneficiary do not impact the amount of the trust estate available to any other beneficiary.

Pure Discretionary Trusts

Pure discretionary trusts are usually couched in terms of authorizing a trustee, in non-compulsory language, such as “is authorized” or “may,” to make distributions using broad discretionary language, such as in the trustee’s “sole,” “absolute,” or “uncontrolled” discretion. They thereby repose almost untrammelled authority in the trustee regarding the timing of trust distributions, the purposes for which distributions will be made, the amount of such distributions, and in circumstances where there are multiple current beneficiaries, i.e., a blended trust, the beneficiaries who are to receive such distributions.

Kansas’ common law recognition of such discretionary trusts is of more than 65 years’ duration. *Watts v. McKay*, 160 Kan. 377, 162 P.2d 82 (1945). In *Watts*, the Kansas Supreme Court determined a discretionary trust was created such that the beneficiary’s ex-wife could not “stand in the shoes” of the beneficiary and compel a trust distribution to satisfy the beneficiary’s alimony obligation due to the trustee’s discretion being absolute as to the making and amounts of any such trust distributions.

Distributions from pure discretionary trusts are not based on any standard or beneficiary need. They are based solely on whether a trustee believes such distribution is appropriate. In *Simpson v. State Department of Social and Rehabilitation Services*, 21 Kan. App. 2d 680, 906 P.2d 174 (1995), a case where the central issue was whether the trust was a pure discretionary trust such that the beneficiary could not compel a distribution so as to preclude the trust estate from being a resource for Medicaid qualification purposes, the trust provided:

“The Trustees shall have the *absolute discretion*, at any time and from time to time, to make unequal payments or distributions to or among any one or more of said group [of beneficiaries] *and to exclude any one or more of them from any such payment or distribution.*”

Id. at 684.

Regarding this distribution standard, the Court stated:

“We cannot imagine a better example of a discretionary trust. No one beneficiary of the Trust has the *right* to any distribution. The trustees have *absolute discretion* as to whom they will make distributions and may exclude any one or more of the beneficiaries from any payment or distribution. The discretion placed in the trustees is total and absolute.”

Id.

The beneficiaries in *Simpson* consisted of the subject beneficiary, Margaret, (who was applying for Medicaid benefits), Margaret’s spouse, Margaret’s issue, and spouses of such issue. There was no distribution standard in the trust instrument. Instead, the trust provisions expressly provided that the trustee could exclude any one or more of such beneficiaries from receiving any distributions, thereby giving an incredible amount of control to the trustee. Indeed, the foregoing language utilized by the Court in defining the subject distribution standard would tend to indicate that the trustee’s discretion in making distributions to the trust beneficiaries was untrammelled in any significant respect.

In a pure discretionary trust, a beneficiary cannot compel the trustee to distribute trust funds absent a showing that the trustee abused the trustee’s discretion in failing to make a distribution (which is difficult to do in a pure discretionary trust devoid of distribution standards), i.e., the trustee acted dishonestly or with an improper motive in failing to make such distribution. *Restatement (Second) of Trusts*, § 187, comment e; *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App. 1997); *State Street Bank and Trust Company v. Reiser*, 389 N.E.2d 768 (Mass. 1979); *Brent v. State of Maryland Central Collection Unit*, 537 A.2d 227 (Md. 1988). The Court in *State Street Bank*, *supra*, cited *Restatement (Second) of Trusts*, § 187 (1959), comment j, which provides that where such adjectives as “absolute” or “unlimited” or “uncontrolled” modify the term “discretion,” the trustees may act unreasonably, so long as not dishonestly, from a motive divorced from the purposes of the trust, or from a failure to use the trustee’s judgment.

In *Scott & Fratcher, The Law of Trusts*, § 187 (4th ed. 1989), the authors state generally that “The real question is whether it appears that the trustee is acting in that state of mind in which it was contemplated by the settlor that he would act.” Obviously, if it is a pure discretionary trust, there is no indication in the trust instrument as to the grantor’s state of mind, guidelines outlining the trustee’s desired exercise of such discretion, or any fettering of such discretion. Thus, the discretion accorded the trustee therein would not only make the grantor’s state of mind irrelevant, but also any parol evidence in such regard inadmissible. Thus, the authors go on to state, in substantial concurrence with the position of the *Restatement (Second) of Trusts* position on the issue, that in a pure discretionary trust, the trustee may act unreasonably, so long as the trustee

does not act in bad faith, for an improper purpose or with an improper motive. *Id.* at § 187.2.

Other discretionary trusts, based on their wording, are not “discretionary trusts” in the pure sense, for they may restrict the authority or limit the discretion of the trustee to some extent, such as to the timing and amounts of trust distributions, or the purposes for which distributions may be made. Discretionary distributions from these more restrictive types of trusts are normally tied to a standard, such as for the support of a beneficiary. As discussed below, when discretionary language is used in connection with a stated distribution standard, such as support, such trust is termed a “hybrid trust.” However, as also discussed below, depending upon its wording, such discretionary language in a hybrid trust will not necessarily result in such trust failing to be considered a pure discretionary trust with respect to the trustee’s exercise of discretion regarding distributions pursuant to such standard in terms of the timing and amount of trust distributions.

Support Trusts

Support trusts are created by a grantor or testator to provide for the support of one or more beneficiaries. Typically, the support standard will relate to the health, education, maintenance and support needs (sometime broadened beyond an ascertainable standard to include “welfare,” “comfort” or “care”) of a given beneficiary or beneficiaries. The trustee of a support trust is directed by the grantor to make distributions of trust income and/or principal pursuant to a standard that relates to a support need of trust beneficiaries. *See, Restatement (Second) of Trusts*, § 154; *First National Bank of Maryland v. Dept. of Health and Mental Hygiene*, 399 A.2d 891 (Md. 1979). Being commanded to make such distributions, the trustee’s discretion is limited to the timing, manner and amount of such distributions to satisfy the support standard. *Eckes v. Richland County Social Services*, 621 N.W.2d 851 (N.D. 2001).

In *Godfrey v. Chandley*, 248 Kan. 975, 811 P.2d 1248 (1991), the Trust provided that the trustee “shall pay . . . such portion of the net income from the trust as may be necessary for [my wife’s] support, health, and maintenance.” *Id.* at 978. The Kansas Supreme Court held that such language required the trustee to make income payments to the surviving spouse, if such payments were necessary for her support, health and maintenance. The trustee had no discretion whether to make such distributions; instead, the trustee only had discretion to determine whether the contemplated distributions met the standard. However, the compulsory support distribution standard may also delineate that the trustee may or shall consider all other resources available to the beneficiary prior to being compelled to make a distribution.

With a support trust, the beneficiary can compel the trustee to make distributions under circumstances dictated by the standard of distribution. *Restatement (Second) of Trusts*, § 128, comments d and e. As more fully discussed below, this also means that absent a spendthrift clause or a statutory provision to the contrary, a creditor under

common law could compel a distribution for the beneficiary's support in circumstances where the debtor/beneficiary could have compelled such a distribution.

Due to limitations in the trustee's discretion imposed by the terms of the trust instrument, the trustee's decision-making with regard to non-mandatory (i.e., discretionary) distributions to be made in a support trust is much more circumspect under a judicial review than in a pure discretionary trust. The singular issue before the court in such circumstance is whether the trustee abused the trustee's more limited discretion in either making, or failing to make, a distribution required to be made for the delineated support needs of a beneficiary, subject to any definitions in the trust instrument as to such support needs and after considering any other factors delineated in the trust instrument for the trustee to consider in making such distribution or the amount thereof. However, courts are understandably averse to substituting their judgment in such regard for that of the trustee. Instead, a court will not interfere with a trustee's determination unless it is so far outside the bounds of normalcy so as to be patently unreasonable or arbitrary.

Kansas to date has followed the *Second Restatement* approach in reviewing such trustee determinations. In *Jennings v. Murdock*, 220 Kan. 182, 553 P.2d 846 (1976), the Court stated:

“ . . . where the instrument creating a trust gives the trustee discretion as to its execution, a court may not control its exercise merely upon a difference of opinion as to matters of policy, and is authorized to interfere only where he acts in bad faith or his conduct is so arbitrary and unreasonable as to amount to practically the same thing. (*Elward v. Elward*, 117 Kan. 458, 459, 232 Pac. 240) . . . Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion. (*Restatement of Trusts, Second, § 187.*) ”

Id. at 201.

The *Restatement (Second) of Trusts*, § 187 (1959), comment d, suggests the following factors are relevant in determining whether a trustee abused his discretion in exercising or failing to exercise his authority to make a distribution:

“(1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or nonexistence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.”

Hybrid Trusts

Hybrid trusts represent a conflation of the aspects of the two traditional types of non-mandatory distribution trusts, support trusts and pure discretionary trusts. Hybrid trusts provide for distributions pursuant to a “support standard,” but they also contain language indicating the trustee has at least some discretion in such regard.

For example, such discretion may be indicated by substituting the permissive word or words “may” or “the trustee is authorized to” for the more compulsory “shall” regarding the making of such distributions pursuant to a standard. It also might be indicated by including discretionary language with the compulsory wording found in a support trust, such as “in the trustee’s discretion” or “in the trustee’s sole discretion.” Finally, it may be implied by subjecting the compulsory wording to accompanying language that would appear to detract in varying degrees from the compulsory mandate, such as “as the trustee deems reasonable and necessary” or “as the trustee may deem appropriate.”

Being both heterodox in nature and far from trenchant in phraseology, hybrid trusts pose significant problems in both their construction and efficacy in implementing the grantor’s or testator’s intent as to the discretion of the trustee. The central issue in hybrid trusts is whether they are to be construed as to the discretion of the trustee as a discretionary trust, a support trust, or a truly hybrid discretionary standard between the two basic types of trusts.

The resolution of this question has had particularly acute consequences historically, due to fact that the *Restatement (Second) of Trusts* does not recognize that the degree of discretion accorded in trustees of hybrid trusts can be hybrid in nature, i.e., between the broad degree of discretion accorded the trustee in a pure discretionary trust and the more limited discretion of the trustee in a support trust context. Thus, absent language in the trust instrument clearly delineating the degree of such discretion in a hybrid trust context, the position of courts that follow such *Restatement* position is that such discretion of the trustee is either that accorded by a pure discretionary trust or that accorded by a support trust, with the courts having to resolve the intent of the grantor or testator in that regard.

In the circumstance where very broad discretionary authority accompanies the support standard, such as “absolute,” “unlimited” or “uncontrolled” discretion, following the position of *Restatement (Second) of Trusts*, Section 187, comment j, the courts will tend to conclude that such discretion need not be exercised reasonably in satisfying the distribution standard, i.e., the discretion is the same as in a pure discretionary trust. However, more limiting discretionary language, being inherently ambiguous, creates the issue of whether the grantor simply intended for the trustee to have fiduciary discretion in interpreting the standard and making the distribution (the degree of discretion being that

accorded the trustee of a support trust or perhaps somewhat greater should the court digress from the *Restatement (Second) of Trusts*' position on the issue) or, alternatively, that distributions were limited to such purposes but the trustee had absolute discretion (to the same degree as in a discretionary trust) in deciding whether to make any such distributions.

