2007

Discretionary Trusts, Support Trusts, Discretionary Support Trusts, Spendthrift Trusts, and Special Needs Trusts under the Nebraska Uniform Trust Code

Bill Lyons
wlyons2@unl.edu

John Gradwohl
University of Nebraska Lincoln, jgradwohl1@unl.edu

Follow this and additional works at: http://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: http://digitalcommons.unl.edu/nlr/vol86/iss2/1
Discretionary Trusts, Support Trusts, Discretionary Support Trusts, Spendthrift Trusts, and Special Needs Trusts under the Nebraska Uniform Trust Code

TABLE OF CONTENTS

I. Introduction .......................................................... 232

II. Nebraska Law Prior to Enactment of the Nebraska UTC .................................................... 235
   A. Discretionary Trusts ............................................. 235
      1. "Discretion"—In General .................................. 236
      2. Effect of Describing a Trustee's Discretion as "Absolute," "Uncontrolled," or "Unconditional" ...... 236
   B. Support Trusts ..................................................... 238
   C. Discretionary Support Trusts .................................. 239
      1. Smith v. Smith ................................................. 239
      2. Doksansky v. Norwest Bank Nebraska, N.A. ............ 242
         3. Footnote on Pohlmann v. Nebraska Department of Health and Human Services .................... 244
   D. Spendthrift Trusts ................................ ............... 244
      1. Definition of "Spendthrift Provision" .................... 244
      2. Nebraska Case Law on Spendthrift Trusts ............. 245
   E. Special Needs Trusts ............................................... 253
      1. Trusts Funded By Third Parties .............................. 253
      2. Trusts Funded with Property of the Beneficiary ........ 254

III. Discretionary and Spendthrift Trusts under the Nebraska UTC ............................................ 255
   A. Overview .......................................................... 255

© Copyright held by the NEBRASKA LAW REVIEW.
* Richard H. Larson Professor of Tax Law, University of Nebraska College of Law. Professor Lyons much appreciates the excellent work of his research assistant, Matthew Warner (Class of 2007, University of Nebraska College of Law), and the support of the College of Law through its McCollum Summer Research Fund.
** Judge Harry A. Spencer Professor of Law, University of Nebraska College of Law.
1. Discretionary Trusts ........................................ 255
   a. Distinctions Among Types of Discretionary Trusts Abolished ........................... 255
   b. Marital Creditors and Children Afforded Limited Right to Reach a Beneficiary's Interest in a Discretionary Trust .......... 256
2. Spendthrift Trusts ........................................ 257
   a. Marital Creditors and Children Afforded Limited Right to Reach a Beneficiary's Interest in a Spendthrift Trust ............ 257
   b. Judgment Creditors Who Provided Services for Protection of Beneficiary's Interest in a Spendthrift Trust .................. 258
   c. Claims of the State of Nebraska or the United States .................................... 258
B. The Conceptual Framework of the Nebraska UTC for Discretionary and Spendthrift Trusts ........... 259
C. Trustee Standards of Reasonableness, Good Faith, and a Grant of “Unlimited Discretion” ................ 261
D. The Roles of the Trustee and the Court in Dealing with Discretion ............................ 262
E. Pohlmann v. Nebraska Department of Health and Human Services .............................. 263

IV. Is the (Creditor Protection) Sky Really Falling?: A Brief Response to the Critics of the UTC ............ 269
A. The UTC and Nebraska UTC Rules on Discretionary Trusts .................................. 269
B. Special Needs Trusts ........................................ 271
   1. Trusts Funded by Third Parties .................................... 272
   2. Trusts Funded with Property of the Beneficiary ............................................ 273
V. A Postscript on In re Trust Created by Hansen .................................................. 274
VI. Conclusion .................................................. 277

I. INTRODUCTION

The Uniform Trust Code (“UTC”)1 includes a number of provisions dealing with the rights of creditors to reach the interests of trust bene-

---

A few authors in a series of articles have raised concerns that adopting the UTC significantly undermines traditional equity rules and policies governing the protection of trust assets against claims of creditors. These articles have caused attorneys and other trust professionals to question the extent to which enactment of the UTC changes the rules in this important area of trust law. The arguments raised by these few authors provided the initial impetus for this article. To address the particular concerns of Nebraska attorneys, we extensively analyzed Nebraska law governing the protection of trust assets against claims of creditors prior to enactment of the Nebraska Uniform Trust Code ("Nebraska UTC") which became operative on January 1, 2005. The comprehensive legislative study prior to enactment concluded that the Nebraska UTC would change prior case law on these types of trusts very little and that the changes made by the Nebraska UTC were grounded in sound legislative policy. We then

2. See, e.g., UTC Sections 501 (Rights of Beneficiary's Creditor or Assignee), 502 (Spendthrift Provision), 503 (Exceptions To Spendthrift Provision), 504 (Discretionary Trusts; Effect of Standard), 505 (Creditor's Claim Against Settlor), and 506 (Overdue Distribution).

3. Mark Merrick, Stephen J. Oshins, and Douglas W. Stein are the most published authors.

4. See, e.g., Mark Merric & Steven J. Oshins, Effect of the UTC on the Asset Protection of Spendthrift Trusts, 31 ESTATE PLANNING 375 (2004); Mark Merric & Steven J. Oshins, UTC May Reduce the Asset Protection of Non-Self-Settled Trusts, 31 ESTATE PLANNING 411 (2004); Mark Merric & Steven J. Oshins, How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC? 31 ESTATE PLANNING 478 (2004); Mark Merric & Douglas W. Stein, A Threat to All SNTs, TRUSTS & ESTATES 38 (November 2004) (arguing that adoption of the UTC gives "state and federal agencies . . . a greater ability to deny government benefits when families have created trusts to supplement the care of their elderly or disabled—unless the governing documents contain 'special needs' language"); and Mark Merric, Robert D. Gillen & Jane Freeman, Malpractice Issues and the Uniform Trust Code, 31 ESTATE PLANNING 586 (2004); Interview by Commerce Clearing House with Mark Merric, manager, Merric Law Firm, LLC, & Douglas Stein, partner, Barris, Sott, Denn and Driker, PLLC, The UTC: A Continuing Threat To Estate Planning, 31 ESTATE PLANNING REVIEW No. 1 (2005).


From the perspective of the author, the rules under Article 5 of the Nebraska UTC provide the needed clarity currently lacking in the case law. The changes wrought by Article 5 are likely to be the subject of continued debate, but at least there is a statutory framework for analysis that will take the Nebraska law beyond the murky depths of the Smith, Donsansky, and Summers trilogy.

Id. at 79. See also William J. Lindsay, Jr., The Nebraska Uniform Trust Code from the Trenches: A Practitioner's Guide to Understanding Nebraska's New Uniform Trust Code, 37 CREIGHTON L. REV. 93, 131-34 (2003).
compared the Nebraska UTC provisions relating to this area with prior Nebraska law. Finally, we examined the arguments presented in the various articles. We concluded that, although the Nebraska UTC expanded the rights of certain specific creditors under limited circumstances,\(^7\) there was no basis for the prophesies of doom asserted by these authors. Similar conclusions have been reached nationally and in other states enacting the UTC.\(^8\)

As we prepared the initial draft, we realized that our analysis suggested a broader policy inquiry—a more extensive examination of the relationships between and among a settlor's powers to preclude or limit the claims of creditors against trust property, a beneficiary's interest in a trust, the discretionary authority of a trustee, and the rights of the beneficiary's creditors in and to the beneficiary's interest in the trust. The Nebraska Supreme Court's 2006 decision in *Pohlmann v. Nebraska Department of Health and Human Services*\(^9\) helped crystalize our thinking about those relationships and also greatly clarified both the pre and post-UTC Nebraska trust law. The 2007 Nebraska Legislature further clarified the Nebraska statutes by enacting revisions to the 2000 original text of the Uniform Trust Code made by the National Conference of Commissioners on Uniform State Laws in 2005.\(^10\) Although this article addresses the arguments of the

---

7. See, e.g., Neb. Rev. Stat. § 30-3848(b) (Cum. Supp. 2006) (allowing, notwithstanding a spendthrift provision, "a beneficiary's child, spouse, or former spouse who has a judgment or court order against a beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust" to obtain a court order attaching present or future distributions to or for the benefit of the beneficiary) (emphasis added). Note that the 2004 Nebraska Legislature amended the Nebraska UTC to make these exceptions applicable only to trusts that became irrevocable on or after January 1, 2005. Neb. Rev. Stat. §§ 30-3848(b), 30-3849(c), 30-38,110(d) (Cum. Supp. 2006). See John M. Gradwohl and William H. Lyons, *Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts*, 82 Neb. L. Rev. 312, 343–45 (2003) (recommending adoption of these amendments to avoid possible constitutional objections relating to retroactive legislation).


10. L.B. 124, §§ 22 to 28 (2007), supra note 5. Legislative history relating to these sections of L.B. 124 can be found associated with L.B. 114 (2007) which was incorporated into L.B. 124 by the Banking, Commerce, and Insurance Committee. The
authors mentioned earlier, its principal purpose is to provide a framework for analysis of the broader issues under the Nebraska UTC.

II. NEBRASKA LAW PRIOR TO ENACTMENT OF THE NEBRASKA UTC

The Nebraska Supreme Court has long recognized various trust arrangements that, to a greater or lesser extent, protect the interests of a beneficiary (other than the settlor) from claims of the beneficiary's creditors. These trust arrangements include the "discretionary trust," the "support trust," the hybrid "discretionary support trust," and the "spendthrift trust." In addition to these trust arrangements, the "special needs trust" (sometimes called a "supplemental needs trust") may offer a measure of asset protection. The primary purpose of the "special needs/supplemental needs trust" is not only to provide a disabled beneficiary benefits over and above those provided by Medicaid and Supplemental Security Income ("SSI") but also to avoid disqualifying the beneficiary from receiving Medicaid and SSI benefits.

A. Discretionary Trusts

In terms of a beneficiary's right to distributions from a trust, trusts have traditionally been classified as either "mandatory" or "discretionary." This terminology has now been codified in the Nebraska UTC. If the trustee is required to distribute income, principal, or both to a beneficiary, the trust is a mandatory trust. If the settlor gives the trustee discretion concerning the distribution, the trust is a discretionary trust. This seemingly clear distinction blurs when a settlor uses language such as "my trustee shall, in its absolute discretion, distribute such amounts as are necessary for my daughter's support."

---

11. Neither prior Nebraska law nor the Nebraska UTC allows a settlor to shield his own retained interest in a trust from creditors. See First National Bank v. First Cadco Corp. 189 Neb. 734, 205 N.W.2d 115 (1973); NEB. REV. STAT. § 30-3850 (Cum. Supp. 2006).
12. See discussion infra section II.A.
13. See Byron Reed Co. v. Klabunde, 76 Neb. 801, 108 N.W. 133 (1906) and discussion infra section II.B.
14. See Doksansky v. Norwest Bank Nebraska, N.A., 260 Neb. 100, 615 N.W.2d 104 (2000) and other cases discussed infra section II.C.
15. See Weller v. Noffsinger, 57 Neb. 455, 77 N.W. 1075 (1899) and other cases discussed infra section II.D.2.
16. See discussion infra section II.E.
18. Id.
19. RESTATEMENT (THIRD) OF TRUSTS §50(1); § 50 Cmt. a (2003).
1. "Discretion"—In general

The amount of discretion accorded to a trustee depends, in the first instance, on the settlor's language in the trust instrument. The grant of discretion may take many forms. For example, the trustee may have discretion to decide whether to pay income or accumulate it and add it to principal. The trustee may have discretion to decide which individuals from a particular group or class will receive distributions. Often, the trustee must exercise the discretion under a standard. For example, a settlor may direct that the trustee make payments only for the education of a beneficiary, or that a trustee may invade corpus only in the event of an emergency, disability or hardship affecting a beneficiary.

When a settlor grants a trustee discretion, that grant affects a beneficiary's right to compel a trustee to provide a benefit because the grant of discretion limits judicial review of the trustee's exercise (or non-exercise) of the discretion. As the Restatement (Third) of Trusts explains, "A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee."\(^{20}\) If the beneficiary's power to compel a distribution is limited, a creditor of the beneficiary has no greater power than does the beneficiary to compel a distribution.

2. Effect of Describing a Trustee's Discretion as "Absolute," "Uncontrolled," or "Unconditional"

Even if a settlor uses words such as "absolute," "sole," "unlimited," or "uncontrolled" to describe the trustee's discretion, the trustee must exercise such discretion in good faith and must not act (or refuse to act) arbitrarily. In re Will of Sullivan\(^\text{21}\) illustrates these very important principles. The decedent, John T. Sullivan, provided in his will that his trustees could act with "full and uncontrolled discretion." Sullivan's will directed that the trustees shall apply the proceeds or the income therefrom for the proper use, support and maintenance of [the decedent's] son, Lawrence P. Sullivan, as the same is received by them or as his needs may require or necessitate, and for that purpose may use and apply any part or portion of the principal of said trust estate from time to time as in their judgment may be required or necessary therefor, they being the sole judges of such necessity without applying to the courts for authority so to do, and I declare that said [trustees] shall have full and uncontrolled discretion as to the application of said income and trust estate for the uses aforesaid.\(^{22}\)

---

21. 144 Neb. 36, 12 N.W.2d 148 (1943).
22. Id. at 37–38, 12 N.W.2d at 149.
Lawrence was wholly incapacitated. His wife's health was "such that she was unable to support herself." And Lawrence's minor son had "a physical deformity which require[d] constant medical care and attention and which limits his earning capacity." Lawrence's wife, brought suit to compel the trustees to pay for her support and maintenance and that of Lawrence's minor child. The district court ordered the trustees to pay $50 per month.

