YOUR BENEFICIARY MOVED TO BOSTON
WHY SHOULD YOU CARE?

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Estate Planning Council of North Texas
October 16, 2019
Gleneagles Country Club, Plano, Texas

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YOUR BENEFICIARY MOVED TO BOSTON
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I. INTRODUCTION

Trusts are creatures of state law, but which state law, and in what situation? Beneficiaries sometimes get into financial trouble. Which state's law governs creditors' rights? Sometimes marriages falter. Which state's law governs the powers of divorce courts, and what can judges in other states do? Accountants are trying to comply with tax laws. What factors affect income tax? Investment in real estate in other states may affect applicable law. This paper seeks to expose readers to some of the concepts at play, so that drafting the trust and administering the trust can be tuned appropriately to the clients' current situation, as well as current and possible future locations of the beneficiaries, trustees and trust investments.

A. What is Not Included. This outline is not a deep dive on any of the states addressed in this paper. As a result, this is intended to start the reader on paths to acquisition of the requisite knowledge to gain mastery of selected subjects. It does not contain a discussion related to whether a settlor can create a trust for the benefit of a settlor and have its assets protected (thus, nothing herein addresses self-settled asset protection trusts).

B. Origin of This Outline. Texas CLE programs commonly make the statement that a spendthrift provision in a trust will protect the trust estate from the creditors of and claimants against the beneficiaries. Decades ago, that might have been truer than it is today. However, case law and statutory laws are both developing, faster in some jurisdictions than others, eroding that protection. Many of those decisions are not made in probate courts where property law concepts may be relatively well-known, but are being made in other forums such as bankruptcy and divorce courts, as well as state legislatures.

II. STATE INCOME TAX

A. Texas Tax. Texas has no income tax. However, it does have a franchise tax that can be imposed on trusts. On the website of the Texas Comptroller of Public Accounts, the list of entities covered by the franchise tax includes "trusts," reflecting Texas Tax Code Section 171.002(a), which includes trusts in the definition of taxable entities. On the same webpage, there then follows a heading for entities not subject to the tax, and the list there includes "certain grantor trusts, estates of natural persons…", ERISA trusts, and charitable trusts. That reflects Texas Tax Code Section 171.002(b). A passive entity is defined in Texas Tax Code Section 171.003(a) to include a trust, other than a business trust, with certain kinds of income that do not include active business income generated by the trust itself.

Christi Mondrik, in her 2008 paper titled "The Nuts and Bolts of the Revised Texas Franchise (Margin) Tax," delivered at the State Bar of Texas Representing Small Business course in Houston, lists taxable entities but, instead of simply saying "trusts," she says "business trusts." The conclusion that must be reached is that express and implied trusts are not subject to the franchise tax, unless they are doing business as a business trust. Even then, certain grantor trusts are taken out of the picture if all grantors and trust beneficiaries are either natural persons or charities or if the trust ends up being a passive entity.

B. The Big News. In June 2019, the US Supreme Court handed down its decision in the *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 588 U.S._ (2019). That case drew a lot of attention because it dealt with whether the state (North Carolina) could tax the income generated by a trust when the trust had been created by a New York grantor and initially managed by a New York trustee, and later a Connecticut trustee, with only a connection to North Carolina because the beneficiaries of the trust lived there. There were no working assets (real estate, etc.) in North Carolina. In fact, the trust gave the trustees discretion on when and if to make distributions to the beneficiaries, giving the beneficiaries no legal right to force any distributions. In fact, no distributions had been made. In an extraordinarily narrow decision, the Supreme Court said "no." Nevertheless, that case and the attention it garnered caused a lot of people to begin thinking about how trusts created could be subject to state income tax, and under what circumstances.

C. State Income Tax Chart. One of the best summaries of state income taxation is by Richard W. Nenno of Wilmington Trust, updated through August 19, 2019, which is posted on the members-only side of the ACTEC website. It lists each state, plus the District

of Columbia and New York City, in alphabetical order, provides the top tax rate, and annotations about whether that jurisdiction taxes trusts created under the will of a person domiciled or resident in that jurisdiction, created during life by a resident or domiciliary of that jurisdiction, administered in that jurisdiction, or having a resident trustee/fiduciary in that jurisdiction, or, as was front and center in the *Kaestner* case, whether a trust has a resident beneficiary in that jurisdiction (Steve Oshins likewise publishes a non-grantor trust state income tax chart which is available at his website, which is **www.oshins.com**).

D. State Income Tax Summaries. The following paragraphs attempt to give a brief overview of state income taxes. These paragraphs focus on and are divided up by driving factors, rather than by states. In other words, these paragraphs attempt to highlight the basis on which different groups of states seek to impose state income tax on trusts.

1. Testamentary Trusts in Wills of Domiciliaries or Residents. Basically, 20 jurisdictions claim to be able to tax the income of the trust if it was created under the will of a person who died while domiciled or resident there. Those are Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York State, New York City, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, West Virginia and Wisconsin. Alabama restricts taxation in its state to the situation where the trustee or fiduciary is also a resident of the state, or, alternatively, where a current beneficiary is a resident of the state. Arkansas imposes tax only if the trust has a resident fiduciary. Delaware will tax the trust only if there is a resident beneficiary, and the same is true of Maryland, Massachusetts and Rhode Island. Idaho has a number of other requirements that have to be met before it will impose tax, as does Iowa and Montana. Minnesota applies the tax only to trusts created after 1995. Missouri taxes only if the trust has a resident income beneficiary during or on the last day of the year. New Jersey excludes trusts and does not tax them if the trustees and trust assets are outside the state and there is no source income within the state, but trustees have to file informational returns. New York State and New York City require the same. Pennsylvania does not tax a trustee if the settlor is no longer a resident or is deceased and the trust lacks sufficient contact with Pennsylvania to establish nexus. Post 2003 Utah irrevocable resident nongrantor trusts having Utah corporate trustees may deduct all non-source income but must file a Utah return if it must file federal tax returns.

2. Other Trusts Created by Domiciliaries or Residents. Jurisdictions claiming the right to tax a trust created by a domiciliary or resident, where the trust is not inside a will or created at death, include Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York State, New York City, Ohio, Oklahoma, Pennsylvania, Rhode Island and Wisconsin. Alabama again requires that there must be a resident fiduciary or a resident current beneficiary. Arkansas and Massachusetts require the trust to have a resident fiduciary. Connecticut will tax a trust provided that trust has a resident non-contingent beneficiary. Jurisdictions requiring a resident beneficiary include Delaware, Maryland, Massachusetts, Ohio, and Rhode Island. Iowa and Montana only impose tax if a number of factors are met. Michigan excludes trusts where the trustees, beneficiaries and administration are all outside of Michigan. Minnesota rules apply only to trusts created after 1995. Missouri tax applies only if the trust has a resident income beneficiary during or on the last day of the year. New Jersey excludes trusts where the trustees and trust assets are outside of the state and no source income is from New Jersey, but the trustee must file an informational return. New York State and New York City have the same rules. Pennsylvania excludes trusts where the settlor is no longer a resident, or is deceased and the trust lacks sufficient contacts with Pennsylvania to establish nexus. Wisconsin requires trusts to have been created or first administered in Wisconsin after October 28, 1999 only.

3. Place of Administration. The places claiming the right to tax based on whether the trust is administered in that state include Colorado, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Montana, New Mexico, North Dakota, Oregon, South Carolina, Utah, Virginia and Wisconsin. Hawaii requires that the trust must have a resident beneficiary, as does Maryland. Other requirements have to be met before Idaho, Iowa, Montana, and North Dakota will tax these trusts. Louisiana excludes trusts that designate governing law other than Louisiana. Minnesota taxes trusts only if they were created before 1996. Utah applies its tax

only to trusts created after 2003 that are irrevocable resident nongrantor trusts having a Utah corporate trustee in which case the trustee may deduct all non-source income but must file a Utah return if it must file a federal return. In addition, Utah says that a testamentary trust created by a non-Utah resident can be taxed if administered in Utah, and trusts created during life by a Utah or non-Utah resident can likewise be taxed if administered in that state. Wisconsin taxes trusts if they are irrevocable and were administered in Wisconsin before October 29, 1999 only.

4. Residence of Trustee. Jurisdictions claiming a right to tax the income based on whether the trustee or other fiduciary is a resident include Arizona, California, Delaware, Hawaii, Idaho, Indiana, Iowa, Kentucky, Montana, New Mexico, North Dakota, Oregon and Virginia. Delaware and Hawaii tax the trust only if it has a resident beneficiary as well. Idaho, Iowa, Montana and North Dakota will require other factors to be present.

5. Residence of Beneficiaries. Jurisdictions claiming a right to tax trust income based on whether the trust has a resident beneficiary (the *Kaestner* case) include California, Georgia, Montana, North Carolina, North Dakota and Tennessee. California taxes a trust if it has a resident non-contingent beneficiary. Montana and North Dakota require other factors to be present before taxing a trust solely because it has a resident beneficiary.

6. Oshins' Non-Grantor Trust Chart. Steve Oshins likewise publishes a non-grantor trust state income tax chart, which is available at his website.

E. Summary. For practitioners in Texas, the key factors to keep in mind part, for testamentary trusts, that the testator dies in Texas, and for inter vivos trusts, that the settlor and trustee (including place of administration) are in Texas, and, finally, that the trust affirmatively selects the application of Texas law.

III. FINANCIAL TROUBLE

A. Texas Law – Creating Spendthrift Trusts. Texas recognized spendthrift trusts before the enactment of statutes on the subject. Decades ago, the statutory framework was established, and has grown over time. (For a detailed background of the growth of the law on the subject, see *Extent and Limits of Spendthrift Protection – Creditors and Divorce*, James V. Roberts, 39th Annual Advanced Estate Planning & Probate Course, 2015, Dallas.)

1. Brief History. Since 1983, the concept of spendthrift trusts has been reduced to statute. The Texas Trust Act was enacted in 1943 with the passage of S.B. 251. In 1983, that Act was replaced with the Texas Trust Code. It added, in the original draft, §22.005, which became §112.035, adding spendthrift trust language. In the Senate Committee Report, there is a section-by-section comparative chart of the Texas Trust Code alongside the Texas Trust Act and the RESTATEMENT (SECOND) OF TRUSTS. That chart reveals that the spendthrift provision in the 1983 Code was new and was not drawn from the earlier Act, but was inspired by the RESTATEMENT (SECOND) OF TRUSTS §152 (restraint on alienation of income), §153 (restraint on alienation of principal) and §156 (self-settled spendthrift trusts).

2. Texas Trust Code. Today, there are two sets of statutes that need to be examined. One set of statutes is in §112.035, Texas Trust Code, which is a part of the Texas Property Code, and the other is in §154.005, Texas Family Code. The latter has to do with child support and will be examined later. The Texas Trust Code has five provisions that touch on spendthrift trusts. The centerpiece of all of them is §112.035 which describes spendthrift trusts and provides the general rule that a settlor may create a spendthrift trust. Subsections (b) and (c) describe the ease with which a spendthrift trust can be created. The settlor of the trust needs only to say that the interests of the beneficiary "shall be held subject to a spendthrift trust." The beneficiary can be the trustee and, so long as distributions to the beneficiary are limited to an ascertainable standard, the protections of the spendthrift clause apply. Subsection (d) of the statute forecloses the possibility of a self-settled spendthrift trust. The statute goes on to define who is and who is not a settlor under various circumstances.

B. Identifying the Settlor. A settlor can create a trust, and be a beneficiary, but a spendthrift clause in such a trust will not operate to protect the settlor's assets from the settlor's creditors. To sort out the cases and develop a protocol for analyzing fact scenarios, identification of the settlor becomes a critical step in the process. Some cases address "faux settlors." See *United States v. McBirney*, 261 Fed. Appx. 741; 2008 U.S. App. LEXIS 752 (5th Cir. 2008, unpublished), finding that a spendthrift trust was a sham (citing RESTATEMENT (THIRD) TRUSTS §29 (2003)). See

also *Hoff v. McConnell (In re Hoff)*, 644 F.3d 244 (5th Cir. 2011), *Bradley v. Ingalls*, 501 F.3d 421 (5th Cir. 2007), *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372 (Tex.App. San Antonio 1992 writ den.), and other cases cited in the paper on *Extent and Limits of Spendthrift Protection – Creditors and Divorce*, James V. Roberts, 39th Annual Advanced Estate Planning & Probate Course, 2015, Dallas.

C. Assets Must Be in the Trust and Not Subject to Withdrawal Rights.

1. Statute – Before Payment. §112.035(a) says the settlor may provide that the interest of a beneficiary may not be transferred "before payment or delivery of the interest to the beneficiary by the trustee." The statute seems to imply, with the use of that phrase, that assets held by the trustee in the name of the trust which have not been paid or delivered to the beneficiary are protected. Conversely, assets which have been distributed or which may be demanded are not protected by the spendthrift clause.

2. Right of Withdrawal. "Before payment or delivery" can be read to mean "before a right to withdraw arises" such that while the assets remain in the hands of the trustee but the beneficiary has no right to demand those assets, then those are still protected by the spendthrift clause. But if the beneficiary has the right to demand the assets, they may not be.

3. Unexpired *Crummey* Powers. *West v. Parker (In re Watson)*, 325 B.R. 380 (US District Court, SD Texas, Houston Div. 2005), holds that unexpired Crummey powers can be seized. This case dealt with Crummey powers that never lapsed until 30 days after notices were sent, but notices were never sent, so they never lapsed, exposing the trust assets to substantial amounts of claims.

D. Conflicts of Law – Which State Law Applies? A critical issue to address, which has been decided on a state-by-state basis, is which state law applies when it comes to creditor rights as against the interest of a beneficiary in a trust, whether the trust is a purely discretionary trust administered by a third party, a trust with the standard of distribution such as health, education, maintenance and support administered by a third party or by the beneficiary as trustee or cotrustee, or otherwise. Prior to the adoption of the Uniform Trust Code, each state developed its own jurisprudence.

1. Texas cases. In Texas, in the case of *Lanius v. Fletcher*, 100 Tex. 550, 101 S.W. 1076 (1907), the Texas Supreme Court addressed the situation involving a trust created by an Illinois resident in her will that required her personal property in Texas to be held during the lifetime of the beneficiary's husband. After the testatrix's death, the beneficiary filed an action against the executor, seeking to have the trust terminated. The trial court terminated the trust, holding that the trust's limitation was unenforceable under Illinois law. After the appeals court affirmed, the executors sought review. In reversing, the Supreme Court held that the law of the state where a testatrix was domiciled governed the disposition of personal property, unless it clearly appeared that the testatrix had in mind Texas law. Because the testatrix presumably knew the law of her domicile and would not have imposed the limitation that was unenforceable in her own domicile, the court held that the testatrix intended to apply Texas law, which recognizes that property bequeathed to a wife could be put into the hands of a trustee to hold free from her husband's control. The court also refused to hold that the trust was simple, passive or dry because the trust's purposes had not been accomplished. While that case dealt with "movables," the case of *Toledo Society for Crippled Children v. Hickok*, 152 Tex. 578, 261 S.W.2d 692 (1953) addressed real property. In that case, the decedent was an Ohio resident who made a will leaving charitable beneficiaries certain real properties located in Texas. Under Ohio law, provisions leaving assets to charities when the decedent had legal heirs-at-law were invalid, so the question presented was whether the Ohio law would govern the gifts of real property interests in Texas. The Court of Civil Appeals held that it did and denied the charitable beneficiaries any interest in the property. The Texas Supreme Court reversed saying that the conflict of laws doctrine required that the laws of the state of Texas would apply to property located in Texas. While an Ohio court had invalidated the gifts and reasoned that because the decedent had requested the property to be sold and the money distributed so that the property was really personal property and governed by Ohio law, the Texas court disagreed. It said that the Ohio concept of "equitable conversion" was a fiction that had no place in conflicts of laws. The court went on to say that the doctrine might not even exist in some jurisdictions and was less desirable than a more realistic basis such as the movable or immovable character of the object in question.

2. Arizona Case Law. In the case of *Bowne of Phoenix, Inc. v. Bank One Arizona, N.A.*, 231 Ariz.Adv.Rep. 25, 1996 Ariz.App. LEXIS 284 (Ct. App, Division Two, Department B 1996), the court cited Section 268 of the Restatement (Second) of Trusts, which says, in subsection (1): "A Will or other instrument creating a trust of interests in movables is construed in accordance with the rules of construction of the state designated for this purpose and the instrument." Subsection (2) goes on to say, "In the absence of such a designation, the instrument is construed (a) as to matters pertaining to administration, in accordance with the rules of construction of the state whose local law governs the administration of the trust, and (b) as to matters not pertaining to administration, in accordance with the rules of construction of the state which the testator or settlor would probably have desired to be applicable." In the Bowne case, the court wrestled with (b). The bank contended that Pennsylvania law should have applied because the settlor created the trust there, appointed two Pennsylvania residents as trustees and designated a Pennsylvania bank to serve as a successor trustee. The court, however, noted that the trust itself said that a majority of the income beneficiaries have the authority to appoint a bank or trust company in any state or country and remove any institution that might be serving. The court concluded that if the settlor really wanted Pennsylvania law to apply, then the settlor could have said that, but having allowed the situs of administration to change, the settlor did not have the requisite desire to keep Pennsylvania law involved.

3. New York. In the case of *Ministers & Missionaries Ben. Bd. Of American Baptist Convention v. McKay*, 64 Misc.2d 231, the Supreme Court of New York, in Trial Term in New York County, said, "In the light of the provisions of the present will, has the testatrix elected that her testamentary dispositions be construed and regulated by the laws of this State? There is no express election in so many words, but there appears what may be deemed to be an implied declaration to that effect, when one notes that the trust res is in New York and that a New York trustee was named by the testatrix in her will. What Professor Beale said in that regard is of moment: "In the case of a testamentary trust, the seat of the trust is usually the domicil of the testator, where the will takes effect, unless a contrary intention appears, as by naming a foreign trust company as trustee" (2 Beale on Conflict of Laws, p. 1024; emphasis supplied by Erdheim *v.* Mabee, 305 N. Y. 307, 314 [1953]); particularly in the light of what is stated in section 298 of the Restatement of Conflict of Laws: "A testamentary trust of movables is administered by the trustee according to the law of the state of the testator's domicil at the time of his death unless the will shows an intention that the trust should be administered in another state", and in Comment "C" on that section: "If the testator appoints as trustee a trust company of another state, presumptively his intention is that the trust should be administered in the latter state; the trust will, therefore, be administered according to the law of the latter state." And then it is stated in section 269 of the Restatement 2d, Conflict of Laws (Proposed Off. Draft, 1969): that -- "except when the provision is invalid under the strong public policy of the state of the testator's domicil at death," -- "the validity of a trust of interests in movables created by will is determined … as to matters that affect only the validity of the trust provisions," "by the local law of the state of the testator's domicil at death, except that the local law of the state where the trust is to be administered will be applied if application of this law is necessary to sustain the validity of the trust."

4. Michigan. In the case of *Ford v. Ford*, 80 Mich. 42, 44 N.W. 1057 (1890), the Supreme Court of Michigan heard an appeal where the decedent, a Wisconsin resident, possessed properties in both Wisconsin and Michigan. His will was admitted to probate in his domicile, and in an action instituted by the executor, the will was construed by a Wisconsin court. The executors subsequently took proceedings in the Michigan trial court for the probate and allowance of the will in Michigan. The court held that the meaning and intent of the decedent having been settled by the domiciliary court, the courts in foreign states and countries would be guided by such construction unless it was clearly gathered from the terms used in the will that the decedent had in mind the law of the place of the situs or used language necessarily referring to the usages and appropriate only to the situs. The court found that it was the intention of the decedent, as indicated by the terms of his will, to give to his executor the absolute power to sell and convey the land in Michigan. Because the will had directed that properties including those in Michigan be sold and the money used to buy "more desirable" property in Missouri, the court held that the doctrine of equitable conversion would apply, which means that the Michigan land would be deemed to have already been sold and converted into cash, and thus not be an immovable but a movable item. Although certain trusts under the will would have been void under the Michigan statute against perpetuities if the land was

treated as immovable, that did not prevent the equitable conversion of the lands in Michigan into Missouri lands.

5. UTC Rules. Section 107 of the Uniform Trust Code, or UTC, says, "The meaning and effect of the terms of the trust are determined by: (1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or (2 in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue." Section 108 says "(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, the terms of the trust designating the principal place of administration are valid and controlling if: (1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or (2) all or part of the administration occurs in the designated jurisdiction. (b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. (c) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (b), may transfer the trust's principal place of administration to another State or to a jurisdiction outside of the United States." That section goes on to provide the mechanism for transfer and objection to transfer. Section 403 says, "A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation: (1) the settlor was domiciled, had a place of abode, or was a national; (2) a trustee was domiciled or had a place of business; or (3) any trust property was located."

