

3-1-2018

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Recommended Citation

Beyer, Gerry W. (2018) "Reactions to Discretionary Trusts: An update by Richard C. Ausness," *ACTEC Law Journal*: Vol. 43: No. 3, Article 7.

Available at: <https://scholarlycommons.law.hofstra.edu/actecelj/vol43/iss3/7>

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Reactions to *Discretionary Trusts*: *An Update* by Richard C. Ausness

Gerry W. Beyer*

I. INTRODUCTION

Although I have known Prof. Ausness for many years by both reputation and e-mail communications, we have never met in person. After a careful study of his article, *Discretionary Trusts: An Update*, I wondered if perhaps he had surreptitiously attended my classes when I discussed discretionary trusts because his organization, focus, and analysis closely track how I present these topics to my students. Virtually every major point I hope my students to “takeaway” after I cover discretionary and support trusts is covered clearly and concisely in the article. In fact, I already plan to recommend this article to my students as an excellent source to supplement my lectures.

II. THE ARTICLE OBJECTIVELY

When Prof. Bridget Crawford asked me to review Prof. Ausness’ article, she indicated that she was not seeking “a descriptive summary of it.”¹ And, I agree – you should first read the article to form your own unbiased opinion before you check out my thoughts. So, I will forego the traditional part of a review where the author provides the CliffsNotes² version of the article. Nonetheless, I believe it would an injustice to any review of the article to fail to mention some of the article’s technical highpoints.

Prof. Ausness masterfully organizes his update on discretionary trusts. Whether you are a long-time trust expert looking for a refresher or a novice struggling to learn basic concepts for the first time, you are guided logically from an academic discussion of the different meanings

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¹ Email from Bridget Crawford, Prof., Pace Univ. School of Law, to Gerry W. Beyer, Prof., Texas Tech Univ. School of Law (Sept. 7, 2017, 17:50 EST) (on file with author).

² See CLIFFSNOTES, <https://www.cliffsnotes.com/> (last visited Apr. 9, 2018) (providing study guides which originally summarized major literary works to shorten a student’s study time).

of discretion,³ through the dichotomy of mandatory versus discretionary trust provisions,⁴ and how courts⁵ and the Restatement (Third) of Trusts have addressed discretionary provisions.⁶ Prof. Ausness then focuses the reader's attention on the rights of both beneficiaries⁷ and creditors⁸ to enforce and compel distributions from discretionary trusts. And finally, like all good authors, he concludes with his recommendations for improving discretionary trust jurisprudence.⁹

Prof. Ausness' writing style is enviable. In fact, I often found myself saying, "I wish I had written this." Beyond the usual signals of good writing such as sentence structure, word choice, grammar, and paragraph flow, what is particularly impressive is his skillful job of weaving the basic legal principles with the cases to support them. A quick Westlaw search yielded almost 1,500 state court cases discussing discretionary trusts¹⁰ which gives you some idea of how difficult it was for Prof. Ausness to decide the cases on which to focus. I also appreciated that he selected major cases from a wide range of jurisdictions and dates.

III. SUGGESTIONS EVALUATED

Prof. Ausness concludes his article by making several suggestions for improving the law of discretionary trusts.¹¹ I think these are both accurate and insightful. For example, he recommends that a court should be able to find an abuse of discretion if the trustee acted unreasonably (an objective test) rather than using the subjective bad faith test.¹² This test, in the absence of the settlor providing an explicit test in the trust, provides, I think, the right balance of carrying out the settlor's intent and protecting the beneficiary from a rogue trustee. Although reasonable people may differ as to what is reasonable, it is better than relying on a pure good faith test which relies on what is inside of a trus-

³ Richard C. Ausness, *Discretionary Trusts: An Update*, 43 ACTEC L.J. 231, 233-236 (2018).

⁴ *Id.* at 236-39.

⁵ *Id.* at 239-43.

⁶ *Id.* at 243-46.

⁷ *Id.* at 246-63.

⁸ *Id.* at 263-80.

⁹ *Id.* at 280-83.

¹⁰ Search for state law cases discussing discretionary trusts, WESTLAW, <https://next.westlaw.com> (follow "Sign in" hyperlink; then search for "adv: discretionary /2 trust!" in the database of "All States").