Consequently, as one might expect, courts across the country have been quite inconsistent in interpreting the discretionary authority reposed in trustees under the provisions of hybrid trusts, even sometimes in interpreting very similar provisions within the same trust instrument. For example, in *Kryzsko v Ramsey County Social Services*, 607 N.W.2d 237 (N.D. 2000), the trustee was given "sole discretion" to make distributions of trust principal for the beneficiary's "proper care, maintenance, support, and education." The North Dakota Court held that such terminology created a support trust. In *First of America Trust Company v. United States*, 93-2 USTC Para. 50,507 (D.C.C.D. Ill. 1993), the Court paradoxically held that a trust distribution standard that "the Trustee shall pay or apply the net income and so much of the principal as the Trustee may in its sole discretion deem necessary or appropriate for the support, comfort and welfare of such of [the beneficiaries] as shall be living from time to time" created a support trust as to the income (all income of the trust being interpreted to be required to be distributed for the support of the beneficiaries) but a discretionary trust as to principal distributions.

Other courts have held that hybrid distribution standards create a support trust, but departing from the position of the *Restatement (Second) of Trusts*, have held that the trustee is given broader discretion in determining the propriety, timing and amount of such distributions than would otherwise have been the case in the absence of such language. See, e.g., *Bureau of Support in Department of Mental Hygiene & Correction v. Kreitzer*, 243 N.E.2d 83 (Ohio 1983); *Strojek ex re. Mills v. Hardin County Board of Supervisors*, 602 N.W.2d 566 (Iowa App. 1999); *Smith v. Smith*, 517 N.W.2d 394 (Neb. 1994). In *Kreitzer*, the court held that the trustee's discretion was subject to the rather amorphous standard of "reasonableness."

Still other courts have indicated that the terminology is inherently ambiguous so as to permit the resolution of the grantor's intent through parol evidence. See, e.g., *Bohac v. Graham*, 424 N.W.2d at 144 (N.D. 1988), in which the trustee was authorized to distribute principal as the trustee "may deem necessary" for the beneficiary's "support, maintenance, medical expenses, care, comfort and general welfare."

Kansas appellate courts have followed the position of the *Restatement (Second) of Trusts* in finding that hybrid trusts do not create a hybrid discretionary authority. However, in resolving the issue as to whether the trustee in a hybrid trust context has the discretion accorded the trustee in a pure discretionary trust or a support trust, the Kansas appellate courts have demonstrated a strong proclivity to find hybrid trusts, which in the absence of the inclusion of a distribution standard such as "maintenance and support" would have been considered to create a pure discretionary trust, to remain a pure

discretionary trust despite the inclusion of a support distribution standard, with distributions being limited to the purpose of satisfying the delineated support standard.

In *State ex. rel. Secretary of SRS v. Jackson*, 249 Kan. 635, 822 P.2d 1033 (1991), the trust provided, in relevant part:

“During the lifetime of Carrie Conner Jackson, the Trustees, in their uncontrolled discretion, shall pay to Carrie Conner Jackson the net income of the Trust. In addition, the Trustees may pay to Carrie Conner Jackson, from the principal of the Trust from time to time, such amount or amounts as the Trustees in their uncontrolled discretion, may determine is necessary for the purposes of her health, education, support and maintenance. The Trustees are not prohibited from invading the principal of the trust for my granddaughter, Carrie Conner Jackson, before she has exhausted her own funds.”

Id. at 639.

The *Jackson* Court analyzed this provision as follows:

“Stripped down, the provision states the Trustees shall pay the net income and, in addition, may pay from the principal. The payment of the net income is not tied to any determination of need as are payments from the principal.”

Id. at 641.

Even though the income distribution standard was phrased in terms of the trustee’s “uncontrolled discretion,” the use of the word “shall” was construed by the Court to have negated the trustee’s ability to use discretion about whether to distribute income. Perhaps the Court gave limited applicability to the words “in their uncontrolled discretion” due to the Court’s unabashed distaste, as expressed in its opinion, for estate planning strategies designed to protect the trust estate from being a resource for Medicaid purposes. In a divided opinion, the majority had to strain to resolve this palpable inconsistency in the language by construing the term “uncontrolled discretion” in a manner that ascribed such discretion only to the timing of such distribution of income, not the amount. The minority opined that such language created an obvious ambiguity that should have been resolved by remanding the case back to the district court for the purpose of determining the grantor’s intent.

Had the trust used the word “may” instead of “shall,” it is likely the Court would have held there was no requirement that the trustee make distributions of income. With respect to distribution of principal, it was conceded that the trustee was deemed to have absolute discretion (due to the use of the word “may” in conjunction with the term

“uncontrolled discretion”) to determine what amounts were necessary to provide for the beneficiary’s health, education, support, and maintenance.

Despite the Court’s judicial constraints imposed on the broad discretionary authority in the trust instrument relating to the trustee’s distribution of income, this decision should be considered anomalous, if not clearly inapposite, to the issue of the degree of discretion legally afforded a trustee in a hybrid trust. First of all, with respect to income distributions the subject trust was not a hybrid trust, because distributions were not related to a support standard. Instead, the sole issue was whether the trust provisions mandated that income be distributed when there was inconsistent language in that regard. Second, the Court’s decision was probably attributable to both its Medicaid context and the palpable inconsistency with the word “shall” being related to making such distribution and the later inconsistent broad discretionary authority which belied its compulsory nature. The position of the minority that such language created an ambiguity would appear to be better reasoned. The majority simply may have been reticent to acknowledge such ambiguity in its desire to find the trust to be a resource for Medicaid purposes.

In any event, as is apparent from the discussion that follows, in other subsequent contexts the Kansas appellate courts have found discretionary language to take precedence in hybrid trust situations having a prescribed support distribution standard, even if the support standard includes compulsory wording.

For example, in *Myers v. Kansas Dept. of Social and Rehabilitation Services*, 254 Kan. 467, 866 P.2d 1052 (1994), involving the same issue that was presented in *Jackson* as to whether the trust estate was an available resource for Medicaid purposes, the Trust provided:

“During my son’s lifetime, my trustee shall hold, manage, invest and reinvest, collect the income there from [sic] any [sic] pay over so much or all the net income and principal to my son as my trustee deems advisable for his care, support, maintenance, emergencies, and welfare.”

In construing the foregoing terms of distribution, the Court in *Myers*, in contrast to its position in *Jackson*, held that the use of the word “shall” in this different context pertained only to management and investment functions of the trust, not to the distribution standard. Then, in looking at the discretion imposed by the distribution standard, the Court held that because the trust provisions gave the trustees authority to make distributions for care, support, maintenance, emergencies and welfare in terms of “so much or all the net income and principal to [the beneficiary] as my trustee deems advisable,” the trust was a pure discretionary trust as it related to the distribution standard. The Court further held that neither the beneficiary nor a creditor of the beneficiary could compel a distribution from the trust if such distribution was not deemed advisable by the trustee.

In *Kershenbaum v. Fasbinder*, 170 P.3d 922, 2007 Kan.App. Unpub. LEXIS 388 (2007), the decedent created a trust naming his sister as income beneficiary and his son as both trustee and remainder beneficiary, creating an unwise clear conflict of interest with regard to the exercise of his fiduciary authority. The terms of the trust provided that:

“the testamentary trustee(s) shall pay to the beneficiaries or for their benefit, from the income or principal of that beneficiary’s trust, such sum or sums, as the testamentary trustee(s) shall deem necessary or proper to provide for that beneficiary’s suitable support, health and maintenance, adding any unused income to the principal at the end of each year.”

Prior to making a distribution to his aunt, the trustee required her to provide evidence of her other sources of income, most particularly her income tax return. His aunt refused, alleging that the distribution standard was objective on its face, thus requiring her nephew as trustee to satisfy her defined needs without any requirement that she provide any additional information or the trustee’s consideration of her circumstances. Her nephew asserted that the trust was a discretionary trust with regard to making distributions in satisfaction of the distribution standard and thus he had a right to request any additional information he deemed relevant, including whether she had other resources with which to satisfy such standard, prior to making a distribution.

The Kansas Court of Appeals, in an unpublished opinion, agreed with the trustee, concluding that the trustee’s authority was purely discretionary in nature. Once again, although the distribution standard of health, support and maintenance was couched in mandatory terms, i.e., “shall pay,” the court deigned that it was required to give import to the additional phraseology “as the testamentary trustee(s) shall deem necessary or proper.” In doing so, the Court found that such qualifying language created a pure discretionary trust. Thus, the trustee was found to have been accorded discretionary authority as to the timing and amount of such distributions such that the trustee could request any additional information relevant to the beneficiary’s financial situation the trustee desired, notwithstanding the vacuity of any terminology in the instrument indicating that such distributions were to be supplemental to the beneficiary’s other resources. The natural conclusion to be drawn from such finding that the trust was a discretionary trust was that any distribution of the trust estate to the nephew’s aunt was purely in the trustee’s discretion.

The foregoing cases leave little doubt as to the Kansas appellate courts’ proclivity to construe hybrid trusts as pure discretionary trusts related to the delineated support standard if such trusts contain any discretionary or permissive language (e.g., “the trustee may” or “the trustee is authorized to make”) or there is at least a bare modicum of discretionary language following compulsory wording (e.g., “in the trustee’s discretion,” “as the trustee shall deem necessary” or “as the trustee shall deem advisable”). No doubt such liberal construction accorded the trustee’s discretionary authority is frequently antithetical to the actual intent of the grantor or testator. It is inconceivable that all such trusts are intended to grant unbridled authority in the trustee as interpreted by the Kansas

Supreme Court, leaving a beneficiary with little, if any, legal redress to compel a distribution, irrespective of the beneficiary's circumstances. One would think this would be particularly true when there is compulsory language used in conjunction with a support or maintenance distribution standard in a hybrid trust context.

In recognition of this reality and the failure of some courts to follow the dichotomy of the *Restatement (Second) of Trusts* on this issue, the *Restatement (Third) of Trusts* abandoned the position of the prior Restatements as to any strict adherence to a "bright line" distinction between "support" and "discretionary" trusts in a hybrid trust context. The Comments to the *Restatement (Third) of Trusts* § 50 (trustee discretion), § 58 (spendthrift provisions), and § 60 (ability of a creditor to "stand in the shoes" of a beneficiary and compel a distribution in the absence of a spendthrift clause) indicate that such a distinction is artificial. Comment b to § 50 first reaffirms the general common law view that "judicial intervention is not warranted merely because the court would have differently exercised its discretion." However, the comment goes on to provide a "reasonableness" test, stating that a court "will not interfere with the trustee's exercise of a trustee's discretionary power when that exercise is reasonable and not based upon an improper interpretation of the terms of the trust." The Commissioners make particular note that this illogical demarcation poses particular problems in the area of determining whether the assets of a trust in which a trustee is given discretion to make distributions to a beneficiary who is on or applying for government benefits, such as Medicaid, should be considered a "support trust," the assets of which should be deemed available to a beneficiary, versus a "discretionary trust" where they are not. Instead, the Comments state that distribution standards should be treated as a continuum from being purely discretionary to providing for support-type needs, with varying degrees of discretion accorded to the trustee dependent upon the evinced intent of the grantor as gleaned first from the provisions of the trust instrument and secondarily from parol evidence in the event such provisions are deemed to be ambiguous.

Although the Kansas Court of Appeals has cited with approval the *Restatement (Third) of Trusts* in other contexts (See, e.g., *In re Breeding Trust*, 21 Kan.App.2d 351, 899 P.2d 511 (1995), in which it was cited with respect to a trustee's duty to successive beneficiaries), neither it nor the Kansas Supreme Court has done so to date in the context of the difference between discretionary and support trusts. Consequently, there is no assurance that Kansas will not continue to follow its foregoing precedents, which to date have found a clear demarcation between both types of trusts. Even if a Kansas appellate court should decide to adopt such position, due to the largely "facts and circumstances" approach that is implicit thereunder in resolving the degree of discretion accorded the trustee in any particular situation, there is little certainty as to the outcome in any given circumstance.

