ACTEC Law Journal

Volume 43 | Number 3 Article 9

3-1-2018

My Response to Beyer and Bove

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Alexander Bove and Gerry Beyer were kind enough to read and comment upon my article about discretionary trusts. I thank them for the time and effort that they put into this assignment and I appreciate the constructive and insightful comments that they made. Needless to say, it is no small task to follow in the footsteps of the great Dean Halbach.

When I read their comments, my first reaction was to say "Gee, I wish that I had thought of that!" Between the two of them, Alexander Bove and Gerry Beyer identified a number of areas that I should have discussed or should have discussed more fully. These include certain aspects of support trusts, spendthrift trusts, child support discretionary trust legislation, special or supplemental needs trusts, Medicaid planning trusts and decanting. This is quite a long list and I can offer several explanations (not necessarily excuses) for only mentioning some of them briefly or omitting others altogether. First, I was forced to limit my coverage of some of these topics to keep my article from becoming unreasonably long. For example, I collected a great deal of material on the "other resources" issue associated with support trusts, but reluctantly decided to leave most of it out to avoid excessive length. However, for the record, I would be in favor of a rule that assumed that the settlor would not want "other resources" to be taken into account unless he said so expressly.

Another explanation for my giving some issues the short shrift has to do with the way legal academics approach things. We tend to rely on reported cases as a source of information about legal issues. In my case, I was primarily interested in the standards courts used when they reviewed alleged abuses of discretion by trustees. Most of the case law on this issue involved traditional types of trusts in which a trustee was given the discretion to distribute trust assets to various beneficiaries. However, in doing so, as Bove and Beyer have observed, I failed to pay enough attention to the role of discretion in more specialized types of trusts, such as supplemental needs trusts. Instead, I focused on creditors' rights issues because that's where most of the reported cases were.

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Professor Beyer rightly points out that I failed to discuss applicable statutes in the area other than the Uniform Trust Code. Of course, the first place a practicing lawyer would go to for guidance would be a statute. Indeed, in many states, legislatures have addressed many of issues discussed in my article. However, academic writers tend to shy away from analyzing statutes because they are sometimes difficult to find (unless someone else has already collected them) and because it is often hard to generalize if the statutes do not fall into a common pattern.

Gerry Beyer also stated that I should have said more about the interface between discretionary trusts and spendthrift trusts. This is an excellent point and I wish that I had thought of it. Most of the cases and law review commentary, including mine, focus on when a spendthrift clause will protect a beneficiary's interest against the claims of creditors. However, as Beyer points out, most trusts, including discretionary trusts, also have spendthrift provisions. It would have been helpful if I had examined how, if at all, the two features interact with one another.

Alexander Bove suggests that I should have given more attention to special needs or supplemental needs trusts that families sometimes create to provide for their disabled children. He also mentions Medicaid planning trusts which provide for the needs of elderly persons. According to Bove, these types of trusts are inherently discretionary and it would have been useful to examine the sorts of trustee discretion issues that may arise in connection with the administration of such trusts. Undoubtedly, this would have been an interesting and fruitful area to explore. Unfortunately, most of the cases involving special needs and Medicaid planning trusts are concerned with the rights of the government and other creditors to reach the trusts' property rather than the nature of the trustee's discretion. Nevertheless, it would be interesting to see whether the discretion issue is handled any differently than it is in other types of support trusts.

Alexander Bove also points out that I failed to discuss decanting in any detail. He is absolutely right. Although legislation typically restricts what kind of distributive provisions the new trust may have, the decision to decant (or not to decant) always involves the exercise of discretion. There is certain to be more litigation in the future on the issue of trustee discretion as decanting becomes more common and affects substantive as well as purely administrative provisions.

Alexander Bove also felt that my "own evaluation of the cases would have been instructional."[1] That is a fair criticism and I will try to at least partially respond to it now. Part III is concerned with the rights

[1] *See* Alexander A. Bove Jr., *Commentary on* Discretionary Trusts: An Update *by Richard C. Ausness*, 43 ACTEC L.J. 441 (2018).

of beneficiaries. In the case of support trusts, courts are prone to uphold a trustee's exercise of discretion even when it seems to downplay the legitimate needs of the trust beneficiary.[2] In my view, when reviewing the exercise of discretion in support trust cases when the settlor has provided little guidance, the court should take a more liberal view of the trust's support purpose and be more willing to overturn a trustee's decision if it seems unduly tightfisted.[3] Pure discretionary trusts are more difficult to deal with because the discretion involved tends to be broader.[4] In such cases, it makes sense for the courts to give more deference to the trustee's judgment unless the trustee has clearly acted unreasonably.[5]