E. The Uniform Trust Code. By way of brief background, the National Conference of Commissioners on Uniform State Laws, or "NCCUSL", is an organization that is more than 100 years old. Its task is "to provide states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law." The Uniform Trust Code, or UTC, is a project of NCCUSL which began in the mid-1990s and originally produced a draft statute in 2000. David English of Missouri was the "reporter," which means he took all of the comments and suggestions from other commissioners as well as his own and wrote the initial draft of the UTC. In a recent ACTEC podcast, David reviewed the history and challenges of the UTC. One of the areas that the commissioners knew would be difficult to address going in was the area of spendthrift and creditors' rights. David said, "Spendthrift was not part of the British common law. It was invented in the US. There was great diversity of approaches on the states on how to recognize spendthrift particularly concerning exceptions. And we've seen that same diversity spillover into the UTC enactments." The initial draft of the UTC contained Chapter 5 dealing with spendthrift provisions. As states considered the UTC and as they began to adopt it, Chapter 5 was often revised and in some cases completely left out. Four years after the initial draft of the UTC was promulgated, amendments were proposed in 2004. In Chapter 5, some of the comments were revised and a new subsection (e) was added to Section 504. Additional amendments were proposed in 2008 and 2009, but those dealt primarily with life insurance. The current draft of the UTC is set out in the appendix. Overall, Chapter 5 of the UTC begins with Section 501, which states that where a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest, giving the court the power to limit the relief in a way that is appropriate under the circumstances. Section 502 is the primary spendthrift provision, saying that it is valid only if it restrains both voluntary and involuntary transfers, and mere use of the phrase "spendthrift trust" is sufficient to impose that restriction. Once imposed, a beneficiary may not transfer an interest in violation of the provision, and a creditor or assignee may not reach the interest or a distribution by the trustee before its actual receipt by the beneficiary. When drafting Section 503, in essence, the UTC follows the Restatement (Third) of Trusts Section 59(a) (1999), which is similar to Restatement (Second) of Trust Section 157(a) (1959), which is also consistent with federal bankruptcy law that exempts orders for child support and support of former spouse from discharge. The effect is to permit the claimant for unpaid support to attach present or future distributions from a trust that would otherwise be made to the beneficiary. Thus, Section 503 sets out the exceptions to a spendthrift trust, beginning by defining a child as a person for whom an order or judgment for child support has been entered, and then saying that a spendthrift provision is unenforceable against a beneficiary's child, spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance. Likewise, spendthrift provisions are not effective against a

judgment creditor who provided services for the protection of the beneficiary's interest in the trust, or against a claim of the enacting state or the United States to the extent statutes so provide. That section concludes by saying that a claimant against which a spendthrift provision cannot be enforced may obtain an order attaching present or future distributions to or for the benefit of the beneficiary, and the court can limit that relief as is appropriate under the circumstances. Section 504 was an attempt to eliminate the distinction that had existed between discretionary and support trusts, essentially following the Reporter's Notes to the comment in Restatement (Third) of Trusts Section 60. The comments to the UTC say, "By eliminating this distinction, the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard, or both. Other than for a claim by a child, spouse or former spouse, a beneficiary's creditor may not reach the beneficiary's interest. Eliminating this distinction affects only the rights of creditors." In that regard, Section 504 begins by, again, defining child as a person for whom an order or judgment for child support has been entered, and then, subject to the provisions of subsection (c), a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion. Subsection (c) then says that to the extent a trustee has not complied with a standard of distribution or has abused it, 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 the statute then requires the court to direct the trustee to pay 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." The original 2000 version of the UTC concludes by saying that the beneficiary is not limited in his or her rights to sue the trustee for an abuse of discretion or failure to comply with a standard for distribution. The 2004 amendment added subsection (e) says that if the trustee's or co-trustee's discretion to make distributions for the trustee's or co-trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or co-trustee. Some states do not have subsection (e). Section 505 deals with creditor's claims against the settlor, which is beyond the scope of this paper. Section 504 merely says the trust property is not subject to the personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

1. Alabama largely follows the UTC. Code of Ala. Section 19-3B-501 through Section 19-3B-503 are verbatim copies of Sections 501-503 of the UTC. In those, Code of Ala. Section 19-3B-501 provides that to the extent a beneficiary's interest is not subject to 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 benefit of the beneficiary or other means. The court has discretion to limit the award as is appropriate under the circumstances. Code of Ala. Section 19-3B-502 allows the creation of spendthrift provisions, providing in subparagraph (a) that a spendthrift provision is valid only if it restraints both voluntary and involuntary transfer of a beneficiary's interest. In subparagraph (b), it provides the term of the 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 transfers. Subparagraph (c) provides that a beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in Article 5 of the Alabama Uniform Trust Code, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary. Code of Ala. Section 19-3B-503 sets forth the exceptions to the spendthrift provision. Subparagraph (a) defines a "child" to include any person for whom an order or judgment for child support has been entered in Alabama or another state. Subparagraph (b) says that 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; (2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and (3) a claim by the state of Alabama or the United States to the extent an Alabama statute or federal law so provides. Subparagraph (c) says that a claimant against whom a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary, giving the court the power to limit the award as is appropriate under the circumstances. Code of Ala. Section 19-3B-504 deviates from the UTC slightly. The standard UTC language provides in subparagraph (a) creates an exception for child support by defining the term "child" to include any person for whom an order or judgment for child support has been entered.

Alabama's version expands the exception for support to include support of a spouse or former spouse. Subparagraph (b) says that unless subparagraph (c) provides otherwise, whether or not a trust contains 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 that discretion. Subparagraph (c) says that to the extent a trustee has not complied with a standard of distribution or has abused the trustee's 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 (note that standard UTC language includes the terms "spouse, or former spouse" notwithstanding the fact that those terms are not defined in the standard language for UTC subparagraph (a)); and (2) the court is required to direct the trustee to pay 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." Subparagraph (d) says that the above provisions don't 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. Subparagraph (e) says that a creditor may not reach the interest of a beneficiary who is also a trustee or co-trustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.

2. Arizona adopted the UTC in Chapter 11 of Title 14 of the Arizona Revised Statutes. Arizona has rewritten Section 501 in AZ Rev. Stat. Sec. 14-10501 in a way similar to that of South Carolina, which adopted the UTC in 2005, beginning by saying that the court may authorize a creditor or assignee to reach the beneficiary's interest by attachment of present or future distributions and the court may limit the award as is appropriate. The statute then goes on to say that the section does not apply and a trustee has no liability to any creditor of the beneficiary for any distributions made to or for the benefit of a beneficiary to the extent a beneficiary's interest is protected by a spendthrift provision or as a discretionary trust interest referred to in AZ Rev. Stat. Sec. 14-10504 (Section 504). AZ Rev. Stat. Sec. 14-10502 modifies Section 502 in an unusual way. It starts by saying a spendthrift provision is valid only if it restrains either (not both) voluntary or involuntary transfers of a beneficiary's interest. It continues by saying that a spendthrift trust can be created merely by using that phrase and that a beneficiary may not transfer an interest in violation of a spendthrift provision and a creditor or assignee of the beneficiary may not attach, garnish, execute on or otherwise reach the interest or a distribution before its actual receipt by the beneficiary. AZ Rev. Stat. Sec. 14-10503 contains the exceptions to spendthrift protection, and, like most states, it moved the definition of Child as a person for whom an order or judgment for child support has been validly entered from UTC Sec.503(a) down to subsection D in AZ Rev. Stat. Sec. 14-10503, so that it starts by saying that even if a trust contains a spendthrift provision, a beneficiary's child who has a judgment or court order for support or maintenance, or a judgment creditor who has provided services related to the protection of the beneficiary's interest in the trust, may obtain an order attaching present or future distributions to or for the benefit of the beneficiary "only for these matters." The Arizona statute does not mention support orders for a spouse or former spouse and that last quoted phrase seems to make clear that those claimants may not attach an interest in a trust. The statute specifically exempts special needs trusts from the exceptions, and concludes, other than the definition of Child, with a statement that a spendthrift provision is unenforceable against a claim by the state of Arizona or the United States "only to the extent a statute of the state or federal law so provides." AZ Rev. Stat. Sec. 14-10504, dealing with discretionary trusts, like the preceding section, moves the definition of "child' for whom an order of support has been entered, to the end of the section instead of at the beginning where the UTC places it. As with the preceding section, this section does not allow any opportunity for a spouse or former spouse to attach distributions. Instead, it begins by saying that whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has not complied with the applicable standard or has abused his discretion. But if a trustee has not complied with the applicable standard of distribution or has abused the discretion, a distribution may be ordered by the court to satisfy a judgment or court order for child support, and the statute requires the court to direct the trustee to pay to the child an amount that is equitable under the circumstances but not more than the amount the trustee would have been required to distribute. Subsection C

contains the language that says the rights of the beneficiary are not limited in terms of suing a trustee for abuse of discretion or failure to comply with a standard of distribution. It adds, however, "provided that this right may not be exercised by a creditor of the beneficiary or to the extent that any creditor of the beneficiary takes through the name or rights of the beneficiary." The Arizona statutes, in AZ Rev. Stat. Sec. 14-10504(D), add unique language protecting insurance proceeds payable to the trustee to the extent that state law exempts them from creditor claims. It goes on to exempt policy cash surrender value or other distributions or payments which would likewise be exempt. The statute then continues with some of the normal language of Section 504 which says that whether or not the beneficiary is also a trustee or co-trustee, a creditor may not reach the beneficiary's interest or compel a distribution if the trustee's discretion to make distributions for the trustee's or beneficiary's own benefit is limited by an ascertainable standard, including one related to health, education, support or maintenance, making reference to Section 2041(b)(1)(a) (sic) of the Internal Revenue Code. The surprising part of Subsection E of the Arizona statute is that it includes the power of a beneficiary as trustee to make distributions that are entirely within the trustee's discretion, not limited by an ascertainable standard. Commentators have picked up on that difference and there are multiple articles suggesting that the language authorizes self-settled asset protection trusts. See, for example, "A Beneficiary Serving as Trustee May Affect Asset Protection" by Kenneth W. Kingma in Estate Planning, April 2011, Vol. 38, No. 4. As of this date, there is only one case under Arizona law dealing with garnishment of income from a trust, and that case is based on a statute adopted in Arizona in 1990, and not on AZ Rev. Stat. Sec. 14-10504. AZ Rev. Stat. Sec. 14-10505 is beyond the scope of this paper. AZ Rev. Stat. Sec. 14-10506 deals with overdue distributions, providing that whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution if the trustee has not made the distribution to the beneficiary within a reasonable time after the mandated distribution date unless the terms of the trust expressly authorize the trustee to delay the distribution. Mandatory distribution is defined to mean a distribution that the trustee is required to make including a distribution amount for a stated age, a distribution to be made pursuant to a power of withdrawal and a distribution on termination of the trust, but it does not include a distribution that is subject to the exercise of the trustee's discretion even if the distribution is expressed in the form of a standard of distribution or the terms of the trust authorizing a distribution couple language of distribution with language of direction. AZ Rev. Stat. Sec. 14-10507 rounds out Chapter 5 by saying that trust property is not subject to the personal obligations of the trustee, even if the trustee is insolvent or bankrupt.

3. Arkansas, like some other states, adopted Chapter 5 of the UTC, but did not adopt Section 503. Thus, its version of Chapter 5 begins at AR Code Sec. 28-73-501, stating that a beneficiary's interest that is not protected by a spendthrift provision can be reached by creditors but a court can limit relief as is appropriate. AR Code Sec. 28-73-502 says that a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers, and the use of the phrase "spendthrift trust" or words of similar import is sufficient to impose that restriction. Once imposed, a beneficiary may not transfer an interest and a creditor may not reach the interest or a distribution by the trustee before its actual receipt by the beneficiary. AR Code Sec. 28-73-503 is reserved. AR Code Sec. 28-73-504 says that whether or not a trust contains a spendthrift provision, a creditor may not compel a distribution subject to the trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion. That section does not limit the right of a beneficiary to sue the trustee for abuse of discretion or failure to comply with a standard. It adds language unique to Arkansas that says a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries. It concludes by saying a creditor may not reach the interest of a beneficiary who is also a trustee or co-trustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard. AR Code Sec. 28-73-505 deals with creditor claims against settlors, which is beyond the scope of this paper. AR Code Sec. 28-73-506 says that whether or not a trust contains a spendthrift provision, a creditor or assignee of the beneficiary may reach a mandatory distribution if the trustee has not made the distribution within a reasonable time after the designated distribution date. AR Code Sec. 28-73-507 says trust property is not subject to the personal obligations of the trustee.

4. Colorado just adopted the UTC on April 26, 2018. In this context, what's very important is that Colorado did not adopt Part 5 of the UTC related to

spendthrift trusts. For that reason, please see the section of this paper dealing with non-UTC states and the paragraph under it related to Colorado. In the meantime, note that Colorado's statute defines "spendthrift provision" as a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest (CRS Sec. 15-5-103(19)) but the term "spendthrift" is only otherwise used once, and that is in CRS Sec. 15-5-411(3) which provides that a spendthrift provision in a trust is not presumed to constitute a material purpose of the trust.

5. Connecticut has adopted a form of the UTC, following a numbering pattern that is significantly different from standard UTC section numbering. The term "spendthrift" is used only three times in the entire statute, once in the definitions section, again to say that spendthrift protection is not a material purpose, and finally as part of its provisions allowing the creation of self-settled asset protection trusts. Otherwise, generally speaking, the rights of creditors are set out in Section 40. Subsection (a) says that a creditor of a beneficiary (other than a creditor of the settlor) may not attach or compel a distribution of property that is subject to: (1) a power of withdrawal held by the beneficiary if the value of the property subject to the power does not exceed the greater of the amounts specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code and the regulations thereunder as they are in effect on January 1, 2020, the effective date of the act; (2) a power, whether mandatory or discretionary, held by the trustee, including a power held by the beneficiary as the sole trustee or as a co-trustee, to make distributions to or for the benefit of the beneficiary if the power is exercisable only in accordance with an ascertainable standard related to the beneficiary's individual health, education, support or maintenance within the meaning of Section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code in effect on January 1, 2020; or (3) a power, whether mandatory or discretionary, held by the trustee of the trust, including a power held by the beneficiary as the sole trustee or a co-trustee, to make distributions to or for the benefit of a person who the beneficiary has an obligation to support if the power is exercisable by the trustee only in accordance with an ascertainable standard related to health, education, support or maintenance, referring to the same Internal Revenue Code sections. Subsection (b) says that a beneficiary holding a power set forth in subsection (a) is not to be treated as a settlor of the trust during the period the power may be exercised or upon the lapse, release or waiver of the power. Finally, in subsection (c), the statute says that section 40 and section 39 do not apply to statutory trusts (which are business trusts).

6. District of Columbia is a UTC jurisdiction. It adopted Chapter 5 of the UTC largely intact, in D.C. Code Section 19-1305.01 – 1305.05, except that it did not adopt Section 504 which deals with discretionary trusts. D.C. Code Section 19-1305.01 contains the basic language saying that a creditor can reach non-spendthrift trust assets and can limit the extent of the invasion as is appropriate under the circumstances. The D.C. Code adds that whether or not a trust contains a spendthrift provision, the creditor of a beneficiary cannot exercise or compel the exercise of the beneficiary's right to commence, approve or disapprove a proposed trust termination or modification, or combination or division. D.C. Code Section 19-1305.02 follows Section 502 of the UTC, providing that a spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest, and merely saying that the interest of the beneficiary is held subject to a "spendthrift trust" or words of similar import is sufficient to create a spendthrift trust. It concludes by saying a beneficiary may not transfer any interest in a trust in violation of a valid spendthrift provision and a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary. D.C. Code Section 19-1305.03 contains the exceptions to spendthrift protection. The term "child" means any person for whom an order or judgment for child support has been entered and whether or not a trust contains a spendthrift provision, a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain a court order attaching present or future distributions when payable to or for the benefit of the beneficiary. It concludes by saying a spendthrift provision is unenforceable against a claim made by the District of Columbia or the United States to the extent a statute so provides. D.C. Code Section 19-1305.04 is "reserved" (this is where Section 504 of the UTC would have been had it been adopted).

7. Florida adopted Chapter 5 of the UTC in Fla.Stat.Sec. 736.0501 largely tracks Section 501 of the UTC, providing that creditors can reach a beneficiary's interest in a non-spendthrift trust, inserting a cross reference to Section 504. Fla.Stat.Sec. 736.0502 says that a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers and specifically provides that the section does not apply to trusts executed before the effective date of the code.

The section goes on to say that merely saying that a beneficiary's interest is held subject to a spendthrift trust or words of similar import is sufficient to restrain both voluntary and involuntary transfer. Like Section 502 of the UTC, Florida provides that a beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before receipt by the beneficiary. Fla.Stat.Sec. 736.0503 contains exceptions to the spendthrift protection, providing that a spendthrift provision is unenforceable against a beneficiary's child, spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance. Likewise, a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust can pierce the trust. Finally, a claim by Florida or the United States is not barred by a spendthrift provision so long as a statute authorizes seizure of trust assets. The section concludes in a modified fashion by making reference to the Uniform Interstate Family Support Act, saying that a claimant against which a spendthrift provision may not be enforced may obtain a court order or pursuant to the UIFSA, obtain an order attaching present or future distributions. Fla.Stat.Sec. 736.0504 defines "discretionary distribution" to mean one that is subject to a trustee's discretion whether or not expressed in the form of a standard and whether or not the trustee has abused the discretion. It provides that whether or not there is a spendthrift provision, if a trustee may make a discretionary distribution, a creditor may not compel a distribution or attach or otherwise reach the interest which the beneficiary might have as result of the trustee's authority. If the trustee's discretion to make the distributions 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 claims were the beneficiary not acting as trustee. Child support awards have been used as the basis of garnishment of a father's special needs trust, saying special needs trusts don't protect the beneficiary's interests from his or her legal obligation to support a child, which case also said that garnishment of a spendthrift trust should be allowed only as a last resort. *Alexander v. Harris*, 2019 Fla.App. LEXIS 7659 (Fla. 2nd DCA May 17, 2019) See also *Berlinger v. Casselberry*, 123 So.3d 961 (Fla. 2nd DCA 2013).

8. Illinois just adopted the UTC. It will not go into effect until January 1, 2020. It largely tracks the UTC as it was proposed. 760 ILCS Sec. 501 is almost identical to UTC Section 501. The only change made was to add a phrase saying "Except as provided in Section 504…" 760 ILCS section 502 adds a subsection (d) that simply says a spendthrift provision does not prevent the appointment of interests through the exercise of a power of appointment. 760 ILCS section 503 has cross-references to Illinois statutes dealing with the support of the child, spouse or former spouse, and subsection (c) has a sentence added to it indicating that the remedies allowed under Section 503 are to be exercised "only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient." 760 ILCS section 504 has been phrased differently from section 504 of the UTC as promulgated. The net effect is largely the same. It inserts a definition of "discretionary distribution" in place of the subsection which would define a child as a person for whom an order or judgment for child support has been entered. The opening cross-reference to subsection (c) at the beginning of subsection (b) of the promulgated text is omitted, but the balance of the section is largely intact.

9. Kansas adopted the UTC in Chapter 58a of the Kansas Statutes in what is named the Kansas Uniform Trust Code. Chapter 5, denominated Article 5, is partially intact. K.S.A. 58a-501 is word-for-word identical to Section 501 of the UTC as promulgated. K.S.A. 58a-502, however, is a modification and amalgamation of Sections 502, 503 and 504 of the UTC. It starts out in subsection (a) by declaring a spendthrift provision is valid without continuing on to say that it's valid only if it restrains voluntary and involuntary alienation. Subsections (b) and (c) are word for word identical to the UTC version. From that point onward, K.S.A. 58a-502 is completely different from the UTC version. Subsection (d) appears to mirror UTC Section 504(b) in that it says irrespective of whether a trust has a spendthrift provision, a creditor may not compel a distribution to a beneficiary that is subject to the trustee's discretion, even if the standard of distribution is expressed in the form of a standard or the trustee has abused his discretion. Subsection (e) looks something like Section 504(e), that is, it says if a beneficiary is or was serving as sole trustee and the standard of distribution is not in the form of an ascertainable standard, a creditor can compel distributions and can attach the beneficiary's interest in the trust. Subsection (f) is word-for-word identical to Section 504(d) of the UTC, saying that nothing limits the right of a beneficiary to maintain a judicial

proceeding against a trustee. K.S.A. Chapter 58a then "reserves" K.S.A. 58a-503 and K.S.A. 58a-504.

10. Kentucky RS Section 386B.5-020 says that although a trust is a spendthrift trust, the interest of the beneficiary shall be subject to the satisfaction of an enforceable claim against the beneficiary by the spouse or child of the beneficiary for support, or by the spouse for maintenance, by providers of necessary services rendered to the beneficiary or necessary supplies furnished to him, or by the United States or Kentucky for taxes due on account of his or her interest in the trust or the income from it.Maine largely follows the UTC. In 18-B M.R.S. Section 504, a creditor may not compel distribution whether or not the trust contains a spendthrift provision if distributions are subject to the trustee's discretion, even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion. That provision goes on to say that a beneficiary can still sue a trustee for failure to exercise a discretionary power in accordance with the terms and purposes of the trust or for failure to comply with a standard for distribution. Finally, that section goes on to say that if a trustee's discretion to make distributions for the trustee'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. 18-B M.R.S. Section 506 addresses the concept of "mandatory distribution," which means a distribution of income or principal that the trustee is required to make including distributions at termination. It does not include a distribution subject to the exercise of a trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the terms of the trust authorizing a distribution coupled with language of direction. That statute goes on to say that whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution, including one on termination, if the trustee has not made the distribution within a reasonable time after the designated distribution date. "Reasonable time" is not defined.