Also, interestingly enough, K.S.A. 58a-814, enacted in 2002 along with other provisions of the Kansas Uniform Trust Code, provides for a "good faith" standard in reviewing discretionary language either in a pure discretionary or hybrid trust context. Such subsection provides that "[n]otwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such term "absolute," "sole" or

“uncontrolled,” the trustee shall exercise a discretionary power in good faith in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” Such terminology has been criticized by some commentators. They assert it gives too much control to beneficiaries (with an asserted consequential exposure of the trust estate to third party claims and potential governmental resource disqualification), requiring a more circumspect test than simply for a trustee not to have acted dishonestly or with improper motive under the position of the *Restatement (Second) of Trusts*. In essence, such commentators posit that a “good faith” standard is higher than simply requiring that the trustee not have acted in bad faith. Obviously, if such was the case, there would have to be a third alternative in between. If any such distinction can be made, the authors believe it is gossamer in nature. In the above-discussed *Kershenbaum*, decision, which was decided in 2007 after the passage of such provision and applicable in construing the subject trust terms, the Kansas Court of Appeals did not even mention this KUTC provision in continuing to adhere to the position of the *Restatement (Second) of Trusts* position on the issue.

Considerations in Choosing a Distribution Standard

Client Intent

The client’s intent should be the primary consideration in determining whether a trust should be drafted as a discretionary trust, a support trust, or a hybrid trust. Historically, the grantor’s intent has been the controlling force in governing trust law -- the polestar that guides all aspects of trust administration. See, e.g., *Splain v. Hogard*, Nos. G022370, G033710, 2005 WL 658156, Cal. Ct. App. (Mar. 22, 2005). The initial intent of many clients is to give their chosen trustee very broad discretion in making distributions for any purpose. On its face, this is understandable. Giving a trustee broad discretion with little to no specificity regarding whether, when, and how to make distributions of income and principal would appear to have a lot of appeal, because it builds in flexibility so that a beneficiary’s ever-changing circumstances can be taken into account by a trustee who is considering whether a particular distribution is appropriate at the time.

However, due to the very broad discretion thereby accorded the trustee, there is little likelihood that the trustee’s decision-making will comport with the intent of the grantor or testator in the trust’s administration. This is because trust distributions would be almost wholly dependent upon the values of the particular trustee who or which happens to be administering the trust at any particular time. Thus, it is a poor substitute for attorneys being knowledgeable as to the legal import of the various distribution standards so that they may appropriately discuss with their clients the differences in these standards and how they will be implemented by trustees and construed by the courts. In order for the trustee to have guidelines as to the grantor’s or testator’s intent regarding distributions so as to increase the likelihood the administration of the trust will comport with such intent, the trust instrument should define the distribution standard with greater

particularity, including the circumstances and factors to be considered regarding both the making of a distribution and the amount thereof.

Just as important as providing more specific distribution standards that incorporate the grantor's or testator's intent is providing an enforcement mechanism should the trustee stray impermissibly from the evinced intent of the grantor or testator. Giving a trustee broad discretion, even if distribution standards are provided with great specificity, nonetheless will leave beneficiaries with little legal redress to compel a distribution, even if the failure to make the distribution is inconsistent with prescribed guidelines. This is because the trustee in such trusts is nonetheless given the discretion whether to make a distribution even if the evinced situation for making a distribution should arise. In effect, it leaves the determination of whether to make a distribution in circumstances where it is otherwise authorized almost entirely to the whim of the trustee.

Given the foregoing judicial authority, particularly in Kansas appellate decisions, as to the extremely broad discretionary authority accorded the trustee of a discretionary trust in making trust distributions to a beneficiary, it would appear to have to be a very egregious situation indeed when a court would intervene in almost any decision of the trustee with regard to a trust that incorporates almost any type of discretionary language, either with respect to the making of a distribution or the withholding of such distribution. It is thus incumbent upon the attorney to advise clients of the hazards of including discretionary terminology regarding trust distributions without including additional language that provides parameters that appropriately fetter such discretion to ensure the effectuation of the grantor's or testator's intent.

In short, without defining in the trust instrument the purposes of the trust or the circumstances that would militate in favor of making a trust distribution, the trustee would have no indication as to the intent of the grantor or testator in this regard. Moreover, without limiting the degree of discretion accorded the trustee, the beneficiary is probably left without legal redress as to the trustee's decision-making regarding trust distributions. The net result is all too often that the desired flexibility in creating a discretionary trust may amount to simply having substituted the values, including the possible caprice, of the trustee for those of the grantor or testator regarding the beneficiaries' actual beneficial interest in the trust estate.

The problem that arises from such non-artful drafting of trust instruments, particularly in the discretion afforded a trustee, is much more acute in Kansas than many other states. This is due to a judicial climate in which, as discussed above, Kansas appellate courts to date have not adopted the position of the *Third Restatement* regarding there being a continuum between pure discretionary and support trusts in a hybrid trust context. Moreover, the courts also have a strong proclivity toward construing hybrid trusts as pure discretionary trusts with regard to the support standard, thereby providing minimal legal redress to disaffected beneficiaries.

This means scriveners must operate under the assumption that Kansas will continue to deem language that would have led to a construction of a pure discretionary trust in the absence of the addition of support language, to be controlling so as to provide for a pure discretionary trust with regard to the trustee's discretion in making distributions in satisfaction of the delineated support standard. Even if a Kansas appellate court in the future should adopt the position of the latest Restatement, there would be little certainty as to the degree of such discretion accorded the trustee in the context of a particular hybrid trust, both due to a lack of preciseness in such approach and little judicial precedent as to where in the discretionary continuum any given language might place a given trust.

Thus, it is quite evident from the foregoing governing case law that estate planning attorneys will clearly place the trustees and beneficiaries in a "stygian morass" as to the discretion reposed in the trustee in hybrid trusts when using such words as "in the trustee's discretion," particularly when such wording is accompanied by the words "sole" or "absolute," without also including additional refining language relating to the degree of such discretion. If Kansas appellate courts continue to follow prior precedent, the discretion given to the trustee is likely to be far beyond what most grantors or testators would have envisioned, let alone intended. On the other hand, should a Kansas appellate court in a future decision choose to abandon such precedent in favor of the more malleable position of the *Third Restatement* on this issue, without proper drafting as to the degree of the trustee's discretion, there would be no relative certainty as to the degree of discretion afforded to the trustee by inclusion of such language.

Accordingly, some attorneys, desiring to provide flexibility to the trustee in making distributions dependent upon undefined circumstances, will nonetheless include such terminology and then advise clients to consider leaving a "letter of wishes" for the trustee that expounds on the client's philosophies regarding the types of distributions that the client would deem to be appropriate. Such a letter is intended to provide guidance to the trustee to give the trustee some assurance that distributions are being made in accordance with the grantor's wishes. See, e.g., Bove and Langa, *Distinguishing Discretion in Discretionary Trusts-The Letter of Wishes*, Massachusetts Lawyers Weekly (January 23, 2006). The authors therein suggest that such "wishes" be precatory in nature so as to not limit the discretion of the trustee.

However, the authors believe it is much better that such intent be actually incorporated in the terms of the trust instrument. Leaving a separate letter will risk the letter being inadvertently misplaced by the client or trustee or "lost" by a disaffected trust beneficiary who happens upon the letter following the death or disability of the grantor or testator. In addition, the beneficiary may not know of its existence (or even have a legal right to discovery of such letter if it is merely precatory in nature) when determining the intent of the grantor or testator or the beneficiary's enforceable rights.

There would also be the issue of its legal import as to the trustee's discretion, as well as its admissibility in court under the parol evidence rule. As noted above, unlike

courts in other jurisdictions, Kansas appellate courts to date have not found any inherent ambiguity by virtue of combining discretionary trust and support trust language in hybrid trusts, instead finding controlling the trustee's discretion if the trust otherwise would have been construed as a pure discretionary trust in the absence of the inclusion of support trust language. Sans any judicial finding of an ambiguity, such letter is not likely to be legally admissible as evidence as to the grantor's or testator's intent. Nor would it probably be admissible in any circumstance where it was clearly precatory in nature, for it would not be controlling on the trustee's administration of the trust. Although such lack of admissibility would not preclude the trustee from using the letter as guidance in exercising the trustee's discretion to the extent not inconsistent with the provisions of the trust, it would not be binding on the trustee should the beneficiary desire its enforcement. In summary, if it is important enough to be intended as a guide to the grantor's or testator's wishes, it should be incorporated in the trust instrument and be enforceable by the beneficiary after giving proper deference to any discretion accorded the trustee in the instrument.

If the issue is simply one of privacy regarding comments, possibly of a pejorative nature, regarding a beneficiary's situation, psychological aspects or character (e.g., lack of motivation, spendthrift tendencies, financial naïvete, lack of candor, married to an abusive spouse, etc.) of which the grantor or trustee simply desires that the trustee be made aware so as to be helpful in the administration of the trust, such comments could simply be included in a separate confidential letter to the trustee which would not be discoverable. In that manner, they would not be embarrassing to a beneficiary. Moreover, if the beneficiary was a child, such disclosure could negatively impact their self-esteem, be hurtful as a parent's final "report card" on their individual worth, or even adversely affect the filial view of the parent.

It also bears mentioning that the "flip side" of a current beneficiary being able to compel a distribution is the ability of a remainder beneficiary to challenge such distribution. Stated another way, more clearly stating a client's intent in the trust document and not making the trustee's discretion in that regard unfettered also increases the ability of remainder beneficiaries to challenge any such distribution to the extent it exceeds the trustee's authority. The Kansas Supreme Court, in *In re Breeding Trust*, 21 Kan.App.2d 351, 899 P.2d 511 (1995), quoting with approval the *Restatement (Third) of Trusts* § 232, stated "If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.' . . . The extent of a trustee's duty to successor beneficiaries is determined from the trust's purposes, terms, and obligations when viewed in light of the circumstances of the trust and the relevant circumstances of its beneficiaries." *Id.* at 356. To the extent that the grantor or testator desires to avoid such challenges or exposure to remainder beneficiaries of excessive distributions to current beneficiaries, the trust instrument may specifically waive such liability of the trustee. Further, to the extent so desired, under provisions of the Kansas Uniform Trust Code the grantor or testator may also waive the obligation of the trustee to provide a copy of the trust instrument or provide accountings to remainder beneficiaries during the term of the trust, which would otherwise be

required under the KUTC. This is because such obligation under the provisions of the KUTC is not one of those which the KUTC provides cannot be superseded by the provisions of the trust instrument. K.S.A. 58a-105(b).

The Drafting Considerations section below outlines with greater specificity provisions that are desirable for inclusion in the trust instrument. Such provisions can provide some flexibility in the administration of the trust, while at the same time ensuring that the grantor's or testator's specific intent is outlined for the trustee to implement and legal redress is reposed in the current and remainder beneficiaries if it is not.

Medicaid Qualification Considerations

Choosing a distribution standard is critical when a trust beneficiary may be receiving, or become eligible to receive, Medicaid or other government benefits. Any mandatory distribution will automatically considered a resource for such purposes. *Kansas Economic and Employment Support Manual* § 5620(4).

Moreover, a support trust is normally considered a countable resource of someone who is receiving or applying for Medicaid benefits. Because the trustee of a support trust has a legal responsibility to make distributions of income and/or principal to or for the benefit of the beneficiary for his support or maintenance, such assets are deemed to be available to the beneficiary and are counted when a beneficiary makes application for Medicaid or a similar program. In *Miller v. Kansas Dept. of Social and Rehabilitation Services*, 275 Kan. 349, 64 P.3d 395 (2003), the Kansas Supreme Court observed:

“A support trust exists when the trustee is required to inquire into the basic support needs of the beneficiary and to provide for those needs. . . . Eligibility for Medicaid depends on the assets ‘available’ to the applicant, and the support trust is always considered such an available asset.”

