Are Trust Funds Safe From Claims For Alimony or Child Support?

State laws vary widely

Parents who want a child's inheritance to pass to a trust, rather than outright, often seek to prevent the child's former spouse from reaching such assets in the event of divorce. Unfortunately, under the laws of some states, regardless of whether a trust has a spendthrift provision or is a discretionary trust (or both), a beneficiary's children and/or a former spouse may have rights to reach trust assets that are otherwise protected from creditors. When clients are concerned about these issues, attorneys should consider creating the trust in a state where the law is clear that no creditor, including children, spouses and former spouses, will have access to trust assets.

Let's explore discretionary and spendthrift trusts under Article 5 of the Uniform Trust Code (UTC) and compare the exposure of both to claims of creditors holding a judgment against a beneficiary with respect to payments required under a divorce decree. State laws differ significantly, even among the states adopting the UTC, with respect to the power of a former spouse or child to enforce his rights against a spendthrift and/or discretionary trust created by a third party.

Each of the 24 states (and the District of Columbia) that adopted the UTC had an opportunity to modify or delete portions of the law. (See “Treatment of Exception Creditors by UTC States,” http://wealthmanagement.com/estate-planning/treatment-exception-creditors-UTC-states.) Many states, including Florida, modified Article 5, titled “Creditor's Claims; Spendthrift and Discretionary Trusts.” Florida's experience in adopting Article 5 of the UTC serves as an example of the type of issue that may arise should a former spouse or child with a judgment for support try to enforce the judgment against an irrevocable spendthrift trust and/or a discretionary trust.

As described below, many states make it easy for a former spouse or child having a judgment for support to reach assets in a spendthrift trust when mandatory distributions are provided, as compared to discretionary trusts. States providing for exception creditors typically have a public policy of protecting former spouses and children holding a judgment and, in furtherance of that policy, give them additional rights to attach or reach certain trust assets. Some states give these rights to children, but not to a spouse or former spouse. The law is less clear as to whether: (1) a former spouse or child with a judgment for support can reach, attach or garnish assets in a discretionary trust, regardless of spendthrift provisions, before the trustee actually distributes trust funds to the intended beneficiaries; and (2) the trustee of a third-party-created trust can make distributions for the benefit of a beneficiary known to be subject to a judgment for support.

Example: Trust for Divorced Son

Mark, a domiciliary of State X, has suffered serious financial difficulties and has no assets or income to satisfy his obligation to his former spouse. Mark's wealthy father, Jack, consults his advisor and asks whether the testamentary trust Jack intends to create for Mark at Jack's death could be reached by Mark's former wife, who has received a judgment for support payments. Jack says that when Mark was financially secure, Mark was making timely payments to his former wife. However, like many others, Mark's ability to satisfy his debts was significantly curtailed when the value of his real estate vanished, as did his capacity to earn a living as a developer. Jack is helping to support Mark (hopefully temporarily) and wants to know that...
when Jack dies, Mark, and not Mark’s former wife, will benefit from assets left in a testamentary trust that will be established for Mark after Jack’s death.

Jack inquired about the benefits of using a spendthrift trust and/or a discretionary trust. He was advised that Mark’s former wife would be considered an “exception creditor” and could reach Mark’s trust if it was a spendthrift trust. Jack was advised that Mark needed a discretionary trust with a spendthrift provision. Jack asked his advisor to explain the difference between a spendthrift trust and a discretionary trust and whether either of them would protect Mark against his former wife’s judgment. If State X’s laws didn’t provide protection, should another jurisdiction be considered?

Spendthrift v. Discretionary
The UTC addresses spendthrift and discretionary trusts.

Spendthrift trusts. Sections 501 and 502 of the UTC address spendthrift trusts. If a beneficiary’s interest in a trust isn’t subject to a spendthrift provision, a court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest in the trust by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The comment to Section 501 of the UTC states:

This section does not prescribe the procedures (“other means”) for reaching a beneficiary’s interest ... leaving those issues to the enacting state’s laws on creditor’s rights. The section does clarify, however, that an order obtained against the trustee ... may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary’s benefit. By allowing an order to extend to future payments, the need for the creditors periodically to return to court will be reduced.

A spendthrift trust is a trust:

"[C]reated with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection..." [quoting Croom v. Ocala Plumbing & Elec. Co., 57 So. 243, 244 (Fla. 1911)]. When a trust includes a valid spendthrift provision, a beneficiary may not transfer his interest in the trust, and a creditor or assignee of the beneficiary may not reach any interest or distribution from the trust until the beneficiary receives the interest..."'

Comments to UTC Section 502 state:

[A] settlor has the power to restrain the transfer of a beneficiary’s interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment was made.

UTC Section 503(b) provides: "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..."

UTC Section 503(c) provides that “a claimant against which a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distribution to or for the benefit of the beneficiary...”

Comments to UTC Section 503 state:

The exception ... for judgments or orders to support a beneficiary’s child or current or former spouse is in accord with Restatement (Third) of Trusts ... and numerous state statutes. It is also consistent with federal bankruptcy law, which
exempts such support orders from discharge.

**Discretionary trusts.** UTC Section 504(b) provides that, other than as provided in UTC Section 504(c), regardless of whether a trust has a spendthrift provision, a creditor of a beneficiary may not compel a distribution that's subject to the trustee's discretion, even if: (1) discretion is expressed in the form of a standard of distribution, or (2) the trustee has abused the discretion. UTC Section 504(c) states if a trustee hasn't complied with the standard or abused his discretion, a court can order a distribution 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 the child, spouse or former spouse such amount as is equitable, but not more than the amount the trustee would have been required to distribute to the beneficiary if the trustee had complied with the standard or had not abused discretion.