12. Maryland has a number of applicable statutes. Est.&Trust Code Section 14.5-501 provides that a court may authorize a creditor or an assignee of a beneficiary to reach the interest of the beneficiary by attachment of present or future distributions to or for the benefit of the beneficiary or by other means if that interest is not subject to a discretionary distribution provision, a support provision or a spendthrift provision. That statute goes on to allow a court to limit awards based on factors such as the support needs of the beneficiary, his/her spouse, the former spouse and the dependent children, and/or when the beneficiary is the recipient of public benefits, the supplemental needs of the beneficiary of the trust was not intended to provide for the basic support of the beneficiary, and/or the amount of the claim of the creditor or assignee and the likely proceeds that a sale would produce as compared to the potential value of the interest to the beneficiary. Est.&Trust Code Section 14.5-502 deals with discretionary distribution provisions, saying in general that a beneficiary has no property right and may not be judicially foreclosed, attached or transferred. Creditors of that beneficiary have no enforceable right (if the beneficiary did not create the trust) against trust income or principal that may be distributed only in the exercise of discretion. Trust property that is subject to discretionary distribution provisions is not subject to the enforcement of a judgment until the income or principal is distributed directly to the beneficiary. That section goes on to say that creditors cannot compel distributions. The protection of discretionary distribution provisions is removed to the extent that the beneficiary may withdraw assets. Est.&Trust Code Section 14.5-503 provides that the beneficial interest subject to a support provision likewise may not be judicially foreclosed, attached by a creditor or transferred by the beneficiary, and trust property that is subject to a support provision is not subject to the enforcement of a judgment until income or principal is distributed directly to the beneficiary. If the trust owns a single parcel of residential real property designated for use by the beneficiary where the beneficiary's interest is subject to a support provision, then the beneficiary may not transfer the use, occupancy or enjoyment of the property, and is not subject to the enforcement of a judgment against the beneficiary. Est.&Trust Code Section 14.5-504 generally validates spendthrift provisions. Est.&Trust Code Section 14.5-505 begins the sections listing allowable claims. A claim against the beneficiary by a child, spouse or former spouse of the beneficiary that is a judgment or court order for support or maintenance, or a judgment creditor that has provided services for the protection of the interest of a beneficiary in the trust, or a claim by Maryland or the United States to the extent a Maryland statute or federal law allows, can reach the beneficiary's interest in a trust even if it is subject to a spendthrift provision or a support provision (notice that a discretionary distribution provision continues to protect the trust). Est.&Trust Code Section 14.5-506 provides that to the

extent the interest of a beneficiary is subject to a mandatory distribution provision, other than a support provision, and the trust does not contain a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to attach present or future mandatory distributions to or for the benefit of the beneficiary, or reach the beneficiary's interest by other means. Here, again, a creditor or an assignee may reach a mandatory distribution if it is not distributed within a reasonable time.

13. Massachusetts in ALM GL ch. 203E Section 501 provides that a beneficiary's interest that is not subject to a spendthrift provision can be reached by a creditor or assignee by attachment of present or future distributions. Interestingly, Massachusetts did not adopt Section 503 of the UTC, which allows a child, spouse or former spouse to get to trust assets and income for support and maintenance purposes. In the famous (or infamous) *Pfannenstiehl v. Pfannenstiehl*, 475 Mass. 105, 55 N.E.3d 933 (2016).

14. Michigan adopted the UTC but substantially modified Part 5. MCLA Sec. 700.7501 declares that Part 5 applies to creditor's or transferee's claims with respect to spendthrift, support and discretionary trusts. MCLA Sec. 700.7502 begins, in subsection (1) that a spendthrift provision is valid and enforceable, but it does not contain the language about only if it restrains voluntary and involuntary transfers. Subsection (2) is identical to UTC Section 502(b) where it says that calling a trust a spendthrift trust is sufficient. Then subsection (3) starts off with cross references to sections 7504, 7506 and 7507, but otherwise says that a beneficiary's interest may not be transferred in violation of a spendthrift provision and is not subject to enforcement of the judgment until directly distributed. MCLA Sec. 700.7503 is where the substantial modifications begin. This section deals with trusts for support. It says that the interest of a beneficiary that is subject to a support provision may not be transferred and is not subject to enforcement of a judgment until income or principal is distributed. After distribution, the distribution is subject to enforcement. MCLA Sec. 700.7504 looks like UTC Section 503. It starts off by saying that the interest of a trust beneficiary, even though subject to a spendthrift provision, may be reached in satisfaction of an enforceable claim for child support in favor of the child or a former spouse supported by judgment or court order, or judgment creditor who is provided services that enhance, preserve or protect the trust beneficiary's interest or claim by Michigan or the United States. The Court is ordered to direct the trustee to satisfy those judgments but only out of all or part of distributions as they become due. Then it says that none of this is applicable to trusts with purely discretionary standards. MCLA Sec. 700.7505 deals with discretionary trusts, saying a transferee or creditor of the beneficiary does not have a right to any amount of trust income or principal that may be distributed only in the exercise of the trustee's discretion. Trust property is not subject to enforcement until actually distributed. MCLA Sec. 700.7507 contains the language about overdue distributions that is normally in UTC Section 504, saying whether or not a trust has a spendthrift provision, a creditor or assignee of a trust beneficiary can reach mandatory distributions if the trustee has not made the distribution within a reasonable time after the designated distribution date.

15. Minnesota in Minn. Stat. Section 501C.0504 provides that whether or not a trust contains 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. Minn.Stat. Section 501C.0506 provides that a mandatory distribution that is overdue can be reached by a creditor or assignee of a beneficiary if the trustee has not made the distribution within a reasonable time. Minnesota did not adopt Section 503 of the UTC.

16. Mississippi is a UTC state but omitted Article 5. For that reason, anything related to spendthrift trusts falls under other provisions of its statutes or its case law.

17. Missouri adopted part of Article 5. RSMo Section 456.5-503 provides that even if a trust contains a spendthrift provision, a beneficiary's child, spouse or former spouse who has a judgment against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain from a court an order attaching present or future trust income. It goes on to say that a spendthrift provision is unenforceable against a claim by Missouri or the United States to the extent a statute of state or federal law so provides. RSMo Section 456.5-504 says that a beneficiary's interest in a trust that is subject to the trustee's discretion does not constitute an interest in property or an enforceable right even if the discretion is expressed in the form of a standard of distribution or the beneficiary is then serving as a trustee or co-

trustee. A creditor or other claimant may not attach present or future distributions from such an interest or right, obtain an order from a court forcing the judicial sale of the interest or compelling the trustee to make distributions, or reach the interest or right by any other means, even if the trustee has abused the trustee's discretion. In *Olsen v Reuter (In re Reuter)*, 499 B.R. 655 (Bankr. W.D. Mo. 2013), the court interpreted Bankruptcy Code Section 541(a)(1) which defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." And the interest which a debtor retains in a trust is property of the estate, including the power to amend the trust and the power to revoke a revocable trust. The court held that the bankruptcy trustee succeeded to the rights of the debtor as trustee. On the other hand, a beneficiary's interest in a trust subject to the trustee's discretion is not an interest in property, citing the Missouri statutes. The trust in this case had a health, support in reasonable comfort, best interests and welfare standard which the court found was a discretionary interest and therefore not property of the estate. The court went on to say that to the extent a debtor had contributed property to a revocable trust over which the debtor had the power of revocation, the assets the debtor could receive upon revocation were assets in the bankruptcy estate. On the other hand, assets of the other settlor were not. The court also held that as long as a spendthrift trust is enforceable under Missouri law, the trust assets are protected from the reach of a debtor's creditors, whether in bankruptcy or otherwise.

18. Montana adopted parts of the UTC, but not Section 503. MT Stat. Section 72-38-504 provides the same discretionary standard seen before, which is that a creditor of a beneficiary may not compel a distribution that is subject to a trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion.

19. Nebraska has adopted Section 503 in R.R.S. Neb. Section 30-3848, providing that a spendthrift provision is unenforceable against a beneficiary's child, spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance, a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, and a claim by Nebraska or the United States to the extent a statute of Nebraska or federal law so provides. R.R.S. Neb. 30-3849 provides that whether or not a trust contains a spendthrift provision, a creditor of the beneficiary may not compel a distribution that is subject to the trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion. To the extent, however, that a trustee has not complied with a standard of distribution or has abused a discretion, 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 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.

20. New Hampshire RSA Section 564-B:5-502(d) provides that a creditor or assignee of a beneficiary may not reach the beneficiary's interest in a spendthrift trust or a distribution from the trust before its receipt by the beneficiary. Subsection (e) goes on to provide that the beneficiary's interest is not property for purposes of RSA Section 458:16-a related to property settlements in an annulment, divorce or separation, and are not subject to any forced heirship, legitime, forced share or any similar heirship rights under the laws of any jurisdiction. Subsection (f) goes on to provide for "Exception creditors" which, with respect to the beneficiary, including an individual to the extent there is a judgment or court order against the beneficiary for child support, a spouse or former spouse to the extent that there is a judgment or court order for basic alimony (defined as the portion of alimony attributable to the most basic food, shelter and medical needs to the extent the judgment or court order expressly specifies that portion), a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, or New Hampshire or the United States to the extent that a New Hampshire statute or federal law so provides. RSA Section 564-B:5-504 says that whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may not compel distribution that is subject to the trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion ("Exception creditors" are excluded from the operation of this provision – see below). However, subsection (c) provides that a court may compel a distribution to the beneficiary to the extent that the beneficiary is a trustee or in any fiduciary capacity, has the power to direct distributions, and in that capacity, the beneficiary has

the discretionary power to make distributions to himself or herself or the discretionary power to direct distributions to himself or herself, and the discretion is expressed in the form of a standard of distribution, and the beneficiary can exercise the power without the consent of any trustee or trust advisor or trust protector or person holding an adverse interest, and the beneficiary has abused the discretion. Subsection (e) goes on to create the definition of "Exception creditors" which include an individual to the extent that there is a judgment or court order against the beneficiary for child support, or a spouse or former spouse to the extent that there is a judgment or court order against the beneficiary for basic alimony (meaning the portion of alimony attributable to the most basic food, shelter and medical needs if the judgment or court order expressly specifies that portion). In compelling a distribution for those purposes, the court "shall direct the trustee to pay to the exception creditor an amount that is equitable under the circumstances" but not more than the lesser of the amount necessary to satisfy the judgment and the maximum amount of trust property that can be distributed to or for the benefit of the beneficiary.

21. New Jersey has adopted some parts of Article 5 of the UTC, but not Section 503. N.J. Stat. Section 3B:31-36, which defines a spendthrift trust, adds a provision that says that a spendthrift provision is valid even though a beneficiary is named as the sole trustee or as a co-trustee of the trust. N.J. Stat. Section 3B:31-38 provides that whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion. N.J. Stat. Section 3B:31-40 provides that where a mandatory distribution is overdue, then whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach the mandatory distribution of income or principal that the trustee has not made to the beneficiary within a reasonable period of time after the mandated distribution date.

22. New Mexico has adopted Section 503 as promulgated. N.M. Stat. Ann. Section 46A-5-503, as in other cases, defines a child as a person for whom an order or judgment of child support has been entered in New Mexico or another state, and goes on to say that a spendthrift provision is unenforceable against a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance, or against the judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, or for a claim by New Mexico or the United States to the extent a New Mexico statute or federal law so provides.

23. North Carolina adopted Chapter 5 of the UTC, but substantially modified Section 503. It includes only the provision saying that a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. It does not contain provisions granting any rights to a spouse, former spouse, judgment creditor who provided services for the protection of the interest, or a claim by North Carolina or the United States. For discretionary trusts, Section 504 was adopted but modified. It still defines a discretionary trust as a trust that is subject to the trustee's discretion, whether or not expressed in the form of a standard of distribution. Generally, then, a creditor or assignee of a beneficiary may not reach a discretionary trust interest or a distribution by the trustee before its receipt by the beneficiary. A creditor cannot compel a distribution even if the trustee has abused the trustee's discretion, except that where a trustee has not complied with the standard or has abused discretion, a distribution can be ordered to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child and the court "shall direct" the trustee to pay the child an amount that is equitable under the circumstances but not more than the amount that the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or had not abused discretion.

24. North Dakota has also adopted Chapter 5 of the UTC, including Section 503. As in other instances, N.D. Code Section 59-13-03 defines a "child" as a person for whom an order or judgment of child support has been entered, and then provides that a spendthrift provision is unenforceable against a beneficiary's child, spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance. It goes on to say that a spendthrift provision is unenforceable against a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, and likewise is unenforceable against a claim of North Dakota or the United States to the extent a statute so provides. The section goes on to say that those

exceptions do not apply either to self-settled or third-party special needs trusts which meet the qualifications of 42 USC 1396p(d). N.D. Code Section 59-13-04 says that whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if the discretion is expressed in the form of a standard of distribution, or the trustee has abused the discretion. Like other states, it goes on to say that to the extent a trustee has not complied with a standard of distribution or has abused a discretion, 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 the court is required to direct the trustee to pay 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." That code section goes on to say that if the trustee's or co-trustee's discretion to make distributions for the trustee's or co-trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim if the beneficiary was not acting as trustee or co-trustee.

25. Ohio has likewise adopted Chapter 5 of the UTC, but has made some substantive as well as stylistic changes. ORC Ann. 5805.01 contains the basic spendthrift provision. ORC Ann. 5805.02, which is a form of UTC Section 503, contains the typical definition of child, but then provides that a spendthrift provision is unenforceable against either the beneficiary's child or spouse who has a judgment or court order against the beneficiary for support, but only if distributions can be made for the beneficiary's support or the beneficiaries entitled to receive mandatory distributions under the terms of the trust, or in situations where a claim by Ohio or the United States is made to the extent provided by ORC or Federal law. This section leaves out the provision in UTC Section 503 about a claim by a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust. ORC Ann. 5805.02 goes on to include a provision which is typically found in the adaptation of UTC Section 504 which provides that the claimants allowed to avoid a spendthrift provision (described above) may obtain from the court an order attaching present or future distributions to or for the benefit of the beneficiary, and provides that the court may limit the award to the relief that is appropriate under the circumstances, considering among other factors the support needs of the beneficiary, the beneficiary's spouse and the beneficiary's dependent children or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary's basic support. The section concludes by saying that the "only exceptions to the effectiveness of a spendthrift provision are those ORC Ann. 5805.02, as well as in ORC Ann. 5805.05(B), ORC Ann. 5805.06 and ORC Ann. 5810.04 (see below for description of these provisions). ORC Ann. 5805.03 provides that notwithstanding the provisions of ORC Ann. 5805.03, no creditor or assignee of a beneficiary of a wholly discretionary trust may reach the beneficiary's interest in the trust or distribution by the trustee before its receipt by the beneficiary by any means. ORC Ann. 5805.04, which adopts UTC Section 504, provides that whether or not a trust contains a spendthrift provision, a creditor of the beneficiary may not compel a distribution that is subject to the trustee's discretion, even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion. It adds a unique Ohio reference providing that the protection just stated does not apply to the state of Ohio for any claim for support of a beneficiary in a state institution if the terms of the trust do not include a spendthrift provision and do include a standard for distributions to or for the benefit of the beneficiary under which the trustee may make distributions for the beneficiary's support. That section goes on to say that unless the settlor has explicitly provided in the trust that the beneficiary's child or spouse or both are excluded from benefiting from the trust, to the extent a trustee of a trust that is not a wholly discretionary trust has not complied with the standard of distribution or has abused a discretion, then: (1) the court may order a distribution to satisfy a judgment or order against the beneficiary for support of the beneficiary's child or spouse, provided the court may order the distributions only if distributions can be made for the beneficiary's support under the terms of the trust and that the court may not order any distributions to satisfy a judgment or court order against the beneficiary for support of the beneficiary's former spouse; and (2) the court is required to direct the trustee to pay to the child or spouse the amount that 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 abuse the discretion. In addition,

that section provides that even if a trust does not contain a spendthrift provision, to the extent a beneficiary's interest is subject to the exercise of discretion, whether or not such discretion is subject to one or more standards of distribution, the interest may not be ordered sold to satisfy or partially satisfy a claim of the beneficiary's creditor or assignee. If the trustee's or co-trustee's discretion to make a distribution for the trustee's or co-trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interests would be subject to the creditor's claim if the beneficiary were not acting as trustee or co-trustee. ORC Ann. 5805.05 deals with mandatory distributions. Unlike other states, it begins with a long paragraph dealing with trusts which do not have spendthrift provisions, and says a court may authorize a creditor or assignee of the beneficiary to attach present or future mandatory distributions to or for the benefit of the beneficiary or to reach the beneficiary's interest by other means, going on to allow the court discretion on limiting the award taking into account factors like support needs of the beneficiary, etc. Then ORC Ann. 5805.05(B) (referred to above) contains the usual language saying that whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary of a trust may reach a mandatory distribution the beneficiary is entitled to receive if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date. Unlike other states, the Ohio statute does not go on with language about ordering distributions for the support or maintenance of the beneficiary's child, spouse or former spouse. That appears to reflect the language in the preceding section allowing a settlor to explicitly exclude benefits for children and spouses. ORC Ann. 5805.06 (referred to above) deals with creditor claims against the settlor of the trust [a topic not discussed in this paper]. ORC Ann. 5810.04 (referred to above) deals with attorney's fees and costs provided that in a judicial proceeding involving the administration of a trust, including a trust that contains a spendthrift provision, the court may award costs, expenses and reasonable attorney's fees to any party, to be paid by another party, from the trust that is the subject of the controversy, or from a party's interest in the trust that is the subject of the controversy.

26. Oregon has adopted the UTC and Part 5 is contained in ORS Sec.130.300-ORS Sec.130.325. Note that the section numbers skip - 300, 305, 310, 315, 320 and 325. ORS Sec.130.300 mirrors Section 501 of the UTC, saying that where a beneficiary's interest is not protected by spendthrift provision, a court may authorize a creditor or assignee to reach the interest. ORS Sec.130.305, which is Section 502 of the UTC, is virtually verbatim the same, saying that a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers. Saying a trust is a spendthrift trust or words of similar import is good enough. A beneficiary cannot transfer interests in violation of a spendthrift provision. After making some cross-references to the rest of Part 5, it says a creditor or assignee of a beneficiary may not reach the interest of the beneficiary or any distribution until it's actually received by the beneficiary. The one real addition is subsection (4), which says that a nonjudicial settlement agreement is not, by itself, a transfer in violation of a valid spendthrift provision. ORS Sec.130.310 is largely like UTC Section 503, defining a child as being someone for whom a judgment for child support has been entered, and then providing that even if a trust contains a spendthrift provision, the holder of a judgment for support or maintenance of the beneficiary's child, spouse or former spouse may obtain an order authorizing garnishment or other execution against present or future distributions to or for the benefit of the beneficiary, giving the court the power to dial that back as the court sees fit. It goes on to say that a spendthrift provision is unenforceable against a claim by the state of Oregon or the United States. UTC Section 504 dealing with discretionary trusts is missing. ORS Sec.130.320 is a copy of UTC Section 506 regarding overdue distributions.

27. Pennsylvania has adopted Part 5 of the UTC almost verbatim. It has rearranged some subsections in a minor way but not with any significant impact. Pa.C.S. Sec. 7741 starts off by saying a judgment creditor can reach an interest not protected by the spendthrift provision. Pa.C.S. Sec. 7742 says that a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers, and merely saying a trust is a spendthrift trust is sufficient. A beneficiary may not transfer an interest in violation of a spendthrift provision and a creditor may not reach the interest or a distribution by the trustee before its receipt by the beneficiary. Pa.C.S. Sec. 7743 is one of the two sections that has a slight rearrangement. Subsection (a), which defines a child as a person for whom an order of support has been entered, has been moved down and is subsection (d) and subsection (a) is "reserved." Otherwise, it is the same as UTC Section 503 which says that a spendthrift provision is unenforceable against the beneficiary's child for whom a support

order has been entered, or is against the person for whom a judgment for support or maintenance has been entered (it is not limited to a spouse or former spouse), and is likewise unenforceable against the creditor providing services for the protection of the beneficiary's interest, or a claim by Pennsylvania or the United States. Pa.C.S. Sec. 7744 is the other rearranged section with subsection (a) being "reserved" and the definition of a child having a support order has been moved down to subsection (f). In addition, UTC Section 503(e) has been moved up and made a part of subsection (b) but the meaning stays the same, which is that a creditor may not compel a distribution even if the discretion of the trustee is expressed in the form of a standard of distribution, or the trustee has abused the discretion, or the beneficiary as the trustee or a co-trustee of his own trust. Subsection (c) says that the spendthrift provision does not protect against a claim by a child with an order for child support or another person with an order for support (again not limited to a spouse or former spouse).

28. South Carolina adopted the UTC as part of Article 7 in Title 62 of the South Carolina Code of Laws. S.C.Code Ann. Sec. 62-7-501 says that where a trust does not have a spendthrift provision, the court can authorize a creditor or assignee to reach the beneficiary's interest. It goes on to say that the section doesn't apply if the interest is protected by a spendthrift provision or if the trust is a discretionary trust as referred to in S.C.Code Ann. Sec. 62-7-504. S.C.Code Ann. Sec. 62-7-502 says, as might be expected, that a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers. Merely using the phrase spendthrift trust is enough and a beneficiary may not transfer an interest in violation of the spendthrift provision. S.C.Code Ann. Sec. 62-7-503 lists the exceptions to spendthrift protection. It starts with the definition of a child as a person for whom an order of support has been entered. It says even if a trust contains a spendthrift provision, a beneficiary's child who has a support order may attach present or future distributions. That rule however does not apply to special needs trusts if the application of the provision would invalidate the trust's exemption from consideration as a countable resource for Medicaid or SSI purposes. S.C.Code Ann. Sec. 62-7-504 again defines child as a person for whom a support order has been entered and then says that a creditor of a beneficiary may not compel a distribution from a trust where the trustee has the power to exercise discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has abused his discretion. If the trustee hasn't complied with the standard of distribution or has abused his discretionary authority, a distribution may be ordered to satisfy a judgment against the beneficiary for child support, and the court is required to direct the trustee to pay the child such amount as is equitable under the circumstances. Nothing limits the power of the beneficiary to sue the trustee for an abuse of discretion. Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution from insurance proceeds payable to the trustee as beneficiary to the extent state law exempts those proceeds. A creditor of a beneficiary who is also a trustee or co-trustee may not reach the trustee's beneficial interest or otherwise compel a distribution.