Id. at 354.

In many states, “pure” discretionary trusts are not considered as a countable resource of a trust beneficiary when that beneficiary applies for Medicaid or similar government programs. This is because the beneficiary has no right to compel distributions from the trust to the beneficiary or for his benefit. This was the position of the Kansas Supreme Court in the three aforesaid Kansas appellate cases, *Jackson*, *Simpson*, and *Myers* which have addressed the issue. Given Kansas' failure to date to adopt the “continuum position” of the *Third Restatement* and its strong predilection to find a hybrid trust that has any discretionary language to be a pure discretionary trust with regard to the support standard, almost any hybrid trust that contained discretionary language would be expected to be found to be unavailable to the beneficiary due to the beneficiary not being able to compel a distribution and thus not a resource for Medicaid purposes.

This common law Kansas position was statutorily repealed in 2004, when the Kansas legislature enacted K.S.A. 39-709(e)(3). This statute, in the absence of prescribed supplemental language delineated therein, literally makes assets of a discretionary trust a countable resource of a Medicaid applicant, to the extent that, using the full extent of his discretion, a trustee may make distributions to or for the benefit of the beneficiary. This statute provides:

“(e)(3) . . . (A) Resources from trusts shall be considered when determining eligibility of a trust beneficiary for medical assistance. Medical assistance is to be secondary to all resources, including trusts, that may be available to an applicant or recipient of medical assistance.

(B) If a trust has discretionary language, the trust shall be considered to be an available resource to the extent, using the full extent of discretion, the trustee may make any of the income or principal available to the applicant or recipient of medical assistance. Any such discretionary trust shall be considered an available resource unless: (i) At the time of creation or amendment of the trust, the trust states a clear intent that the trust is supplemental to public assistance; and (ii) the trust: (a) Is funded from resources of a person who, at the time of such funding, owed no duty of support to the applicant or recipient of medical assistance; or (b) is funded not more than nominally from resources of a person while that person owed a duty of support to the applicant or recipient of medical assistance.

(C) For the purposes of this paragraph, "public assistance" includes, but is not limited to, medicaid, medical assistance or title XIX of the social security act.”

In light of this statute, it has become critical to include additional language heretofore not required in Kansas in a discretionary trust, comporting with that in subparagraph (B) above, stating that it is the intent of the grantor or testator that the trust be considered supplemental to benefits that may be available to a trust beneficiary from public assistance such as Medicaid or a similar program. It is important to note that the foregoing statutory requirement does not appear to require that the trust be a “pure discretionary trust” with respect to the discretionary language, only that the language indicate there is discretion in the trustee. Such intent might be best expressed as follows:

Supplemental to Governmental Resources. To the extent the Trustee is given the discretion to make a distribution of income or principal of a Trust created hereunder for any beneficiary's health, education, support, or maintenance, notwithstanding any provision in this Trust Agreement to the contrary, it is my intent that such Trust income or principal shall be supplemental to any resources available for such needs from public assistance provided from any local, regional, state or federal government or agency (such as Medicaid, medical assistance or any other benefits

provided under Title XIX of the Social Security Act) or from private agencies, it being my express purpose and intent that such Trust income or principal not be utilized for such purposes to the extent such needs are otherwise provided for from all such other resources. Thus, in the event of a disability or diminished capacity of a beneficiary such that governmental or private resources would otherwise be available to provide for such beneficiary's support, maintenance, health or educational needs, and provided the Trustee hereunder is otherwise authorized to make distributions of income or principal to such beneficiary for any such needs, which discretion, provided the beneficiary is not serving as a Trustee, shall be sole and absolute and not subject to judicial challenge by the beneficiary in the event it need be in order for the trust estate to not be considered an available resource regarding such aforesaid governmental and other resources, the Trustee shall distribute funds supplemental to such other resources to or for the beneficiary's benefit for: differentials in cost between housing and shelter or shared and private rooms, dental care, supplemental nursing care and other health services not provided, sophisticated or experimental medical diagnostic work or treatment (including non-medically necessary procedures), programs of non-rehabilitative and private rehabilitative training where government assistance programs are not available or are insufficient, travel and outings (including necessary or desirable companions), cultural and entertainment experiences (such as athletic activities, camping, contests and movies, plays, musicals, and symphonies), and entertainment and communication equipment and services (such as radios, cassette or compact disc players and the like, television sets, telephones and television cable services). No part of the principal or income of any Trust hereunder shall be used to supplant or replace any public assistance benefits received by or through any County, State, Federal or other governmental agency, including but not limited to benefits from Medicaid, medical assistance or benefits available under Title XIX of the Social Security Act. The foregoing provisions of this Paragraph shall supersede all other provisions of this Trust Agreement to the contrary to the extent necessary to effectuate my foregoing expressed intent.

Note that the above provision only makes the trust totally discretionary if it needs to be in order for the trust estate not to be considered a resource for public assistance purposes. This has two benefits. First, it would permit the beneficiary to be able to compel a distribution and have enforceable rights in all circumstances in which the beneficiary was not on governmental assistance, and probably in Kansas even if the beneficiary was on governmental assistance. Second, it should ensure the beneficiary will be eligible for governmental assistance should the beneficiary reside in another jurisdiction that requires the trust to be a pure discretionary trust for the trust not to be considered an available

resource to the beneficiary or should Kansas change its law in the future to so require.

Finally, it should be noted that the specific supplemental needs delineated in such example provision following the colon, although perhaps desirable if the beneficiary is already on governmental assistance when the trust is drafted for guideline purposes, are not necessary in Kansas for the trust to not be an available resource to the beneficiary. Thus, an abbreviated form of such above provision sans such specific examples of supplemental needs should suffice to make any discretionary trust of any type not a resource in Kansas, and in most other jurisdictions as well, for governmental resource purposes should any beneficiary at any time become otherwise eligible for public assistance.

Creditor Protection Considerations

As alluded to in the introduction, it is becoming more *de riguer* for estate planners to routinely advise their clients regarding the creditor protection benefits of lifetime asset protection trusts for the beneficiaries of their estate. This trend has been driven by a more litigious society, a reflexive desire by clients to seek asset protection countermeasures, and, in the face of precipitous increases in the estate tax applicable exclusion amount in the last decade, a much greater awareness by estate planners of the asset protection benefits of such third party trusts, even in circumstances where no estate tax benefits may be derived. However, under common law, particularly in the absence of a spendthrift provision restricting the attachment by a creditor of a beneficiary's interest in the trust or the assignment by the beneficiary of such interest while in the trust, the asset protection benefits desired by clients could be in peril if the distribution standard set forth in the trust document was drafted as something other than a discretionary trust.

Such exposure is at its zenith with trusts that are termed "mandatory distribution trusts." A mandatory distribution trust is one in which trust distributions are not to be made pursuant to a standard (such as for health, education, support and maintenance) by the trustee or in any manner in which the trustee has discretion, but instead are required to be made under a "bright line" standard specified in the trust instrument divorced from any trustee discretion. Examples include income distributions required to be made on a periodic basis and terminating distributions when the primary beneficiary attains a certain age or dies during the trust term. There is no creditor protection afforded mandatory distributions. They are an unrestricted property right, and as such, in the absence of a valid spendthrift provision which under common law would prevent their attachment prior to a distribution being in the hands of creditors, are subject to attachment by creditors even prior to their distribution to the beneficiary. See *Bogert, Trusts & Trustees*, § 222 at 380, et seq. (Rev. 2d Ed.1992).

On the other hand, as long as the beneficiary was not serving as sole trustee, such exposure to creditors at common law was minimal with a pure discretionary trust. Under

common law, a creditor could only reach trust assets held in a pure discretionary trust in the limited circumstance where the beneficiary could legally compel the trustee to make a trust distribution to the beneficiary. If the beneficiary was serving as sole trustee, the trustee's discretionary authority would amount to a general power of appointment, potentially exposing the entire trust estate to the claims of any creditor of the trustee/beneficiary and to its exercise by a trustee in bankruptcy.

However, if the beneficiary was not serving as sole trustee, normally the beneficiary of a pure discretionary trust would only be able to compel a trust distribution if the beneficiary could demonstrate that the trustee abused the trustee's discretion in failing to make a distribution. *Restatement (Second) of Trusts*, § 187, comment e; *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex. App. 1997); *State Street Bank and Trust Company v. Reiser*, 389 N.E.2d 768 (Mass. 1979); *Brent v. State of Maryland Central Collection Unit*, 537 A.2d 227 (Md. 1988).

If a beneficiary cannot compel a trust distribution because the trustee has absolute discretion whether, when, and how to make distributions, the beneficiary has no property right that a creditor can reach. See *Bogert, Trusts & Trustees*, § 228 at pp. 524-32 (Rev.2d Ed. 1992). Because a beneficiary has no discernible property interest in a discretionary trust, the courts will often imply that the grantor intended for a creditor to be unable to attach the beneficiary's interest, i.e., the trust was intended to be spendthrift in nature. As such, it would have the same effect as if a spendthrift clause had been included expressly in the trust instrument. Consequently, creditors are unable to attach the interest of the beneficiary in the trust such that the trustee may not make a distribution to the beneficiary without satisfying the claim of the creditor. See, e.g., *2A Scott & Fratcher, The Law of Trusts*, § 152.4, at 110 and § 155 at 157 (4th ed. 1989). *But, see, Wilcox v. Gentry*, 254 Kan. 411, 867 P.2d 281 (1994), in which a creditor was permitted to attach the interest of a trust beneficiary in a trust that did not include a spendthrift provision where the trustee was given sole discretion (with no distribution standard) to distribute income and principal for the benefit of the beneficiary. Citing *Restatement (Second) of Trusts*, § 155(2), which provides that a trustee may not pay to or for the beneficiary any part of the income or principal after being served with process of a creditor attachment in a trust that has no valid restraint on alienation, the Court held that no payments could be made, even indirectly, for the beneficiary's benefit after attachment of the beneficiary's interest without first satisfying the debt of the attaching creditor. The Court failed to address the issue of whether such trust, nonetheless, should have been considered an implied spendthrift trust due to the presence of discretionary trust distribution provisions.

The *Restatement (Second) of Trusts* § 155(1) (1959), concerning discretionary trusts, states as follows:

"[I]f by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a

transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal."

Comment b of this subsection, addressing a pure discretionary trust situation, provides that

"A trust containing such a provision as is stated in this Section a 'discretionary trust' is to be distinguished from a spendthrift trust and from a trust for support. In a discretionary trust it is the nature of the beneficiary's interest rather than a provision forbidding alienation which prevents the transfer of the beneficiary's interest. The rule stated in this Section is not dependent upon a prohibition of alienation by the settlor; but the transferee or creditor cannot compel the trustee to pay anything to him because the beneficiary could not compel payment to himself on application for his own benefit."

As noted above in *Wilcox v. Gentry, supra, Restatement (Second) of Trusts* § 155(2) provides that in the absence of "a valid restraint on alienation," i.e., a spendthrift clause restricting assignments of trust interests in favor of creditors and attachments of a beneficiary's beneficial interest in the trust, an indirect payment actually made should be treated in the same manner as a direct payment so as to be subject to creditor attachment.