Turning to the issue of creditors' rights, the trend appears to be moving toward allowing certain favored classes of creditors to reach the assets in support trusts in some cases.[6] These creditors include spouses and ex-spouses,[7] as well as minor children[8] of the beneficiary. Government creditors, on the other hand, have not fared so well.[9] Some courts have also shown a willingness to allow favored creditors to reach the assets in a discretionary trust.[10] My own view is that courts should respect the wishes of the settlor and not allow creditors of the beneficiary to directly reach the assets of either a support trust or a discretionary trust. If the settlor desires to benefit creditors of a beneficiary, he or she is free to do so. However, in the absence of an express expression of such intent, the courts (and legislatures) should refrain from treating the assets of such trusts as a piggy bank for the benefit of ex-spouses and even children of a beneficiary. This is particularly true in the case of

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2 *See*, *e.g.*, Laubner v. J.P. Morgan Chase Bank, N.A., 898 N.E.2d 744, 751-52 (Ill. App. Ct. 2008); Rogers v. Munsey, 164 A.2d 554, 556 (N.H. 1960); *In re* Trusts for McDonald, 953 N.Y.S.2d 751, 753-54 (App. Div. 2012).

3 *See, e.g.*, Conlin v. Murdock, 43 A.2d 218, 220 (N.J. Ch. 1945); Stallard v. Johnson, 116 P.2d 965, 966 (Okla. 1941).

4 *See*, *e.g.*, Hurtig v. Gabrielson, 525 N.W.2d 612, 614 (Minn. Ct. App. 1995); *In re* Ternansky's Estate, 141 N.E.2d 189, 193 (Ohio Ct. App. 1957).

5 *See, e.g.*, Rinker's Adm'r v. Simpson, 166 S.E. 546, 549 (Va. 1932).

6 *See* RESTATEMENT (THIRD) OF TRUSTS § 60 (AM. LAW INST. 2003); UNIF. TRUST CODE § 504(b) (UNIF. LAW COMM'N 2010).

7 *See, e.g.*, Robison v. Elston Bank & Tr. Co., 48 N.E.2d 181, 189 (Ind. Ct. App. 1943); Reynolds v. Reynolds, 180 S.E. 70, 77 (N.C. 1935); *but see* Culver v. Culver, 169 N.E.2d 486, 489-90 (Ohio Ct. App. 1960).

8 *See, e.g.*, Matthews v. Matthews, 450 N.E.2d 278, 282 (Ohio Ct. App. 1981).

9 *See, e.g.*, Pohlmann *ex rel.* Pohlmann v. Neb. Dep't of Health & Hum. Serv., 710 N.W.2d 639, 646 (Neb. 2006); *but see* Texas v. Rubion, 308 S.W.2d 4, 9 (Tex. 1957).

10 *See, e.g.*, Bacardi v. White, 463 So. 2d 218, 223 (Fla. 1985); Berlinger v. Casselberry, 133 So. 3d 961, 966 (Fla. Dist. Ct. App. 2013); but see *In re* Watts, 162 P.2d 82, 88 (Kan. 1945); Doksansky v. Norwest Bank Neb. N.A., 615 N.W.2d 104, 109-10 (Neb. 2000); Kolpack v. Torres, 829 S.W.2d 913, 916 (Tex. App. 1992).

discretionary trusts where a beneficiary has no legal claim against these assets.

Finally, both commentators decried my failure to provide "practical advice" on the issue of discretion to estate planners. Fortunately, they have taken this task upon themselves so I will shamelessly adopt some of their suggestions. Before doing so, however, let me explain why I did not provide many practical tips to practitioners. As a student of trust and estate law, I feel that I am qualified to comment on doctrine and principles in this area. On the other hand, since I do not draft trust instruments or deal with clients on a daily basis, I feel that it would be pretentious of me to "advise" others who do this sort of work for a living.

Both Bove and Beyer emphasize that the drafter should determine what the settlor's intent is and incorporate it in the trust instrument. Unfortunately, drafters apparently do not always identify various circumstances that may arise in the future or discuss the various options that may be available to deal with them. In addition, too often drafters fail to spell out the settlor's intent in detail in the trust instrument, but instead rely on boilerplate phrases, such as "comfortable maintenance and support," and leave it to the trustee or the court to figure out what this language means. In this respect, Alexander Bove makes an excellent suggestion, namely that the drafter should assist the settlor to prepare a non-binding "letter of wishes"[11] to provide the trustee with additional information or instructions. Although the trustee would not be bound by these instructions, a conscientious one would almost certainly take them into account when exercising discretion.

In conclusion, I am grateful of Gerry Beyer and Alexander Bove for taking the time to read my article so carefully and for providing us with the benefit their insightful comments.

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11 Bove, *supra* note 1, at 445. *See also* Alexander A. Bove, Jr., *The Letter of Wishes: Can We Influence Discretion in Discretionary Trusts*?, 35 ACTEC J. 38, 39 (2009).