29. Tennessee has placed Part five of the UTC in Chapter 15 of Title 35 of the Tennessee Code. Tenn. Code Ann. Sec. 35-15-501 says that a court may authorize a creditor or assignee to reach a beneficiary's distribution by attachment or otherwise if there is no spendthrift provision. Tenn. Code Ann. Sec. 35-15-502 indicates a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers, and says that merely using the term "spendthrift trust" is sufficient to create one. A spendthrift provision applies to all beneficial interests including distributions and remainders. A beneficiary cannot transfer an interest in violation of a spendthrift provision and a creditor cannot reach the interest, present, future or prospective. Interestingly, the Tennessee Code adds a subsection saying that regardless of whether a beneficiary has an outstanding creditor, a trustee may directly pay any expense on behalf of the beneficiary and may exhaust the income and principal of the trust for his or her benefit. No trustee is liable to any creditor for doing that if the trust has a spendthrift provision. Tenn. Code Ann. Sec. 35-15-503 merely says a spendthrift provision is unenforceable against a claim by the state of Tennessee. The balance of UTC Section 503 was not adopted. Tenn. Code Ann. Sec. 35-15-504 starts off by saying a discretionary interest is neither a property interest nor an enforceable right but a mere expectancy. If there is a discretionary interest, then whether or not the trust is a spendthrift trust, no creditor or assignee can force or otherwise reach a distribution, and no creditor or assignee can require trustee to make a distribution. Regardless of whether a beneficiary has outstanding creditors, the trustee can pay expenses directly and not face any liability for doing so. If a beneficiary is also the trustee, those rules are applicable if the beneficiary does not have the discretion to make or participate in making

distributions to himself, the distribution provision has an ascertainable standard, or the power to make distributions is exercisable only with the consent of a person holding an adverse interest.

30. Utah. Utah Code Ann. Sec. 75-7-501 says that an interest that's in a non-spendthrift trust can be reached by creditors. Utah Code Ann. Sec. 75-7-502 says they spendthrift provision is valid only if it restrains both voluntary and involuntary transfers, even if the beneficiary is a trustee or co-trustee. Merely using the phrase "spendthrift trust, is sufficient to restrain transfer. A beneficiary may not transfer an interest in violation of the spendthrift provision. Utah Code Ann. Sec. 75-7-503 contains exceptions to spendthrift provisions, first defining a child as a person for whom an order or judgment of child support is been entered, and then defining "restitution" by cross reference to another section of the Tennessee Code, and likewise defining "victim" in the same way. It then says that even if a trust contains a spendthrift provision, a beneficiary's child who has a child support order can reach present or future distributions. In *Booth v. Booth*, 2006 UT App 144 (Court of Appeals of Utah 2006), the issue of whether a claim for child support could bypass the spendthrift clause came before the Utah Court of Appeals. In 1994, Charlotte Booth, mother of the husband, John Booth, created a trust which was to terminate at her death and distribute assets. Joan Booth was married to John, and they divorced in 1988. After Charlotte died, the trustee distributed to Joan her share of the trust and obtained a release of liability. Based on narrowly drawn reasoning, the court disregarded the release and addressed the spendthrift protection, citing Utah Code Ann. Section 75-7-503(2), which is the Utah version of Section 503 of the UTC, saying "However, and of utmost importance here, section 75-7-503(2) of the Utah Code renders spendthrift provisions null and void against the claim of a beneficiary's child for court-ordered child support." Likewise, a judgment creditor who has provide services for the protection of the interest can do so. Finally, a victim who has a judgment requiring the beneficiary to pay restitution can reach present and future distributions. Finally, a spendthrift provision is unenforceable against a claim by the state of Utah or the United States. Utah Code Ann. Sec. 75-7-504 deals with discretionary trusts, starting out by defining child as a person for whom an order of judgment of child support has been entered and then going on to say that with certain exceptions, whether or not a trust contains a spendthrift provision, a creditor may not compel a distribution subject to the trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion. The exception to that is that where the trustee has not complied with the standard of distribution or has abused discretion, a distribution may be ordered to satisfy a judgment for support or maintenance of the beneficiary's child, spouse or former spouse. The statute requires the court to order the trustee to pay the child, spouse or former spouse whatever's equitable under the circumstances but not more than the existing judgment, and nothing limits the right of the beneficiary to sue the trustee.

31. Vermont adopted Part 5 of the UTC in Title 14A. Vt.Stat.Ann.tit. 14A, Sec. 501 provides that trusts which don't have a spendthrift provision can be reached by creditors. Vt.Stat.Ann.tit. 14A, Sec. 502 says the spendthrift provision is valid only if it restrains both voluntary and involuntary transfers and says that using the phrase "spendthrift trust" is sufficient. It closes by saying a beneficiary may not transfer an interest in violation of a valid spendthrift provision. Vt.Stat.Ann.tit. 14A, Sec. 503 starts off by defining child as a person for whom an order or judgment of child support has been entered, and then says a spendthrift provision is unenforceable against a beneficiary's child who has such an order, or judgment creditor who has provided services for the protection of the beneficiary's interest in the trust, or a claim by Vermont or the United States. Where a spendthrift provision can be avoided, the claimant is entitled to a court order attaching present or future distributions to or for the benefit of the beneficiary. Vt.Stat.Ann.tit. 14A, Sec. 504 deals with discretionary trusts, starting off by defining a child as a person for whom an order or judgment of child support has been entered. Whether or not a trust contains a spendthrift provision, a creditor may not compel a distribution subject to a trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion. However, where the trustee has not complied with the standard or has abused discretion, a distribution may be ordered by the court to satisfy a judgment against the beneficiary for support or maintenance of the beneficiary's child, spouse or former spouse, and the statute requires the court to direct the trustee to pay the child, spouse or former spouse amounts that are equitable but not more than what the trustee would be required to distribute to or for the benefit of the beneficiary. The statue doesn't limit the right of a beneficiary to sue the trustee. If a trustee is allowed to make distributions for his own benefit and that is limited by an ascertainable standard,

a creditor may not reach or compel distributions except to the extent the interest would be subject to the creditor's claim were the beneficiary not the trustee.

32. Virginia's UTC is in Title 64 of the Code of Virginia. Va. Code Ann. Sec. 64.2-742 says that where a beneficiary's interest is not subject to a spendthrift provision, a court can attach the beneficiary's interest. Va. Code Ann. Sec. 64.2-743 says a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers, and merely saying a trust is a spendthrift trust is sufficient to create one. Once created, a beneficiary may not transfer an interest in violation of that provision. Va. Code Ann. Sec. 64.2-744 creates exceptions to spendthrift protection. It defines a child as a person for whom an order or judgment of child support has been entered and then says that even if a trust has a spendthrift provision, a beneficiary's child who has such an order, or a judgment creditor who has provided services for the protection of the beneficiary's interest, may obtain an order attaching present or future distributions to or for the benefit of the beneficiary. Absent from this provision is anything allowing a spouse or former spouse to get such relief. Va. Code Ann. Sec. 64.2-745 deals with supplemental needs trusts saying, notwithstanding anything to the contrary, if a statute or regulation requires the beneficiary to reimburse Virginia or any agency for public assistance, the Attorney General may sue the trust for reimbursement. Va. Code Ann. Sec. 64.2-745.1-745.2 contain Virginia's self-settled asset protection trust provisions (which are beyond the scope of this paper). Va. Code Ann. Sec. 64.2-746 addresses discretionary trusts, beginning with the definition of a child as a person for whom an order or judgment for child support has been entered. It says whether or not a trust contains a spendthrift provision, a creditor may not compel a distribution subject to the trustee's discretion even if expressed in the form of a standard of distribution or the trustee has abused his discretion. But if the trustee has not complied with the standard or has abused his discretion, a distribution may be ordered to satisfy a judgment or court order for support or maintenance of a child and the statute directs the court to order the trustee to pay the child such amount as is equitable but not more than what the trustee would be required to distribute otherwise. Nothing limits the ability of the beneficiary to sue the trustee. The statute concludes by saying a creditor may not reach the interest of the beneficiary who is a trustee or co-trustee if the trustee's discretion to make distributions is limited by an ascertainable standard.

33. West Virginia statutes provide in W.Va. Code Sec. 44D-5-501 that a beneficiary's interest that is not protected by a spendthrift provision can be reached by creditors. W.Va. Code Sec. 44D-5-502 says that a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers and using the phrase "spendthrift trust" is sufficient to accomplish the purpose. A beneficiary cannot transfer an interest in a spendthrift trust. W.Va. Code Sec. 44D-5-503 sets forth exceptions to spendthrift provisions, first by defining a child as a person for whom an order or judgment for child support has been entered, and then saying a spendthrift provision is unenforceable against that child, or against a judgment creditor who has provided services for the protection of the beneficiary or a claim by West Virginia or the United States. When the spendthrift provision is unenforceable, the claimant can obtain an order attaching present or future distributions. W.Va. Code Sec. 44D-5-503a-503c contain West Virginia's self-settled asset protection trust provisions which are beyond the scope of this paper. W.Va. Code Sec. 44D-5-504 deals with discretionary trusts, starting off by defining a child as a person for whom an order or judgment for child support has been entered and then saying whether or not a trust has a spendthrift provision, a creditor may not compel distribution even if the discretion is expressed in the form of a standard of distribution or the trustee has abused his discretion. However, if the trustee is not complied with the standard of distribution or has abused his discretion, a distribution can be ordered to satisfy a judgment or court order for child support and the statute requires the court to direct the trustee to pay the child, spouse or former spouse such amount as is equitable but not more than what the trustee would have been required to distribute otherwise. Nothing limits the right of a beneficiary to sue the trustee and a creditor may not reach the interest of a beneficiary who is also a trustee or co-trustee if the trustee's discretion to make distributions is limited by an ascertainable standard.

34. Wisconsin provides in Wis. Stat. Sec. 701.0501 that where a beneficiary's interest is not protected by a spendthrift provision, a creditor can reach that interest, but that provision does not apply to a trust for an individual with a disability. A trustee is not liable to a creditor if the beneficiary's interest is protected by a spendthrift provision or the trust is a trust for an individual with a disability. Wis. Stat. Sec. 701.0502 says the spendthrift provision is valid only if the beneficiary is a person other than the settlor and is not treated as the settlor under another provision, or the

trust is for an individual with a disability. Subject to that, a term of a trust saying the beneficiary's interest is held subject to a spendthrift trust or words of similar import restrains both voluntary and involuntary transfers. A beneficiary may not then transfer an interest in a spendthrift trust. Real property or tangible personal property that is owned by the trust but that is made available for a beneficiary's occupancy or use in accordance with the trustee's authority may not be considered to have been distributed by the trustee or received by the beneficiary. Wis. Stat. Sec. 701.0503 contains exceptions to spendthrift provisions. First it says that on application a person having a valid order directing a beneficiary to make payment for support of the beneficiary's child, the court may order the trustee to satisfy part or all of the claim if the beneficiary is entitled to receive income or principal, or if the beneficiary may receive income or principal at the trustee's discretion, the court can order the trustee to satisfy all or part of the claim out of future payments that are made pursuant to the exercise of discretion. If the settlor of the trust is legally obligated to pay for public support of a beneficiary, or the beneficiary is legally obligated to pay for the beneficiary's public support, a court may order the trustee to satisfy part or all of the liability out of part or all of the payments of income or principal to which the beneficiary is entitled as they are due, presently or in the future, or where the distributions are discretionary, the court may order the trustee to satisfy the claims when distributions are made in the trustee's discretion. In the case of a beneficiary who may receive income or principal at the trustee's discretion and who is a settlor or a spouse or minor child of the settlor, the court can order the trustee to satisfy the liability without regard to whether the trustee is then exercised or may thereafter exercise discretion in favor of the beneficiary. None of that applies to a trust for an individual with a disability; assets of the trust that are exempt from claims of creditors under other statutes are not subject to those provisions. Wis. Stat. Sec. 701.0504 deals with discretionary trusts, saying that a beneficiary's interest in a trust that is subject to the trustee's discretion does not constitute an interest in property or an enforceable right even if the discretion is expressed in the form of a standard of distribution or the beneficiary is then serving as trustee or co-trustee. A creditor or other claimant may not attach present or future distributions from a beneficiary's interest in property or an enforceable right, obtain an order from a court forcing judicial sale or compelling the trustee to make distributions, or reach the interest or right by any other means, even if the trustee has abused the trustee's discretion. However, those restrictions don't apply if the beneficiary is acting as sole trustee for his own benefit and his discretionary authority is not limited by an ascertainable standard or the consent of a person holding an adverse interest. Nothing limits the right of a beneficiary to sue the trustee.

35. Wyoming, like some of the other states described above, has adopted the UTC but it also has adopted self-settled asset protection trust provisions which are folded into Part 5. Wyo. Stat. Ann. Sec. 4-10-501 starts off by saying that where a beneficiary's interest is not subject to a spendthrift provision or the exercise of the trustee's discretion, the court may authorize attachment of distributions when distributions are received by the beneficiary or third party for the benefit of the beneficiary. Wyo. Stat. Ann. Sec. 4-10-502 does not contain the usual requirement that a spendthrift provision is valid only if it restrains both voluntary and involuntary transfers, but does say that merely using the phrase "spendthrift trust" is sufficient to accomplish that. Except in the case of a valid disclaimer, a beneficiary may not transfer an interest in a trust in violation of a spendthrift provision. Wyo. Stat. Ann. Sec. 4-10-503 is highly abbreviated, defining child as a person for whom an order or judgment for child support has been entered, and then saying that even if a judgment contains a spendthrift provision, that child may obtain an order from a court attaching present or future distributions to or for the benefit of the beneficiary. Wyo. Stat. Ann. Sec. 4-10-504 deals with discretionary trusts. When a trust provides that the trustee may only make discretionary distributions to a beneficiary, whether or not the trust contains a spendthrift provision, a creditor, including a creditor with a claim for forced heirship or legitime may not compel the trustee to distribute any income or principal unless and until a trust distribution is actually received by the beneficiary, even if the trustee has discretion to make distributions under a standard of distribution or the trustee has abused the discretion, or the trustee makes distributions directly to third parties for the benefit of the beneficiary. Nothing in that section limits the right of the beneficiary to sue the trustee. However, a creditor or assignee of a beneficiary may not maintain or compel the beneficiary to maintain a proceeding on behalf of the beneficiary or the creditor or assignee. A discretionary trust created for the benefit of a disabled person has the protection of a discretionary trust and the protection is applied regardless of the date the trust was created. Terms of the trust providing a trustee may make discretionary distributions to a beneficiary, whether or not the

discretionary distributions are pursuant to a standard of distribution, shall not create a property interest in the beneficiary or any enforceable right to a distribution for the beneficiary. Wyo. Stat. Ann. Sec. 4-10-505 deals with standards of distribution. It says that regardless of whether there is a spendthrift provision, if the terms of the trust direct the trustee to make distributions according to a standard, including maintenance or support, and the trustee has not complied with that standard, a distribution may be ordered by a court to satisfy a judgment or court order against the beneficiary for child support, and the court is required to direct the trustee to pay that support but no more than the amount the trustee would have been required to distribute had the trustee complied with the standard of distribution. A creditor or assignee of a beneficiary, including a creditor bringing a claim for forced heirship or legitime, may not compel distributions from a trust or attached distributions to be made until the distributions are actually received by the beneficiary, if the terms of the trust limit the trustee's ability to make distributions by a standard of distribution, even when the beneficiary is also a trustee or co-trustee. Nothing prevents the beneficiary from suing the trustee. Wyo. Stat. Ann. Sec. 4-10-505.1 deals with powers of appointment, saying that property of a trust that the holder of a power of appointment is authorized to appoint may not be reached or attached except to the extent the powerholder is authorized to appoint the property to himself, his creditors, his estate or the creditors of his estate, and he exercises the power of appointment in favor of himself, his creditors, his estate or the creditors of his estate. Otherwise, property of a trust that may be withdrawn by a person holding a power to withdraw from the trust may not be reached or attached unless and until the powerholder withdraws the property from the trust. Wyo. Stat. Ann. Sec. 4-10-508 deals with overdue mandatory distributions, saying that if a trust includes a spendthrift provision, a creditor may not compel a mandatory distribution until it is received by the beneficiary, but if the trust does not have a spendthrift provision, a creditor may compel that mandatory distribution to be made to the beneficiary if the distribution was not made within a reasonable time.

F. Non-UTC States with Limited Spendthrift Protection. The Uniform Trust Code, or UTC, has not been adopted in all states, but some states have provisions that are similar to Section 503 of the UTC.

1. Alaska contains a very distinctly different set of trust provisions which are well known for creation of self-settled asset protection trusts. Those are beyond the scope of this paper.

2. California Prob.Code Section 15309 provides that if a beneficiary has a right under a trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may order the trustee to satisfy all or part of the support judgment out of those payments as they become due. That statute goes on to say that whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal, the court may order the trustee to satisfy all or part of the support judgment out of all or part of future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary. The statute specifically says that it applies to a support judgment notwithstanding any provision in the trust instrument.

3. Colorado, as noted above, has just adopted the UTC. Aside from that, Colorado generally follows the Restatement (Third) of Trusts. A beneficiary has an equitable interest in the subject matter of the trust. Creditors can attach a beneficiary's trust interest in satisfaction of claims, except where limited by spendthrift and other restrictions. Generally, under the common law, a provision that prohibits both voluntary and involuntary alienation of a beneficial interest generally provides direct protection against creditor claims. *Newell v. Tubbs*, 84 P.2d 820 (1938); *Snyder v. O'Conner*, 81 P.2d 773 (1938). Whether or not a trust contains a valid spendthrift provision, creditors who are able to attach the beneficial interest generally are not able to force exercise of discretion by the trustee, and there are no Colorado cases or statutes, other than in the newly adopted UTC, recognizing spendthrift exception creditor classes. That said, the Restatement (Third) of Trust, section 59, does recognize certain public policy exceptions to spendthrift protection, such as for those who provide necessities and child-support claimants. Colorado law on the extent and limits of spendthrift protection is virtually nonexistent. Generally, Colorado courts rely upon the Restatement. Self-settled spendthrift trusts are generally disfavored. Some commentators believe that CRS 38-10-111, which says that transfers "made in trust for the use of the person making the same shall be void as against the creditor's existing of such person" implies that a transfer should be valid as against future creditors. No statutory framework otherwise exists for self-settled asset protection trusts. Generally, revocable trusts are recognized as valid but are not protected from creditor

claims, absent a potential interpretation of the foregoing statute in a favorable manner. General powers of appointment are treated as the property of the powerholder but special powers of appointment or not.

4. Delaware as its own, unique trust code. Addressing its various terms requires an in-depth review of Delaware law and is beyond the scope of this paper.

5. Georgia contains statutory spendthrift provisions. Ga. Code Ann. Sec. 53-12-80 says the spendthrift provision is valid only if it prohibits both voluntary and involuntary transfers, and merely using the phrase "spendthrift trust" is sufficient to create one. A beneficiary cannot transfer an interest in violation of the provision. A spendthrift provision is not valid against claims for alimony or child support, taxes or other governmental claims, tort judgments, judgments or orders for restitution as a result of a criminal conviction or judgments for necessaries. However, none of that applies to the extent that reaching the interest would disqualify the trust as a special needs trust under federal law. A provision in a trust that a beneficiary's interest shall terminate or become discretionary upon an attempt by the beneficiary to transfer it, an attempt by the beneficiary's creditors to reach it, or the bankruptcy or receivership of the beneficiary is valid except to the extent of the proportion of trust property attributable to the beneficiary's contribution. If a beneficiary is also a contributor, a spendthrift provision is not valid to the extent of that portion of the trust property. That does not apply to first party special needs trusts. A spendthrift provision in a pension or retirement arrangement under the Internal Revenue Code is valid with respect to the entire interest of the beneficiary even if the beneficiary is also a contributor to trust property except where a claim is made pursuant to a qualified domestic relations order under Section 414(p) of the Internal Revenue Code. Ga. Code Ann. Sec. 53-12-81 says that a transferee or creditor of a beneficiary shall not compel the trustee to pay any amount that is payable only in the trustee's discretion regardless of whether the trustee is also a beneficiary, but that section does not apply to the extent of the proportion of trust property attributable to the beneficiary's contributions. Ga. Code Ann. Sec. 53-12-83 provides that the holder of a power of withdrawal, during the period that the power may be exercised, is to be treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power. The lapse, release or waiver of a power does not cause the holder to be treated as a settlor of the trust.

6. Hawaii has a self-settled asset protection trust statute which begins at HI Rev. Stat. Sec. 554G-2, and which is beyond the scope of this paper.