Thus, if there is no explicit spendthrift provision, and spendthrift protection would not be implied under local law due to the broad discretionary nature of trust distributions, a creditor is free to attach the beneficiary's interest in the trust. However, a creditor has no more right to compel a distribution in such circumstance than does the beneficiary whose interest was attached. Thus, the limited effect of a valid creditor attachment of a beneficiary's interest in a pure discretionary trust is that a trustee may not make distributions to a beneficiary without first satisfying the obligation of the beneficiary/debtor to an attaching creditor.

However, with a support trust the beneficiary can compel the trustee to make distributions under circumstances dictated by the standard, (i.e., where it would be an abuse of the discretion afforded the trustee to not make the distribution). *Restatement (Second) of Trusts*, § 128, comments d and e. This means a creditor under common law could "stand in the shoes" of a beneficiary and compel a distribution for the beneficiary's support in circumstances where the debtor/beneficiary could have compelled such a distribution. This problem was assuaged with a valid spendthrift clause, for permitting a creditor to "stand in the shoes" of a beneficiary would violate the literal terms of the spendthrift provision.

This problem of creditor exposure to the assets of a beneficiary of a support trust was exacerbated if the beneficiary was serving as sole trustee. In that situation, the degree of creditor compulsion would appear to be much greater. Instead of the normal standard as to whether it would be an abuse of discretion for the trustee to not make a

distribution, the standard in that situation would likely be whether it would be an abuse of discretion for the trustee to make the distribution. In effect, the reach of a creditor of a trustee/beneficiary in that situation would be the greatest amount the trustee could distribute without abusing the trustee's discretion rather than the minimum amount the trustee could distribute without abusing such discretion.

If the beneficiary was serving as a trustee and the distribution standard was not ascertainable in nature, the spendthrift clause would not provide any protection in any event, because the trustee/beneficiary would in effect have a general power of appointment exercisable by the beneficiary's creditors or a trustee in bankruptcy. However, even if the distribution standard was ascertainable, at common law there is at least some exposure that even with a spendthrift clause the ascertainable distribution standard could be viewed similarly as a property right, such that the creditor could reach, or compel a distribution, unaffected by a spendthrift clause, up to the amount the trustee/beneficiary could have distributed to himself or herself without abusing such discretion. Indeed, the *Restatement (Third) of Trusts*, section 60, comment g at p. 412 has taken just such liberal view on this issue, far beyond what most courts, other than a few isolated court decisions, mostly involving bankruptcy situations, have concluded to date was reachable in this situation. It remains to be seen if a significant number of other courts will adopt this position.

In a blended trust having multiple beneficiaries, the lack of definable interest in any one beneficiary normally establishes proof of lack of assignability. This typically prevents a creditor from attaching a beneficiary's interest in a blended trust, even if there is no spendthrift clause. The lack of definable interest, coupled with trustee discretion, makes it extremely difficult for creditors or purported assignees to compel a trust distribution. *Bogert, Trusts and Trustees*, § 230 at 544 (Rev. 2d Ed. 1992). If the trust provisions give the trustee discretion to exclude any particular beneficiary, it is considered proof of a restriction on any voluntary or involuntary alienation of the beneficiary's interest, for the same reasons as exist in a pure discretionary trust. *Id.* at 543-44. In other circumstances, irrespective of whether the courts have viewed the interest of any one beneficiary as not being distinct enough to permit its alienation or that the trust is owned collectively by the class and only the class can alienate it for class debts, the judicial outcome has been that neither a voluntary alienee nor a creditor of one member of the class may compel the trustee to pay over to the creditor any income or principal. *Id.* at 544.

As discussed above, the *Restatement (Third) of Trusts* has abandoned the adherence to a "bright line" distinction between "support" and "discretionary" trusts, instead viewing as a continuum the differences between purely discretionary and support trusts, with varying degrees of discretion to be accorded to the trustee dependent upon the evinced intent of the grantor as gleaned first from the provisions of the trust instrument and secondarily from parol evidence in the event such provisions are ambiguous.

Much of the disdain from certain practitioners regarding the *Third Restatement's* “continuum” position on discretionary trusts has been directed at its Comments, which some commentators assert materially change the position of Section 187, comment j, of the *Second Restatement*. This *Second Restatement* comment provides that provisions of a trust may evince an intent that the trustee’s discretion need not be exercised reasonably, such as by including the words “absolute,” “unlimited,” or “uncontrolled” in describing such discretion. Such commentators are concerned, if not alarmed, from a creditor protection standpoint that the comments to the *Third Restatement* may now require a finding of reasonableness regarding all trustee distribution decisions and thereby confer enforceable rights in beneficiaries that would be subject to creditor claims.

Whether such fears are merited requires a careful analysis of the Comments to the *Third Restatement* that such commentators find most objectionable. Comment e to §60 of the *Third Restatement* provides that a creditor of a beneficiary may not compel a trust distribution if the beneficiary/debtor could not compel such distribution. It goes on to state that “It is rare, however, that the beneficiary’s circumstances, the terms of the discretionary power and the purposes of the trust would leave a beneficiary so powerless.” The Comment on Section(2): d of §50 of the *Third Restatement* states that “Reasonably definite or objective standards serve to assure a beneficiary some minimum level of benefits, even when other standards are included to grant broad latitude with respect to additional benefits.”

Most important to the Commentators’ concerns, however, is Comment on Subsection (1): b, §50, which provides that “It is not necessary, however, that the terms of the trust provide specific standards in order for the trustee’s good-faith discretion to be found unreasonable and thus constitute an abuse of discretion. . . . a general standard of reasonableness or at least good-faith judgment will apply to the trustee . . . based on the extent of the trustee’s discretion, the various beneficial interests created, the beneficiaries’ circumstances and relationships to the settlor, and the general purposes of the trust.” In short, even in a discretionary trust that has no standard, a “good-faith” requirement is imposed on the trustee by the *Third Restatement* position.

The authors find no such creditor protection alarm from these Comments. Attempting to discern the intent of the grantor in the face of an endemic of imprecise drafting (i.e., reasonableness of the trustee’s determination whether to make a distribution to a beneficiary) has always been the central focus of the courts. Moreover, few grantors or testators would probably have intended that a trustee could leave the beneficiary destitute with no legal remedy, despite the discretionary language in the trust instrument, particularly when the trust instrument provides for a support standard of distribution. The *Restatement* authors were correct in commenting, with the bracketed words inserted, that “It is rare, however, that the beneficiary’s circumstances, the terms of the discretionary power, and the purposes of the trust [were intended to] leave the beneficiary so powerless.”

Although the *Restatement* authors are adopting the position of a small minority of states (Ohio, Pennsylvania and Connecticut) that have adopted a hybrid trust discretionary authority in a hybrid trust and a “reasonableness standard” in a discretionary trust not tied to a standard, the authors believe such position was adopted essentially to “bail out” the probable true intent of grantors and testators whose estate planning attorneys frequently fall into the pitfalls of relying on imprecise drafting in lieu of determining their client’s intent and overly broad discretionary language in pursuit of flexibility.

Despite such position, in the small minority of situations where such result would be desired, precise drafting should still be able to create a pure discretionary trust or a trust with absolute discretion even when tied to a support standard where same is intended by specifically removing any “reasonableness” requirement regarding the trustee’s discretion irrespective of the circumstances of the beneficiaries, their need for such distribution, or the destitute condition in which they could be left in the absence of such distribution. Obviously, as the *Third Restatement* acknowledges, such intent of a grantor or testator to leave a beneficiary without remedy in such situation would be a rare intended circumstance. However, it certainly does not preclude such result. It would simply appear to take specific language that the grantor or testator clearly contemplated and intended just such result.

Whatever enforceable rights a beneficiary may have under a “reasonableness” requirement will not be directly accessible by creditors in the face of a valid spendthrift clause having application to such creditors. Under provisions of the Kansas Uniform Trust Code, enacted in 2002, Kansas has eliminated any creditor exception to the efficacy of spendthrift clauses in protecting the trust estate from the claims of a beneficiary’s creditors with respect to third party trusts. K.S.A. 58a-502.

Section 504(b) of the Uniform Trust Code (UTC) provides substantial protection against creditors being able to “stand in the shoes” of a beneficiary and compel distributions from discretionary trusts subject to a distribution standard. Section 504(b) provides that whether or not a trust contains a spendthrift clause, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion, even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion.

An exception under § 504(c) permits the court to order a distribution to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary’s spouse, former spouse or child up to the amount that the beneficiary could compel the trustee to distribute if the trustee had complied with the standard or not abused the discretion. Section 504(e) of the UTC further provides that if the trustee’s or co-trustee’s discretion to make distributions for the trustee’s or co-trustee’s own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest in the trust of such fiduciary except to the extent the interest would

be subject to the creditor's claim were the beneficiary not acting as a trustee or co-trustee (i.e., the exceptions under § 504(c) would be applicable).

Because the provisions of the UTC expressly provide under § 106 that it is to be supplemented by the common law, and the *Restatement (Third) of Trusts*, § 60, comment g, as above discussed, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary's creditors, i.e., a creditor can compel a beneficiary/trustee to make a mandatory or authorized distribution to the beneficiary, § 504(e) was added by the Uniform Commissioners to the UTC in 2004 to ensure that any common law adoption of such *Restatement* position could not "preempt" the provisions of § 504(b) in the circumstance where a beneficiary was serving as co-trustee or sole trustee of a trust authorizing the trustee to make distributions for the beneficiary's health, education, support and/or maintenance. Such provision states that a creditor of a beneficiary in that situation cannot compel a distribution, or otherwise reach, such beneficiary's beneficial interest in that situation unless such interest could have otherwise have been reached in the absence of a beneficiary serving as trustee. The Comments of the Uniform Commissioners to this Section specifically provide that to the extent the assets of the trust estate would not be includible in the beneficiary/trustee's estate due to the distribution provisions being subject to an ascertainable standard, the creditors of the beneficiary cannot compel the trustee to make any distribution of the trust estate for the benefit of the creditor unless the exception under § 504(c) is applicable.

Although Kansas has adopted the Uniform Trust Code, it omitted § 504 from its version of the UTC. Nonetheless, K.S.A. 58a-502(d), mirroring § 504(b) of the UTC, provides that even in the absence of a spendthrift clause, "a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion even if: (1) The discretion is expressed in the form of a standard for distribution; or (2) the trustee has abused the discretion." Presumably, given such broad language and providing no exceptions for a trustee/beneficiary serving in such situation, such asset protection should be extant even in a situation where the beneficiary is serving as trustee. Even should a Kansas court adopt such a distinction, before a creditor could reach the beneficiary's beneficial interest in the trust, a Kansas appellate court would have to adopt the position of the *Third Restatement* on this issue.

The authors believe that for a myriad of cogent reasons, it is quite unlikely to do so. The position of the *Third Restatement* on this issue, proposed in 2003, has clearly gone too far in protecting the interests of creditors. It has departed from well-reasoned prior *Restatements* and has scant judicial support. Moreover, unlike its position on discretionary and hybrid trusts discussed above, it is also devoid of a persuasive rationale. It wrongfully equates a discretionary trust interest subject to significant fiduciary constraints under an ascertainable standard to an unfettered general power of appointment property right having no such restrictions on its disposition or the purposes for which it can be appropriated. For the same reason that such an ascertainable standard precludes trust property from being includible in the trustee's estate, it should preclude it from being subject to the claims of creditors. It simply does not repose in the

trustee/beneficiary the degree of control over the trust estate that is even close to being tantamount to the beneficiary being the owner of the property.