The Nebraska Supreme Court first cited section 157 of the Restatement of Trusts:

> The question appears to be one of first impression in this state, and while the courts of other states have passed upon similar cases, their holdings have not been uniform. We think the general rule is that a trust for the support and maintenance of a named beneficiary can be reached to satisfy the claim of a wife or minor child for support against such beneficiary. This is so, even if the testamentary provision provides that the trustee is under a duty to support the named beneficiary and the extent of its exercise is left to the judgment of the trustee.23

Turning to the direction that the trustees "shall have full and uncontrolled discretion as to the said income and trust estate for the uses aforesaid," the Court relied upon section 187 of the Restatement of Trusts:

> We think the correct statement of the law appears in Restatement, Trusts, sec. 187(j), wherein it is said: "The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have 'absolute' or 'unlimited' or 'uncontrolled' discretion. These words are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act."24

However, in this instance, the Trustees had arbitrarily refused to act when the language of the will required them to act in respect to providing maintenance and support for Lawrence's spouse and their son. The Court stated that the trustees [could not] ignore testator's desire that "they shall apply the proceeds or income therefrom for the proper use, support and maintenance of said son, Lawrence P. Sullivan," by refusing his needy wife and son support from the trust fund created for his support. While it may be true that the judgment of the trustees, when exercised, is final and not subject to review by the courts under the wording of this particular trust arrangement, they are nevertheless required to act in respect to providing support for a wife and minor son shown to be in need thereof.25

---

23. Id. at 38–39, 12 N.W.2d at 150 (citation omitted).
24. Id. at 39–40, 12 N.W.2d at 150 (quoting RESTATEMENT OF TRUSTS § 187(j) (1935)).
25. Id. at 40, 12 N.W.2d at 150–51.
Having concluded that the trustees acted arbitrarily, the Nebraska Supreme Court nonetheless reversed the district court's determination that the trustees be ordered to pay $50 per month, reasoning that the settlor of the trust prescribed that this was to be a duty of the trustees and clearly the court has no authority to substitute its judgment for that of the trustees. The court can, in a proper case and by proper proceedings, compel the trustees to carry out the terms of the trust in the manner that the settlor contemplated that they would act.\(^\text{26}\)

Remanding the case, the Court stated that “the district court should have entered a decree pointing out the duties of the trustees under the will and directing that they proceed to act in accordance therewith.”\(^\text{27}\)

### B. Support Trusts

Support trusts are, conceptually, a subcategory of discretionary trusts, limited to providing “support” for a beneficiary. Typically, a support trust would give a trustee discretion to make payments for the “support and maintenance” of the beneficiary. Courts, such as those in Nebraska prior to the adoption of the Nebraska UTC, that recognized the special category of support trusts did so to develop rules about when a beneficiary of such a trust could compel a trustee to provide support. Those rules helped determine when the creditor of a beneficiary of a support trust could compel payment by the trustee for support provided to a beneficiary.

*Byron Reed Co. v. Klabunde,\(^\text{28}\)* a 1906 Commissioners' opinion adopted by the Nebraska Supreme Court, applied decisions of other states in recognizing a distinct category of support trusts. No subsequent reported Nebraska decision cites *Klabunde* for this proposition. Thus, it is an interesting question whether or not Nebraska still would have recognized a separate category of “support trust” at the time the Nebraska UTC was enacted. But, apart from qualification for Medicaid or SSI benefits,\(^\text{29}\) the answer to that question alone would seem to have been of no practical significance. If the trust required the trustee to provide for a beneficiary's support, a creditor could reach the trust property as soon as the beneficiary had a right to demand the proceeds, whether or not the trust also contained a spendthrift

---

26. *Id.* at 41, 12 N.W.2d at 151 (stating also that “the court cannot act for the trustee or do anything other than prescribe the minimum or maximum limits within which the trustees must act and compel such action within such limits”).

27. *Id.* at 42, 12 N.W.2d at 151.

28. 76 Neb. 801, 809, 108 N.W. 133, 135–36 (1906) (“And it is generally held that where a trust is created for the support and maintenance of the beneficiary, neither the trustee nor the beneficiary has the power to assign or mortgage the trust estate without such power is expressly conferred in the instrument creating the trust.”).

29. See discussion *infra* section II.E.
provision. On the other hand, if the trustee had discretion over the distribution, depriving the beneficiary of an enforceable right to compel payments from the trust, the property would not have been subject to the claims of creditors under Nebraska's hybrid discretionary support trust rules, discussed below. Note also that in Smith v. Smith, the Nebraska Supreme Court relied on In re Sullivan's Will, which the Court had previously treated in the same manner as a garden variety support trust case when it was decided to trigger the new category of hybrid discretionary support trust.

C. Discretionary Support Trusts

A discretionary support trust is a hybrid of the discretionary trust and the support trust. A settlor creates a discretionary support trust when she combines explicit discretionary language “with language that, in itself, would be deemed to create a pure support trust.” The effect of a discretionary support trust is to establish the minimal distributions a trustee must make to comport with the settlor's intent of providing basic support, while giving the trustee broad discretionary powers. Nebraska first recognized the discretionary support trust in Smith v. Smith and reiterated that recognition in Doksansky v. Norwest Bank Nebraska, N.A. In Smith, Opal L. Smith and Vern W. Smith, parents of Richard D. Smith, created nearly identical trusts that provided in pertinent part:

(a) Until the death of my son Richard the Trustee shall pay over to, or for the benefit of, any one or more of the living members of a class composed of my son Richard and his issue, so much of the net income and principal of the trust as the Trustee shall deem to be in the best interests of each such person, from time to time. Such distributions need not be made equally unto all members of the class. In determining the amount and frequency of such distributions, the Trustee shall consider that:


31. 245 Neb. 193, 517 N.W.2d 394 (1994). Discussed infra section II.C.

32. 144 Neb. 36, 12 N.W.2d 148 (1943). Discussed supra section II.A.2.

33. The term "discretionary support trust" was first used by Professor Evelyn Ginsberg Abravanel. Evelyn G. Abravanel, Discretionary Support Trusts, 68 IOWA L. REV. 273 (1983).

34. Id. at 279 n.26.

35. Id. at 290.


(1) The primary purpose of the trust is to provide for the health, support, care and maintenance of my son Richard during his lifetime.

(2) The secondary purpose of the trust is to provide for the health, support, care, comfort and education of the issue of my son Richard in the event the parents of any such issue are unable to provide the same.

The Trustee shall have full, absolute and uncontrolled discretionary power and authority to exercise or fail to exercise any and all of the powers, rights and authorities provided under this Declaration of Trust without license, leave or order of any court. All decisions made in good faith pursuant to discretionary powers and authorities herein conferred upon the Trustee shall be final and conclusive upon all beneficiaries hereunder.

The trusts also provided that Richard's then living issue would receive the corpus of the trusts when Richard died.

Iris A. Smith, former wife of Richard, sought to garnish the assets of these trusts to satisfy child support arrearages owed by Richard. The Dodge County District Court found that the trusts were discretionary trusts, rather than support trusts, and thus beyond the reach of any creditors. Iris appealed to the Nebraska Supreme Court, which held that the trusts were neither discretionary trusts nor support trusts but instead discretionary support trusts: "The Smith trusts contain provisions which are in conflict under the facts of the case. The discretionary provision allows the trustee essentially unlimited freedom in controlling trust assets; the support provision limits the trustee's power to apply trust assets." Noting that the trustee ar-

38. Smith, 246 Neb. at 195, 517 N.W.2d at 396–97.
39. The court identified the following trust language as the "discretionary provision": The Trustee shall have full, absolute and uncontrolled discretionary power and authority to exercise or fail to exercise any and all of the powers, rights and authorities provided under this Declaration of Trust without license, leave or order of any court. All decisions made in good faith pursuant to discretionary powers and authorities herein conferred upon the Trustee shall be final and conclusive upon all beneficiaries hereunder [hereinafter referred to as the discretionary provision].

Id. at 195, 517 N.W.2d at 397.

40. The court identified the following trust language as the "support provision": (a) Until the death of my son Richard the Trustee shall pay over to, or for the benefit of, any one or more of the living members of a class composed of my son Richard and his issue, so much of the net income and principal of the trust as the Trustee shall deem to be in the best interests of each such person, from time to time. Such distributions need not be made equally unto all members of the class. In determining the amount and frequency of such distributions, the Trustee shall consider that:

1. The primary purpose of the trust is to provide for the health, support, care and maintenance of my son Richard during his lifetime.

2. The secondary purpose of the trust is to provide for the health, support, care, comfort and education of the issue of my son Richard in the event the parents of any such issue are unable to provide the same [hereinafter referred to as the support provision].

Id. at 195, 517 N.W.2d at 396–97.

41. Id. at 197, 517 N.W.2d at 398.
gued that the trusts were discretionary trusts while Iris argued that the trusts were support trusts, the court explained that "[n]either of these interpretations is correct. The trusts should not be construed as either type of trust but as a hybrid of the two types of trusts: a discretionary support trust."\(^ {42}\)

Before the Nebraska Supreme Court, Iris relied on *In re Will of Sullivan*\(^ {43}\) where the Court acknowledged that the wife was in need and entitled to support payments, but held that the trial court did not have the power to set the amount of the support payments. Relying on sections 187(j) and 187(e) of the *Restatement of Trusts*,\(^ {44}\) the *Sullivan* Court had explained that by giving the trustees "full and uncontrolled discretion" over the application of the trust income, the settlor intended that the trustees would carry out the purposes of the trust but would not be bound by the usual standard of reasonableness that applies to trustees.\(^ {45}\) The *Sullivan* Court concluded:

> We are of the opinion, therefore, that the trustees are required to act in respect to providing maintenance and support for plaintiff and her minor son in accordance with the provisions of the testamentary trust as construed herein. They cannot ignore testator's desire that "they shall apply the proceeds or income therefrom for the proper use, support and maintenance of said son, Lawrence P. Sullivan," by refusing his needy wife and son support from the trust fund created for his support. While it may be true that the judgment of the trustees, when exercised, is final and not subject to review by the courts under the wording of this particular trust arrangement, they are nevertheless required to act in respect to providing support for a wife and minor son shown to be in need thereof.\(^ {46}\)

In response to Iris Smith's argument based on *In re Will of Sullivan*, the Court stated in *Smith v. Smith* that the trust in *Sullivan* was a discretionary support trust, even though not identified as such in the *Sullivan* opinion:

> We find that *In re Will of Sullivan* does not stand for the proposition that in all cases the dependents of a beneficiary of a discretionary support trust can compel a trustee to make payments for their benefit. We interpret the case to mean that the trustee of a discretionary support trust can be compelled to carry out the purposes of the trust in good faith. As indicated by the language of the trusts, the settlors' purpose in creating the trusts was not only to support the beneficiaries of the trusts, Richard and his issue, but also to grant the trustee greater liberty in decisionmaking than the trustee of an ordinary support trust. These purposes must be served by [the trustee].\(^ {47}\)

The court concluded that "ordinarily, the trustee of a discretionary support trust should consider factors such as the degree of need experienced by the beneficiaries, the standard of living experienced by

---

\(^{42}\) Id.

\(^{43}\) 144 Neb. 36, 12 N.W.2d 148 (1943).

\(^{44}\) *See supra* text accompanying note 23.

\(^{45}\) *Sullivan*, 144 Neb. at 40, 12 N.W.2d at 150.

\(^{46}\) *Id.* at 40, 12 N.W.2d at 150–51.

\(^{47}\) *Smith*, 246 Neb. at 198, 517 N.W.2d at 398.
the beneficiaries at the time the trust was created, and the financial relations between the settlor and the beneficiaries prior to the formation of the trust.”\(^{48}\) However, the court explained, in this instance, payment of the child support arrearage would not further the purposes of the trusts because the beneficiary’s two children were emancipated. Thus the court could not compel the trustee to provide support for the children.

2. Doksansky v. Norwest Bank Nebraska, N.A.

In *Doksansky v. Norwest Bank Nebraska, N.A.*,\(^ {49}\) the Court revisited the Smith family trusts. Iris (Smith) Doksansky, the former wife of Richard Smith, the beneficiary of the Smith trusts, petitioned for an “equitable assets creditor’s bill” to require the trustee to apply future trust distributions to her judgment for child support arrearages owed by Richard Smith. The Dodge County District Court dismissed the petition, stating that the Smith trusts were discretionary support trusts and that the court could not compel the trustee to make payments from the trust because to do so would violate the express purpose of the trusts.\(^ {50}\) The Nebraska Supreme Court affirmed the district court.