7. Idaho has its spendthrift provision in Idaho Code Sec. 15-7-502. Subsection (1) says that a settlor may provide that the interest of a beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary. Subsection (2) says that a declaration in a trust instrument that the interest of a beneficiary shall be held subject to a "spendthrift trust" is sufficient to restrain voluntary or involuntary alienation to the maximum extent permitted by Idaho Code Sec. 15-7-502. Subsection (3) says the validity of a restraint on transfer shall not require specific reference to or identical verbiage set out in the two preceding subsections. Subsection (4) deals with settlors who are beneficiaries, allowing creditors to reach those assets. Subsection (5) says a beneficiary is not considered to be a settlor merely because of a lapse, waiver or release of the beneficiary's right to withdraw to the extent it doesn't exceed the amounts specified in Section 2041(b)(2), 2514(e) or 2503(b) of the Internal Revenue Code. Subsection (6) goes on to say that a beneficiary is not to be considered a settlor, or to have made a voluntary or involuntary transfer of the beneficiary's interest, or to have the power to make a voluntary or involuntary transfer, merely because the beneficiary, in any capacity including as trustee, holds or exercises a presently exercisable power to consume, invade, appropriate or distribute property to or for the benefit of the beneficiary if the power is exercisable only on consent of another person holding an adverse interest, or is limited by an ascertainable standard including but not limited to health, education, support or maintenance, or a presently exercisable power to exercise a limited power of appointment including but not limited to the power to appoint any property to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary's estate or a creditor of the beneficiary's estate. Subsection (6) goes on to say that a beneficiary isn't considered to be a settlor, if the beneficiary has a testamentary power of appointment or a presently exercisable right under the preceding Subsection (5)(b) (which refers to 5 or 5 powers).

8. Indiana's Trust Code is in Article 4 of Title 30 of the Indiana Code. The spendthrift provision is in Chapter 3. IN Code Sec. 30-4-3-2, adopted in 1971, allows a settlor to provide in the terms of the trust that the interest of a beneficiary may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary. IN Code Sec. 30-4-3-10 provides that unless a contract or non-negotiable obligation expressly provides otherwise, a trustee is not personally liable on a contract or non-negotiable obligation with a third person made by him in the administration of the trust. When a third person is entitled to compensation for injury suffered, liability is imposed on the trustee but only if as a result of the trustee's personal act or omission. Indiana courts have allowed a creditor providing necessaries to a beneficiary to have some access to trust assets. See *Sisters of Mercy Health Corp. v. First Bank*, 624 N.E,2d 520 (Indiana Appeals, Third District 1993) citing *McDaniel v. McDaniel*, 245 Ind. 551 (1964); *Clay v. Hamilton*, 116 Ind. App. 214 (1945). That case also holds that an "ordinary" creditor cannot gain access to trust assets. It's not clear if federal tax liens can reach trust assets in the face of a valid spendthrift clause. The only case addressing that is *United States v. Grimm*, 865 F.Supp. 1303 (N.D. Indiana 1994), but, in that case, the taxpayer was a beneficiary of his father's estate but the will did not provide that the inheritance would pass into a trust with a spendthrift clause. Instead, it said that if the decedent's personal representative believed that the interest of a beneficiary would be threatened to be diverted in any manner, then the property would go to a bank to hold in trust. The court concluded that no trust had been established at the time of the filing of the claim and so no spendthrift protection was available.

9. Iowa provides for statutory spendthrift protection in Title XV, Subtitle 4 Probate, in Chapter 633A Iowa Trust Code. In particular, IA Code Sec. 633A.2202 recognizes spendthrift protection, saying that except as provided in IA Code Sec. 633A.2203, a term of the trust providing that the interest of the beneficiary is held subject to a spendthrift trust, or words of similar import, restrain both voluntary and involuntary transfer, assignment or encumbrance. It goes on to say a beneficiary may not transfer in violation of a valid spendthrift provision and, more importantly, says a creditor or assignee of the beneficiary may not reach the interest of the beneficiary or a distribution by the trustee before its actual receipt by the beneficiary. Notwithstanding those protections, the statute says the interest of a beneficiary may be reached to satisfy an enforceable claim against the beneficiary or the beneficiary's estate for services or supplies for necessaries provided to the beneficiary or for tax claims by the United States to the extent authorized by federal law or an applicable provision of the Iowa Code. IA Code Sec. 633A.2205 provides that whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may not compel a distribution subject to the trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the trustee has abused its discretion. That section does not apply to a creditor of a beneficiary or of a deceased beneficiary in forcing an interest in a trust given to a beneficiary by the trust instrument. IA Code Sec. 633A.2206 says that if a trustee has discretion as to payments to a beneficiary and refuses to make payments or exercise its discretion, a court can neither order the trustee to exercise its discretion nor order payment from any such trust if such payment would inure, directly or indirectly, to the benefit of a creditor of the beneficiary. The statute goes on to say that if the beneficiary "has or had an interest in the trust," the court may order payment to a creditor. IA Code Sec. 633A.2207 says that a creditor or assignee may reach a mandatory distribution if the trustee has not made it within a reasonable time after the required distribution date. It defines mandatory distribution and also says a distribution subject to a condition is not mandatory. The statute says the sole remedy for a creditor or assignee is to apply to the court after a reasonable period of time has expired for a judgment ordering the trustee to pay the creditor or assignee the money equal to the lesser of the amount of the debt or assignment, or the amount of the mandatory distribution. Other remedies, such as attachment or garnishment, recovery of court costs or attorney's fees, or imposing any type of land on any trust property or the interest of the beneficiary, are not permitted and may not be ordered by any court. In addition, anything the beneficiary signs allowing a remedy other than payment of the mandatory distribution is void and is not to be enforced by any court. A good article covering these provisions as well as other parts of the code is Son of The Trust Code – The Iowa Trust Code After Ten Years, Martin D Begleiter, 59 Drake Law Review 265 (Winter, 2011).

10. Louisiana R.S. Section 9:2004 provides that a creditor may seize only an interest in income or principal that is subject to voluntary alienation by a beneficiary. It goes on to say that a beneficiary's interest in income and principal, to the extent that the

beneficiary has donated property to the trust, directly or indirectly, can be seized, but the failure to exercise a right of withdrawal is not deemed a donation. Louisiana R.S. Section 9:2005 provides that notwithstanding anything in the trust, "the proper court, in summary proceedings to which the trustee, the beneficiary, and the beneficiary's creditors shall be parties, may permit seizure of any portion of the beneficiary's interest in trust income and principal in its discretion and as may be just under the circumstances if the claim is based upon a judgment for: (1) Alimony, or maintenance of a person whom the beneficiary is obligated to support; (2) Necessary services rendered or necessary supplies furnished to the beneficiary or to a person whom the beneficiary is obligated to support; or (3) Damages arising from a felony criminal offense committed by the beneficiary which results in a conviction or a plea of guilty." Then, in the next section, Louisiana R.S. Section 9:2006, says, "Exemptions from seizure recorded by law to any kind of property or interest in property are effective with respect to such property in trust to the same extent as if the property were held free of trust."

11. Nevada is a self-settled asset protection state. N.R.S. Section 166.015 provides that unless the trust instrument declares to the contrary, expressly, Chapter 166 of the Nevada Statutes governs the construction, operation and enforcement of all spendthrift trusts (created in or outside this State if: (a) All or part of the land, rents, issues or profits affected are in this State; (b) All or part of the personal property, interest of money, dividends upon stock and other produce thereof, affected, are in this State; (c) The declared domicile of the creator of a spendthrift trust affecting personal property is in this State; or (d) At least one trustee qualified under subsection 2 has powers that include maintaining records and preparing income tax returns for the trust, and all or part of the administration of the trust is performed in this State." The term "writing" which is used frequently in the statutes can be a will, trust or instrument and can include an electronic will or electronic trust. N.R.S. Section 166.080 provides that the beneficiary or beneficiaries of a spendthrift trust shall be named or clearly referred to in the writing. No spouse, former spouse, child or dependent shall be a beneficiary unless named or clearly referred to as a beneficiary in the writing. N.R.S. Section 166.090 indicates that provision for the beneficiary will be for the support, education, maintenance and benefit of the beneficiary alone, and without reference to or limitation by the beneficiary's needs, station in life, or mode of life, or the needs of any other person, whether dependent upon the beneficiary or not. N.R.S. Section 166.130 says that a beneficiary of a spendthrift trust has no legal estate in the capital, principal or corpus of the trust estate unless under the terms of the trust the beneficiary or one deriving title from him or her is entitled to have it conveyed or transferred to him or her immediately or after a term of years or after a life, and in the meantime the income from the corpus is not to be paid to him or her or any other beneficiary.

12. New York allows a creditor to reach trust assets that are not necessary for the education and support of the beneficiary in some limited instances. NY CLS EPTL Section 7-3.4 provides, "Where a trust is created to receive the income from property and no valid direction for accumulation is given, the income in excess of the sum necessary for the education and support of the beneficiary is subject to the claims of his creditors in the same manner as other property which cannot be reached by execution." Judging from the cases which cite this section, it appears to be of little use. The last case found in Lexis is from 1955. The reason can be seen in the case decisions. In *Spellman v. Spellman*, 43 F.2d 762 (DC SD New York 1930), the court citing earlier cases said, "The creditor must show that he is a judgment creditor with execution returned unsatisfied." The case refers to a proceeding under this statute as a suit in equity, and the statute allows the creditor only to reach "surplus income." Determination of what is surplus income cannot occur in the original action to collect the debt or in discovery on that judgment, but must be a separate suit in equity and the trustee must be a necessary party. *In re Estate of Senior*, 171 Misc. 904, 14. N.Y.S2d 121 (Surrogate's Court of New York, Orange County 1939).

13. Oklahoma's spendthrift protections begin at OK Stat. Section 60-175.85 which is the basic provision saying that a spendthrift provision is valid if it restrains either voluntary or involuntary transfer of a beneficiary's interest. It goes on to say that if a trust contains a spendthrift provision, a creditor or assignee of the beneficiary may not reach an interest in the trust or a distribution by the trustee until such distribution is received by the beneficiary, but it provides an exception for an "exception creditor of a support interest" of another part of the law, discussed below. Continuing, the section says, "A creditor shall wait until a distribution is received by a beneficiary before attachment; provided, however, an exception creditor may attach current and future distributions at the trust level." Continuing, the statute says a spendthrift

provision applies to both current and future distributions as well as remainder interests, and says a power of appointment is personal in nature and cannot be attached or forced to be exercised. A "reserved power" is not protected by a spendthrift provision. OK Stat. Section 60-175.86 provides for characterization of distribution interests as either mandatory, support or discretionary, and says a beneficiary may hold all three at once. It then says that to the extent a trust contains a combination, the trust shall be a mandatory interest only to the extent of the mandatory language and a support interest only to the extent of support language, providing that the remaining trust property is held as a discretionary interest. OK Stat. Section 60-175.87 provides that for trusts created on or after November 1, 2010 which contain a spendthrift provision, a creditor cannot attach present or future mandatory distributions and shall wait until the distribution is received before attachment. Again, however, it says an exception creditor may attach present and future mandatory distributions at the trust level, and goes on to say that a beneficiary holding a mandatory distribution interest may enforce it in court. OK Stat. Section 60-175.88 deals with trusts with one or more beneficiaries holding support interests. First, it says the fact that the court would have exercised the distribution power under a support interest differently than the trustee is not sufficient reason for interfering, but goes on to say a court may review the distribution discretion if the trustee acts beyond the bounds of reasonableness. In addition, it says a support interest relies on the spendthrift provision for protection of a beneficial interest as well as the additional protection provided by protective or restrictive distribution language under Section 10 of the Oklahoma act. The only exception creditor under the Act is a child of a beneficiary who has a judgment or order against the beneficiary for support. The sole and exclusive remedy of an exception creditor is the attachment of the beneficiary's support interest at the trust level, and says the court may limit the amount as appropriate under the circumstances. Like the preceding section, it says a beneficiary holding a support interest as an enforceable right to a distribution that can be pursued in court. OK Stat. Section 60-175.89 deals with discretionary interests. It starts by saying those interests are neither a property interest nor an enforceable right but are a "mere expectancy" but provide that a beneficiary holding a discretionary interest has an equitable interest to bring an action against the trustee for judicial review. No creditor, regardless of whether the Act provides for any exception creditors, can attach a discretionary interest, require the trustee to exercise the trustee's discretion to make a distribution, or cause a court to judicially sell a discretionary interest. To aid the trustee, that section goes on to say that regardless of whether a beneficiary has any outstanding creditor, the trustee may directly pay any expense on behalf of the beneficiary and may exhaust the income and principal of the trust for the benefit of the beneficiary without being liable to any creditor or beneficiary for paying the expenses of a beneficiary. A creditor, including an exception creditor, of a beneficiary has no greater rights in a discretionary interest in a beneficiary and shall not compel a distribution that is subject to the discretion of the trustee nor may a court order a distribution. The court's ability to review a decision by the trustee regarding a distribution is allowed only if the abuse is proved by clear and convincing evidence that the trustee: (a) acted dishonestly, (b) acted by an improper motive or (c) failed to act, saying that the sole factor not to make a distribution does not constitute a failure to act. Finally, absent express language to the contrary, if the distribution language permits unequal distributions or distributions to the exclusion of other beneficiaries, the trustee may distribute all of the accumulated, accrued or undistributed income and principal to one beneficiary in the discretion of the trustee. OK Stat. Section 60-175.90 says a trustee may only make distributions for the purposes designated by the settlor and a creditor, including an exception creditor, has no greater rights than a beneficiary. This section also says that a restriction on distributions in situations where a distribution might result in the loss of eligibility for governmental benefits like Medicaid, SSI, SSDI and other such programs, is valid and no creditor, including an exception creditor, may attach present or future distributions from such a trust. All other restrictions curtailing the distribution power of a trustee are void as to exception creditors, if an exception creditor is provided for by the Oklahoma Discretionary and Special Needs Trust Act. Interestingly, OK Stat. Section 60-175.91 specifically provides that a provision which converts a current distribution interest to a discretionary interest or which says that the current distribution interest terminates upon attachment by a creditor, including an exception creditor, is valid. It goes on to say that a provision providing that a remainder interest shall terminate or change into a dynasty interest upon attachment by a creditor, including an exception creditor, is valid. Finally, OK Stat. The Family Wealth Preservation Trust Act creates an exception to any creditor rights of future creditors in certain circumstances, similar to a homestead exemption or exemptions for retirement accounts, and

is designed to protect the family including the spouse, lineal heirs or charities. The Act is not for the purpose of creating self-settled asset protection trusts.

14. Rhode Island recognizes spendthrift clauses in RI Gen L Sec. 18-9.1-1, which allows any person to create an express trust for the benefit of anyone else and, in the terms of the trust, establishes valid restraints on voluntary and/or in voluntary transfers of interests in the express trust by its beneficiaries. Rhode Island law recognized the ability of a creditor to claim against a vested interest of a beneficiary, but provisions allowing distributions for care, maintenance and support do not give the beneficiary a vested interest, but a court can order distributions for those purposes. *Thurber v. Thurber*, 43 R.I. 504 (1921).

15. South Dakota has codified its general spendthrift statute in SD Codified L Sec. 55-1-41 (in addition to its self-settled asset protection trust provisions), which says that if a trust contains a spendthrift provision, no creditor may reach present or future mandatory distributions from the trust at the trust level. It goes on to say that no court may order a trustee to distribute past-due mandatory distributions directly to a creditor. SD Codified L Sec. 55-1-42 says that a beneficiary of a mandatory or support interest has an enforceable right to a distribution pursuant to a court's review based on unreasonableness, dishonesty, improper motivation or failure, but if there is a spendthrift provision in the trust, a creditor cannot force the distribution or reach present or future support distributions. In addition, regardless of whether a beneficiary has an outstanding creditor, the trustee of a mandatory or support interest may directly pay any expense on behalf of the beneficiary and is not liable to any creditor for doing so.

16. Washington recognizes spendthrift trust protection as against creditors, with exceptions. RCW 6.32.250 says that Chapter 6.32 of the Washington Revised Code does not authorize seizure or interference with any money, thing in action or other property held in trust for a judgment debtor where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor. RCW 11.96A.190 says nothing forbids execution on the income of a trust created by a person other than the judgment debtor for data arising through the furnishing of the necessities of life to the beneficiary, or as to such income forbids the enforcement of any order requiring the payment of support for children under the age of 18, or forbids the enforcement of any order of a court subjecting the vested remainder upon its expiration to execution for the debts of the remainderman. See *Seattle First National Bank v. Crosby*, 42 Wn.2d 234, 254 P.2d 732 (1953) the Washington Supreme Court held that a trustee had no duty to honor any assignment of principal and interest of the trust containing a spendthrift provision. See also Restatement (Third) of the Law of Trusts Section 58(1). In *Erickson v. Bank of California*, 97 Wn2d 246, 643 P.2d 670 (1982) the Washington Supreme Court held that a bankruptcy trustee was not able to pierce a spendthrift trust although he could obtain distributions for the benefit of the bankrupt's "necessities of life."

IV. DIVORCE IN TEXAS.

In Texas, marital property concepts, though sometimes complex, are fairly well defined. Trusts add a layer of complexity. This area has been a battleground for decades.

A. Texas Constitution. The Texas Constitution is notable for the multiple changes that have occurred over the decades. The provisions dealing with the separate property of a married couple are no different.

1. 1924 Version. The early cases deal with a version of the separate property provisions of the Texas Constitution that are somewhat different from what they are today. At that time, the Texas Constitution defined the separate property of the wife. It did not attempt to define the separate property of the husband. Part of the issue in the landmark case of *Arnold v. Leonard*, infra, was a statute that attempted to extend the definition of separate property of the wife to include the income as well. The current version of Section 15, as quoted below, uses "spouse" instead of "wife."

2. Current Version. Article 16 General Provisions, Section 15, Separate and Community Property, reads as follows:

> *Sec. 15. SEPARATE AND COMMUNITY PROPERTY. All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining*

> *the rights of the spouses, in relation to separate and community property; …*

The balance of the provision deals with the ability of spouses to enter into prenuptial agreements, partition agreements, and postnuptial agreements, and the effect of gifts of income producing property from one spouse to the other. It is important to note that the foregoing section, like its predecessor, does not define community property; it only defines separate property.

3. *Arnold v. Leonard*. In *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (Tex. 1925), the Texas Supreme Court's seminal decision on the issue, the Court declared that the Texas Constitution defined the separate property of a wife and it was beyond the power of the Legislature or the parties to enlarge or diminish the definition. Everything else gained during marriage, however acquired, including income from separate property of the wife, is community property.

B. Trust Dynamic. Trusts create an interesting dynamic because they introduce another owner of the property. The questions then become: (a) how much ownership does the trustee have to have, versus what the beneficiary has; (b) where is the dividing line that turns trust income into income of the beneficiary that is community property versus separate property; and (c) where is the dividing line that turns corpus of the trust into property belonging to the beneficiary (which may be separate property which produces community property income, or which may be itself community property). Traveling back to *Arnold v. Leonard*, supra and coming forward from there, the growth, changes and confusion in how courts have treated trusts in the context of a marriage can be seen.

1. *Land v. Marshall* – Illusory Trust Doctrine. *Land v. Marshall*, 426 S.W.2d 841, 39 A.L.R.3d 1 (Tex. 1968) addressed a claim made by Viola Marshall, widow of W. E. Marshall, to set aside a trust created by him during their marriage and three days before his death in 1960. Except for a small house and some worthless stock, the only community property of any value was stock he transferred to their daughter, Erie Darnell Land, as trustee of an irrevocable trust for the wife. The stock was worth $99,587.75. The trust was a spendthrift trust and she was the beneficiary, but Mr. Marshall acted without his wife's knowledge or consent. Article 4619 at that time made the husband the sole manager of community property, and on that basis, the trustee- daughter claimed he had the right to convey the stock to the trust. While holding that the actions of the husband were not fraud on the community, the Supreme Court nevertheless invalidated the trust, referring to the illusory trust doctrine. It said, "The trustor transferred the legal title of the corpus to a trustee, but he retained complete control over the trustee. Marshall had and could exercise every power over the corpus… As expressed by [wife], Marshall created a trust, but nothing happened." As a result, the entire trust failed.

2. *Wilson* Tax Case. *Commissioner v. Wilson*, 76 F.2d 766, 35-1 U.S. Tax Cas. (CCH) P9284; 15 A.F.T.R. (P-H) 1228 (5th Cir. 1935) is an opinion handed down after consolidating a pair of cases into one. The Commissioner was appealing decisions by the Board of Tax Appeals which held that income from a third-party spendthrift trust distributed to two men, who were both beneficiaries of the same trust, was community income. The Commissioner was contending that the income was separate property, and, if that were established, there would be an increase in the amount of income tax due. The Commissioner referred back to the statute which had been at issue in the *Arnold v. Leonard* case ten years earlier, asserting that even though the Texas Constitution prohibited the legislative attempt to expand the definition of the wife's separate property, the lack of any definition of the husband's separate property should mean that the Texas Legislature could freely legislate in that area. The court disagreed saying that the "whole course of legislation indicates a purpose to treat husband and wife alike in fixing their separate estates as against the community." Id at 769. Because the trustee was bound to distribute all of the income to the men, the court held that the ordinary rents and revenues of the separate property of the men would be community property and "the interests in the corpus of this trust are their separate property though acquired since marriage, because acquired by gift." Id at 769.

3. *Porter* Tax Case. *Commissioner v. Porter*, 148 F.2d 566, 45-1 U.S. Tax Cas. (CCH) P9254; 33 A.F.T.R. (P-H_ 1118; 1945 P.H. P72,482 (5th Cir. 1945) also was a pair of cases, this time involving two women who were beneficiaries of a trust created by their father. The women had received income from the trusts and had reported it as community income. The Commissioner sought to have the income declared to be their separate income, which would have increased the tax.