It also permits a creditor to misdirect property to purposes not intended by the grantor or testator. An ascertainable standard, coupled with a spendthrift provision, is obviously intended to preclude the trust estate from being expended for any other purposes. Such is not the case with a testator or grantor who reposes a general power of appointment in a beneficiary. Thus, it is hard to divine any possible public policy consideration that would dictate that this polestar of trust law should be vitiated in favor of a creditor of a beneficiary the grantor or testator clearly did not wish to benefit. Creditors of the trustee would be not only taking property away from the intended beneficiary/trustee's needs, but also from all other current and remainder beneficiaries of the trust.

Moreover, the *Restatement* position is inconsistent with other long-standing trust principles. It would give creditors the ability to ignore spendthrift clauses when a beneficiary is serving as sole trustee subject to fiduciary constraints as to trust distributions under an ascertainable standard, yet in conformity with prior *Restatements* and long-standing common law principles, continue to give such clause efficacy when a beneficiary has no such fiduciary duties and an unconstrained vested property interest in the trust estate, such as the right to income, mandatory principal distribution rights, or even a vested remainder interest, all of which could have an economic value far in excess of the discretionary distribution right reposed in a beneficiary/trustee. Further, in permitting creditors to ignore any "consideration of other resources" provision in the instrument with regard to being able to attach distributions the trustee could have made, as demonstrated by the example in the commentary to the *Restatement* position, the *Restatement* would thereby give creditors an even greater interest in the trust estate than the beneficiary held as trustee.

If a Kansas court adopted the position, it would be making a sophistic distinction between "reaching the beneficiary's beneficial interest" under the *Restatement (Third) of Trusts'* position and the proscribed "compelling of a distribution of such interest" under the current Kansas UTC statutory provision. The same could be said of not making the efficacy of a spendthrift provision dependent upon the beneficiary's beneficial interest in the trust estate, but upon the identity of the trustee, in circumstances when such interest is otherwise identical due to being based on the same ascertainable distribution standard and fiduciary constraints.

Such position would further place the beneficiary and creditor in the factual and quite costly abyss of litigating, on an on-going situational basis, the economic value of the trustee's discretionary authority in the beneficiary's favor. Given the plethora of variations in the wording of trusts, including the distribution standards, discretionary authority and factors to be taken into account by the trustee in making distributions, along with the complexities imposed by "blended trusts," all juxtaposed with the issue of whether a Kansas appellate court might adopt the position of the *Third Restatement* and break from its prior adherence to the *Second Restatement* position regarding the degree of

such discretionary authority, it is hard to envision a much more complex factual or legal quagmire.

The Uniform Commissioners clearly do not agree with this position and did not intend such result in proposing the UTC, stating in the Comments to the clarifying provision of Section 504(e) that such a position would have an adverse effect on estate planning if the *Restatement* position was judicially adopted. This adverse effect would extend beyond mere asset protection to possible inclusion of the trust estate in the trustee/beneficiary's estate despite the ascertainable standard that would normally preclude its inclusion under Section 2041 of the Internal Revenue Code. If the trust estate was indeed exposed to the claims of the trustee/beneficiary's creditors under the *Restatement* position, this could well be viewed as an impermissible general power of appointment in favor of the beneficiary's creditors.

Finally, the Kansas legislature, in enacting the foregoing modifications to the UTC, has shown a decided interest in preferring the intent of the grantor first, and interests of the beneficiary second, over interests of the beneficiary's creditors, deleting all creditor exceptions to the validity of spendthrift provisions included in the proposed UTC and precluding any ability of a creditor to compel a trustee, without providing any exception if the trustee was also a beneficiary, to make a distribution limited by a standard, even if that standard has been abused.

Thus, the Kansas judiciary, if it accepted the position of the *Third Restatement*, would be creating a totally inscrutable, meritless, new public policy exception in favor of creditors in the face of clear legislative intent under the Kansas version of the UTC to not provide any such exception in the very circumstance the *Restatement* is proposing. Nonetheless, to eliminate this prospect entirely, the Kansas legislature hopefully will adopt the clarifying provisions of Section 504(e). Because Kansas has no creditor exceptions to the validity of spendthrift clauses (which creditor exceptions are contemplated in the suggested provision of the Uniform Commissioners), and Kansas' spendthrift provisions are in K.S.A. 58a-502, not 504, it is suggested that the Kansas legislature modify K.S.A. 58a-502(d) by replacing it with the following provision:

“(d) Except as provided in subsection (e) below, irrespective of whether the trust has a spendthrift clause, a creditor of a beneficiary may not compel a distribution to a beneficiary that is subject to the trustee's discretion, even if the standard of distribution is expressed in the form of a standard and the trustee has abused the trustee's discretion.

(e) If a beneficiary is or was serving as sole trustee and the standard of distribution with regard to such beneficiary is not in the form of an ascertainable standard relating to such beneficiary's health, education, support or maintenance, a creditor shall have the right to (1) compel any distribution the beneficiary, while serving as sole trustee, either is presently authorized to make to such beneficiary or was authorized to make to such beneficiary and did not make; and (2) attach such beneficiary's beneficial interest in the trust with respect to any present or future discretionary distributions to such beneficiary, in the absence of a spendthrift clause precluding such attachment.”

This would require the renumbering of existing subsection “e” to “f.”

The authors and the KBA Real Property, Probate and Trust Section are pursuing a legislative change in the 2012 Kansas legislature to effectuate the foregoing change. In the interim, to preclude any potential creditor exposure in this regard, a “shifting provision” could be included in the trust instrument, whereby a beneficiary would immediately cease serving as sole trustee if a creditor attached such interest in the event so serving as sole trustee would expose the trust estate to such creditor claim. Such removal would continue until an independent Trust Protector or Special Trustee restored the beneficiary to such capacity at a time the trust estate ceased to be so exposed. This approach is clearly preferable to the trustee simply resigning, which according to the comments to the subject *Third Restatement* provision indicates must be effectuated prior to the attachment and even then would raise the issue of whether such resignation constituted a release so as to be a fraudulent transfer. Such “shifting provisions” are normally upheld under the rationale that they further the intent of the grantor. *Am.Jur.2d Trusts*, § 126; *In re Reuss’ Estate*, 196 Misc. 24, 91 NYS2d 479.

Thus, full creditor protection (except for claims under superseding federal law, e.g., a federal income tax liability of a beneficiary) should be provided in a Kansas trust with the inclusion of a spendthrift clause even if the beneficiary is serving as a trustee, provided distributions are to be made pursuant to a standard, preferably an ascertainable standard. This is because the combination of the impact of the foregoing statutory provision, the inclusion of a spendthrift clause, and the deletion of all exceptions in the UTC regarding the efficacy of spendthrift clauses should preclude the attachment of the trust by any non-federal creditor of a beneficiary, and no such creditor should be able to do an “end around” the spendthrift clause simply by standing in the shoes of the beneficiary so as to be able to compel a distribution that the beneficiary would otherwise be able to compel under the distribution standard.

In short, beneficiaries should be able to serve as sole trustees of hybrid trusts in Kansas without compromising in any respect the asset protection that would otherwise have been afforded by having a third party serve in the same capacity. Moreover, the beneficiary as trustee should be able to be given almost the same degree of control over the trust estate as would be afforded by an outright distribution without sacrificing such asset protection benefits from creditors or from spousal claims under the foregoing subsection. For example, beneficiary/trustees can be given the authority to name their successor trustees or a co-trustee, make distributions for the health, education, maintenance and support of themselves and their descendants, be given broad investment authority, and have reposed in them a limited power of appointment whereby they may appoint the remaining trust estate to any persons or entities other than their estate or the creditors of their estate. Consequently, although asset protection trusts are clearly on the ascendency as an estate planning tool, they nonetheless are underutilized in the substantial majority of situations in which they would otherwise have been chosen by a fully informed grantor or testator.

All of the foregoing issues focus on exposure of the trust estate to creditors of current beneficiaries. Before concluding such discussion, it is advisable to point out that exposure of remainder beneficiaries to creditor claims was always normally quite limited, even in the absence of a spendthrift clause. This is because such interests are often intertwined with other remainder beneficiaries (such as in a succeeding sub-trust) that they cannot be separately valued or are so remote or contingent that they cannot be sold at a price that is fair to both the creditor and beneficiary. In such situations, the courts have refused to permit such attachment. *Restatement (Second) of Trusts*, §§ 161, 162.

Spousal Claims Considerations

Third party trusts can protect the beneficiary against the claim of a spouse in a marital dissolution proceeding and following death regarding forced inheritance rights. The absence of a general power of appointment or mandatory distribution right (such as a mandatory income distribution, which would then be a property right vested in such beneficiary) would preclude any distribution of the trust estate other than for the beneficiary's health, education, maintenance and support needs, thereby precluding the trust estate from being available to satisfy a spousal claim in the event of a marital dissolution. Such protection would be afforded because a court may not legally order the trustee of a third party trust (i.e., a trust not created by the grantor) to make any distribution to a person that the trustee was legally prohibited from benefiting under the terms of the instrument. Moreover, following death the provisions of the Kansas Elective Share Act would normally preclude the claim of a surviving spouse to the trust estate, absent a general power of appointment in the trust estate being held by a decedent beneficiary. K.S.A. 59-6a205(a)(1).

Drafting Considerations

As is readily apparent in the foregoing discussion, the authors have little fondness for discretionary trusts in the broad sense in most circumstances. They provide no indication of the grantor's or testator's intent and provide little, if any, protection for a beneficiary against the distribution whims of the trustee. Thus, the authors believe that the trust instrument should specifically indicate the intent of the grantor in making trust distributions, as well as the circumstances that merit a distribution and the intended "needs" of the beneficiary to be satisfied by the trustee in the making of such distribution. Normally, the latter relates to health, education, maintenance and support needs. Sometimes, such support standard will be extended to more expanded purposes, such as for vacations and recreational and artistic activities. Often such expanded purposes are only applicable after a beneficiary reaches retirement age, say age 65, and usually such authority is only exercisable by an independent trustee who is not a beneficiary so as to avoid such authority being considered to be a general power of appointment for both estate tax and creditor exposure purposes.

In addition, such authority is often only exercisable after considering all other resources available to the beneficiary for such purposes (to maximize asset protection of

the trust estate, most other resources of a beneficiary normally being exposed to such claims). Such resources may include, but not necessarily be limited to, income of the beneficiary, other assets of the beneficiary that could satisfy such distribution need, insurance or governmental resources that could satisfy such need, any other trust that could satisfy such need, the obligation of a spouse or parent to support such beneficiary, and the ability of an adult beneficiary who is not caring for a minor or disabled child, or an adult in need of care, to engage in gainful employment prior to attainment of an advanced adult age.

Further, there should normally be included “priority provisions” in a blended trust that delineate which current beneficiaries have priority in the event there are insufficient trust assets to satisfy the current and reasonably anticipated future needs of the beneficiaries. For example, with respect to a spousal beneficiary, such spousal needs can be given priority over all other beneficiaries. With respect to distributions to other beneficiaries, normally the beneficiary having the closest relationship to the grantor or testator (e.g., a surviving spouse over a child and a child over a grandchild) is given priority. With respect to discretionary beneficiaries within the same class (e.g., children or grandchildren), a minority beneficiary is normally given priority over an adult beneficiary and a disabled child over a child having no disability. Finally, the trust provisions should provide whether distributions to current beneficiaries in the same class (e.g. the grantor’s children) who are also remainder beneficiaries upon termination of the trust should be treated as an advancement toward their remainder shares.

With respect to adult beneficiaries under a certain age (say age 30), clients usually desire that distributions for support and maintenance (as opposed to distributions for health and education) should be conservatively construed, e.g., to only provide for the “barest necessities of life, irrespective of the standard of living to which such beneficiary may be accustomed, so as to not adversely impact such beneficiary’s maturational development, personal ambition and financial independence.”