¹¹ Ausness, *supra* note 3, at 280-83.

¹² *Id.* at 280-81.

tee's mind and in the absence of a reliable truth machine,¹³ can never be ascertained with certainty. Likewise, I agree with his characterization of key terms used in discretionary trusts such as "support" and "maintenance" as having similar meanings and "best interests" and "welfare" allowing for "luxuries that go beyond mere support."¹⁴

Prof. Ausness' recommendation "to abandon the practice of characterizing the interest of the beneficiary of a pure discretionary trust as an 'expectancy'"¹⁵ also has merit as the beneficiary does have an actual interest although that interest, just like a traditional contingent remainder, may never come into possession. Another wise suggestion is to allow creditors with claims for necessities supplied to the beneficiary to be able to reach funds in a support trust for the payment of their claims.¹⁶

IV. THE QUIBBLES

Notwithstanding my previous glowing critique of Prof. Ausness' article and the fact I take no exception to what he has to say, there were indeed several things that puzzled me. Let's take a look at a few of these.

A. The Minor Ones

1. *Omission of Statutory Law on Trustee Discretion Review and Standards*

Prof. Ausness discusses when courts elect to review a trustee's exercise in discretion and the standards they use.¹⁷ Although his coverage of caselaw is more than adequate for an update article, I was disappointed not to see a discussion of applicable state statutory law. For example, the Texas Trust Code directly addresses the issue of whether a court may review the conduct of a trustee of a discretionary trust when it states,

Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such 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.¹⁸

¹³ See JAMES L. HALPERIN, *THE TRUTH MACHINE* (1996) (exploring the implications of a scientist's development of an infallible lie detector).

¹⁴ Ausness, *supra* note 3, at 281.

¹⁵ *Id.*

¹⁶ *Id.* at 282.

¹⁷ *Id.* at 239-43.

¹⁸ TEX. PROP. CODE ANN. § 113.029(a) (West 2017).

Texas law likewise provides that, "The trustee shall administer the trust in good faith according to its terms and this subtitle"¹⁹ thereby adopting the subjective standard.

2. *Lack of Discussion of First vs. Last Dollar Issue with Support Trusts*

In Prof. Ausness' coverage of support trusts,²⁰ I appreciated his discussion of the mandatory versus discretionary distinction and his consideration of whether the trustee should consider the beneficiary's other resources. I would, however, also like to have seen him discuss how support trusts should be presumptively considered. Is the beneficiary entitled to funds from a mandatory support trust only if the beneficiary lacks sufficient resources perhaps incentivizing the beneficiary to be unemployed so the beneficiary can receive trust property? Or, does the beneficiary automatically receive the funds necessary for support with anything extra the beneficiary earns being available for the beneficiary's non-support enjoyment which would drain the trust of funds that may later be needed?

3. *Insufficient Coverage of Interface with Spendthrift Provisions*

In the rights of creditors discussion,²¹ I think it would have been helpful if Prof. Ausness had included a more comprehensive discussion of the interface between discretionary/support trusts and spendthrift provisions. He explains how courts view these trusts when they lack a spendthrift clause, how support trusts are often deemed impliedly spendthrift, and that discretionary trusts lack an interest which a creditor may attach. In actuality, it would be extremely rare to find a discretionary or support trust that did not also include a spendthrift provision. Perhaps Prof. Ausness did not want to "muddy the waters" by opening the door to a discussion of spendthrift trust issues which would have increased the length of his already ample paper, but I do think his discussion would have been more realistic with enhanced coverage of spendthrift provisions.

4. *Failure to Discuss Specific Child Support Discretionary Trust Legislation*

Prof. Ausness provides a look into the issues that arise when the beneficiary's children attempt to reach through the "shield" of a discre-

¹⁹ *Id.* § 113.051.

²⁰ Ausness, *supra* note 3, at 247.