The Commissioner tried a different approach than the one in the *Wilson* case, supra. Here, the

Commissioner cited *McClelland v. McClelland*, supra, together with the cases of *Sullivan v. Skinner*, 66 S.W. 680 Tex.Civ.App. – San Antonio, 1902, writ ref'd) and *Hutchison v. Mitchell*, 39 Texas 487 (Tex. 1873), claiming that the income was received as the women's sole and separate property. The *Hutchison* case is interesting because it occurred during Reconstruction after the Civil War and was handed down by what is sometimes referred to as the Semicolon or Carpet Bag Court of Texas. The respondents in this case claimed that the case had no precedential authority (but see the discussion in *Sharma v Routh*, infra). The *Sullivan* case, on the other hand, while writ was refused, has never been cited again, other than in this case. Instead the women argued that *Arnold v. Leonard* made clear that anything coming to them during marriage that was not constitutionally defined as separate property must be community property. The court agreed with the women and declared the income to be community property.

4. *Wilson* Cases – Special Statute. *Mercantile National Bank v. Wilson*, 279 S.W.2d 650 and *Mercantile National Bank v. Wilson*, 279 S.W.2d 654 (Tex.Civ.App. – Dallas, 1955, writ ref.) are an interesting pair of opinions. The first is the opinion on the appeal, and the second is the opinion on the motion for rehearing. Mention is made of this case simply to alert the reader that, at the time, Article 4616 exempted from the husband's debts all of the wife's separate property and revenue from it, including rents from real property, interest on her bonds and notes, and dividends on her stocks, as well as her personal earnings. The court, therefore, reached conclusions based upon that statute, which do not make clear how the court analyzed income inside, and distributions, from, the trust at issue. Without knowing about the statute, this case would seem to provide an exception on the rule regarding self-settled trusts.

5. *Marriage of Long* - Withdrawal Rights. *In the Matter of the Marriage of Long*, 542 S. W. 2d 712 (Tex.Civ.App.—Texarkana 1976, no writ) is cited often. In the *Long* case, Charles Long had certain withdrawal rights from a spendthrift trust established for him by his parents. But he chose not to withdraw assets and, instead, left them in the hands of the trustee. The court concluded that the assets he could have withdrawn would be treated as his separate property, as opposed to property owned by the trust. As his separate property, income earned on those assets would be community property, and half could be awarded to Kathy, Charles's spouse.

6. *Currie* – Tax Payments and Accumulations Not Community: *Currie v. Currie*, 518 S.W.2d 386 (Tex.Civ.App. – San Antonio, 1974, writ of error dism'd woj) involved two trusts from two different decedents, one involving a famous relative. John Currie married Mary Currie in 1963. Both decedents who left trusts for John Currie died during the marriage. Mary filed for divorce in 1972, and divorce was granted in 1974.

John was John Garner Currie, great-grandchild of John Nance Garner, a native Texan and 32nd Vice President of the United States. Mr. Garner died in 1967, during the marriage, leaving a will with the trust for the three children of his granddaughter, Genevieve, one of them being John. The trust mandated that as each great-grandchild attained the age of 21, $25,000 was to be distributed and "thereafter" the trustee could make additional distributions in the trustee's "uncontrolled discretion." John turned 21 in 1969, received his $25,000, and every year thereafter received amounts ranging from $9,500 to $15,000. "Most of such sums were lost in unsuccessful stock market investments." Id at 389.

Mr. Garner's estate was taxable, and the estate elected to pay estate tax in installments. The trust for the three great-grandchildren paid those installments. The trustee made a practice of distributing the net income of the trust, retaining only a very small amount, so the amounts paid to John after he turned 21 constituted his one-third of the net revenue.

Since there was so little net revenue retained in the trust and so much had been paid to the IRS, Mary asserted the trust was John's separate property and claimed that the payments out of trust income to the IRS constituted the use of community property for the maintenance of John's separate property. As a result, the community estate was entitled to reimbursement. But Mr. Garner's will provided that taxes were to be paid out of either corpus or income, and the executor/trustee elected to pay out of income. So only the residual income was added to the corpus of the trust. Thus the court concluded that the money paid in taxes was not ever part of John's trust, and, thus could never have been part of the community estate.

The other testamentary trust was left by Tully Garner for Genevieve Garner Currie, John's mother, mandating that income be distributed to her during her lifetime and, on her death, the trust was to be divided into trust for her children. She was still alive but she

wasn't using all of the income, and so it was accumulating inside the trust. There were no provisions for any distributions to be made to John until she died. Nevertheless, John's wife, Mary, asserted that the accumulated net income which had not been spent by Genevieve should be community earnings and she would be entitled to one-half. The court said that since Genevieve was still alive, John had no right to receive anything and thus concluded that the community estate was not entitled to any part of the income in that trust.

7. *McClelland* – In Futuro, No Vesting, House and Fixed Stipend. The case of *McClelland v. McClelland*, supra, was a divorce case in which the wife, Dora, was seeing a portion of the trust assets. There was no language that obviously would be interpreted as a spendthrift clause, and the court's decision turned on whether the language in the will was somehow sufficient to create a spendthrift trust. As detailed above, the court found the expression of the father's intent to be sufficient to create a spendthrift trust, and, as a result, it held no community property to which Dora could lay a claim.

8. *Buckler* – Undistributed Income. *Buckler v. Buckler*, 424 S.W.2d 514 (Tex.Civ.App. – Fort Worth 1967 error dism'd w.o.j, reh. den.) was a divorce case in which the husband, Jack, was a beneficiary of a trust which did not have spendthrift language *per se*. The settlor of the trusts was not directly identified but, in a paraphrase of an earlier case, the court mentioned Alice Walker and alluded to her as Jack's grandmother. Jack contended that *McClelland v. McClelland*, supra, was controlling. Mary contended that *Arnold v. Leonard*, supra, effectively overruled its decision.

The court disagreed, taking language directly from page 358 of the *McClelland* decision, which also had a trust without spendthrift language *per se*, and paraphrased it, using the identities of the parties in the Buckler divorce in place of the similarly situated parties in the *McClelland* case. The court then said, "Here, as in *McClelland v. McClelland*, the terms and provisions of the trusts created in behalf of [Jack] so restricted and defined his rights and interests as to exclude his entitlement to undistributed income which the trustees had not seen fit to deliver to him." Id at 516. After quoting extensively from Mary's brief focusing on her contention that *Arnold v. Leonard* overruled the *McClelland* decision, this court said, "The decision does overrule a portion of the holding in *McClelland*, but it does not overrule the holding which is material to the question before us." Id at 516. After disposing of another minor issue, the decision of the trial court holding that the income of the trusts was not community property was affirmed.

9. *Marriage of Burns* – Undistributed Income. *In the Matter of the Marriage of Burns*, 573 S. W. 2d 555 (Tex.Civ.App. – Texarkana 1978, writ dism'd w.o.j.) is a case in which Barbara and Bill Burns were getting a divorce. Bill, at the time of marriage, was the beneficiary of several trusts. His parents died during the marriage and he was also the beneficiary of testamentary trusts created by their wills. While those trusts were unfunded at the time of trial, the assets were treated as though already in the trusts and the question was whether the income being generated was community property. Out of the numerous inter vivos trusts, three of the trusts were spendthrift trusts. Five of the inter vivos trusts did not have spendthrift provisions but gave the trustee complete discretion on distributions. The other inter vivos trust did not have a spendthrift clause and did not provide for any distributions until the trust terminated and then all assets were distributable to Bill. There were two testamentary trusts and both were spendthrift trusts with pure discretionary distribution provisions. While Barbara conceded that she had no rights to the inheritance itself, she claimed the income was community property. The court said,

> *It is unquestioned but what The (sic) property in question is income and thereby would normally be characterized as community property; however, the issue presented for our determination is whether The (sic) property was acquired by either spouse during the marriage. By definition, the undistributed trust and estate income had not been distributed to Mr. Burns nor did he have a present or past right to require its distribution so as to compel a finding that there was a constructive acquisition. The income was actually acquired by the trusts and estates and not by either Mr. or Mrs. Burns. As stated, there was no constructive acquisition. Since neither spouse actually or constructively acquired the undistributed trust and estate income during the marriage, such income, though earned during the marriage, remained a part of the respective trust or estate and was not subject to division by the court. Such income was not community property.*

10. *Wilmington Trust* - Discretion Equals Separate Property. *Wilmington Trust Company v. United States*, 4 Cl.Ct. 6 (1983), affm'd 753 F.2d 1055, 85-2 U.S. Tax Cases, 55 A.F.T.R.2d 1572 (Fed.Cir. 1985) is a United States Claims Court case dealing with certain third-party spendthrift trusts created for the benefit of Mrs. Asche, with a third party as trustee, which produced income during her marriage. Mrs. Asche's husband died and the issue was whether part of the income in the trusts was community property, and, thus, part of his taxable estate. The court noted that Mrs. Asche, the income beneficiary, had no right to, or control over, trust assets. Based on that fact the court decided that the income derived from those assets, if distributed, would be Mrs. Asche's separate property, not community property, and, thus, no part would be includable in the estate of her deceased spouse. The court in the Wilmington Trust case looked at and discussed in *Mercantile National Bank at Dallas v. Wilson*, supra, *McClelland v. McClelland*, supra, *Buckler v. Buckler*, supra, *Commissioner v. Wilson*, supra, and *Commissioner v. Porter*, supra. The court was critical of those last two cases, and said,

> *"… But the court in both cases seemingly overlooked the circumstance that the income involved in each case was "from" a trust corpus, and the trust corpus was not the "separate property" of the beneficiaries of the trust. The beneficiaries had no right to or control over the corpus of the trust. Those powers were vested in the trustee. It is concluded that, under the laws of Texas, as developed and expounded by the Texas courts, the income derived during the marriage of Mr. and Mrs. Asche from the seven trusts that are involved in the present case constituted the separate property of Mrs. Asche, and was not community property of Mr. and Mrs. Asche. Mrs. Asche never "acquired" – and she never will acquired – the corpus of any of these trusts. The corpus of each trust is to be held and controlled by the trustee or trustees during Mrs. Asche's life-time, and, upon Mrs. Asche's death, the corpus will pass to her issue. Accordingly, the corpus of each trust was not Mrs. Asche's separate property, and the trust income was not from Mrs. Asche's separate property.… As the income resulted from gifts made to trustees for Mrs. Asche's benefit, the income necessarily constituted her separate property under section 15 of article XVI of the Texas Constitution. As the trust income, whether distributed or undistributed, was Mrs. Asche's separate property, it is not necessary for the executors of Mr. Asche's estate to include in the estate tax return any part of the undistributed income of the property which Mrs. Asche acquired with the previously distributed income."*

11. *Taylor* – Clear Intention Wins. In *Taylor v. Taylor*, 680 S.W.2d 645 (Tex.App. – Beaumont 1984, writ ref n.r.e.), Martha and Travis Taylor were getting a divorce. Martha's parents had established a trust for her with a bank as trustee ten years before the marriage, contributing the business of "Schmidt's," a ladies dress shop in Nacogdoches, Texas. Travis admitted that the corpus was Martha's separate property. The trust directed certain distributions during Martha's childhood for her care, support and education. In adulthood, the trustee had the right to distribute the net income at such times and in such amounts as the trustee in its sole discretion might elect. The trust went on to say that any undistributed income would be invested and re-invested. During her marriage to Travis, the trustee did, in fact, distribute substantial amounts which were used by her to buy real property. The court, looking at that language, and those facts, said that the trust

> *…clearly indicated that the income and profits derived from the operation of the dress shop were a part of the corpus of the trust estate. The trustors specifically directed the disposition of both. They directed the manner in which the income, as distinguished from profits, could be distributed under certain conditions. The intention of the trustors clearly show that the income and profits were as much a part of the corpus of the trust as the individual items of personal property used in the operation of the retail business. The mere operation of a dress shop by the trustee, without receiving income or profits, would be of no benefit or value to the beneficiary of the trust. We hold that the income and profits from the operation of the dress shop were not only a part of the corpus of the trust estate, but were the principal assets of the trust. Id at 649.*

12. *Cleaver* – Corporate Earnings. *Cleaver v. Cleaver*, 935 S.W.2d 491 (Tex.App. – Tyler 1996, no writ). Sally Susan Staton was one of three children of George Staton. George and his brother, Joe, were partners in the Staton lumber business. George owned

25% and Joe owned 75%. George died in 1966. His will created separate trusts for his three children, one of whom was Sally. Joe was named as trustee, and the trust instructed him to provide for Sally's general support until she reached age 21, from which time forward "the income of the trust shall be distributed to the beneficiary semi-annually or more often, the time of such payments to be in the sole discretion of my Trustee hereunder." Id at 492-493. Sally was 13 years old at the time. She married Jimmy Cleaver in 1971. She reached her 21st birthday in 1973, at which time the trust mandated that she receive semi-annual distributions of trust income. In 1974, Joe, the managing partner of the lumber business partnership, formed two C corporations from partnership assets, and Sally's trust became the owner of 8.33% of the stock of the two new corporations. In his management capacity of the partnership and later of the corporations, Joe decided not to distribute on a regular basis the earnings from the Staton business, but retain the earnings as operating capital. Neither Jimmy nor Sally complained for the following 20 years. Sally filed for divorce after twenty-one years of marriage.

a. The trial court held that Sally's interest in the trust was her separate property. Jimmy appealed. On that point, the court simply said, "The nature of Wife's relationship to the trust is not disputed. Since reaching her majority, she has been the income beneficiary of the trust. Wife received through distribution only funds actually acquired by the trust that it had received from the Staton businesses. She was bequeathed no interest in the corpus of the trust; she has never owned an interest in the Staton businesses. Wife's income from the trust is her separate property because her interest was established before her marriage and was conveyed by gift or devise."

b. Jimmy then contended that the earnings inside the corporations should somehow be declared to be community property, and the court quickly disposed of that by saying those earnings belonged to the corporations, not the trust and certainly not Sally.

c. Jimmy then complained that over $8,000 of income had been accumulated inside the trust, and had not been distributed on the semi-annual basis as required. In that regard, the court said, "A different result obtains as to any income that may have been earned on undistributed funds in the trust if these monies had been withheld from the beneficiary for a greater period of time than permitted by the terms of the testamentary trust; Wife has a present possessory interest in such funds that should have been, but had not been, timely distributed to her by the trust, and the income earned on them, if any, is property characterized as the couple's community property."

13. *Lemke* - Self-Settled Trust Income Not Community. *Lemke v. Lemke*, 929 S.W.2d 662 (Tex.App. – Fort Worth 1996, pet. denied). Jacob Lemke received a large sum of money from a settlement of a medical malpractice lawsuit four years before he got married. Acting as settlor, he created an irrevocable spendthrift trust with himself as the sole beneficiary, naming a third party as trustee, and giving the trustee the sole discretion to distribute as much of the trust income and corpus as the trustee deemed appropriate for Jacob's health, education, maintenance and welfare needs. And, on Jacob's death, the remaining assets were to be divided equally between his parents and his brother, or if none of them survived, to his descendants per stirpes. A subsequent marriage to Joyce was short-lived, and an issue arose as to whether the income generated inside that trust was community property. The Court ruled that the income had not been acquired by either spouse during the marriage since it was owned by the trust. Part of the Court's reasoning turned on the fact that, as a spendthrift trust, Jacob could not assign any interest in the trust. As a result, the Court determined that the income inside the trust could not be community property and thus could not be divided. In the *Lemke v. Lemke* case, neither Joyce nor the Court addressed the fact that the trust was self-settled and thus the spendthrift clause was void as to Jacob's creditors.

So a self-settled irrevocable discretionary spendthrift trust was good enough to keep income from being community property even though not good enough to keep creditors at bay.

14. *Ridgell* – Withdrawable Assets Produce Community Income. In *Ridgell v. Ridgell*, 960 S.W.2d 144 (Tex.App. – Corpus Christi 1997, no pet.) Robert and Nona were getting a divorce. Her parents left assets for her in trust. During the marriage, her father died, establishing a testamentary trust with his assets. The trust mandated income distributions on a quarterly (or monthly) basis, and gave her certain withdrawal rights at certain ages. While it was a spendthrift trust, the court made a point of saying that it found nothing in the instruments "operating so as to preclude the trust income from becoming community property in the event of Nona's marriage." Id at 149. As part of its

reasoning, the court said, "If appellee does not receive income from the trusts and has no more than an expectancy interest in the corpuses, the income remains separate property." Id at 148. Because the trust under her father's will mandated income distributions and made assets withdrawable, the court concluded that parts of the corpus had become her separate property, and that the income on those parts was community property.

15. *Sharma* - Excellent Historical Analysis. *Sharma v. Routh*, 302 S.W.3d 355 (Tex.App. Houston 14th District 2009, no writ). An excellent analysis and summary of the law in this area is found in this case. Timothy Sharma was married to Alice for 19 years. She died in 2001. Her will established a bypass trust, known as the Alice Hiniker Sharma Family Trust, with instructions to distribute income or principal as needed for support and maintenance, and a QTIP marital trust, known as the Alice Hiniker Sharma Marital Trust, with instructions to the trustee to distribute income at least quarterly and principal as needed for support and maintenance. She named her husband, Timothy, as the sole trustee and beneficiary during his lifetime, with the Upreach Foundation as the beneficiary after Timothy's death. All of the income distributable to Timothy was donated by him to a charitable organization which had purchased property belonging to the trusts, giving a promissory note in exchange for that acquisition. Timothy had no experience as a trustee, and it was on display in this case. During the 20 months following the funding of the trusts, neither had a bank account. Principal portions of payments on the notes were deposited in Timothy's personal bank account. There was testimony that this was done in error and a reconciliation by professional staff resulted in separate accounts being established for both trusts. There was no evidence that Timothy, as trustee, ever declared or determined that he was entitled to receive those deposits as distributions of corpus from either trust. The trial court did not find that the depositing of principal into Timothy's personal account constituted distributions of corpus to him. In 2004, Timothy married Lisa. A few months later, he filed for divorce. Lisa claimed that the distributions from the trusts, being all of the income from the Marital Trust, and distributions from the Family Trust, were community property. The court began by saying, "In the context of a spouse who receives distributions of trust income under an irrevocable trust during marriage, case law indicates that the income distributions are community property if the receiving spouse owns the trust corpus but that the distributions are separate property if the receiving spouse does not own the trust corpus. Neither the Supreme Court of Texas nor this court has decided what the legal standard should be for determining whether the receiving spouse owns the trust corpus. We hold that, when a spouse receives distributions of trust income under an irrevocable trust during marriage, the income distributions are community property only if the recipient has a present possessory right to part of the corpus. The trial evidence conclusively proved that the husband did not have such a right and that the distributions in question were separate property to which the husband acquired title by devise or gift during the marriage." The court went through an extensive analysis of several cases, including *Cleaver*, supra, *Wilmington Trust Company*, supra, *Arnold v. Leonard*, supra, *Lemke v. Lemke*, supra, *In Re Marriage of Burns*, supra, *Currie v. Currie*, supra, *In Re Marriage of Long*, supra, *McClelland v. McClelland*, supra, *Ridgell v. Ridgell*, supra, *Buckler v. Buckler*, supra, and *Shepflin v. Small*, supra. The court said there were at least four possible rules in the context of a distribution of trust income under an irrevocable trust during marriage:

a. income distributions are always community property, even if the recipient has no right to the corpus of the trust, because the recipient's right to receive the income means that the recipient is a trust beneficiary and effectively an owner of the trust corpus;

b. income distributions are community property only if the recipient has some potential right to the corpus, even if the right has not yet become a possessory right, because the recipient's potential right to access the corpus means that the recipient is effectively an owner of the trust corpus;

c. income distributions are community property only if the recipient has a present possessory right to part of the corpus, even if the recipient has chosen not to exercise that right, because the recipient's possessory right to access the corpus means that the recipient is effectively an owner of the trust corpus; or

d. income distributions are community property only if the recipient has exercised a possessory right to part of the corpus, because the recipient's exercise of this possessory right means that the recipient is effectively an owner of the trust corpus.

After analyzing all of those cases, the court ultimately decided that the rule in (c) was the proper rule. In a concurring opinion, Justice Adele Hedges, in a much shorter manner, came to the same conclusion, but she specifically addressed Timothy's deposits of trust corpus and income in his personal accounts during that first 20 months, and she said that, "Although Sharma improperly took personal possession of the funds, such physical possession without a showing of need did not give Sharma a right to the principal payments or other trust corpus… As such, the principal payments remained trust property…. Because the principal payments remained trust property, Sharma had no interest in the corpus…. Accordingly, the trust income arising from trust corpus, namely the interest payments, were not community property."

16. *Benevides* - Partially Self-Settled Trust. *Benavides v Mathis*, 433 S.W.3d 59 (Tex.App. – San Antonio 2014, no pet.) is similar to the *Shurley* case but instead of bankruptcy, this is a divorce case. The court dealt with a situation where Carlos Benavides and other relatives formed the Benavides Family Mineral Trust years before Carlos Benavides married Leticia. The trust was irrevocable unless three-fourths of parties in interest agreed to amend it. The trust provided that all revenue would be distributed. The trust owned mineral interests and so the revenue was bonuses and royalties, which are normally part of corpus. In their divorce, Leticia sought one-half of all distributions, claiming they were community property and further claiming that the trust was actually self-settled so that the spendthrift clause would not prevent Carlos' access to the assets. The court ruled against her, deciding both that the distributions were separate property because: (1) they came from assets that existed before marriage which were his separate property; and (2) even though Carlos might, with the aid of three-fourths of his relatives, be able to amend the trust, that did not give him a present possessory right to any of the trust assets, and, as a result, none of the trust assets could be considered his so that the revenue from them would be community property. In part, the claim that the trust was self-settled was sidestepped because Leticia provided no case support or other authority for her argument.