Finally, the trust instrument should make it clear that current beneficiaries are to be given priority over remainder beneficiaries and that within the foregoing guidelines, there is no requirement that discretionary distributions among multiple current beneficiaries necessarily be equal in amount, whether currently or on a cumulative basis. Nonetheless, if it is the grantor’s or testator’s intent that any distributions to a current beneficiary who is also a remainder beneficiary are to be considered an “advancement” with respect to the share such remainder beneficiary is to receive upon termination of the trust, the trust instrument needs to so specify.

It is important to keep in mind that the trustee is the grantor’s or testator’s surrogate. Estate planning attorneys should thus inform clients that, as much as practically possible, the trustee should not be authorized to make any distributions that the grantor or testator would not have made under the circumstances, nor withhold any distribution that the grantor or testator would have made in such situation. In essence, if the grantor or testator would have made such distribution to a beneficiary under the

circumstances, so should the trustee. In the absence of clear trust language evincing the grantor's or testator's intent as above provided, there is little likelihood that this would be the case. Instead, the probability is that the grantor's or testator's intent will not be carried out by the trustee, the beneficiary may not have an enforceable right with respect to ensuring such intent is effectuated, there will be significant disagreements between the trustee and beneficiary as to the grantor's and testator's intent, and trust administration expenses will be dramatically increased as a result thereof (unless, of course, the beneficiary is serving as sole trustee).

The foregoing result is likely to ensue if such guidelines and distribution standards are not included in the trust instrument due to the parol evidence rule, which normally precludes the introduction of any extrinsic evidence as to the grantor's or testator's intent in the absence of an ambiguity in the trust instrument as to such intent. *McGinley v. Bank of America*, 279 Kan. 426, 440, 109 P.3d 1146 (2005). This rule is one of judicial efficiency. Otherwise, every trust instrument would be subject to a judicial challenge as to the intent of the grantor or testator through the introduction of extrinsic evidence as to such intent. In essence, by virtue of such parol evidence rule, a court is unlikely to construe the intent of the grantor or testator based upon evidence outside of the provisions of the trust instrument in the absence of an ambiguity as to such intent. *Id.* Similarly, a court is not likely to consider the priority of beneficiaries, or assume a support and maintenance distribution standard is other than the standard of living to which the beneficiary was accustomed, in the absence of trust provisions that clearly delineate such factors are to be considered by the trustee. Further, the instrument should specify whether outside resources are to be considered in making trust distributions. Such resources should be delineated with specificity, including other assets, support obligations of a spouse or parent to support such beneficiary and the ability of a beneficiary to engage in gainful employment when not attending an educational institution full-time or attending to a minor child or disabled child or other family member in the home,

Moreover, if the discretion of the trustee is to be subject to judicially imposed restrictions (so as to provide an enforceable right in a beneficiary to compel a distribution), the instrument should clearly so provide. Thus, if the distribution standard is intended to be "in the trustee's discretion" which is not intended to be plenary in nature, the trust instrument should thus indicate. Although most clients normally desire to afford some discretion in the trustee with regard to the circumstances that require a distribution, as well as the amount of a distribution, such authority is normally not meant to be unfettered as it would be in a pure discretionary trust. Thus, in order to ensure that the administration of the trust conforms to the grantor's intent with the inclusion of such discretionary language, it would normally be desirable that the following provision, or a provision of similar import, be included in the trust instrument:

Trustee's Discretionary Authority Regarding Trust Distributions. Under the provisions of this Trust Agreement, I have both authorized and provided for the Trustee to make trust distributions for the health, education, maintenance and

support needs of trust beneficiaries. To the extent such distributions are made subject to additional qualifying language, such as “in the trustee’s discretion” or in amounts the Trustee “determines to be necessary or advisable,” unless a beneficiary who is then entitled to priority as to discretionary distributions is serving as a Trustee and such discretionary authority relates to such Trustee/beneficiary’s descendants, or a beneficiary who is otherwise qualified to receive governmental benefits such as Medicaid and SSI is not serving as a Trustee and such interpretation (as provided herein) is necessary for such beneficiary to qualify for such governmental benefits, it is not my intent by the inclusion of such qualifying language to create a purely discretionary trust whereby the Trustee is unfettered by normally applicable fiduciary constraints and responsibilities regarding the Trustee’s determination whether to make a distribution to a trust beneficiary pursuant to such distribution standard or the amount of such distribution, to be limited only in circumstances of dishonesty or bad faith.

To the contrary, despite the inclusion of such qualifying language, the exercise of such Trustee authority shall be subject to reasonable fiduciary constraints and principles. However, it is not my intent that a court of competent jurisdiction shall be free to simply substitute its determination for that of the Trustee in the exercise of such authority. Rather, I intend by the inclusion of such qualifying language that the Trustee be afforded a reasonable degree of discretion regarding whether to exercise such authority, as well as the amounts to be distributed to a trust beneficiary in satisfaction of such distribution standard, such that a court of competent jurisdiction would not substitute its judgment for that of the Trustee unless the court has found that the admissible evidence demonstrates that there was an abuse of the exercise or non-exercise of such Trustee’s discretionary authority such that the Trustee’s action or inaction in that regard was clearly unreasonable (i.e., beyond the realm of reasonable debate) or arbitrary after applying the applicable distribution standard, the beneficiary’s circumstances, and all other provisions of this Trust Agreement which are intended to impact such Trustee determination.

It is important that the foregoing provisions limit the trustee’s discretion only with respect to distributions for health, education, maintenance and support (“HEMS”). It does so because these standards are termed “ascertainable” both in estate tax provisions and otherwise in that they have defined “need based” meanings and limitations judicially (although the trust instrument can also define them as the grantor or testator desires). Broader distribution standards such as “happiness” or “comfort” (the latter if not related in the trust instrument to a certain standard of living) have no such limitations and are unrelated to need. Consequently, the integrity of the grantor’s or testator’s intent would be compromised in the vast majority of situations if the discretion of the trustee was limited in terms of not making a distribution with respect to distributions beyond an ascertainable standard, for the beneficiary could arguably thereby compel a distribution to satisfy such much broader standard, e.g., whatever made the beneficiary “happy” with

regard to a “happiness” standard. It could also be fatal to asset protection if the beneficiary was serving as sole trustee, for such broad authority would likely constitute a general power of appointment exercisable by a creditor or trustee in bankruptcy. K.S.A. 58a-505(a)(1); 11 U.S.C. § 541. In any event, for such reasons and the fact that the HEMS standard in and of itself is normally sufficient to cover almost any conceivable living need a beneficiary might have, distributions in trust instruments as a general rule are normally limited to such standard.

It should also be again noted that in circumstances where a beneficiary is to serve as sole trustee (albeit possibly not until the beneficiary has reached a desired age), the trust provisions, although still providing asset protection benefits, would no longer protect the beneficiary from his or her own imprudent decisions, including not giving proper deference to them, in its administration. Nonetheless, it would be hoped that such trustee/beneficiary would adhere to them and such provisions would remain important in governing any successor third party trustee who might serve in the event of a disability of the trustee/beneficiary.

In light of the foregoing, the following hypotheticals examine some alternatives an attorney may want to consider in drafting trusts where potential creditor, Medicaid, or other competing interests may be present.

Hypothetical #1 – Mary

Let’s assume Mary, a widow, has two children. Both are adults. The first child, Jack, is married, but the marriage has been rocky. Divorce proceedings were recently filed by his wife. Jack has one son, Jordan. Mary’s other child, Susan, has severe health issues and is likely to require assistance from Medicaid or other government programs at some point. Susan is not married and has no children. Mary has been diagnosed with terminal cancer and likely does not have long to live.

Let’s first consider Jack’s situation. Because a divorce is pending, Mary is going to want to ensure that Jack’s share will not be subject to division by the court. This means she will want to require Jack’s share to be held in trust for his benefit and not distributed to him outright. Mary also may want to allow the trustee of Jack’s trust share to make distributions for the benefit of her grandson, Jordan. Mary also knows that Jack may need to purchase a different home, if his wife is awarded their current residence as part of the divorce proceeding. In order to provide both for protection of Jack’s share from his soon to be ex-wife, to allow Jack to purchase a different home after the divorce is final, and to allow distributions to be made for the benefit of Jordan, Mary may want to consider the following language concerning distributions from Jack’s trust share:

“Trust Share for my son, Jack. The Trust share set apart for my son, Jack, shall be held for his lifetime by the Trustee for the following uses and purposes:

“1. Discretionary Distributions During Trust Term. The Trustee shall expend so much of the income and principal of said share for the benefit of my son and my son’s descendants, without regard to equalization, as the Trustee, in the Trustee’s discretion, deems necessary or advisable for the support, maintenance, health and education of such beneficiaries. The primary purpose of such Trust created for my son Jack is to provide for him, and the Trustee is to satisfy the distribution standards with respect to Jack prior to making any discretionary distribution to his descendants. Discretion on the part of the Trustee to provide for the support and maintenance of Jack shall include authority to permit Jack to acquire, enlarge, improve, or refurbish any residence occupied or to be occupied by him and/or his family.”

This distribution standard ensures that distributions can be made for Jack and Jordan, and it protects the trust assets from division in the divorce proceeding. With the addition of a “boilerplate” spendthrift clause, it also should serve to fully protect the trust estate from any potential creditors of Jack or Jordan.

With Susan’s situation, Mary wants to ensure that the trust share created for her does not disqualify her from receiving Medicaid or other government benefits. But, she also wants to make sure Susan has the opportunity to enjoy luxuries that are not provided, or that she could not afford, using such government benefits. Mary may want to consider the following language concerning distributions from Susan’s trust share:

Trust Share for my daughter, Susan. The Trust share so set apart for my daughter, Susan, shall be held in trust for her benefit and managed, distributed, and disposed of by the Trustee for the following uses and purposes:

During and throughout the continuation of this Trust, the Trustee shall pay, in the Trustee’s discretion, so much of the net income and principal thereof to or for the benefit of Susan, at such time or times, however frequently, or infrequently, as the Trustee, in the Trustee’s discretion, shall deem advisable and for the best interest of Susan, or, in the discretion of the Trustee, all or any portion of the net income otherwise payable to or for the benefit of Susan may be withheld, retained, accumulated, and added to the principal of the Trust, hereby vesting Trustee with discretion to determine whether and when to make any such invasion and distribution. It is my intention to create a supplemental fund for the benefit of Susan and not to displace any assistance that might otherwise be available to her from any government or private agency source.

In no event shall the Trustee make any distribution to or for the benefit of Susan if the effect of the distribution is to disqualify her from receiving federal, state or other governmental assistance or assistance from any

private agency which has a legal obligation to provide services or other assistance to her. Distributions to or for the benefit of Susan shall be limited to providing for her special needs which are not otherwise satisfied by any governmental or private agency program, including but not limited to SSI and Medicaid. No distribution shall be made to provide basic food, clothing and shelter, or be available to Susan for conversion to such items, unless all government benefits for which she is eligible, if any, have been applied to those purposes and have been exhausted, or are not otherwise available.

Such supplemental distributions may include, by way of description but not by way of limitation, spending money, differentials in cost between housing and shelter or shared and private rooms (and, in this connection, it is of paramount importance to me that my daughter be permitted to occupy a private room (in any facility in which she may be a resident) should she wish to do so and if the resources of her Trust are adequate in the judgment of the Trustee to pay for such private room), dental care, supplemental nursing care and other health services not provided, sophisticated or experimental medical diagnostic work or treatment (including non-medically necessary procedures), programs of non-rehabilitative and private rehabilitative training where government assistance programs are not available or are insufficient, travel, vacations, outings and other recreation (including necessary or desirable companions), cultural and entertainment experiences (such as athletic activities, camping, contests, movies, plays, musicals, and symphonies); entertainment and communication equipment and services (such as computers, radios, cassette or compact disc players and the like, television sets, cable or satellite television services, VCRs, DVD players, and cellular or land-line telephones); and motor vehicles and other transportation devices, including those modified to accommodate any disability or condition of Susan.

