

trusts are not considered available resources for Medicaid qualification purposes; moreover, the result is codified by statute in many jurisdictions. The UTC will have no effect on the continued effectiveness of such trusts for this purpose. Under section 814(a), the trustee is required to carry out the terms of the trust in good faith; if the trust terms prohibit distributions for the beneficiary's basic support needs, the UTC will require adherence to this prohibition.

Next, consider a trust expressly intended to be a supplemental needs trust. To what extent will such a trust be considered an available resource for Medicaid purposes, and what effect, if any, will the UTC have on that result? In general, a trust under which the trustee is required to make distribution for the beneficiary's basic support needs will be considered an available resource for Medicaid qualification purposes. The UTC will have no bearing on the treatment of such trusts. On the other hand, in general a wholly discretionary trust without a support standard will not be considered an available resource for Medicaid purposes. As discussed earlier, the UTC should not enhance a beneficiary's ability to compel distributions from such trusts; thus the UTC should not adversely affect the effectiveness of wholly discretionary trusts for purposes of Medicaid qualification.

A more difficult issue is the Medicaid treatment of third-party trusts in which the trustee is granted discretion in making distributions for the beneficiary's support. Putting aside the effect that the UTC may have on this question, the case law concerning such trusts is inconsistent, with some cases holding that the trust assets are an available resource for Medicaid qualification purposes, and others holding that they are not. The cases turn on the court's interpretation of the settlor's intent and thus the outcome of any particular case is largely fact-driven. The UTC should have little, if any, effect on the outcome of these cases, although for several reasons it may help somewhat for those seeking to qualify for public assistance. First, as earlier discussed, the UTC treats support trusts as discretionary, thereby limiting a beneficiary's ability to compel distributions. Second, under a 2005 amendment, the comment to section 814 cites with approval language from the Restatement (Third) to the effect that, in exercising its discretion, a trustee should do so in a manner that avoids disqualifying the beneficiary for public benefits. In a borderline case, the comment to section 814 may help produce a favorable interpretation of the language of a discretionary trust that also includes a support standard.¹³

¹³ Robert T. Danforth, "Article Five of the UTC and the Future of Creditors' Rights in Trusts," 27 *Cardozo L. Rev.* 2551, 2589-90 (2006); also see Richard E. Davis, "Uniform Trust Code and SNTs: Should UTC Be Feared, Embraced or Ignored?," 5 *NAELA J.* 13 (2009).