The Court explained that there are three requirements for an equitable assets creditor’s bill: “First, the creditor must have a judgment against the debtor; second, the creditor must ‘allege and show that he has exhausted his remedy at law,’ *i.e.*, the creditor must show that execution has not satisfied the judgment; and finally, the debtor must have some interest in property that the creditor is unable to reach through execution.”\(^ {51}\) Noting that the petition contained sufficient factual allegations to satisfy the first two requirements, the court explained that “[t]he dispositive issue is whether Richard’s beneficial interest in the discretionary support trusts is an ‘interest in property’ which may be reached by an equitable assets creditor’s bill to satisfy [Iris] Doksansky’s judgment for child support arrearage.”\(^ {52}\) In considering whether Richard’s interest in the discretionary support trust was an “interest in property” subject to Iris’ claim for child support arrearages, the Court restated and relied upon the earlier *dictum* in *Summers v. Summers*:

In *Summers v. Summers*, 177 Neb. 365, 128 N.W.2d 829 (1964), we held that an equitable assets creditor’s bill could attach to a beneficiary’s interest in the income from a spendthrift trust because of res judicata arising from a prior judgment from which no appeal was taken. However, we stated that “if this were a case in which the controlling question was that of whether or not the

\(^{48}\) *Id.* at 199, 517 N.W.2d at 399.

\(^{49}\) 260 Neb. 100, 615 N.W.2d 104 (2000).

\(^{50}\) *Id.* at 104, 615 N.W.2d at 107.

\(^{51}\) *Id.* at 105, 615 N.W.2d at 108 (citations omitted).

\(^{52}\) *Id.* at 105, 615 N.W.2d at 108.
income of this trust could be invaded for the purpose of satisfaction of the judgment of plaintiff against the [trust beneficiary/judgment debtor] the required answer would be that it could not."

After noting that the interest subject to an equitable assets creditor’s bill can be no greater than the interest of the trust beneficiary, the Court held:

Under our decision in Smith v. Smith, Richard would have no right to compel the cotrustees to distribute trust assets for the purpose of satisfying his child support arrearage even if he wished to do so. [T]he creditor’s rights with respect to property can be no greater than that of the debtor. Thus, because of the restricted purposes for which assets can be distributed to Richard under the discretionary support trusts, his beneficial interests therein do not constitute an interest in property which can be reached by an equitable assets creditor’s bill in order to satisfy a judgment for child support arrearage where the children are emancipated.

Finally and importantly, the Court applied the maxim that “equity follows the law” with respect to creditor’s bills “used to reach equitable assets or property of a debtor on which execution at law cannot be levied." The Court stated:

In determining whether Richard's beneficial interest in the discretionary support trusts can be reached by a creditor's bill, we are guided by the maxim that “equity follows the law” to the extent of “obeying it and conforming to its general rules and policies whether contained in common law or statute.” This maxim is strictly applicable whenever the rights of the parties are clearly defined and established by the law.

To the extent that the Nebraska UTC establishes new Nebraska statutory “general rules and policies,” the traditional role that equity follows the law may become significant in the application of discretionary trust and other trust law situations.

53. Id. at 106, 615 N.W.2d at 109.
54. Id. at 107, 615 N.W.2d at 109–10.
55. Id. at 105, 107, 615 N.W.2d at 108 and 109–10.
56. Id. at 107, 615 N.W.2d at 109–10, (quoting Guy Dean's Lake Shore Marina v. Ramey, 246 Neb. 258, 264, 514 N.W.2d 129–33 (1994)). The Court added:

Under our decision in Smith v. Smith... Richard would have no right to compel the cotrustees to distribute trust assets for the purpose of satisfying his child support arrearage even if he wished to do so. As noted above, the creditor’s rights with respect to property can be no greater than that of the debtor. Thus because of the restricted purposes for which assets can be distributed to Richard under the discretionary support trusts, his beneficial interests therein do not constitute an interest in property which can be reached by an equitable assets creditor’s bill in order to satisfy a judgment for child support arrearage where the children are emancipated.

Id. at 101, 615 N.W.2d at 109–10.
3. **Footnote on Pohlmann v. Nebraska Department of Health and Human Services**

The *Pohlmann* decision should be read as grounded on both pre-UTC Nebraska trust law and the law of the Nebraska UTC. The case was on appeal when the Nebraska UTC became operative on January 1, 2005. The transitional rules of the enactment state that "the code applies to judicial proceedings concerning trusts commenced before January 1, 2005, unless the court finds that application of a particular provision of the code would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties..." 57 As discussed below, 58 the circumstances of its briefing on appeal, the transfer from the Court of Appeals, the argument in the Supreme Court, and the opinion authored by the same author of the *Doksansky* decision, make clear that the Supreme Court considered its analysis of discretionary trust law to be equally applicable before and following adoption of the Nebraska UTC.

D. **Spendthrift Trusts**

The spendthrift trust rules developed to limit claims of beneficiaries' creditors against the trust property. As explained below, the essential elements of a spendthrift provision were (1) the prohibition on alienation on the beneficiary's interest by the beneficiary and (2) the prohibition on creditors of the beneficiary from reaching the beneficiary's interest.

1. **Definition of "Spendthrift Provision"**

Prior to enactment of the Nebraska UTC, the Nebraska Supreme Court defined the term "spendthrift provision" in the following way:

"It is now well established that no particular form of words is necessary to create the restriction. Nor is it necessary that the restriction be expressed directly in the language of the will. On the other hand, courts look at all of the provisions of the will, and the circumstances under which it was made, including the condition of the beneficiary, and, if the intent to restrict is reasonably plain from a consideration of all these features, courts will give effect to that intent. . . . [citations omitted] The fact of placing property in the hands of a trustee evidences an intent on the part of the testator to put it beyond the power of the beneficiary to alienate, or his creditors to seize." 59

58. See discussion infra section III.E.
59. Lancaster County Bank v. Marshel, 130 Neb. 141, 152, 264 N.W. 470, 475-76 (1936) (quoting Jones v. Harrison 7 F.2d 461, 464 (8th Cir. 1925)). The Court in *Marshel* also cited numerous state court decisions also relied upon in the quoted passage.
This definition of a spendthrift provision was consistent with the position of the Restatement of Trusts.60

2. Nebraska Case Law on Spendthrift Trusts

The Nebraska Supreme Court first recognized the spendthrift trust in Weller v. Noffsinger.61 Calista Blakeney's will left all her real and personal property to her husband, Daniel H. Blakeney, and to her son, Frank L. Blakeney, subject to the following conditions:

I wish all my just debts and taxes to be paid. I wish and it is my will that Robert Williamson . . . hold said property in trust, and as trustee for my said husband and my said son, until my son, the said Frank L. Blakeney, shall arrive at the age of thirty (30) years. And then the said property, all the real and personal property belonging to my said estate, shall be divided equally between my said husband, Daniel Blakeney, and my said son, Frank L. Blakeney, each to share equally and alike in the division of the same, and the same to be theirs, their heirs' and assigns' forever. In the interval of time intervening between my death and the date when my said son, Frank L. Blakeney, shall reach the age of thirty (30) years, as above, it is my will that the said trustee shall collect the rents, issue, and profits of my said estate, and divide the sum remaining after paying all taxes, charges, and expenses incident to the proper care of said estate, equally between my said husband, Daniel Blakeney, and my said son, Frank L. Blakeney. But neither my husband nor son shall be permitted or allowed to further incumber said estate, or put any charge or lien upon the said estate, during said interval of time that shall intervene between my death and the period when my son, Frank, shall reach the age of thirty (30) years, as aforesaid. Nor shall said estate be subject to any debts contracted by either my said husband or son, other than the said balance in the hands of said trustee after paying said charges and expenses, taxes . . . .62

Weller, a creditor of Daniel Blakeley and Frank Blakeley, sought to reach the property held by Robert Williamson as trustee for the benefit of Daniel and Frank. Weller had obtained a judgment against Daniel and Frank and, pursuant to an execution sale, had received a sheriff's deed to the property. In response to Weller's action for ejectment, Daniel and Frank argued that the trust established by Calista's will prevented Weller from reaching the trust property. The Nebraska Supreme Court rejected Weller's argument that the restrictions on alienation and on creditors' rights contravened public policy. Acknowledging that English law and the law of some other United States jurisdictions supported Weller's argument, the court nonetheless concluded the better rule was "that the inhibitions against alienating and incumbering the property are effective; [and] that the

60. RESTATEMENT OF TRUSTS § 152 cmt. c (1935) ("No specific language necessary to create. No particular form of words is necessary for the creation of a spendthrift trust. It is sufficient if by the terms of the trust the settlor manifests an intention to create such a trust . . . .").  
61. 57 Neb. 455, 77 N.W. 1075 (1899).  
62. Id. at 457, 77 N.W. at 1076 (emphasis added).
provision of the will excluding creditors neither trenches upon their legal rights nor infringes any principle of public policy . . . .”

Although Weller made it clear that a spendthrift provision offered significant protection from claims by a beneficiary’s creditors, such protection was not absolute under Nebraska law. For example, a Nebraska settlor could not avail herself of the protection of a spendthrift provision. Nebraska case law was consistent with the law in other states on this issue.

Once the beneficiary has a legally enforceable claim against the trust, creditors can reach that claim to the trust property. But, the Nebraska Supreme Court has ruled definitively that spendthrift provisions are enforceable with respect to final distributions at the time of trust termination. In Beals v. Croughwell, the testamentary trust provided that “if upon that date [of termination] said nephew Thomas F. Croughwell, owes no debts which may be enforced against him by legal process, then in that event, and in that event only” the trust property shall pass to Thomas F. Croughwell. A bankruptcy trustee brought suit to establish rights on behalf of Thomas against the trust property. Quoting the Restatement of Trusts, the Court enforced the spendthrift provision:

Except where a person creates a trust for his own benefit, if it is provided by the terms of the trust that the beneficiary shall be entitled to receive the principal of the trust property only when he shall become financially solvent, his interest under the trust cannot be reached by his creditors or by his trustee in bankruptcy.

In many states, courts have allowed spouses, former spouses and dependent children of spendthrift beneficiaries to satisfy their claims

63. Id. at 462, 77 N.W. at 1078.
64. See, e.g., First National Bank v. First Cadco Corp., 189 Neb. 734, 738, 205 N.W.2d 115, 118 (1973) (citing II SCOTT ON TRUSTS § 156 at 1192 (3d ed. 1967) (“It is uniformly held to be against public policy to permit a person to tie up his own property in such a way that he can still enjoy it but can prevent his creditors from reaching it.”)). In First Cadco Corp., the Court held that when a trust with spendthrift provisions terminated and the beneficiary had the right to demand distribution from the trustee, “a construction which would allow the spendthrift protection to continue after the termination of the trust when the beneficiary had the right to demand delivery would, in effect, allow her to establish a spendthrift trust for herself.” 189 Neb. at 738, 205 N.W.2d at 118.
67. 140 Neb. 320, 299 N.W. 638 (1941).
68. Id. at 323, 299 N.W. at 639.
69. Id. at 328, 299 N.W. at 641 (quoting RESTATEMENT OF TRUSTS § 159 (1935)).
for support from the spendthrift beneficiary's interest.\textsuperscript{70} Nevertheless, the UTC and Nebraska exception to spendthrift protection for claims under "a judgment or court order against the beneficiary for support or maintenance" of the beneficiary's child, spouse, or former spouse\textsuperscript{71} has been a very controversial policy issue in states considering enactment of the UTC. Many other states have deleted or modified these provisions.\textsuperscript{72}

No reported Nebraska judicial decision directly addressed the question of whether a spendthrift provision offered a beneficiary protection from the claims of marital or dependent children creditors of the beneficiary. Thus, it was not clear whether a spouse, a former spouse, or a dependent child of the beneficiary could satisfy any claims for support or alimony from the beneficiary’s interest in the trust. Two decisions by the Nebraska Supreme Court involved enforcement of support and maintenance judgments of current spouses, one of which also presented claims of minor children, seeking to reach spendthrift trust assets. But, the Court did not decide either case on those issues.\textsuperscript{73}

In \textit{Summers v. Summers},\textsuperscript{74} Stuart Summers was a beneficiary of a testamentary trust created by his mother, who died in 1938. The trust included spendthrift language.\textsuperscript{75} Stuart was married to Elaine Summers. In 1957, while Elaine and Stuart were residents of Florida, they separated. Elaine instituted a separate maintenance action against

\textsuperscript{70} See M. L. Cross, Annotation, \textit{Trust Income or Assets as Subject To Claim Against Beneficiary for Alimony, Maintenance, or Child Support}, 91 A.L.R.2d 262 (1963).

\textsuperscript{71} NEB. REV. STAT. § 30-3848(b) (Cum. Supp. 2006).

\textsuperscript{72} See Alan Newman, \textit{Spendthrift and Discretionary Trusts: Alive and Well Under The Uniform Trust Code}, 40 REAL PROP. PROB. & TR. J. 567, 568--69 (2005). Although the Nebraska UTC is generally applicable "to all trusts created before, on, or after January 1, 2005," the marital and dependent children creditor provisions "apply only to trusts which become irrevocable on or after January 1, 2005." NEB. REV. STAT. § 30-38,110(a)(1) and (d) (Cum. Supp. 2006).


\textsuperscript{74} 177 Neb. 365, 128 N.W.2d 829 (1964).