17. Summary. *Arnold v. Leonard* set the tone. Only assets existing prior to marriage and those obtained by gift or descent are separate property. But income earned by a trustee is not owned by either spouse and, thus, is not community property. *Currie, Wilmington Trust, Taylor* and *Lemke* seem to indicate that undistributed income generally is not community property. But *Burns, Ridgell*, and *Wilmington Trust* seem to say income that must be distributed without discretion and without any power to spray or be sprinkled to others. But *Taylor* and *Benevides* seem to reach opposite conclusions. *Cleaver* says that if the trust owns a corporation, the income inside the corporation is not trust income, so regardless of the trust provisions, that income cannot be community or separate property. *Marriage of Long* declares that if assets are subject to withdrawal, those will be treated as that beneficiary's separate property, and income earned on them will be community property as though it were held outside of the trust.

C. Spousal Support. In *In Re Bancorpsouth Bank*, 2014 Tex.App. LEXIS 4052 (Tex.App. – Dallas 2014, no writ) is a case in which William Slicker and his wife, Phyllis, were getting a divorce. Anne Cook Slicker and Joseph A. Slicker had created a trust in 1993 for William's benefit. The trust included a spendthrift clause. In their divorce proceeding, the trial court ordered the bank, as trustee, to withhold mandatory and discretionary distributions which otherwise would have been payable to William and, instead, to pay those to Phyllis as spousal support. The bank appealed. In the face of the spendthrift clause, Phyllis attempted to justify the trial court's order by analogy with child support orders under Texas Family Code Section 154.005. But the court responded that such orders are creatures of specific statutes that create an exception to the general limitation imposed by spendthrift clauses. On the basis that there is no similar statute permitting a trial court to redirect payments from a spendthrift trust to a spouse, the court granted the bank's writ of mandamus, directing the trial court to vacate the portion of its order related to withholding distributions and paying them to Phyllis.

D. Child Support. Texas, like many states, has carved out an exception to the spendthrift protection for trusts in the area of child support. When a beneficiary of a spendthrift trust, whether it is a support trust or a discretionary trust, is ordered to pay child support, the court may likewise order the trustees of the trust for that beneficiary to pay some or all of that support out of the trust. The details and limitations are in Section 154.005 of the Texas Family Code, which reads as follows:

1. Statute. The statute regarding trusts and child support is Texas Family Code 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."*

2. *Marriage of Long* – Parent Must be Ordered to Pay. *In the Matter of the Marriage of Long*, supra, addressed the issue of whether child-support payments could be ordered to be paid by trustees directly without first ordering the parent-beneficiary of that trust to pay those amounts. In this case, Kathy, the mother of the child at issue, obtained a trial court order which directed to the trustees of a spendthrift trust for the benefit of the father, Charles, directing the trustees to pay $200 per month for the support of the minor child of the parties. The court looked at Section 14.05(c) of the Texas Family Code, which is now Section 154.005 of the Texas Family Code, which says, "The court may order the trustees of a spendthrift or other trust to make disbursements for the support of the child to the extent the trustees are required to make payments to a beneficiary who is required to make support payments under this section.…" The trial court had not ordered Charles, the father, to make support payments. In examining the language, and in particular the phrase "a beneficiary who is required to make support payments," the court found that because Charles was not obligated to make support payments, the trustees of the trust could not be directly obligated.

3. *Kolpack* – Trust Can Pay Only What Parent Pays. *Kolpack v. Torres*, 829 S.W.2d 913 (Tex.App. Corpus Christi, writ denied) is a case in which Patricia Torres obtained an order from the trial court in her claim for child support. The court ordered the father, Gregory Stelfox, to pay $105 per month in child support. He did not appeal. The court also ordered Jeri Kolpack, trustee of the Gregory Alan Stelfox Trust, to pay child support of $348 per month out of the trust income, and the trustee appealed on the grounds that the $348 per month was not imposed on Gregory and also because the trust was a discretionary trust. The court did not recite the exact terms of the trust so there is no way from the opinion to determine how the parties came to the conclusion that it was discretionary. The court examined Section 14.05(c) of the Texas Family Code, which is now Section 154.005, and cited *In the Marriage of Long*, supra. The court said, "The court may order the trustees of a spendthrift or other trust to make disbursements for the support of the child to the extent the trustees are required to make payments to a beneficiary who is required to make support payments under this section. If disbursement of the assets of the trust is discretionary in the trustee, the court may order payments for the benefit of the child from the income of the trust, but not from the principal." Id at 915. The mother argued that the legislature had provided other means of enforcing a child support decree, such as garnishment and wage withholding, but the court said that those remedies could be invoked only after first obligating the parent for the amount of child support. "In other words, it is only when the parent is obligated to pay an amount of child support that the court may order a third-party under the statutes to make disbursements directly to the child support obligating." Id at 916. The court went on to look at the bigger issue, which was who was obligated to pay child support. The court said, "Throughout the Family Code, the focus is on the ability of parents to pay for the support of their children, and on determining their resources available to contribute to their children's support.… We do not find a provision in the Family Code that would place a duty on a discretionary trust to support its beneficiary-parent's child." Id at 916. Without directly saying so, apparently the court felt it unnecessary to address whether the trust had income out of which Gregory's child-support could be paid, presumably since he had not been obligated to pay anything more than the $105 per month. The judgment against the trustee was reversed and rendered, leaving only the obligation of the father to pay the $105 per month.

V. DIVORCE OUTSIDE OF TEXAS

A. Introduction. If a beneficiary of a Texas trust lives outside of Texas, it is most likely that a court in that jurisdiction generally will not attempt to address the validity or invalidity of the Texas trust, but will use the law of the jurisdiction in other issues. The one where most disputes arise is in the area of divorce, in terms of property division and spousal support/alimony, and child support.

B. *Tannen* Case. *Tannen v. Tannen*, 3 A.3d 1229 (N.J. App,Div, affm'd per curiam 208 N.J. 409, 31 A.3d. 621), dealt with the issue of whether a family law court could compel a trustee to distribute funds from a discretionary trust to or for the benefit of a

soon-to-be-ex-spouse of a beneficiary. Or, more accurately, could potential distributions to the beneficiary be taken into account in setting alimony. The decisions of the trial judge caught the attention of trust and estate lawyers nationwide. Please keep in mind that the descriptions below of the actions of the trial judge occurred in mid- to late- 2007 and his final decree of divorce was entered in January 2008. The appellate court's decision was not entered until 31 months later.

Just prior to the scheduled trial date, the judge ordered the husband, Mark, to join four trusts in which either Wendy Tannen or the couple's children were beneficiaries as third-party defendants. One of those trusts was the Wendy Tannen Trust ("WTT") created by her parents 12 years after Mark and Wendy married. Section 3 of the WTT provided,

> "The Trustees shall apply and distribute the net income and corpus of the trust…to the beneficiary…in the following manner: (A) The Trustees ... *shall pay over to or apply for the benefit of the beneficiary's health, support, maintenance, education and general welfare, all or any part of the net income therefrom and any or all of the principal thereof, as the Trustees shall determine to be in the beneficiary's best interests, after taking into account the other financial resources available to the beneficiary for such purposes that are known to the Trustees. The term "best interests" shall include, without limitation and in the Trustees' sole discretion as to need and amount, payments from the Trust to help meet educational expenses, medical expenses or other emergency needs of the beneficiary, to enable the beneficiary to purchase a home, and to enable the beneficiary to enter into a business or profession .... The time or times, amount or amounts, manner and form in which said distributions shall be made, or sums so expended, shall be left to the sole discretion of the Trustees and shall be made without court order and without regard to the duty of any person to support such beneficiary. ...*
>
> (C) Notwithstanding any other provision in this Trust Agreement to the contrary, *it is the express intention of the Grantors in creating this Trust that the beneficiary shall not be permitted, under any circumstances, to compel distributions of income and/or principal prior to the time of final distribution*. The WTT also contained a spendthrift provision in Section 14 which said,
>
> "Distribution of both income and principal shall be made as directed under the terms of this Trust, and *the beneficiary shall not have the right to alienate, anticipate, pledge, assign, sell, transfer or encumber such income or principal distribution without first procuring the written consent of the Trustees. Any endeavor of any such beneficiary to circumvent this direction in any manner shall be wholly disregarded by the Trustees, and shall be null and void.*" (emphasis was added by the court)

At the time of trial, the WTT had mutual funds and stocks of $1,155,877, a commercial property from which the trust received rental income, and the home of Mark and Wendy which had been conveyed from Wendy. The trust paid the annual real estate taxes on the home of approximately $13,000 and half of the annual cost of a housekeeper which likewise was about $13,000. There was no mortgage. The trust also paid for capital improvements on the house including a two-story addition, a new roof, driveway, kitchen and deck, some new floors, and landscaping and pool renovation. In the four years prior to trial, the trust generated at least $124,000 per year in the investment and rental income. On top of all of that, the trust paid the children's private school tuition for two years. According to Wendy and her father, she asked for money from the trust to go on a trip with some friends, but her father, the trustee, refused. No other requests were made. In addition to the WTT, her parents settled the Children's Trusts, both of which were irrevocable and for the benefit of the son and daughter. Each trust was to allow the trustee in his or her sole discretion to make distributions that were necessary on behalf of the children. The day before the trial, Wendy tried to get the court to exclude from the evidence any income generated by the trusts as an asset for computation of alimony and child support. The judge denied her request. The judge decided the trusts should be parties to the action. Ultimately the case was tried on August 6. On December 20, the judge issued his written opinion. He noted that alimony orders are based on actual income, potential to generate income, as well as "imputation of income." The judge went on to say that Mark and Wendy had fiduciary duties toward each other, and that Wendy had a fiduciary duty to pursue her option to seek income from the WTT. Because she failed to do that, its income was properly imputable to her, and her failure to request the income was an "unreasonable action on her part and a breach of fairness in her fiduciary duty." The judge also decided that he had the authority to compel a distribution of income to Wendy from the WTT. In part, the judge

relied upon the Restatement (Third) of Trusts Section 50, comment d(2) (2003) which said "support and maintenance and the language of the trust require[d] the trustee to disperse [sic] such sums as are necessary to maintain the lifestyle of the beneficiary." The judge decided that the trustees abused their discretion by failing to comply with the support provisions of the trust. As a result, the judge decided that $4000 per month in income should be imputed to Wendy from the trust and ordered the trust to make that payment to her and to continue making the other payments on the marital home, for the housekeeper's expenses, etc., and said that any failure to do so would be deemed an abuse of discretion.

The appellate court, citing N.J.S.A 2A:34-23, said that the court should make such orders as to alimony or maintenance as the circumstances and nature of the case render fit, reasonable and just, and noted that subsection (b) of that statute sets forth a nonexclusive list of 13 factors that can be considered. One factor is the income available to either party through investment of any assets held by that party. The appellate court went over a number of cases the trial judge had relied upon to come up with the idea that Mark and Wendy owed fiduciary duties to each other, and concluded that the judge was wrong. The appellate court said they need to be fair, but that's not a fiduciary duty, which the appellate court said "the essence of which is to act primarily for another's benefit."

The appellate court then addressed the portion of those cases that said a spouse who has assets and fails to properly utilize the assets to support himself or herself can be ordered to make better utilization of the assets. Mark contended that applied to the relationship between Wendy and the WTT, as though its assets were her assets. Wendy and the trustees said the trust conferred absolute discretion upon the trustees to make distributions and denied Wendy the ability to compel any, meaning that the trust's assets were not her assets at all. The appellate court said that deciding between those two positions required an examination of the document and then consideration of the circumstances surrounding its execution and other extrinsic evidence. "The extent of the interest of the beneficiary of a trust depends upon the manifestation of the intention of the settlor…" Restatement (Second) Trusts Section 128 (1959); accord Restatement (Third) of Trusts, Section 49 which provides, "Except as limited by law or public policy…, the extent of the interest of a trust beneficiary depends upon the intention manifested by the settlor."

The appellate court then pointed out Paragraph 3(A) which gave the trustees "sole discretion" to pay out principal and income "for the benefit of [Wendy's] health, support, maintenance, education and general welfare,… after taking into account the other financial resources available to [Wendy]." Paragraph 3(C) went on to say that it was the express intention of the grantors that Wendy "shall not be permitted, under any circumstances, to compel distributions of income and/or principal prior to the time of final distribution." The appellate court then pointed to Paragraph 14, the spendthrift provision, saying that Wendy had no ability "to alienate, anticipate, pledge, assign, sell, transfer or encumber" distributions from the trust. The husband, Mark, argued that the language of the trust must be interpreted "consistently with evolving standards and the well-defined fiduciary obligations of a trustee. *See, e.g. Commercial Trust Co. v. Barnard*, 27 N.J. 332, 341, 142 A.2d 865 (1958) ("It is the duty of a trustee, imbued by the settlor with discretionary powers, to exercise active judgment and not to remain inert.") [Mark] contends that [Wendy's] beneficial interest in the WTT is an asset to which income was properly imputed." The appellate court, however, disagreed with the husband and sided with the wife.

From that point forward in the opinion, the appellate court cited many provisions in the Restatement (Second) of Trusts, and noted that the trial judge relied on multiple sections of the Restatement (Third) of Trusts. The appellate court acknowledged that the Restatement (Third) of Trusts adopted significant changes regarding the rights of a beneficiary of a discretionary or support trust, but clearly indicated that New Jersey would continue to apply the Restatement (Second) of Trusts. The appellate court concluded that the existing law of the state of New Jersey was such that Wendy's beneficial interest in her trust was not an asset held by her and, therefore, it was improper to impute income of that trust to her to determine alimony obligations.

The appellate court went on to conclude that the trial judge erred in ordering the trust to disperse monies to Wendy and likewise erred in ordering the trusts to continue to pay taxes and expenses of the home, etc. Finally, the appellate court concluded that since the trial judge had no authority to enter those orders as against the trusts, they should never have been made parties to the litigation.

C. Roman's ACTEC Article. In "Protecting Your Clients' Assets from Their Future Ex-Sons and Daughters-in-Law: The Impact of Evolving Trust Laws

on Alimony Awards," Christopher J. Roman, ACTEC Law Journal – Spring/Fall 2013, Vol. 39, No. 1 and 2, the author points out that the *Tannen* case is not the first of its kind, citing cases from Iowa, Colorado and Massachusetts among others. Mr. Roman asserts that the RESTATEMENT (THIRD) OF TRUSTS serves as the basis for some of the best arguments that trust assets or income should be counted in the computation of alimony. And he asserts that the decision in *Tannen* reverberates nationally because it provides a fairly typical set of facts involving wealthy parents establishing a trust for their daughter, who later marries, has children, relies on trust distribution and then files for divorce.

D. Pennell Comments. Prof. Jeffrey Pennell, in a paper delivered to the South Palm Beach County Estate and Tax Roundtable Series in March 2014 entitled, "Third Party Trusts in Divorce: Is a Beneficiary's Interest Marital Property?" (and again in a paper entitled "Trust Interests in Divorce: Is a Beneficiary's Interest Marital Property?" presented to the Central Arizona Estate Planning Council in 2015) asserted that the *Tannen* case was informative for several reasons. The first was that the lower court's decision signaled the possibility that the assets in third-party spendthrift trusts might be treated as marital property in an equitable division of marital assets. He pointed out that the New Jersey Supreme Court resolved the case adversely to that theory, but that the *Tannen* case was not the first to treat beneficial interests as marital property. He said that indeed such cases have been decided for many years in a variety of ways. The second thing to note was that the trial court ordered the trustees to make mandatory distributions to the beneficiary, which the court then considered in setting the award of alimony, raising doubts about the ability of a spendthrift trust to insulate family wealth. Again, while the trial court's decision was reversed on appeal, courts in other states have already made that inroad on the ability to protect wealth.

> *"Finally, of broad interest is the appellate court's rejection of a change made in Restatement (Third) of Trusts §60 and Uniform Trust Code ("UTC") §504, which the court correctly quoted as 'eliminat[ing] the distinction between discretionary and support trust[s], treating the latter as a discretionary trust with the standard' and then saying that '[t]hese changes reflect recognition that a beneficiary of a discretionary trust has an enforceable interest in the benefits of the trust, even if the trustees are accorded the broadest discretion.' This is a correct statement, but it does not mean what the courts in Tannen assumed." Id at 6.*

Prof. Pennell said the lower court in Tannen determined the trust terms like "support and maintenance" meant that the trustee must distribute amounts needed to support the beneficiary. The court had said that benefits from the trust had to be considered before any alimony amount could be determined. The court then said the failure of a trustee to make distributions would be an abuse of discretion. And all of that was even though the trust expressly said that the beneficiary would not be permitted under any circumstances to compel any distributions and also in the face of a comment to UTC §504 which said that the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard or both, and a beneficiary's creditor may not reach the beneficiary's interest. The comment eliminated the distinction as far as it affected the rights of creditors, but it did not affect the rights of a beneficiary to compel a distribution. And all of that meant that whether a beneficiary could compel a distribution was irrelevant in determining what a creditor could do.

Prof. Pennell's opinion is that state law has confused traditional distinctions between marital and nonmarital property, such that commingling or transmutation may occur even if traditional constructs are honored. This "tainting" usually occurs by inadvertence. Some of this is a creature of existing law. But some of this occurs because of confusion as courts unfamiliar with trust concepts engage in an equitable distribution of property. Prof. Pennell said, "Court opinions confirm that a traditional assumption is failing: that property left to a beneficiary outright may not be protected but holding the same property in a third-party spendthrift trust for that beneficiary will insulate the property." He then proceeded to discuss cases that he said "reveals that the historic treatment of spendthrift trusts has eroded to the point that simply creating a trust with the spendthrift provision is no guarantee that the property will be insulated from spousal or child support claims in or following a divorce. And it may not protect the wealth in an equitable distribution either." Id at 11.

E. Breitstone Article and Prenups. Lauren Brightstone and Stephen M. Brightstone are the authors of an August 21, 2019 article entitled "Protect

Assets Held in a Spendthrift Trust From Divorce," published in Trusts & Estate's Magazine. The article begins, "It's a common misconception in the estate-planning community that assets held in a spendthrift trust are protected against claims in a divorce. It's also a common misconception that setting up a spendthrift trust for your client's children's share of the family wealth obviates a prenuptial agreement (prenup)…. It stands to reason that if the assets of the trust can't be reached by creditors, they should be, likewise, exempt from the claims of a spouse in a divorce. However, that isn't always the case. The law is nuanced." From that point, the Brightstones argue that prenuptial agreements are an important protection for assets held in trust. They say the best case for excluding assets held in trust from the marital estate is when the trust is established by a third party and the beneficiary doesn't have access or control. They note that the desire to keep trust assets out of the divorce may be compromised by common estate-planning features, such as mandatory distributions of income or mandatory payouts on reaching specific ages. Even absent those sorts of distribution rights, the Brightstones argue that common features designed to allow the beneficiary indirectly to maintain control at a minimum raise an issue that the court may be required to address in a divorce. That might include the power to hire or fire trustees, investment advisory powers, and control over the appointment of trust protectors. A serious matter of concern is when the beneficiary is also a trustee. The authors argue that the beneficiary-as-trustee problem can be mitigated by a provision in the trust or under state law that prohibits trustees from exercising discretion to make distributions to themselves. Even when distributions are discretionary, a course of conduct allowing access to trust assets or income can be detrimental. The uncertainty about how a divorce court will consider all of these factors is the very reason for having a prenuptial agreement.

F. Equitable Distribution Statutes. Over the last 30 years, most states have moved away from dividing assets in a divorce based on legal title. Instead state legislatures have adopted statutes that require equitable distribution.

1. UDMA. The change can be seen fairly clearly in the proposed Uniform Marriage and Divorce Act ("UDMA") put forward by the Uniform Law Commission of the National Conference of Commissioners on Uniform State Laws. The UDMA §307, which deals with division of property upon divorce, proposes two alternatives.

2. Alternative A. Alternative A provides, in part:

> *(a) In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage… the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. …* (emphasis added)

Alternative A exists currently in only four states: Conn.Gen.Stat. §46b-81, Mass.Gen.Laws Ch. 208, §34, Ind.Code §31-15-7-4, and Or.Rev.Stat. §107.105(1)(f). The Comment to this section provides,

> *"Alternative A, which is the alternative recommended generally for adoption, proceeds upon the principle that all property of the spouses, however acquired, should be regarded as assets of the married couple, available for distribution among them, upon consideration of the various factors enumerated in subsection (a)…. Alternative B was included because a number of Commissioners from community property states represented that their jurisdictions would not wish to substitute, for their own systems, the great hotchpot of assets created by Alternative A…"* (emphasis added)

3. Alternative B. Alternative B, reads in part:

> *In a proceeding for dissolution of the marriage, legal separation, or disposition of property following a decree of dissolution of the marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's separate property to that spouse. It also shall divide community property, without regard to marital misconduct, in just proportions after considering all relevant factors…*

Alternative B states, which include Arizona, Georgia, Minnesota, Montana and Washington, have adopted the UDMA in one form or another. Several states have

adopted versions of Alternative B. Colo.Rev.Stat. §14-10-113, Fla.Stat. §61.075(6)(b)(2), M.R.S. Title 19 §953, and NY Dom.Rel.Law §236(B)(1)(d)(1).

4. Colorado. For example, Colorado has some similarities defining marital property broadly but excludes property acquired by gift or bequest or devise or descent, property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift or bequest or devise or descent, property acquired by a spouse after a decree of legal separation and property excluded by valid agreement of the parties. The statute then provides that the court may divide the marital property taking into account several factors. But it does not set aside compensation for personal injury or address the issue of increase in value, as other states do.