²¹ *Id.* at 263-80.

tionary trust to reach funds for delinquent child support.²² Being a professor at a Texas law school, I was pleased when he cited one of the leading Texas cases on this point, *Kolpack v. Torres*.²³ However, my pleasure turned quickly to disappointment when Prof. Ausness did not cover the special Texas statute that provides a definitive rule to resolve the issue. The Texas Family Code (yes, the Family Code, not the Trust Code which does make the provision difficult to locate as there is no reference to it in the Trust Code), provides:

Sec. 154.005. Payments of Support Obligation by Trust. (a) The court may order the trustees of a spendthrift or other trust to make disbursements for the support of a child to the extent the trustees are required to make payments to a beneficiary who is required to make child support payments as provided by this chapter.

(b) If disbursement of the assets of the trust is discretionary, the court may order child support payments from the income of the trust but not from the principal.²⁴

B. The Major One

As I come to the conclusion of my concerns with Prof. Ausness' article, the time has come to mention the one that irks me the most. And, it is also the one that I find irking me about too many law review articles that I review – limited practitioner advice. My belief is that every law review article, unless purely historical or philosophical, should contain recommendations for our practicing bar, especially when the article appears in a journal distributed primarily to practitioners which is this case are fellows of the American College of Trust and Estate Counsel who are the icons of the practicing estate planning bar in the United States.

Prof. Ausness concludes merely by saying that discretionary trusts are “worthy of continuing study by legal scholars and practitioners.”²⁵ True, I completely agree. However, at this point, I would have appreciated seeing a list of steps practitioners could take when drafting discretionary trusts to address the issues previously covered with such expertise. For example, Prof. Ausness could have explained that a discretionary support trust should directly explain when and how the beneficiary's other resources should be considered. In addition, he could have stressed the importance of indicating the level of support the set-

²² *Id.* at 273.

²³ *Id.* at 274 (citing *Kolpack v. Torres* 828 S.W.2d 913 (Tex. App. 1992)). *See also id.* at 273-74 (recognizing split of case law authority but not mentioning statutory provisions).

²⁴ TEX. FAM. CODE ANN. § 154.005 (West 2017).

²⁵ Ausness, *supra* note 3, at 283.

tlor intends the beneficiary to receive from the trust. To elaborate this point — Prof Ausness explained that a support trust usually maintains the beneficiary’s accustomed lifestyle except if it is very low.²⁶ However, it would be prudent for the attorney to ask the client what the client intends — perhaps the client desires to increase the lifestyle of a beneficiary from modest to high, maintain the beneficiary’s lavish lifestyle, or merely provide a safety net if the beneficiary experiences financial hard times.

V. CONCLUSION

So, what would my “final answer”²⁷ be in response to the question, “What do you think of how Prof. Ausness handled discretionary trusts in his new article?” I would start by explaining that his well-crafted and superbly researched article provides an excellent presentation of basic legal principles and cases demonstrating those rules. As such, his article makes a valuable addition to our collective knowledge and one I recommend without hesitation to someone who wants to be brought “up to speed”²⁸ on the interpretation of trusts containing discretionary and support provisions. However, I would not be able to muster full and unbridled enthusiasm because the article fails to “bring it on home”²⁹ by providing useful advice to estate planning practitioners.

²⁶ *Id.* at 261.

²⁷ See Carrie Grosvenor, *Unforgettable Game Show Catch Phrases*, THOUGHTCO. (updated Mar. 17, 2017), <https://www.thoughtco.com/best-game-show-catch-phrases-1396892>. See also Lauren Duca, *The Final Answer on “Who Wants to be a Millionaire?,” 15 Years After it Premiered*, HUFFPOST TV (Aug. 15, 2014 9:20 AM, updated on Dec. 6, 2017), https://www.huffingtonpost.com/2014/08/15/millionaire-15-years_n_5673088.html.

²⁸ See BARBARA ANN KIPFER, *THE DICTIONARY OF AMERICAN SLANG* (4th ed. 2007) (defining this phrase to mean increasing the operation of a motor, especially of a phonograph turntable, to the proper rate).

²⁹ SONNY BOY WILLIAMSON II, *BRING IT ON HOME* (Checker Records 1966). See also LED ZEPPELIN, *BRING IT ON HOME* (Atlantic Records 1969) (paying homage to Sonny Boy Williamson’s version of this song in its intro and outro).