\textsuperscript{75} The mother's will provided, in pertinent part:

\begin{quote}
[Alt no time while any of the trusts herein created are in existence shall a beneficiary have any right or power whatsoever to in any wise assign, transfer, alienate or encumber any of the incomes or assets of the trust estate and no persons can have or take through any attempted assignment, transfer, alienation or encumbrance any right or interest of whatsoever kind in any of the incomes or assets of the trust estate. None of the incomes or the assets of the trust estate shall ever in any wise be subject to any claim, demand, judgment or garnishment arising or existing through any act or liability of a beneficiary, and at no time and in no way shall the Trustee be accountable to any person or persons other than to the beneficiary directly and personally.
\end{quote}

\textit{Id.} at 367, 128 N.W.2d at 831.
Stuart in the Circuit Court of Duval County, Florida. That court issued a decree requiring Stuart to pay Elaine $600 a month; however, Stuart made no payments under the decree. In an effort to obtain payment from Stuart's assets and property in Nebraska, Elaine registered the Florida decree in Douglas County, Nebraska, pursuant to the provisions of the Nebraska Uniform Enforcement of Foreign Judgments Act. Elaine then commenced suit in Nebraska, based on the Florida judgment, against Stuart and First National Bank of Omaha as trustee of Stuart's mother's testamentary trust. Elaine sought an order requiring the trustee to pay trust income to her rather than to Stuart. The Douglas County District Court found that "[t]he bar of a spendthrift . . . provision in a trust is ineffective as to maintenance payments due a wife from her husband but her right to penetrate the bar is limited to her right to maintenance and may not be extended."76 Neither Stuart nor the trustee appealed from the district court's decision.77

When the trustee failed to pay over the full amount required by the district court's decision, Elaine commenced a second action, again in the Douglas County District Court. The district court, concluding that the doctrine of res judicata applied to most of the issues of fact and law in the second case, issued a decision in favor of Elaine. But, the district court also reduced the amount of maintenance to which Elaine was entitled as an "equitable determination based on the marital problems of the parties and not necessarily on the registered judgment."78 Elaine sought to restore the reduction on appeal, contending that the Florida decree was entitled to full faith and credit and that the determination in the earlier Nebraska District Court proceeding was res judicata.79 The trustee responded on appeal that the spendthrift provisions protected the trust funds from Elaine's claim; that even if the trust could be reached for Elaine's support, the court having jurisdiction over the administration of the trust can determine the

76. Id. at 371, 128 N.W.2d at 833–34.
77. Stuart executed a waiver of his right to appeal in which he also requested the trustee not to appeal on his behalf. See Brief of Appellee First National Bank of Omaha at 8, Summers v. Summers, 177 Neb. 365, 128 N.W.2d 829 (1964) (No. 35650). The trustee asserted the spendthrift provision as a defense in that case as well as in the second suit. Id. at 6.
78. Summers, 177 Neb. at 372, 128 N.W.2d at 834. Stuart met Elaine at a California bar in January 1951 and they began dating. They were married six months later in Reno, Nevada, the afternoon of the same day Stuart was divorced in Reno from his second wife. See Brief of Appellee [Stuart] Summers at 4–5, Summers v. Summers 177 Neb. 365, 128 N.W.2d 829 (1964) (No. 35650) ("She had previously been a prima donna . . . , was sponsored in some manner . . . by a Walter Gallagher, a married man she met while he was estranged from his wife . . . ." [citations to trial record omitted]).
amount of support; and, that, with respect to res judicata, the earlier Nebraska District Court proceeding allowed Elaine to nullify the spendthrift provisions only for her maintenance and for nothing more.\textsuperscript{80} In seeking affirmance of the district court, Stuart’s position was that a Nebraska equity court enforcing the Florida judgment “must be governed by the principles of equity and the public policy of the state in which the equitable remedy is sought.”\textsuperscript{81}

The Nebraska Supreme Court based its decision on the res judicata effect of the first Douglas County District Court case. The Court explained that

[in both [district court] cases the true question presented was that of whether or not the district court for Douglas County, Nebraska, could, notwithstanding the positive and clear terms of the restrictions upon the use to which income of the trust could be put, apply it under some theory to the payment of delinquent payments under the Florida judgment in favor of the plaintiff and against the defendant Summers for alimony. The district court for Douglas County in this case and by the judgment in the other case adjudged that this could properly be done.\textsuperscript{82}]

The Court then held that the decision in the first district court case, from which no party appealed, bound the parties. Thus, the Nebraska Supreme Court concluded that the second district court committed reversible error by modifying the decision in the first case.

Because the Nebraska Supreme Court determined that the judgment of the first district court case allowing Elaine to reach Stuart’s interest in the trust was final and non-reviewable, the Court was not required to address the question of whether the first district court decision correctly resolved the spendthrift issue. However, prompted by an argument made in the trustee’s brief,\textsuperscript{83} the Court stated, in apparent \textit{dicta}:

In the brief of the trustee herein it directs attention to general observations made in Restatement, Trusts, 2d, § 157,\textsuperscript{84} pp. 328 and 329,\textsuperscript{85} and the Appen-

\begin{itemize}
  \item \textsuperscript{80} Brief of Appellee First National Bank of Omaha, \textit{supra} note 77, at 3-4.
  \item \textsuperscript{81} Brief of Appellee [Stuart] Summers, \textit{supra} note 78, at 3.
  \item \textsuperscript{82} \textit{Summers}, 177 Neb. at 371, 128 N.W.2d at 833.
  \item \textsuperscript{84} \textit{RESTATEMENT (SECOND) OF TRUSTS} § 157 (1959) states: Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary, (a) by the wife or child of the beneficiary for support, or by the wife for alimony; (b) for necessary services rendered to the beneficiary or necessary supplies furnished to him; (c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary;
\end{itemize}
dix, p. 242, and appears to agree that in instances there may be such an invasion, but that under the decisions in this jurisdiction and those of most of the other jurisdictions, because of the terms of the trust, no such invasion is permissible in this case. Numerous cases bearing on this question are cited at pp. 242, 243, and 244 of this Restatement Appendix, some of which support the right of invasion under conditions such as those of concern here but most of them do not.

In the light of this, if this were a case in which the controlling question was that of whether or not the income of this trust could be invaded for the purpose of satisfaction of the judgment of [Elaine] against [Stuart] the required answer would be that it could not. The true question is that of whether or not the judgment in the earlier case on the same pleaded and tried issues as were pleaded herein and on which trial was had is res judicata on the issue of the right of [Elaine] to have invaded the income of the trust for the satisfaction of her judgment against [Stuart].

Ten years after the Summers decision, the Nebraska Supreme Court decided O'Shea v. O'Shea, which, like Summers, involved a trial court order allowing a current spouse (and dependent children) to reach a beneficiary's interest in a spendthrift trust. Like the decision in Summers, the decision in O'Shea did not reach the question of

(d) by the United States or a State to satisfy a claim against the beneficiary.

85. Id. at 328–29, cmt. on Clause (a) states:
   Even if the clause is construed as applicable to claims of his dependents for support, it is against public policy to give full effect to the provision. The beneficiary should not be permitted to have the enjoyment of his interest under the trust while neglecting to support his dependents. It is a matter for the exercise of discretion by the court having jurisdiction over the administration of the trust as to how much of the income under the trust should be applied for such support and how much the beneficiary himself should receive. Even though the beneficiary's wife has obtained a decree for alimony directing the beneficiary to pay certain sums to her, she cannot compel the trustee to pay her the full amount so decreed unless the court which has jurisdiction over the administration of the trust deems it to be fair to the beneficiary himself to compel the trustee to make such payment.

Id.

86. Summers, 177 Neb. at 370–71, 128 N.W.2d at 833 (emphasis added). Although the language may be dicta, the trustee asserted the spendthrift provisions as a defense in both district court proceedings and in the Nebraska Supreme Court on appeal.


88. The opinion states that the trust was a spendthrift trust and paraphrases the pertinent language of the trust:
   On May 14, 1945, Matilde O'Shea, the then widowed mother of John and Frank, conveyed by deed certain real property in trust to John for the benefit of Frank. This was a spendthrift trust with the only asset being the real property described in the trust deed, together with the rental income from a garage building situated thereon. The conditions of the trust imposed on John the duty to manage the property, collect the rents, pay the taxes, insurance, and necessary repairs, and to pay the net income derived from said property to Frank "for twenty (20) years from the 25th day of October, 1944. After such period, the said trustee is directed to convey said trust property to Frank P. O'Shea if he be then
whether the trial court should have allowed the spouse and dependent children to reach the interest of the spendthrift beneficiary. The spouse of the trust beneficiary had obtained a support order against the trustee from the Scotts Bluff County District Court. The order, issued in 1961, directed the trustee to “pay from the net income of the trust the sum of $150 a month until November 1, 1964, and thereafter the sum of $250 per month for the support of [the beneficiary’s spouse and minor children].” The trustee fully complied with the support order through 1965 but, although there was net income from which additional payments could have been made, the trustee only partially complied with the order after 1965.

The spendthrift beneficiary died in 1970; thereafter, his spouse (now widow) commenced a separate action against the trustee in the Scotts Bluff County District Court requesting an accounting and seeking recovery as a judgment creditor against the trustee for the sum due under the 1961 support order. One issue was whether the trust had continued after October 25, 1964, the date specified by the settlor for termination of the trust. Following the pretrial conference, the trial court circulated its pretrial report, which expressly found that the trust continued until October 5, 1970, when the spendthrift beneficiary died. Although the trial court’s pretrial report stated that “[a]ny party may except to this Report in writing within 10 days from date,” no party excepted to the report, and the court tried the case on the issues fixed in the report.

Two months after the case was tried, but while the trial court still had the case under advisement, the trustee moved to correct the pretrial report to state that the trust had terminated on October 25, 1964. The trial court denied the motion and determined the amount due to the spouse of the spendthrift beneficiary based on the termination of the trust on October 5, 1970. The trustee appealed, and the Nebraska Supreme Court affirmed the determination of the trial court based on

---

**Id. at 218-19, 214 N.W.2d at 487-88.**

**89. Id. at 220, 214 N.W.2d at 488.**

**90. Id.**

**91. The settlor’s trust provided:**

The conditions of the trust imposed on John the duty to manage the property, collect the rents, pay the taxes, insurance, and necessary repairs, and to pay the net income derived from said property to Frank “for twenty (20) years from the 25th day of October, 1944. After such period, the said trustee is directed to convey said trust property to Frank P. O'Shea if he be then living or to his heirs at law if he be not living.”

**Id. at 218-19, 214 N.W.2d at 487-88.**

**92. Id. at 220, 214 N.W.2d at 488.**
the pretrial order,\textsuperscript{93} with a recalculation using the trial evidence of the amount owed to the spouse.\textsuperscript{94} The court did not cite *Summers*, and the briefs of the parties did not mention that case. Other than noting that this case involved a spendthrift trust, the opinion does not consider issues relating to the spendthrift provisions.

The Nebraska Supreme Court's most recent statement with respect to the question of whether there are circumstances in which a marital creditor can reach the interest of a spendthrift trust beneficiary appears in *Doksansky v. Norwest Bank Nebraska, N.A.*,\textsuperscript{95} one of the hybrid discretionary support trust cases discussed above. In the course of its opinion in *Doksansky*, the Court recited the *dicta* from *Summers*, with approval.\textsuperscript{96} The reference to *Summers* in *Doksansky* is clearly additional *dicta* as the trust in *Doksansky* was considered to be a discretionary support trust, not a spendthrift trust. Although it is difficult to say whether the recognition of an exception to spendthrift protection for marital creditors currently reflects a majority view in the United States, such an exception is widely recognized.\textsuperscript{97} Both the first and second editions of the *Restatement of Trusts* recognized this exception.\textsuperscript{98} Thus, if the *dicta* in *Summers* and *Doksansky* in fact reflected the fixed view of the Nebraska Supreme Court, the Court rejected substantial support for the exception as well as the con-

\textsuperscript{93} We hold that it was not an abuse of discretion for the trial court to refuse to amend its pretrial order 60 days after the trial. It was not incumbent on [the spouse of the spendthrift beneficiary] to prove that which was admitted in the pretrial report and to which [the trustee] made no timely exception. Under the facts in this case, the finding of the trial court that the trust terminated on the death of [the spendthrift beneficiary] on October 5, 1970, is correct.

*Id.* at 222, 214 N.W.2d at 489.

\textsuperscript{94} *Id.* at 223, 214 N.W.2d at 490.

\textsuperscript{95} 260 Neb. 100, 615 N.W.2d 104 (2000).

\textsuperscript{96} In a discussion of Nebraska law relating to whether a beneficiary's beneficial interest in a "discretionary support trust" is an "interest in property" that may be reached by an equitable assets creditor's bill to satisfy a judgment for child support arrearages, the court stated:

In *Summers v. Summers*, 177 Neb. 365, 128 N.W.2d 829 (1964), we held that an equitable assets creditor's bill could attach to a beneficiary's interest in the income from a spendthrift trust because of res judicata arising from a prior judgment from which no appeal was taken. However, we stated that "if this were a case in which the controlling question was that of whether or not the income of this trust could be invaded for the purpose of satisfaction of the judgment of plaintiff against the [trust beneficiary/judgment debtor] the required answer would be that it could not."

*Doksansky*, 260 Neb. at 106, 615 N.W.2d at 109 (quoting *Summers*, 177 Neb. at 371, 128 N.W.2d at 833.

\textsuperscript{97} See *Cross*, supra note 70.

\textsuperscript{98} *Restatement of Trusts* § 157 (1935); *Restatement (Second) of Trusts* § 157 (1959).
sistent position taken by the *Restatement of Trusts.* The language of the first and second editions of the *Restatement of Trusts* now appears in section 59 of the *Restatement (Third) of Trusts* (2003). Section 503(b) of the UTC, now section 30-3848(b) in the Nebraska UTC, is intended to codify the long standing statements in the *Restatement of Trusts.* In any event, the Nebraska Supreme Court had not squarely addressed this issue prior to the enactment of the Nebraska UTC in a case where a determination of the issue was necessary for its decision.