5. New York. The New York statute, for example, defines marital property broadly, but specifically states that marital property shall not include separate property, which is defined as property acquired before marriage, acquired by bequest or devise or descent, acquired by gift from a party other than the spouse, compensation for personal injury, property acquired in exchange for the increase in value of separate property (except to the extent the appreciation is due to contributions or efforts of the other spouse) and property described as separate property by written agreement. It goes on to add a clarification which is only implied in the Colorado statute, which is that "separate property shall remain as such" and "marital property shall be distributed equitably between the parties…"

6. Arkansas. Arkansas has a variant of Alternative B in Ark.Code §9-12-315. It says that marital property is to be divided equally, but also says that property shall be returned to the party "who owned it prior to the marriage unless the court shall make some other division that the court deems equitable…" The language after "unless" appears to open the door for division of separate property.

7. California. California statutes simply do not allow separate property to be awarded to the other spouse. In fact, the statutes studiously avoid mentioning separate property when discussing division of property. See for example Ca.Fam.Code §§ 770 and 2550.

8. Washington State. Washington State approaches Alternative A in their statutory scheme. RCW 26.09.080 allows a court to "make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors…"

9. Massachusetts. One of the most bothersome of these is the one applicable in Massachusetts. Their statute requires a court to consider any "opportunity for future acquisition of capital assets and income." Prof. Pennell, in his paper, cited the Massachusetts Divorce Law Practice Manual which, in part, stated:

> *§8.3.1: G.L. c. 208, §34 states that "[u]pon divorce... the court may assign to either husband or wife all or any part of the estate of the other." The... court may assign property to either party, regardless of whose name is on the title [and] property subject to negotiation and division is not limited to property acquired during the marriage, but includes all property, "whenever and however acquired."*
>
> *§8.3.6: Gifted assets acquired during the marriage by one spouse can be ordered transferred to the other spouse upon divorce. Vested inheritances may be assigned upon divorce.*
>
> *A mere expectancy under a revocable trust or will is not a property interest subject to division upon divorce. [But]... the court may consider such expected inheritances under §34 as an opportunity for future acquisition of capital assets and income in determining what disposition to make of the property that is subject to division...*
>
> *§29.10.3: Although trust assets which are not subject to general powers of appointment in a beneficiary are not reachable by the creditors of a beneficiary... it may still be part of the marital estate subject to equitable division under G.L. c 208, §34."*

G. Cases. The following cases illustrate the direction in which the different states are going.

1. Montana. In the case of *In re Marriage of Beadle*, 968 P. 2d 698 (Mont. 1998), Andy Beadle appealed the decision requiring him to pay $1,000 per month maintenance for Linda Beadle. Linda also appealed complaining of the court's order excluding Andy's trust interest from the marital estate. The court, when dealing with the trust, noted that Andy "was sure

to inherit" as long as he survived his mother and she didn't spend everything. As a result, the court could take his interest into account as a vested interest. However, his mother held a power of appointment, and so it was subject to divestment. The decision raises the question, "what sort of power of appointment would be sufficient to remove any interest of a remainder beneficiary from consideration?" And, of course, if no power of appointment is present, then this case decision stands for the proposition that the divorce court can take trust assets into account, perhaps discounting them for the usage of the lifetime beneficiary.

2. Colorado. In the case of *In re Marriage of Balanson*, 25 P.3d 28 (Colo. 2001), the Colorado Supreme Court looked at the issue of whether a wife's interest as a successor beneficiary in an irrevocable trust left by her mother for the support of her father was marital property, even though her father was still alive and had the right to receive distributions of the principal over the balance of his lifetime. The trust at issue was created in 1976 by the wife's parents and reserved to them the power to alter, amend or revoke the trust until one of them died. The mother died in 1990 and the trust divided into Trust A and Trust B. The father was to receive the net income from both trusts during his lifetime and he had the discretion to invade the corpus for his support, care and maintenance. Upon his death, the trusts would combine and then be divided between the wife and her living siblings. The trial court determined that the wife's interest was a vested remainder subject to divestment if she predeceased her father, and this was her separate property and any appreciation during marriage was marital property. The trial court determined half of the trust would be distributed to the wife so long as her father predeceased her and set the value of that interest. The Supreme Court held that although the father could invade the corpus, that only rendered the wife's remainder interest uncertain but it did not convert it to a mere expectancy, which normally would not be considered. Upon remand, the trial court issued revised permanent orders resulting in a redetermination of the value of the wife's interest, and then determined that the trust had appreciated during the term of the marriage and that half of that belonged to the wife. It went on to determine that the possibility of her predeceasing her 80-year-old father was negligible and that he would have no need to invade one of the two trusts because he had long-term health insurance and would use only the other trust. Ultimately, the trial court ordered the wife to make an equalization payment to the husband of her share of the trust upon her father's death.

3. Illinois. *In re Marriage of Jannsen*, 2013 Ill.App.Unpub. LEXIS 786 was reported by Prof. Pennell in his paper and he quoted the court as saying, "Potential inheritances are not property which can be valued and awarded to a spouse, although they can be given some consideration in determining property distribution."

4. Massachusetts. *Lauricella v. Lauricella*, 565 N.E.2d 436 (Mass. 1991) addressed a situation where the husband's parents established a trust in 1976 which owned certain real property. The trust provided that the trust was to last for 21 years after the death of the father during which the beneficiaries had equitable interests with no power to require partition or distribution. A spendthrift clause restricted the rights of the beneficiaries. The husband and his wife were married in 1983. The father died in 1986 as did his wife shortly thereafter. During the marriage, the parties resided in the trust property in one of its two apartments. The husband's sister lived in the other apartment. Throughout the marriage, the husband and his sister were the sole beneficiaries. In 1988, the wife filed for divorce. She emphasized that the trust property was the only asset of any value in the marriage and that she needed it financially. It was valued at $247,000. The court looked at the Massachusetts statute recited above. The court said that the husband had a present, enforceable, equitable right to use the trust property for his benefit. He exercised that right during marriage. He can continue to use the property as a residence or he could generate income by renting it out. He had a vested right to the future receipt of a share of legal title to the trust property. As the husband was only about 26 years old, the likelihood that he would survive to receive his share of the title was significant. The court said, "The spendthrift clause is not a bar." The court went on to say that the husband's interest is unlike a mere expectancy. The husband's rights in the trust property were present, enforceable and valuable. His interest originated before marriage and expanded during the marriage. Difficulty in valuation of the interest did not alter its character, and concluded that the husband's beneficial interest in the trust property was subject to equitable division under Section 34.

Much more recently, the case of *Amy Levitan v. Daniel J. Rosen*, 124 N.E.3d 148, 95 Mass.App.Ct. 248 (2019) was decided. Quoting from the Advisor

Alert from the law firm of Bove & Langa, "Amy's father established an irrevocable trust for her sole benefit. Except for Amy's right to withdraw a limited amount annually, all distributions were at the sole discretion of the trustee. The trust contained a "spendthrift" clause, as such trusts usually do, prohibiting Amy's beneficial interest from being reached or obstructed by creditors. Under "normal" well-settled principles of creditor's rights law, since the trust was established and funded by a third-party, Amy's creditors would be unable to reach the assets in this trust. The Massachusetts Court of Appeals made an end run around this law. Amy and her husband were divorcing, and the issue was whether the assets in Amy's trust (about $1.6 million) should be considered "a marital asset subject to equitable division." If the trust was not a marital asset, the only significant marital asset would be the husband's retirement account of about $140,000. Although the lower court held (in accordance with well-settled law) that except for Amy's right to withdraw, the trust assets were not reachable by Amy and therefore were not a part of the marital estate. The Appeals Court reversed on the basis that Amy was the sole beneficiary of that trust, and her interest was "more than a mere expectancy." Thus, the court held the entire trust fund should be considered a marital asset subject to equitable division."

Key facts to remember about the trust in this case are: (1) it is a Florida trust; (2) established by Amy's father in 1984, about 15 years before Amy's marriage, for Amy and her two siblings; (3) which divided into three separate trusts at the father's death in 2007, one for Amy which will last for her entire lifetime; and (4) and the trustees are Amy and an independent, non-beneficiary trustee. As noted in the case summary above, Amy could make limited withdrawals but it was the independent trustee who had the "sole discretion" to distribute "as much of the income and principal" to Amy as the Independent trustee deemed advisable.

5. Vermont. *Billings v. Billings*, 35 A.3d 1030 (Vt. 2011) addressed a situation where the husband's parents had created a revocable living trust and the wife contended that even though they had not yet died, the assets in that trust should be taken into account in dividing the couple's assets. The Vermont Supreme Court ruled that any revocable trusts or wills under which the husband may be a beneficiary are not marital property to be distributed by the court, citing 15 V.S.A §751(a) which said, in part, "'[a]ll property owned by either or both of the parties, however and whenever acquired, shall be subject to the jurisdiction of the court. Title to the property, whether in the names of the husband, the wife, both parties, or a nominee shall be immaterial…' Although we have not addressed the issue, the near unanimous holdings around the country are that a beneficiary's interest under a will is not property before the death of the testator, but instead is only an expectancy that is not subject to the jurisdiction of the Family Court." However, the court went on to say that the wife did not appear to contest that result with respect to the will, but argued that interests created by revocable trusts should be treated differently. The court disagreed on that particular point, but went on to say, "While we agree with the husband that his beneficial interest in the revocable trust is not marital property, that determination does not end the issues before us." The wife argued that the potential inheritance should somehow be taken into account. And ultimately the court agreed saying, "We conclude that consideration of likely receipt of future inheritances and trust assets or proceeds may be considered under §751(b)(8). The statute does not distinguish between different opportunities based on the means by which the opportunity is created."

6. South Dakota. *Halbersma v. Halbersma*, 738 N.W.2d 545 (S.D. 2007) said, "South Dakota is an 'all property state,' meaning all property of the 'divorcing parties is subject to equitable division by the circuit court, regardless of title or origin.'" Citing earlier precedent, the court said that inherited property is not ipso facto excluded from consideration in the overall division of the property, and further said, "Only in the case where one spouse has made no or de minimis contributions to the acquisition or maintenance of an item of property and has no need for support, should a court set it aside as 'non-marital' property."

H. Discovery. The natural question that must follow from a procedural standpoint is whether a divorcing spouse non-beneficiary can seek and obtain discovery of the assets in the third-party trust.

A Texas court has already addressed the issue. A spouse of a beneficiary, who is also the other parent of the beneficiary's child, may seek discovery from a trustee to ascertain information about the trust assets and distribution history to that beneficiary. In *Lucas v. Lucas*, 365 S.W.2d 372 (Tex.Civ.App. – Beaumont 1962, no writ) Carolyn Lucas and Philip Lucas were involved in a divorce. During that proceeding, she attempted to take the deposition of H. E. Dishman,

trustee of a trust created by Harry and Mildred Lucas for the husband and father, Philip Lucas, when he was 14 years old, and who also served as trustee of a trust under the will of Harry Lucas who died in 1951. The trustee sought and obtained a temporary injunction prohibiting the taking of the deposition, but the court ruled that the injunction should not have been granted, reversing the lower court and dissolving the injunction. The assertion by the trustee that the spendthrift trust, which gave complete discretion to the trustee on when and if to make distributions, did not mean that the trustees held the absolute title to all of the properties in the trusts and that the beneficiary, Philip, had no title or interest. While the trusts were spendthrift trusts and the trustee had "sole discretion," the court said that even a trustee in that position may not exercise the discretion arbitrarily. Before the court was an allegation that the trustees had paid Philip between $35,000 and $40,000 per year for several years, but when the divorce was filed, all payments stopped. In addition, Philip had filed a motion to reduce temporary alimony to his wife and for the support of his children from $1000 per month because of "lack of funds." The court said, "It is against public policy to allow such person to be well taken care of by a trust when those who have every right to look to him for support are doing without." But, more to the point, the court said, "The primary object of judicial inquiry is to seek and establish the relevant facts. Therefore the liberal use of means of discovery will be upheld. One of the most effective means of discovery is by use of depositions; and restraint against their employment should be cautiously exercised." Id at 375.

Again, in *Mayfield v. Peek*, 546 S.W.3d 253 (Tex.App. – El Paso 2017, no pet.), the trial court dealt with a claim where a beneficiary alleged that the trustee had violated his fiduciary duty when he convinced his mentally impaired mother to transfer assets out of the trust and into another trust for his benefit. The trial court determined that because the trust was revocable, the beneficiary did not have a vested interest to give her standing. The appeals court, however, reversed, citing Texas Property Code (Texas Trust Code) Sec. 115.001(a), which provides that any interested person may bring an action and that an "interested person" is defined in Property Code (Trust Code) Sec. 111.004(7) to include a beneficiary. Beneficiary is defined to include a person for whose benefit the property is held in trust regardless of the nature of the interest. Property Code (Trust Code) Sec. 111.004(2). Property Code Sec. 111.004(6) defines an "interest" as both vested and contingent interests. Because of that, the beneficiary's contingent interest in a trust that was revocable created by another was still an interest sufficient to give the beneficiary standing. From that platform, the beneficiary surely could obtain information about the trust through discovery and, likewise, a soon-to-be-ex-spouse could as well.

VI. SUMMARY

A. Texas. Texas has fairly stable law regarding spendthrift trusts. However, the notion that it will stay that way is not realistic. Courts have begun to cite the RESTATEMENT (THIRD) OF TRUSTS, which many view as not being a restatement of existing law but as a manifesto for what the law should be. However, Texas' native sons and daughters often go elsewhere to live, get married, and sometimes spend the rest of their lives in jurisdictions outside of Texas. Planners within Texas need to be mindful of what might happen to their inter vivos and testamentary trusts created here in Texas by Texans.

B. *Tannen*'s Roadmap. Mr. Roman, in his article referenced above, said, "… the court did provide future non-beneficiary spouses in other states with a roadmap to argue that the Restatement (Third) applies in the context of an alimony claim. In particular, *Tannen* serves as a roadmap to argue that distributions from a discretionary trust should be included in the alimony calculation to a non-beneficiary spouse in states where (i) the Restatement (Third) has been adopted; (ii) the Restatement (Third) has not yet been considered or (iii) the Uniform Trust Code, which includes provisions similar to the Restatement (Third), has been adopted." Considering the fact that the RESTATEMENT (THIRD) OF TRUSTS has been cited in Texas divorce cases, this jurisdiction may very well fall within (i) above.

C. Applicable State Laws. In many cases, creditors will face the law of the jurisdiction where the trust was created or, perhaps, where it is administered. Soon-to-be ex-spouses, however, will deal with the law of the jurisdiction where the married couple resides as they are separating and seeking a divorce. Just looking at the statutes and cases cited above, there are far more family law cases where divorce courts are considering how to divide property than there are creditor lawsuits, in state or federal courts, or bankruptcy cases, or otherwise, attempting to interpret spendthrift and other protective clauses. That strongly suggests, as Prof. Pennell states, that family law cases are going to affect the law of trusts much more than property, probate or

creditor cases. Family law property divisions are based in concepts related to fairness and equity, not in rules of law like those found in trust cases. With the advent of the Uniform Trust Code and the RESTATEMENT (THIRD) OF TRUSTS, which are used in many states and cited even in Texas, it is likely if not probable, or even destined, that the law will move further to erode spendthrift clause protection.

D. Possible Strategies. Many have suggested strategies. Some are found in the articles cited above. The following is a list of possible tactics to take, borrowed heavily from Prof. Pennell's article.

1. Pure Discretion. Mr. Roman advised, "Despite the expansion of a beneficiary's power to compel distributions from discretionary trusts in the Restatement (Third), a pure discretionary standard remains the best protection from the claim of an exception creditor, including a soon-to-be ex-spouse." "For estate planners, when drafting a pure discretionary standard for a trust, they must be careful not to inject any support language that will limit the trustee's absolute discretion over distribution decisions." "With that objective in mind, however, the estate planner must be aware that each injection of support language that limits the breadth of the standard of discretion can increase the potential for an alimony award based on future trust distributions."

2. Extended Discretion. Mr. Roman further suggested that in a pure discretionary standard, planners should add phrases like "in their uncontrolled discretion." Roman refers to these additions as "extended discretion." "With respect to language of extended discretion, at common law, a court could interfere with a trustee's distribution decision if the trustee acted unreasonably. However, under section 187 of the Restatement (Second) when adjectives like 'sole,' 'absolute,' 'uncontrolled' and other words of extended discretion are included in the standard of discretion, courts were to dispense with the reasonableness standard and instead review distribution decisions under a less stringent standard – an abuse of discretion standard."

3. Spray Trusts and Spray Group Trusts. Prof. Pennell suggested, "Create totally discretionary spray trusts rather than trusts with more easily valued interests. Better yet, create totally discretionary spray group trusts, in which no beneficiary has an exclusive right to receive anything at any time." The recent *Levitan* case, supra, certainly indicates that is a worthwhile tactic to employ.

4. Disinterested Trustee. Both Mr. Roman and Prof. Pennell suggested the use a disinterested trustee. "If instead of incorporating a disinterested trustee, the beneficiary was the sole trustee and held sole control over the distributions, the court may see the discretionary aspect of the standard as a sham because the beneficiary would be controlling the distributions."

5. Income Interest Only. Prof. Pennell suggested that the planner should give a beneficiary only an income interest. "This is because the current income from a trust might be treated as marital property, in the way that income from separate property becomes community property in some states. But if all that the beneficiary owns is an income interest for life, then perhaps the income interest will be treated as the nonmarital property itself, and not as an interest that is subject to this 'income from property' concept."

6. SNT-like Language. Prof. Pennell suggested, "Consider how special needs trusts hold Medicaid at bay. Would similar planning be similarly effective in divorce? Although the special needs trust rules are a statutory safe-harbor, quaere whether they may inform a dissolution safe harbor by judicial analogy."

7. Dual Trusts. Planners might consider dual trusts. That is, a smaller trust with an ascertainable standard for distribution such as health, education, maintenance and support, with the beneficiary as his or her own trustee. The larger part of the client's estate might go into a trust where distributions are purely discretionary, and the trustee is an independent trustee based in Texas. When it comes to discovery of trust assets, it would be best to have a Texas-only trust company or bank.

8. Form an Entity. Prof. Pennell suggests creating an entity and transferring property to it. He said, "Consider whether to insulate property inside as entity such as an FLP or LLC that denies or restricts rights of any transferee from family member owners. The question is whether entity restrictions on transferability will be any more effective than spendthrift restrictions in a trust. And whether they will impact evaluation in an affirmative manner more

effectively than they have for wealth transfer tax purposes."

9. Double Down. Do both. Create a spendthrift trust, transfer property to it, and then create an FLP or LLC inside the trust. Or, alternatively, transfer ownership interests in an FLP or LLC into a spendthrift trust. Care should be taken to make sure that the diversification requirement found in §117.005 of the Texas Trust Code is specifically overridden so that the trustee can properly hold those interests if they are a substantial part of trust holdings. See, for example, *Cleaver v. Cleaver*, supra.

10. Prenuptial (Marital Property) Agreements. In the Brightstone article, the authors make an effective argument for the idea that the beneficiary of any kind of trust should have a prenuptial agreement with his or her spouse-to-be or, if already married when the trust is created, should obtain a marital property agreement, which agreements, in either case, should protect the trust and are excluded from being considered a part of the marital property.

11. Prenup as a Condition Precedent. Another potential technique is to include in the trust provisions the requirement that the beneficiary must obtain a prenuptial agreement with certain terms that protect the trust as a condition precedent to the beneficiary being able to receive any income or distributions from the trust. In other words, the language of the trust could prevent the beneficiary from ever becoming a beneficiary, avoiding any issue of standing, if the beneficiary fails to have a prenuptial or marital property agreement that provides that the assets and income of the trust are deemed to be the separate property of the beneficiary, are not marital property, and that the other spouse agrees not to assert in any separation or divorce proceeding that any assets or income should be considered for alimony or spousal support purposes, or in the division of the martial property estate.

12. Texas Law. Include clear provisions in your wills and trusts that Texas law applies in all respects, including for purposes of testing the validity of the trust, controlling and the rights and duties of the trustees and beneficiaries in all aspects without regarding to the nature, location, domicile or nationality of the trustees, the beneficiaries, the types of assets (moveables or immovable) and sources of income.

13. Material Purpose Statement. Be sure also to include a clear statement about whether providing spendthrift protection for the beneficiaries is a material and significant purpose of the trust, and whether it should be preserved. Clearly express the testator's or settlor's desire regarding whether the trust can be modified in a way to eliminate or reduce the effectiveness of the spendthrift provisions or allow assignments. As noted above, provisions of the UTC declare that spendthrift provisions are not material and, as a result, can easily be modified, with or without judicial intervention.

14. Accept it. Prof. Pennell suggests that clients might simply accept the inevitable and have their trusts for their own descendants written so that the spouse of a beneficiary is also made a beneficiary to some extent.

Appendix A

UNIFORM TRUST CODE (2018 VERSION)
ARTICLE 5
CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

SECTION 501. RIGHTS OF BENEFICIARY'S CREDITOR OR ASSIGNEE. To the extent a beneficiary's interest is not subject to 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 benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

SECTION 502. SPENDTHRIFT PROVISION.

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) 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.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

SECTION 503. EXCEPTIONS TO SPENDTHRIFT PROVISION.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(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;

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

(3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.

(c) A claimant against which a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.

SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Except as otherwise provided in subsection (c), whether or not a trust contains 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.

(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.

(d) This section 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.

(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.

SECTION 505. CREDITOR'S CLAIM AGAINST SETTLOR.

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(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.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and [statutory allowances] to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and [allowances].

(b) For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on [the effective date of this [Code]] [, or as later amended].

SECTION 506. OVERDUE DISTRIBUTION.

(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.

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.

(b) 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.

SECTION 507. PERSONAL OBLIGATIONS OF TRUSTEE. Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.