I direct the Trustee to assist Susan in obtaining the full benefit of all governmental assistance programs. I further direct the Trustee to collect, expend and account separately for all such governmental assistance benefits, but not commingle them with these trust funds.

No part of the Trust shall be used to supplant or replace benefits due from any insurance carrier under any insurance policy covering Susan.

If the Trustee decides that the mere existence of this trust jeopardizes Susan's eligibility for federal, state or other governmental assistance, the Trustee, without any court approval or court involvement, may amend this Trust in any way the Trustee deems appropriate to avoid jeopardizing Susan's eligibility. It is my intent that this trust for Susan be supplemental

to public assistance benefits available to Susan, including but not limited to benefits from medicaid, medical assistance or benefits available under Title XIX of the social security act.

In exercising discretion under the provisions of this Trust, it is my desire that the Trustee attempt to help Susan become self-sufficient but, inasmuch as that may not be practical, that the Trustee consider the long-term needs of Susan and the possibility that it may be essential to preserve the trust assets to provide security for Susan.

The foregoing distribution standard should ensure that Susan will continue to receive the government benefits to which she is entitled, but it also will allow her to enjoy comforts that would not otherwise be provided to her by such government benefits. It is important to note that the term “sole and absolute” discretion is not employed in such distribution standard. As mentioned above, the applicable Kansas statutory law, K.S.A. 39-709(e)(3)(B), does not literally require such language for such trust to be a “supplemental needs” trust. It only requires that distributions employ “discretionary language.” The reason such language is not included is to not unnecessarily risk arbitrariness in the trustee’s discretion. Inclusion of the above suggested “boilerplate language” relating to the degree of discretion to be accorded the trustee should provide the requisite tethering of such discretion. It also includes “savings clause” provisions that would broaden such discretion to a pure discretion should it be required to preclude the trust from being a resource for Medicaid or SSI benefits. This could occur should Kansas change its governing statute or should Mary reside in another state where broader discretion is required. Finally, it should be noted that as any beneficiary may at some later time become disabled so as to otherwise qualify for governmental resource benefits absent the availability of assets left in trust for such beneficiary, it is advisable to place a standard “boilerplate provision” in the general trust administration provisions such as that included above. Such provisions would provide that it is intended that distributions to be made “in the trustee’s discretion” for a beneficiary always be made supplemental to any governmental benefits, such as Medicaid or SSI, with respect to which the beneficiary would otherwise be eligible absent the availability of assets in the trust estate.

Hypothetical #2 – Howard and Evelyn

Howard and Evelyn have been married for fourteen years. It’s the second marriage for both. Howard’s first wife died twenty years ago. He has four adult children from his prior marriage and 11 grandchildren. Evelyn’s first marriage ended in a divorce shortly before she and Howard married. Evelyn has three adult children from her prior marriage and nine grandchildren. Howard and Evelyn both want to make sure the survivor of the two of them is able to continue to enjoy the same lifestyle they currently enjoy. However, they also want to ensure that they are able to pass something on to their respective children and grandchildren. For purposes of this hypothetical, we will assume Howard’s and Evelyn’s estates are not subject to federal or state estate taxes, so a single trust for the survivor will be established. In order to give their trustee some direction as

to how the sometimes competing interests of the surviving spouse and children and grandchildren of the prior marriages should be treated, Howard and Evelyn may want to consider language such as the following:

“Distributions to My Spouse and Issue. The Trustee shall pay to or for the benefit of my spouse so much of the income and principal of the Trust as the Trustee, in the Trustee's discretion, deems necessary or advisable to provide for the health, education, support, and maintenance of my spouse, taking into consideration any and all other resources available to my spouse for such purposes. Although the primary purpose of this Trust is to provide for my spouse during my spouse's lifetime, provided my spouse's current needs are provided for and the Trustee deems there are sufficient remaining assets in the Trust to provide for the reasonably foreseeable future needs of my spouse, the Trustee may distribute so much of any remaining income of the Trust not distributed to my spouse, and principal of the Trust if deemed appropriate by the Trustee, to my descendants, without any required regard to equalization, as the Trustee deems necessary or proper for their health, education, support and maintenance. Before making any contemplated discretionary distribution hereunder, the Trustee shall take into consideration any and all resources available to such beneficiaries for the foregoing purposes. As used herein, "support" and "maintenance" shall mean support and maintenance in reasonable comfort and in the accustomed manner of living with respect to my spouse, but such terms shall be conservatively construed with respect to all other beneficiaries.”

It also usually would be advisable to make the above-discussed trust distribution provisions global in nature so as to apply to all sub-trusts created under the instrument. This can be accomplished by including them in the general trust administrative provisions of the instrument. Such provision would specify the priority of beneficiaries with respect to distributions, the consideration of other resources with specificity to be taken into consideration prior to making trust distributions, the exactitude of the conservative nature of support and maintenance distributions to adult beneficiaries (other than the grantor's or testator's spouse) prior to their attainment of a certain age, the preference of current beneficiaries over remainder beneficiaries, whether distributions to the grantor's or testator's descendants should be treated as advancements against their remainder shares, and the legal construction to be given to the discretionary language relating to the trustee.

The foregoing distribution standard states Howard's and Evelyn's primary intent of making sure the surviving spouse is able to continue to live in his or her accustomed manner of living, but it also leaves room for the trustee to provide for their children, too, during the surviving spouse's lifetime. Obviously, for family harmony and other considerations in this second marriage scenario, neither Evelyn nor any of Howard's children should be named to serve as sole trustee. As an additional consideration, should a bonded third party, such as a bank or trust company, be named as sole trustee or co-

trustee with the spouse, it may be desirable given the protection such trusteeship affords for the other current and remainder beneficiaries to be “defined out” as “qualified beneficiaries” who would otherwise be entitled to accountings in its administration under provisions of the Kansas Uniform Trust Code, if also not a copy of the trust instrument. To not do so clearly would raise a substantial risk of family disharmony, both between the spouse and such other beneficiaries, as well as among such other beneficiaries, regarding trust distributions during the surviving spouse’s lifetime prior to the termination of the trust. In such circumstance, it would be best that the grantor or testator leave a letter to be delivered to his children by the estate planning attorney or third party trustee following his death noting, inter alia, the considerations that went into the estate plan, particularly family harmony, in a very “broad brush” fashion the tenor of its provisions, and that such waiver provisions were included in the instrument to avoid any divisive issues among the beneficiaries regarding the propriety of trust distributions.

Conclusion

Without question, the words chosen for a distribution standard in a trust document are of lasting impact. Other than possibly having a competent and responsible trustee, what could be more important in a trust instrument than ensuring that the trust assets are distributed in a manner that comports with the intent of the testator or grantor? Yet, often without sufficient forethought as to the consequences, estate planning attorneys tend not only to use less than precise language with respect to the discretionary authority accorded a trustee in satisfying a particular distribution standard, but also with respect to the standard of distribution and related factors to be considered by the trustee in making such distribution. The result is much too often no clearly evinced intent with regard to the grantor’s or testator’s wishes in this regard, too much discretion being reposed in the trustee, an often unenforceable right of a beneficiary to compel a distribution that the grantor or testator would have intended to be made, frequent contentious arguments between the beneficiary or beneficiaries and trustee as well as among the beneficiaries themselves as to the grantor’s or testator’s intent, and substantial administrative costs and attorneys’ fees attendant to discerning whether distributions are proper or required to be made under the terms of the trust instrument.

Far too many trust instruments provide far too much trustee discretion and a far too indiscernible distribution standard. Much of this is in the pursuit of the ostensibly laudable goal of providing administrative flexibility. Ironically, however, in the vast majority of circumstances when the trustee is called upon to exercise such discretion, the client’s intent is likely to be thwarted. With little restrictions on the exercise or non-exercise of the trustee’s discretion and insufficient distribution guidelines, unless the subjective goals and values of the trustee coincidentally just happen to mirror those of the grantor or testator in every important respect and the factors the trustee would consider in deciding to make a distribution and the amount thereof just happen to be consonant with those the grantor or testator would have made, it truly would be mere happenstance if the trustee’s decision in any particular instance matched the decision that the grantor or

testator would have made. Thus, practically speaking in a trust administration context, there often can only be an ephemeral distinction made between purely discretionary authority and arbitrary authority.

To avoid dispositive consequences normally antithetical to the grantor's or testator's intent, the practice of "indolent default drafting" in the rather mindless incorporation of generic and simplistic "boilerplate" distribution standards should be avoided. There is no substitute for estate planning attorneys devoting sufficient time with their clients to understand their philosophies, values and desires as they might impact trust distribution standards. Then, the trust instrument must be drafted in a manner that best ensures that the client's intent is actually later effectuated in the administration of the trust. After all, the trustee is in effect the grantor's or testator's surrogate in this regard. Consequently, the phraseology in the support standard should be accompanied by, and made subject to, other trust provisions specific as to the considerations to be taken into account by the trustee in making a trust distribution (such as outside resources with specificity), the liberal or conservative nature of the support standard applicable to the beneficiaries usually attendant to prior to attaining a specified age, the priority of distributions among multiple current beneficiaries, and whether any types of distributions to current beneficiaries should be considered as an advancement against their remainder share.

Just as important as outlining in detail the standards and factors to be considered in making a trust distribution is determining the degree of discretion to be accorded the trustee in making such determinations under the provisions of the trust instrument. This normally means eschewing the incorporation of the words "sole" or "absolute" in terms of the trustee's discretionary authority regarding distributions for the health, education, maintenance and support needs of a beneficiary. Moreover, the incorporation of "weasel worded" terminology, such as "the trustee is authorized to make" or "the trustee may," as opposed to "shall," should be shunned in most instances. Such language normally serves only to obfuscate the grantor's or testator's intent. Nonetheless, the usage of the term "in the trustee's discretion" is often desirable to overtly indicate at least some degree of flexibility to be accorded the trustee in making distributions (which would otherwise only be implicit as to the timing, amount, manner and degree under the standard). It also serves as protection for the trustee against overly demanding beneficiaries, particularly children of a grantor or testator, who frequently view their access to the trust estate as an untrammelled entitlement upon demand as opposed to simply having serendipitously benefited from the grantor's or testator's largesse. However, when such limited discretionary language is included so as to make the trust a hybrid trust, it is important that the degree of such discretion be outlined in the instrument such as with the above discussed provision. Otherwise, its interpretation would be left to the whim of the trustee, and if challenged, to a current Kansas judicial climate favoring a very broad degree of discretion probably well beyond what most clients had contemplated.

In sum, infusing the aforementioned considerations into the estate planning process will ensure the trust is not interpreted as a pure discretionary trust in the majority

of circumstances where an informed grantor or testator would not have intended that result. It also will provide the desired degree of substantive legal redress to current and remainder beneficiaries, which along with much more definitive guidelines regarding trust distributions, go a long way to ensure that the trustee's administration of the trust will actually substantially comport in the vast majority of circumstances with the grantor's or testator's intent. Perhaps just as gratifying to estate planning attorneys, thoroughness in discerning the client's dispositive intent and its incorporation in the trust provisions is also likely to give their clients a much greater satisfaction with both the attorney's expertise and comprehensiveness, as well as an appreciation of the substantial "value added" component it brings to the integrity of their estate plans.