E. Special Needs Trusts

A special needs trust, sometimes also called a supplemental needs trust, provides additional benefits to a disabled beneficiary without causing the beneficiary to lose public benefits such as SSI and Medicaid. The trust assets may consist of property transferred by a parent or other relative of the disabled beneficiary or of property awarded to the disabled beneficiary as a result of, for example, a personal injury action. Different rules apply to special needs trusts created by parents or relatives with their property and special needs trusts created using money or property of the disabled person.

1. Trusts Funded By Third Parties

If a parent or other relative of a disabled beneficiary uses assets to create a special needs trust, the settlor must follow rules established by the Social Security Administration ("SSA") to avoid having the trust assets considered as "available" to the disabled beneficiary. The SSA's "Program Operation Manual" describes a "supplemental (special) needs trust" as

---

99. *See Volkmer, supra* note 37, at 77-78 (stating that "to the extent that Summers and Doksansky imply that the spendthrift clause is effective to bar maintenance claims by ex-spouses, that would mean that Nebraska was consciously following a minority rule and not following the rule articulated in section 157 of the Restatement (Second) of Trusts").


101. *See UTC § 503 cmt (2005):*

The exception in subsection (b) for judgments or orders to support a beneficiary's child or current or former spouse is in accord with Restatement (Third) of Trusts § 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts § 157(a) (1959), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge.

*Id.*


103. *Id.*
a type of trust that limits the trustee's discretion as to the purpose of the distributions. This type of trust typically contains language that distributions should supplement, but not supplant, sources of income including SSI or other government benefits.  

If a special needs trust funded with property of a third party is irrevocable, only benefits the disabled beneficiary, and has identifiable residual beneficiaries, the trust should not be an "available" asset for the disabled trust beneficiary.

2. Trusts Funded with Property of the Beneficiary

Drafters of special needs trusts funded with money or property of the beneficiary must pay special attention to 42 U.S.C. section 1396p(d)(4), which provides that, in general, assets of such trusts will be treated as "available" to the disabled beneficiary except in the following situations:

1. A trust containing the assets of an individual under age 65 who is disabled (as defined in 42 U.S.C. Section 1382c(a)(3)) if established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under the State's Medicaid and Supplemental Security Income plan.

2. A trust established in a State for the benefit of an individual if—
   a. the trust is composed only of pension, Social Security, and other income to the individual (and accumulated income in the trust),
   b. the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under the State's Medicaid or Supplemental Security Income plan, and
   c. the State makes medical assistance available to individuals described in 42 U.S.C. Section 1396a(a)(10)(A)(ii)(V), but does not make such assistance available to individuals for nursing facility services under 42 U.S.C. Section 1396a(a)(10)(C).

3. A trust containing the assets of an individual who is disabled (as defined in 42 U.S.C. Section 1382c(a)(3)) that meets the following conditions:
   a. The trust is established and managed by a nonprofit association.
   b. A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.


c. Accounts in the trust are established *solely for the benefit of individuals who are disabled* (as defined in 42 U.S.C. Section 1382c(a)(3)) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.

d. To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State's Medicaid or Supplemental Security Income plan.  

### III. DISCRETIONARY AND SPENDTHRIFT TRUSTS UNDER THE NEBRASKA UTC

A. Overview

The Nebraska UTC codifies much of prior Nebraska case law on discretionary and spendthrift trusts. Throughout its history, the Nebraska Supreme Court has relied heavily on the text and policies of the successive A.L.I. Restatements of the Law of Trusts. The UTC is patterned closely on the current *Restatement (Third) of Trusts*. The primary (and beneficial) changes accomplished by the Nebraska UTC are:

1. **Discretionary Trusts**
   
   a. **Distinctions Among Types of Discretionary Trusts Abolished**

   The Nebraska UTC, following the position of the *Restatement (Third) of Trusts*, recognizes the distinction between mandatory trusts and discretionary trusts but does not continue the nominal Nebraska case law distinctions among discretionary trusts, support trusts, and discretionary support trusts. However, this change is a change in terminology and not in substance. Read in light of the Nebraska Supreme Court's decision in *Pohlmann*, the term "discretionary trust" as used in the Nebraska UTC will include trusts formerly known as discretionary support trusts. The term "discretionary trust" will also include trusts formerly known as support trusts unless, under the terms of the trust, the beneficiary can compel distri-

---

111. *See § 30-3803(19) (defining the phrase "terms of the trust" as "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding").
b. **Marital Creditors and Children Afforded Limited Right to Reach a Beneficiary's Interest in a Discretionary Trust**

Under very limited circumstances, a beneficiary's spouse, former spouse, or child who holds a judgment or court order for support or maintenance can reach the beneficiary's interest in a discretionary trust. Section 30-3849(c) clearly changes the prior Nebraska rule that creditors of a beneficiary of a pure discretionary trust could not reach the beneficiary's interest in the trust for any reason. However, the Nebraska UTC position is consistent with the majority rule in other states and, like the similar change in the law of spendthrift trusts, reflects a proper public policy balance between a person's marital obligations and a settlor's interest in protecting a beneficiary from claims of creditors. As with the similar spendthrift trust exception, this exception is narrowly tailored. Only a spouse, former spouse, or child of the beneficiary can claim the exemption, and then only if that person has a judgment or court order "for support or maintenance." Further, the claimant must show that the trustee has not complied with a standard of distribution or has abused a discretion. Finally, the court must base the order to pay the child, spouse, or former spouse on what "is equitable under the circumstances" and, in any event, must not direct payment of more than the amount the trustee would have been required to distribute had the trustee complied with

112. See Pohlman, 271 Neb. at 279–81, 710 N.W.2d at 645–46.

113. See § 30-3849(c).

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and

(2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

Id. (emphasis added).

114. "While a creditor of a beneficiary generally may not assert that a trustee has abused discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child, spouse, or former spouse enforcing a judgment or court order against the beneficiary for unpaid support or maintenance." UTC § 504 cmt. (2005).

115. "Before fixing [the amount to be paid to the child, spouse, or former spouse], the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family." UTC § 504 cmt. (2005).
the standard or not abuse the discretion. The Nebraska UTC now contains the current national UTC language:

[i]f the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or cotrustee.116

2. Spendthrift Trusts

The Nebraska UTC makes two changes and one clarification relating to the extent of spendthrift protection.117 The two changes appear in section 30-3848(b), as amended in 2007, to use the revised official UTC language:

(b) A spendthrift provision is unenforceable against:

(1) a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance; [and]

(2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust . . . .118

a. Marital Creditors and Children Afforded Limited Right to Reach a Beneficiary's Interest in a Spendthrift Trust

As to the support or maintenance judgment claims of marital creditors and dependent children, the Nebraska UTC takes a position contrary to the Nebraska Supreme Court's dicta discussed above. To the extent trial courts in Nebraska have adopted the dicta, and to the extent that the Nebraska Supreme Court, if actually presented with the issue would have taken the position expressed in the dicta, the Nebraska UTC changes Nebraska law. However, the Nebraska UTC position is consistent with the majority rule in other states and reflects a proper legislative policy balance between a person's marital obligations and a settlor's interest in protecting the settlor's property and a trust beneficiary from claims of creditors. Further, the exception is narrowly tailored. Only a spouse, former spouse, or child of the beneficiary can claim the exemption, and then only if that person has a judgment or court order "for support or maintenance."


117. Section 30-3847(b) provides that "[a] term of a trust providing that the interest of a beneficiary is held subject to a 'spendthrift trust', or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest."

b. Judgment Creditors Who Provided Services for Protection of Beneficiary’s Interest in a Spendthrift Trust

As to the new exception for judgment creditors who have provided services for the beneficiary’s interest in the trust, there was no prior reported Nebraska law dealing with this issue. However, the exception is consistent with both the Restatement (Second) of Trusts and the Restatement (Third) of Trusts. The Nebraska Supreme Court has followed or cited with approval the Restatement (Second) of Trusts; therefore, it might have followed this rule prior to enactment of the Nebraska UTC. Further, as the Comment to the UTC explains, “This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary’s obtaining services essential to the protection or enforcement of the beneficiary’s rights under the trust.” Thus, this exception does not represent a significant erosion of spendthrift protection.

c. Claims of the State of Nebraska or the United States

Finally, as to the clarification of the extent of spendthrift protection, section 30-3848(b)(3) (as amended in 2007) of the Nebraska Revised Statutes provides that “[a] spendthrift provision is unenforceable against: . . . (3) a claim of this state or the United States to the extent a statute of this state or federal law so provides” (emphasis added). The UTC section has drawn unjustified criticism from commentators who contend that the UTC seriously limits the asset protection offered by spendthrift trusts. These commentators assert that UTC section 503(b)(3) will cause Congress and state legislatures to enact legislation creating spendthrift exceptions for multitudes of federal and state claims. Congress and state legislatures could, of course, do so even if UTC Section 503(b)(3) did not exist. In fact, section 30-3848(b)(3) makes it clear that either the Nebraska Legislature or Congress would have to enact a statute overriding spendthrift protection. Thus, the provision precludes a successful argument either by the state or federal government for an exception to spendthrift protection based solely on a policy analysis. Section 30-3848(b)(3) gives the government no additional power to break through spendthrift protection.

119. Restatement (Second) of Trusts § 157(c) (1959).
120. Restatement (Third) of Trusts § 59(b) (Tentative Draft No. 2, 1999).
121. UTC § 503 cmt (2005).
122. See, e.g., Merric & Oshins, How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?, supra note 4 at 484 (“Once the state governmental agencies realize that they no longer may recover from this type of trust, it may be only a matter of time before the state or federal government is able to convince state legislators to add them as an exception creditor.”).
B. The Conceptual Framework of the Nebraska UTC for Discretionary and Spendthrift Trusts

For purposes of determining the ability of a creditor of a trust beneficiary to reach the beneficiary's interest in the trust, the UTC and Nebraska UTC identify two classes of trusts: spendthrift trusts and discretionary trusts.123 This conceptual framework is simple and sensible:

Spendthrift Protection—If a settlor wishes to prevent the creditor of a trust beneficiary from attaching the beneficiary's interest in the trust, the settlor must include a spendthrift provision covering the beneficiary's interest. With three exceptions, a creditor of the beneficiary cannot reach the beneficiary's interest in a spendthrift trust before its receipt by the beneficiary:124 (1) "a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance"; (2) "a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust"; or (3) "a claim of this state or the United States to the extent a statute of this state or the federal law so provides."125

No Spendthrift Protection—If a settlor does not include a spendthrift provision, the court may authorize the creditor to attach the beneficiary's interest in the trust.126 Because the proceedings against the trust are equitable in nature, "[t]he court may limit the award to such relief as is appropriate under the circumstances."127 If the creditor obtains an attachment, "the trustee will then pay to the creditor instead of the beneficiary any payments the trustee would otherwise be required to make to the beneficiary, as well as discretionary distributions the trustee decides to make."128

Discretionary Trust—Regardless of whether the settlor has included a spendthrift provision, if the settlor has given the trustee discretion over whether or when to make distributions to the beneficiary, the creditor's power to compel a discretionary distribution is very limited. A creditor cannot reach the beneficiary's interest in a discretionary trust even if the trustee's discretion is expressed in the form of a standard for distribution or the trustee has abused its discretion,129 with just one exception: "a distribution may be or-

123. The Nebraska UTC tracks the official text of UTC Part 5, Creditor's Claims; Spendthrift and Discretionary Trusts, including all of the most recent technical, clarifying amendments in the current March 7, 2005, version of the UTC. Those changes can be identified in L.B. 124, §§ 22 to 28, 100th Legis., 1st Sess. (2007), signed by the Governor on March 19, 2007.

124. NEB. REV. STAT. § 30-3847(c) (Cum. Supp. 2006). But see § 30-3851(b), amended by L.B. 124, § 26, 100th Legis., 1st Sess. (2007) which states: Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

125. § 30-3848(b) & (c), amended by L.B. 124, § 24, 100th Legis., 1st Sess. (2007), which also provides that "[t]he court may limit the award to such relief as is appropriate under the circumstances."


127. Id.; see UTC § 501 cmt (2005).


129. § 30-3849(b).
dered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse." To the extent the trustee has not complied with a standard of distribution or has abused a discretion with respect to a child, spouse or former spouse having a judgment or court order for support or maintenance, the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.131

Note that the question of whether a trust is "mandatory" or "discretionary" depends on the terms of a trust. The Nebraska UTC defines the phrase "terms of a trust" as "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding."132 The official text of the Uniform Trust Code contains a definition of "mandatory" distribution which has been enacted in Nebraska and which clarifies but does not change the current Nebraska UTC.133

A beneficiary of a "mandatory trust" can "maintain a judicial proceeding against a trustee for ... failure to comply with a standard for distribution."134 A creditor or assignee of a beneficiary "may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date."135 If the "beneficiary's interest is not protected by

130. NEB. REV. STAT. § 30-3849(c)(1) (Cum. Supp. 2006). Note that section 30-3849(c)(1) does not include the exception, found in section 30-3848(b), for "a judgment creditor who has provided services for the protection of a beneficiary's interest" in a spendthrift trust.

131. § 30-3849(c)(2) (emphasis added). Section 30-3849(d) provides that § 30-3849 "does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution." A clarifying amendment in LB 124, §25, 100th Legis., 1st Sess. (2007), deals with a situation where the beneficiary is also a trustee or co-trustee by amending § 30-3849(e) to read:

(e) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or cotrustee.


133. See L.B. 124, § 26, 100th Legis., 1st Sess. (2007), adding the official text definition of a "mandatory" distribution to § 30-3851 as new section 30-3851(a):

(a) In this section, "mandatory distribution" means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust.


a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the beneficiary or other means.”  

C. Trustee Standards of Reasonableness, Good Faith, and a Grant of “Unlimited Discretion”

Prior Nebraska law reflected in In re Will of Sullivan, Smith v. Smith, and Doksansky concerning trustee standards of reasonableness, good faith, and “unlimited discretion” has now been codified in the Nebraska UTC. The basic standard is one of reasonableness: “A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”

This duty “does not depend on whether the trustee receives compensation” and “may be altered by the terms of the trust.” But, the terms of a trust cannot modify “the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.”

The Nebraska UTC provides that: “Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and interests of the beneficiaries, and in accordance with the Nebraska Uniform Trust Code.” The good faith standard remains applicable in all cases whether or not the terms of the trust may alter the reasonableness standard and empower the trustee to possess “absolute,” “sole,” or “uncontrolled” discretion.

Smith v. Smith said that In re Will of Sullivan “does not stand for the proposition that in all cases the dependents of a beneficiary of a discretionary support trust can compel a trustee to make payments for their benefit.” Quoting directly from Sullivan, the Court explained:

136. § 30-3846 ("The court may limit the award to such relief as is appropriate under the circumstances.").
137. § 30-3869.
140. § 30-3866.
141. § 30-3879(a) ("Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as 'absolute', 'sole', or 'uncontrolled', the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.").
The settlor may, however, manifest an intention that the trustee’s judgment need not be exercised reasonably . . . . [Words which purport to give trustees unlimited discretion] are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness . . . . Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment. 143

Doksansky then relied on Smith v. Smith as having determined that the trustee of a discretionary support trust could be “compelled to carry out the purposes of the trust in good faith,” but concluded that the payment of the child support arrearage, which was the subject of [the action in both Doksansky and Smith v. Smith], “would not further the purposes of the trusts, since the children are emancipated.” 144

Pohlmann v. Nebraska Department of Health and Human Services 145 applies this rationale, citing Smith v. Smith and Doksansky, to a trust in which the directions to the trustee were stated in mandatory terms that discretion be exercised but in permissive, judgmental terms as to how that discretion should be exercised.

D. The Roles of the Trustee and the Court in Dealing with Discretion

In general, the settlor confers on the trustee such discretion as the settlor believes is necessary to accomplish the purposes of the trust. However, even a grant of “absolute discretion” cannot absolve the trustee of the bedrock “duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” 146 Thus, although “[a] court will not interfere with a trustee’s exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust,” 147 “a court will not permit abuse of discretion by the trustee.” 148 The Restatement (Third) of Trusts explains that “[w]hat constitutes abuse depends on the terms of the trust, as well as on basic fiduciary duties and principles . . . . Of particular importance are the purposes of the power and the standards, if any, applicable to its exercise . . . . and the extent of the discretion conferred upon the trustee . . . .” 149 Finally, note that

143. 246 Neb. at 198–99, 517 N.W.2d at 398–99 (deletions and brackets in original text). The opinion also cites as “Accord,” Restatement (Second) of Trusts § 187, comment j. In fact, the Court in In re Will of Sullivan was quoting Restatement (Second) of Trusts § 187, comment j.
148. Id.
149. Id.
a court will intervene where the exercise of a power is left to the judgment of a
trustee who improperly fails to exercise that judgment. Thus, even where a
trustee has discretion whether or not to make any payments to a particular
beneficiary, the court will interpose if the trustee, arbitrarily or without
knowledge of or inquiry into relevant circumstances, fails to exercise the
discretion.\textsuperscript{150}

The basic rules defining "discretion," interpreting the scope of a
trustee's discretion, and considering the role of a court with respect to
the exercise or nonexercise of discretion by a trustee have remained
unchanged by the Nebraska UTC.\textsuperscript{151} The parameters of judicial over-
sight of a trustee's discretion were stated in \textit{In re Sullivan's Will}:

This holding [that the trustees had failed "to act in respect to providing sup-
port for a wife and minor son shown to be in need thereof"] makes it necessary
for us to consider the form of the decree or judgment which can properly be
entered in a case of this kind. It appears clear at the outset that the court was
without authority to determine the amount of support to which plaintiff was
entitled from the trust fund. The settlor of the trust prescribed that this was
to be a duty of the trustees and clearly the court has no authority to substitute
its judgment for that of the trustees. The court can, in a proper case and by
proper proceedings compel the trustees to carry out the terms of the trust in
the manner that the settlor contemplated that they would act. But the court
cannot act for the trustee or do anything other than prescribe the minimum or
maximum limits within which the trustees must act and compel such action
within such limits.\textsuperscript{152}

The Court added what would appear to be hornbook law that:

When the court controls the exercise of a power by the trustee, it may do so by
directing him to act or refrain from acting; by setting aside the transaction
where he has already acted; or by holding him liable for the results of his
action or non-action. The court will sometimes remove a trustee or deny or
diminish his compensation where he has abused discretion conferred upon
him.\textsuperscript{153}

The rationale of the former \textit{Restatements of Trusts} § 187 and \textit{In re Sul-
livan's Will} are now reflected in \textit{Restatement (Third) of Trusts} § 50,
Enforcement and Construction of Discretionary Interests.

\textbf{E. Pohlmann v. Nebraska Department of Health and Human Services}

\textit{Pohlmann v. Nebraska Department of Health and Human Services}\textsuperscript{154} is a solid and important link in defining the interest of a bene-

\textsuperscript{150} Id. at 261.
\textsuperscript{151} For a detailed analysis of a court's power to review a trustee's refusal to exercise
discretion to terminate a trust, see \textit{Scully v. Scully}, 162 Neb. 368, 76 N.W.2d 239
(1956).
\textsuperscript{152} 144 Neb. 36, 40-41, 12 N.W.2d 148, 151 (1943) (Terms of the trust had dispensed
with the usual standard of reasonableness, the trustees had failed to act, and the
lower court had ordered a specific amount to be paid.).
\textsuperscript{153} \textit{Id.} at 42, 12 N.W.2d at 151 (holding that the district court erred in ordering $50
per month to be paid for support) (citing \textit{Restatement of Trusts} § 187(b)(1935)).
\textsuperscript{154} 271 Neb. 272, 710 N.W.2d 639 (2006).
ficiary under the Nebraska UTC when the settlor has given the
trustee what, under the case law prior to adoption of the Nebraska
UTC, was called discretionary support authority. The Court's opinion
in Pohlmann was authored by Justice Kenneth C. Stephan, who wrote
the Court's opinion in Doksansky. The case was pending in the
Court of Appeals on January 1, 2005, but later transferred to the Su-
preme Court for argument and decision. The briefs of the parties in
Pohlmann did not cite the Nebraska UTC, Doksansky, or the Restate-
ment (Third) of Trusts, but each found its way into the Court's opinion.

Pohlmann involved “the question of whether the corpus of an irre-
revocable discretionary testamentary trust is a resource available to the
beneficiary spouse of the grantor for purposes of determining the
spouse's eligibility for Medicaid benefits.” As stated in the opinion:
“The will directed that Ruth was to receive from the Family Trust 'all
of the accumulative income from the individual funds and such por-
tion of the principal as [the trustee] may, from time to time, deem
appropriate for her health, education, support or maintenance.'”
The Court held that the corpus of the trust was not a disqualifying
available resource attributable to Ruth's spouse inasmuch as it was a
testamentary trust established by her spouse's will, specifically ex-
empted under the controlling Medicaid statute. It avoided the
question of whether Ruth's failure to elect to take against the will ren-
dered the testamentary trust established under the will her own self-
settled trust for Medicaid eligibility purposes because that issue "was
not presented to or passed upon by the trial court." Nevertheless,

155. Justice Stephan also wrote one of the Court's two decisions in February 2005 that
applied the Nebraska UTC to cases pending in the Supreme Court on January 1,
2005, the operative date of the Nebraska UTC. See In re Trust of Inman, 269
Neb. 376, 693 N.W.2d 514 (2005) (Stephan, J.); In re Trust of Rosenberg, 269 Neb.
310, 693 N.W.2d 500 (2005) (McCormack, J.).
156. The case was transferred from the Court of Appeals, after the briefs were filed, by
an order of the Supreme Court on June 3, 2005, without statement of a reason for
the transfer.
157. Pohlmann, 271 Neb. at 275, 710 N.W.2d at 642.
158. Id. at 273 710 N.W.2d at 641.
159. Id. at 275-79, 710 N.W.2d at 642-44. The Court acknowledged that the statutory
exemption of testamentary trusts seems inconsistent “with the underlying pur-
pose of Medicaid, which is to provide medical assistance to those who have no
other financial means,” but declined to substitute its “own ideas of what might
be a wise provision in place of a clear expression of legislative will.” Id. (quoting
Skindzier v. Commissioner of Social Services, 258 Conn. 642, 661, 784 A.2d 323,
336 (2001)).
160. Id. at 279, 710 N.W.2d 644-45. If this question is presented directly in a subse-
quent case, the court should hold that a surviving spouse's decision not to elect a
share of the deceased spouse's augmented estate does not cause a testamentary
trust created by the decedent spouse's will to be treated as a self-settled trust
created by the surviving spouse for two reasons. First, to hold otherwise would
the Court concluded that the Nebraska Medicaid Regulations required a determination of whether the terms of the testamentary trust provided an available resource in determining Ruth's Medicaid eligibility.161

The Brief of the Nebraska Department of Health and Human Services quoted the provision in the will as follows: "the '[t]rustee shall pay to my spouse . . . such portion of that principal as it may, from time to time, deem appropriate for her health, education support or maintenance."

Following that, the Brief argued:

This being the case, there is little doubt that Mrs. Pohlmann is in need of payment for her health, support, and maintenance. The petitioner, in fact, is making just that claim when applying for Medicaid benefits. It is unreasonable to think that a trustee would deny payment of the trust principal to Mrs. Pohlmann given the current circumstances.163

The matter was argued in the Supreme Court before well-prepared, active Justices.164 Counsel for the Department of Health and Human Services was asked by an unidentified Justice: "[A]t least the corpus provisions are discretionary, aren't they?"165 Counsel responded: "No, I think it only gives the trustee discretion as to how much to pay."166 Later, an unidentified Justice asked: "Could the trustee deem nothing to be appropriate?"167 Counsel replied: "We would argue that would be a violation of the spirit of the word 'shall,' that they would deem nothing appropriate. . . . The trustee is obligated by the word 'shall' to make a determination as to what is appropriate for health, education, support or maintenance and to pay in accordance with that determination."168 An unidentified Justice then

---

161. 469 NEB. ADMIN. CODE, § 2-009.07A5g (2001) provided that "[t]estamentary trusts may be excluded as resources, depending on the availability of the funds to the individual or his/her spouse as specified in the terms of the trust." The current cite for this language is 469 NEB. ADMIN. CODE § 2-009.07A5b (2005).


163. Id.

164. A transcript of the oral argument, provided by special permission of the Court, has been placed in the University of Nebraska Law College Library. Transcript of Oral Argument, Pohlmann v. Nebraska Dep't of Health and Human Serv. (2006) (No. S-04-1327).

165. Id. at 13.

166. Id. at 13-14.

167. Id. at 14.

168. Id.
said: "When 'shall' was modified by 'deemed as appropriate,' I'm not sure it's mandatory anymore, is it?" Further responses of Counsel were that the language did not leave complete discretion in the trustee whether or not to pay anything for appropriate support from the corpus of the trust and suggested, additionally, that the trustee's duty to inquire into the support of the beneficiary made those trust assets an available resource of the beneficiary for Medicaid purposes.

Pohlmann examines the nature of Ruth's interest with references to the Nebraska UTC, Kansas, and North Dakota decisions distinguishing support trusts from discretionary trusts with respect to Medicaid eligibility determinations, the Restatement (Third) of Trusts, and Nebraska's Doksansky and Smith v. Smith hybrid discretionary support trust decisions. Pohlmann cites the Nebraska UTC for its operative date and definition of "terms of a trust." The Kansas and North Dakota decisions are cited for the proposition that "[i]n analyzing the terms of a testamentary trust to determine if the corpus is 'available' to a beneficiary for purposes of Medicaid eligibility, courts have looked to whether the trust is a support trust or a discretionary trust." The Kansas decision states that "[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." As quoted in Pohlmann, the North Dakota decision defines a support trust as one in which the trustee "shall pay or apply only so much as is necessary for the education or support of a beneficiary" and which "allows a beneficiary to compel distributions of income, principal, or both for expenses necessary for the beneficiary's support." Further, Pohlmann cites Restatement (Third) of Trusts section 60 (2003) simply as a "See also" without explanation, the bold text of which states in pertinent part:

[i]f the terms of a trust provide for a beneficiary to receive distributions in the trustee's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion. . . . The amounts a creditor can reach may be limited to provide for the beneficiary's needs . . . .

169. Id. at 14–15.
170. Id. at 14–15.
171. Pohlmann v. Nebraska Dep't of Health and Human Serv., 271 Neb. 272, 279, 710 N.W.2d 639, 645. Although the trust was irrevocable on January 1, 2005, it would appear that all relevant provisions of the Nebraska UTC were applicable to the Court's decision. See Neb. Rev. Stat. § 30-38,110 (Cum. Supp. 2006).
172. Pohlmann, 271 Neb. at 279–80, 710 N.W.2d at 645.
173. Miller v. Kansas Dep't of Soc. and Rehab. Serv., 275 Kan. 349, 354, 64 P.3d 395, 400 (2003) ("Eligibility for Medicaid depends on the assets 'available' to the applicant, and the support trust is always considered such an available asset.").
174. Pohlmann, 271 Neb. at 280, 710 N.W.2d 645 (quoting Eckes v. Richland County Social Services, 621 N.W.2d 851, 855–56 (ND 2001)).
175. Id. at 280, 710 N.W.2d at 645.
Emphasizing the discretionary language through italics, Pohlmann refers to the language of the testamentary trust: "The key provision of the Family Trust stated that the trustee was to pay Ruth 'all of the accumulative income from the individual funds and such portion of the principal as it may, from time to time, deem appropriate for her health, education, support or maintenance.'" Then Pohlmann cites Doksansky and Smith v. Smith for this statement: "Although not in the context of a Medicaid eligibility determination, we have held that similar powers granted to a trustee do not create a right of the beneficiary to compel payments from the trust."

Implicit in the Pohlmann analysis is the conclusion that unless a trust beneficiary can compel a distribution, the trust is a discretionary trust. This implicit conclusion seems clear from the Court's characterization of the position of the Department of Health and Human Services ("DHHS"): "In this case, DHHS concedes that the Family Trust is discretionary with respect to distributions of corpus, and we likewise conclude." Although DHHS argued in its Brief and during oral argument about the nature and extent of the trustee's discretion, it did not contend that the beneficiary could compel the trustee to make corpus distributions.

Like the trust terms in Doksansky and Smith v. Smith, the terms of the Pohlmann trust gave both mandatory and discretionary directions. The trustee was directed to use discretion in making support payments to Ruth, the surviving spouse. Pohlmann recognizes that the terms of the trust can allow the trustee to exercise that discretion by declining to make a trust distribution in order to carry out the terms and purposes of the trust.

Although Pohlmann speaks in terms of the standard in other states for determining available resources for Medicaid based upon classifications of "support" or "discretionary" trusts, the bottom line of the Pohlmann analysis is that it classifies "discretionary" trusts as trusts "which do not create a right of the beneficiary to compel payments from the trust." Thus, read in light of Pohlmann, the term "discretionary trust" as used in the Nebraska UTC will include trusts formerly known as discretionary support trusts. The term "discretionary trust" will also include trusts formerly known as support trusts unless, under the terms of the trust, the beneficiary can compel dis-

176. Id. (emphasis in original).
177. Id. at 280, 710 N.W.2d at 645–46
178. Id. at 280, 710 N.W.2d at 646.
179. Id. at 279–81, 710 N.W.2d at 645–46.
180. See Neb. Rev. Stat. § 30-3803(19) (Cum. Supp. 2006) (defining the phrase "terms of the trust" as "the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding").
tributions of income, principal, or both for expenses necessary for the beneficiary's support.\textsuperscript{181}

This distinction between mandatory and discretionary distributions is at the core of Nebraska UTC § 30-3851. At the time of \textit{Pohlmann}, that section read:\textsuperscript{182}

Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

The 2007 Nebraska Legislature added new clarifying language from the current official text of the 2005 amendments to the UTC regarding the different rules applicable to mandatory and discretionary distributions:

In this section, "mandatory distribution" means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term does not include a distribution subject to the exercise of the trustee's discretion even if (1) the discretion is expressed in the form of a standard of distribution, or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction.\textsuperscript{183}

To reach its decision, the Court in \textit{Pohlmann} considered both the criteria for Medicaid eligibility and the nature of the trust beneficiary's interest. As to the issue of whether or not Ruth's interest was an available resource for Medicaid eligibility purposes, the Court held that the determination depended on whether Ruth could compel the trustee to provide for her support, thus allowing her to avoid applying for Medicaid benefits. To answer that question, the Court considered the "terms of the trust" as defined by the Nebraska UTC,\textsuperscript{184} the nature of a trustee's discretion as stated in Restatement (Third) of Trusts § 60,\textsuperscript{185} and its decisions in \textit{Doksansky} and \textit{Smith v. Smith}. The Court concluded that the "terms of the trust" manifested the settlor-testator's intention that the trustee could not be required to pay

\begin{enumerate}
\item \textit{NEB. REV. STAT.} § 30-3851 (Cum. Supp. 2006).
\item LB 124, § 26, 100th Legis., 1st Sess. (2007).
\item "Terms of a trust' means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding." \textit{NEB. REV. STAT.} § 30-3803(19) (Cum. Supp. 2006).
\item Section 60 states in pertinent part:

\begin{quote}
[I]f the terms of a trust provide for a beneficiary to receive distributions in the trustee's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion... The amounts a creditor can reach may be limited to provide for the beneficiary's needs. \textit{RESTATEMENT (THIRD) OF TRUSTS} § 60 (2003).
\end{quote}
\end{enumerate}
Ruth's support, at least to the extent that other resources were available. Further, the court concluded, the discretionary powers given to the trustee did not create a right of the beneficiary to compel payments from the trust in this situation. "Because Ruth cannot compel a distribution from the Family Trust corpus, it is not an available asset for purposes of determining her eligibility for Medicaid benefits."186

IV. IS THE (CREDITOR PROTECTION) SKY REALLY FALLING?: A BRIEF RESPONSE TO THE CRITICS OF THE UTC

A. The UTC and Nebraska UTC Rules on Discretionary Trusts

Those who find fault with UTC section 504 (and by implication Nebraska UTC section 30-3849) focus on the following arguments:

1. Elimination of the distinction between discretionary trusts and support trusts greatly increases the rights of creditors to reach the interests of beneficiaries of discretionary trusts.187 This argument simply does not withstand a careful reading of UTC section 504. UTC section 504(b) makes it clear that regardless of whether a trust includes a spendthrift provision, "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 of distribution; or (2) the trustee has abused the discretion."188 Professor Robert T. Danforth explains that UTC section 504(b) not only does not give creditors additional rights, UTC section 504(b) strengthens protection against claims of creditors:

First, even a supplier of necessaries cannot compel distributions from a support trust. Second, the statute eliminates any argument that a support interest should be treated as mandatory and thus subject to compelled distributions to certain creditors, who would stand in the beneficiary's shoes. Third, the statute eliminates any argument that a creditor, under some circumstances, might be able to reach a discretionary interest, under the theory

186. Pohlmann, 271 Neb. at 280–81, 710 N.W.2d at 646. The Court reiterated this point in its Conclusion: "We conclude as a matter of law that the Family Trust created by Herman's will is discretionary in nature, such that the beneficiary, Ruth, may not compel a distribution from its corpus and that therefore, such corpus is not an available asset for purposes of determining Ruth's eligibility for Medicaid benefits. . . ."). Id. at 281, 710 N.W.2d at 646.


188. UTC § 504(b) (2005); NEB. REV. STAT. § 30-3849(b) (Cum. Supp. 2006) (emphasis added).
that a beneficiary could have compelled distributions from a trustee who had inappropriately withheld distributions.\footnote{189}

While UTC section 504(b) and Nebraska UTC section 30-3849(b) deny a creditor the right to compel any distribution that is subject to the trustee's discretion, UTC section 504(d) and Nebraska UTC section 30-3849(d) make it clear that UTC section 504 and Nebraska UTC section 30-3849 "[d]o not limit the right of the beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution."\footnote{190} In other words, UTC section 504 and Nebraska UTC section 30-3849 do not permit creditors to step into the shoes of beneficiaries of discretionary trusts.

2. The exceptions to protection from creditors recognized by UTC section 504(c) are too generous.\footnote{191} Again, this argument does not withstand a careful reading of the statute. The exceptions apply only to creditors who are children,\footnote{192} spouses or former spouses of a beneficiary.\footnote{193} Further, these creditors must be claiming under a judgment or court order against the beneficiary.\footnote{194} These exceptions only apply if and "[t]o the extent a trustee has not complied with a standard of distribution or has abused a discretion."\footnote{195} Finally, if a creditor satisfies all of these requirements, "the court shall direct the trustee to pay to the child, spouse or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion."\footnote{196}

\footnote{190. UTC § 504(d) (2005); Neb. Rev. Stat. § 30-3849(d) (Cum. Supp. 2006) (emphasis added).}
\footnote{191. "While exception creditors had no claim against a discretionary trust under common law, all exception creditors would be allowed to directly attach the assets of a discretionary trust under the UTC . . . ." Merric & Oshins, How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?, supra note 4 at 484 (2004).}
\footnote{192. UTC § 504(a) (2005); NEB. REV. STAT. § 30-3849(a) (Cum. Supp. 2006) provides that the term "'child' includes any person for whom an order or judgment for child support has been entered in this or another State."}
\footnote{193. UTC § 504(c)(1) (2005); NEB. REV. STAT. § 30-3849(c)(1) (Cum. Supp. 2006) provide: "a distribution may be ordered by the court to satisfy a judgment or a court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse . . . ."}
\footnote{194. UTC § 504(c)(1) (2005); NEB. REV. STAT. § 30-3849(c)(1)(Cum. Supp. 2006).}
\footnote{195. UTC § 504(c)(2005); NEB. REV. STAT. § 30-3849(c)(2)(Cum. Supp. 2006).}
\footnote{196. UTC § 504(c)(2); NEB. REV. STAT. § 30-3849(c)(2)(Cum. Supp. 2006) (emphasis added).}
3. The list of exceptions in UTC Section 504(c) can be expanded too easily. Because those who oppose UTC Section 504 seem to consider the UTC and the Restatement (Third) of Trusts as virtually identical, they confuse possible judicial expansion of exceptions in a state without a statute dealing with exceptions with possible legislative expansion of exceptions in a state with a statute dealing with exceptions. Although a court in a state without an exceptions statute might decide to adopt the exceptions in the Restatement (Third) of Trusts, once a state has adopted a statute dealing with such exceptions, addition of exceptions will have to come from the legislature. To argue that a state legislature might add an exception to the UTC "by simply appending an unnoticed exception as part of any other bill that passes through the legislature," is not the same thing as saying that such a stealth expansion is likely. Presumably, the legislative process in most states is robust enough to avoid such a problem.

B. Special Needs Trusts

The Nebraska UTC does nothing to endanger either third party funded special needs trusts or special needs trusts funded with property of the beneficiary. Although some commentators have argued that eliminating the distinction between various types of discretionary trusts could somehow change the extent to which the beneficiary's creditors could reach the beneficiary's interest in the trust, such

---


198. The UTC and the Restatement Third [of Trusts] are interrelated. The comments from the UTC contain over 100 specific references to the Restatement Third's text, comments, and reporter notes. Additionally, the comment under section 106 of the UTC implies that the Restatement Third should be given a preference even over common law when interpreting the UTC.

The committee of both the Restatement Third and the UTC worked hand in hand to draft a few areas of new trust law. While there are minor differences in the asset protection issues between the two pronouncements, for the most part the two pronouncements read as though they were written by the same authors. With respect to traditional asset protection, the Restatement Third is for the most part not a restatement of trust law at all. Rather, it is a new and untested approach to trust law. The same is true for Article 5 of the UTC, which appears to be an abbreviated version of the Restatement Third, sections 50 and 56-60.

Merric & Oshins, How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?, supra note 4 at 478-79.

199. Id. at 484.

200. See, e.g., Merric & Oshins, UTC May Reduce the Asset Protection of Non-Self-Settled Trusts, supra note 4; Merric & Oshins, How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?, supra note 4; Merric & Stein, A Threat to All SNTs, supra note 4 (arguing that adoption of the UTC gives "state and federal agencies . . . a greater ability to deny government benefits when fami-
arguments are not persuasive. We will first examine how the Nebraska UTC affects special needs trusts funded by third parties and then how it affects special needs trusts funded with property of the beneficiary of the trust.

1. Trusts Funded by Third Parties

As explained in Section II-E, this type of special needs trust has served both a Medicaid/SSI purpose and an asset protection purpose. If properly drawn, the interest of the disabled beneficiary in this type of special needs trust will not be an “available” interest that would disqualify the beneficiary from receiving Medicaid or SSI benefits. The beneficiary’s interest in the trust will be ignored for Medicaid and SSI purposes either (1) because the trustee has absolute discretion regarding payments to or for the benefit of the disabled beneficiary (thus giving the beneficiary and the beneficiary’s creditors no right to demand payments) or (2) because the trust instrument provides that the trustee can distribute income or principal only for care not otherwise provided by or available from the government. Nothing in the Nebraska UTC will change these results. Indeed, because it eliminates the concept of the discretionary support trust, the Nebraska UTC should prevent a Nebraska court from finding that a beneficiary’s interest in such a trust is an “available” asset for purposes of qualification for Medicaid or SSI.201

Similarly, nothing in the Nebraska UTC should change the extent to which special needs trusts protect the interest of the disabled beneficiary from the claims of his or her creditors. The Nebraska UTC continues recognition of spendthrift protection, so use of spendthrift language in this type of special needs trust will continue to provide asset protection. The only exceptions are for claims by the beneficiary’s children, spouse, or former spouse, or by a person who provided services for the protection of the beneficiary’s interest in the trust. Although these exceptions diminish, to some extent, the asset protection afforded by spendthrift provisions prior to the Nebraska UTC, the exceptions will be significant in the context of a special needs trust only if the disabled beneficiary has children, a spouse, or a former spouse, and then only if the claimant has a judgment or court order for support or maintenance.

If the asset protection derived from this type of special needs trust flows from the fact that the trustee has discretion over whether and

201. See Bureau of Support in the Dep’t of Mental Hygiene and Corr. v. Kreitzer, 243 N.E.2d 83 (Ohio 1968) (holding that a beneficiary’s interest in a discretionary support trust providing for the beneficiary’s “care, comfort, maintenance and general well being” was an “available” asset for Medicaid qualification purposes).
when to make payments to or on behalf of the disabled beneficiary, nothing in the Nebraska UTC should change a drafter's ability to provide such protection. As explained earlier, with the limited exception for support and maintenance claims of children, the spouse, or the former spouse of a beneficiary, the Nebraska UTC provides that "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 of distribution; or (2) the trustee has abused the discretion." The limited exception for support and maintenance claims by children, a spouse, or a former spouse will be significant in the context of a special needs trust only if the disabled beneficiary has children, a spouse, or a former spouse, and then only if the claimant has a judgment or court order for support or maintenance and can persuade a court that the trustee has either failed to comply with a standard of distribution or has abused a discretion.

2. Trusts Funded with Property of the Beneficiary

As explained in Section II-E, this type of special needs trust, often called a self-settled special needs trust, is effective for Medicaid and SSI purposes only if drafted in accordance with the specific requirements of 42 U.S.C. section 1396p(d)(4). As to protection from the beneficiary's creditors, both before and after enactment of the Nebraska UTC, Nebraska law prohibits a settlor from using a spendthrift trust to protect the settlor's interests in trusts from claims of the settlor's creditors. Further, both before and after enactment of the Nebraska UTC, a settlor's interest in a discretionary trust was not immune from the claims of the settlor's creditors. The Nebraska UTC simply continues prior Nebraska law when it provides:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

As currently permitted under federal law, self-settled special needs trusts are a vehicle to allow a disabled person to enjoy benefits in excess of those available under Medicaid or SSI without disqualifying the disabled person from receiving Medicaid or SSI benefits. These trusts are not, and have never been, asset protection devices. If the Nebraska Legislature determines that such trusts should enjoy some measure of asset protection, it would have to pass legislation, perhaps

203. § 30-3849(b) (emphasis added).
204. § 30-3850.
similar to legislation in Alaska and Delaware, creating such protection.

V. A POSTSCRIPT ON IN RE TRUST CREATED BY HANSEN

(Editor’s Note: During the publication process for this article, the Nebraska Supreme Court decided In re Trust Created by Hansen. As this case addressed discretionary trusts, the authors thought it appropriate to include a brief discussion within this article. That discussion follows below.)

In re Trust Created by Hansen205 was decided by the Nebraska Supreme Court on August 31, 2007. The opinion relied heavily on the Pohlmann decision, but it lacked the clarity which Pohlmann gave to Nebraska’s transition to the Nebraska UTC. Hansen was the first Nebraska case to invoke the derivative right of a deceased life beneficiary’s estate to compel a distribution from a discretionary trust. Unfortunately, the opinion created needless confusion by discussing distinctions that have no continuing importance under the Nebraska UTC. The decision rested primarily on general statements of trust law, and the court did not refer to relevant Nebraska UTC provisions concerning discretionary trusts.

The Nebraska UTC does not separately classify various forms of discretionary trusts. While distinctive rules may have pertained to Nebraska’s hybrid “discretionary support trust” prior to enactment of the Nebraska UTC, the term “support” in connection with trusts to which the Nebraska UTC applies merely describes the subject of mandatory payments, the subject of discretionary payments, or the standard by which discretion is to be exercised.

Under the Nebraska UTC, if the trustee has discretion relating to distributions, the trust is a discretionary trust. With a limited exception for certain marital creditors,206 “a creditor of a beneficiary may not compel a distribution that is subject to a trustee’s discretion, even if: (1) the discretion is expressed in the form of a standard of distribution; or (2) the trustee has abused the discretion.”207 Thus, the Nebraska UTC distinguishes between the right of a creditor to compel distribution and the right of a beneficiary to compel a distribution and expressly recognizes “the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.”208 That distinction reflects a policy determination that “the power to force a distribution due to an

205. 274 Neb. 199, 739 N.W.2d 170. Notably, this opinion was authored by Chief Justice Heavican who was not a member of the Pohlmann Court.
207. Id. § 30-3849(b) (emphasis added).
208. Id. § 30-3849(d).
abuse of discretion or failure to comply with a standard belongs solely to the beneficiary." Hansen involved the right of a beneficiary's estate to compel a distribution and, on the record presented, did not raise issues involving the rights of third party creditors. In contrast, Pohlmann involved the assertion of rights of a potential creditor, the Nebraska Department of Health and Human Services. The Court could have avoided this confusion by omitting all discussion of the nature of the trust in Hansen and holding only that the county court erred in determining as a matter of law that the trustee could not pay expenses of the beneficiary's final illness after the beneficiary's death without conducting an evidentiary hearing on factual issues relevant to that determination.

The trust provisions in Hansen, like those in Pohlmann, Dokiansky, and Smith v. Smith, contained both mandatory and discretionary instructions. The terms of the trust in each case require ("mandate") the trustee to exercise discretion with respect to specified payments from the trust property. The terms of the Hansen trust stated: "[S]hould either of said daughters, by reason of accident or illness require funds in excess of the net income of the Trust, then the Trustee shall make such payments from such daughter's division of the principal as it may deem proper for the benefit of such daughter." Because this provision included both mandatory and discretionary language, the provision would have created a discretionary support trust under Nebraska law prior to the Nebraska UTC. Under the Nebraska UTC, as explained in Pohlmann, such language creates a discretionary trust. The clarifying amendment of Nebraska UTC § 30-3851 (a) enacted in 2007 now expressly contains the same rule: "The term ['mandatory distribution'] does not include a distribution subject to the exercise of the trustee's discretion even if (1) the discretion is expressed in the form of a standard of distribution or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction." The Court stated that "the county court and both parties are laboring under an incorrect assumption that Hansen created a discretion-

209. Id. § 30-3849; UTC § 504 cmt.
210. See, Hansen, 274 Neb. at 213, 214, 739 N.W.2d at 182.

This court has very recently either reversed or vacated three separate county court orders for lack of competent evidence when the court failed to hold an evidentiary hearing on factual issues. . . . In light of our conclusion that the county court must conduct an evidentiary hearing to determine whether the trustee abused its discretion or had a duty to make support payments, it is unnecessary for us to reach the remaining assignments of error.

Id.
211. Id. at 201, 739 N.W.2d at 174.
ary support trust, or hybrid trust." Unfortunately, to correct that incorrect assumption, the Court seized on language in Pohlmann drawing an apparent distinction between a "support trust" and a "discretionary trust." The language from the Pohlmann opinion came, in turn, from a North Dakota decision addressing whether a beneficiary's interest in a trust was an "available asset" for purposes of Medicaid. The Hansen Court apparently read this language to mean that a "support trust" could never be a "discretionary trust" and vice versa. Such a reading is too narrow because the terms of a trust providing for "support" may establish either "mandatory" or "discretionary" distributions. As noted above, if the trust provides for "discretionary" distributions, the trust is a discretionary trust for purposes of the Nebraska UTC. With respect to discretionary trusts, the Nebraska UTC distinguishes between the rights of a beneficiary and the rights of creditors to compel distributions. Hansen involved a beneficiary's claim. Pohlmann involved a creditor's claim.

The Hansen Court's purported distinction between the language used in the Hansen trust document and the language used in the Pohlmann trust document does not withstand scrutiny. The Court argued that the language in the Hansen trust

 did not grant the trustee the same breadth of discretion created by the trust in Pohlmann. That is, Hansen did not provide that the trustee "may, from time to time" make determinations of his daughter's needs; rather he provided that "the Trustee 'shall' make payments for his daughter's benefit if she should require funds in excess of the trust's income because of an accident or illness.

This provision is the functional equivalent of a term providing that "the trustee 'shall pay or apply only so much of the... principal... as is necessary for the [medical care]... of a beneficiary." The Court focused on the discretionary language in Pohlmann ("may, from time to time") and did not acknowledge the use of both mandatory and discretionary language in the trust provision in Pohlmann: "[T]he Trustee shall pay to my spouse... such portion of

213. Hansen, 274 Neb. at 208, 739 N.W.2d at 178.
214. A support trust essentially provides the trustee 'shall pay or apply only so much of the income and principal or either as is necessary for the education or support of a beneficiary.'... A support trust allows a beneficiary to compel distributions of income, principal, or both, for expenses necessary for the beneficiary's support. Id. at 208-209, 739 N.W.2d at 178-79 (quoting Pohlan v. Nebraska Dep't of Health and Human Serv., 271 Neb. 272, 280, 710 N.W.2d 639, 645 (2006) (quoting Eckes v. Richland County Soc. Serv., 621 N.W.2d 851, 855-56 (N.D. 2001))).
215. "Conversely, a discretionary trust grants the trustee 'uncontrolled discretion over payment to the beneficiary' and may reference the 'general welfare' of the beneficiary. Id. at 209 (quoting Pohlman, 271 Neb. at 280, 710 N.W.2d at 645 (quoting Eckes, 621 N.W.2d at 855-56)).
217. Hansen, 274 Neb. at 209, 739 N.W.2d at 179.
that principal *as it may from time to time, deem appropriate* for her health, education, support or maintenance.”218 A comparison of the complete provisions in *Pohlmann* and *Hansen* demonstrates that there is no meaningful difference between the two provisions, inasmuch as the terms of both trusts include a combination of mandatory and discretionary language. Both *Pohlmann* and *Hansen* should be treated as discretionary trusts under the Nebraska UTC.219

Notwithstanding the foregoing criticism of *Hansen*, the decision is important because the Court explicitly adopted the “standard for an estate’s recovery of the beneficiary’s last illness expenses from the *Restatement (Third) of Trusts* § 50 (2003), which concerns the enforcement of a beneficiary’s interests and specifically deals with postdeath obligations.”220 In so doing, the Court held that the estate of a deceased trust beneficiary can enforce the beneficiary’s interests in a trust “to the same extent that the beneficiary could have enforced his or her interests immediately before death.”221 In this context, the Court properly distinguished *Smith v. Smith* because the person attempting to reach the trust was the beneficiary’s creditor. . . . [The creditor] did not show that her claim against the son was support-related or would support his children if the parents were unable, because the children were emancipated. Nor were we dealing with a beneficiary’s request for support payments in that action.222

VI. CONCLUSION

Prior to the enactment of the Nebraska UTC, the Nebraska Supreme Court, relying heavily on the A.L.I. *Restatement of Trusts*, had developed a significant body of case law defining the relationships between and among a settlor’s powers to preclude or limit the claims of

---


219. The Court’s discussion of *Smith v. Smith*, as it applies to the nature of the trust, adds to this problem because it could be read as treating *Smith* as a “support trust” case. “In *Smith*, this court stated that ‘support trusts may be reached by creditors for support-related debts, but that discretionary trusts may not be reached by creditors for any reason.” *Hansen*, 274 Neb. at 211, 739 N.W.2d at 180 (emphasis added). Although the Court immediately refers to the trusts in *Smith* as “discretionary support trusts,” the quoted language suggests, incorrectly, that a “support trust” could never be a “discretionary trust.”

220. *Hansen*, 274 Neb. at 212, 739 N.W.2d at 181. The numerous references to the currently developing *Restatement (Third) of Trusts* throughout the *Hansen* decision are also significant because of the similarity of the rules and policies reflected in the *Restatement (Third)* and the Nebraska UTC and because of the extensive reliance of prior Nebraska decisions on prior editions of the *Restatement of Trusts*.

221. *Hansen*, 274 Neb. at 200, 739 N.W.2d at 174.

222. *Id.* at 211, 739 N.W.2d at 180.
creditors against trust property, a beneficiary’s interest in a trust, the discretionary authority of a trustee, and the rights of the beneficiary’s creditors in and to the beneficiary’s interest in the trust. The Nebraska UTC codified much of the prior case law. The changes made by the Nebraska UTC are founded on sound public policy and do not undermine appropriate planning to protect beneficiaries (other than the settlor) and trust property from claims by creditors. Contrary to the often shrill voices of the relatively few critics of the UTC, the Nebraska UTC does not diminish appropriate protection of trust property and beneficiaries from the claims of creditors.

The Nebraska Supreme Court’s decision in Pohlmann v. Nebraska Department of Health and Human Services provides assurance that the Court views the Nebraska UTC as consistent with the great majority of the prior case law. The Court’s analysis in that decision helps Nebraska attorneys understand how prior Nebraska case law fits into the conceptual framework and policies of the Nebraska UTC. Subsequent to the Court’s decision in Pohlmann, the 2007 Nebraska Legislature has further clarified the text and underlying policies of the statutes.

Read in light of Pohlmann, the term “discretionary trust” as used in the Nebraska UTC will include trusts formerly known as discretionary support trusts. The term “discretionary trust” will also include trusts formerly known as support trusts unless, under the terms of the trust, the beneficiary can compel distributions of income, principal, or both for expenses necessary for the beneficiary’s support. In that case, the general Nebraska UTC provisions concerning mandatory distributions will apply. Special needs trusts may continue to play an important role in planning with respect to governmental benefits. Longstanding judicial rules concerning spendthrift trusts have been well codified in the Nebraska UTC.