The comments to UTC Section 504 state that the power to force a distribution due to an abuse of discretion or failure to comply with the standard belongs solely to the beneficiary, unless it's on behalf of a spouse, former spouse or child having a judgment or order against a beneficiary for support or maintenance. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable, but not to exceed what the trustee is required to pay the beneficiary. Similar to the law for spendthrift trusts, the UTC doesn't provide a procedure to enforce a judgment against the trustee of a discretionary trust.

**Florida's Experience**

Florida adopted the UTC with modifications. Attorneys with clients similar to Mark in "Trust for Divorced Son" must determine whether applicable local law follows the UTC or creates greater protection to beneficiaries of irrevocable trusts. The laws of Nevada and South Dakota appear to more clearly state that a spouse, former spouse or child can't reach assets in a properly drafted irrevocable discretionary and/or spendthrift trust, and the trustee can make payments to or for the benefit of the intended beneficiary of the trust.

**Common law.** Before enactment of Florida's Trust Code (FTC) in 2006, the Florida Supreme Court's decision in *Bacardi v. White* provided Florida common law on the rights of a former spouse to assets in a spendthrift and/or discretionary trust when a former spouse had a judgment for support. The court distinguished the consequences of assets held in a spendthrift trust from assets held in a discretionary trust. In *Bacardi*, the former spouse of a donor's son was granted alimony. After the son ceased paying the requisite amount of alimony, his ex-wife obtained a judgment for the unpaid balance. In aid of execution on her judgments, the ex-wife served a writ of garnishment on the trustee of the spendthrift trust created by the father for his son's benefit. The son and trustee asserted that, under the trust's spendthrift provision, the trust couldn't be garnished for the collection of alimony and attorney's fees. The issue on appeal to the Florida Supreme Court was whether disbursements from spendthrift trusts could be garnished to satisfy court-ordered alimony and attorney's fees before such disbursements reached the debtor-beneficiary. The court held that disbursements from spendthrift trusts, in certain limited circumstances, may be garnished to enforce court orders or judgments for alimony.

Much of the *Bacardi* opinion centered on Florida's public policy in creating an exception to spendthrift trust provisions, specifically:

This state has always had a strong public policy favoring the enforcement of both alimony and child support orders ... We have weighed the competing public policies and, although we reaffirm the validity of spendthrift trusts, we conclude that in these types of cases the restraint of spendthrift trusts should not be an absolute bar to the enforcement of alimony orders or judgments. Florida's interest in the enforcement of these awards under certain limited circumstances is paramount to the declared intention of the donor and the restraint of a spendthrift trust.

The court added:

In not every case where someone is attempting to enforce alimony orders or judgment, however, will garnishment of a spendthrift trust be appropriate. This enforcement alternative should be allowed only as a last resort. If the debtor himself or his property is within the jurisdiction of this state's courts, the traditional methods of enforcing alimony arrearages may be sufficient. In this event, there would be no overriding reason to defeat the intent.
of the settlor. Florida courts have a variety of methods available to enforce alimony and child support. When these traditional remedies are not effective, it would be unjust and inequitable to allow the debtor to enjoy the benefits of wealth without being subject to the responsibility to support those whom he has a legal obligation to support.17

It appears that the FTC codified a portion of the Bacardi opinion.18 Florida Statutes Section 736.0503(3) provides an exception to spendthrift provisions:

Except as otherwise provided in this subsection and in s. 736.0504, a claimant against which a spendthrift provision may not be enforced may obtain from a court, or pursuant to the Uniform Interstate Family Support Act, 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. Notwithstanding this subsection, the remedies provided in this subsection apply to a claim by a beneficiary's child, spouse, former spouse, or a judgment creditor described in paragraph (2)(a) or paragraph (2)(b) only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient.19

Did the FTC overrule Bacardi for discretionary trusts? When Florida enacted the FTC, it included separate statutes for spendthrift trusts (Sections 736.0502 and 736.0503) and discretionary trusts (Section 736.0504). Although Florida's adoption was consistent with UTC Sections 501, 502 and 503, Florida's law takes a different approach with respect to discretionary trusts. Florida law is clear that a spendthrift provision is unenforceable against exception creditors, including a trust beneficiary's child, spouse or former spouse, who has a judgment for support or maintenance.20 However, Florida doesn't give a child, spouse or former spouse the power that UTC Section 504(c) gives them to enforce judgments against a discretionary trust when the trustee hasn't complied with a standard or has abused his discretion.

A quick and literal reading of Florida Statutes Section 736.0504 (entitled "Discretionary trusts; effect of standard" (the same title as in the UTC)) could lead to the conclusion that trust assets left to a client's child in a discretionary trust in Florida are protected from a spouse, former spouse or child holding a support judgment. Although the creditor may be an exception creditor and therefore, able to reach assets in a spendthrift trust, Section 736.0504(2) (Florida's modification of UTC Section 504) states:

Whether or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, including a creditor as described in s. 736.0503(2) [i.e., an exception creditor], may not: (a) Compel a distribution that is subject to the trustee's discretion; or (b) Attach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.21

The critical issue is whether Section 736.0504(2) means a spouse, former spouse or child holding a judgment in the form of support can garnish distributions from the discretionary trust before they're in the hands of the beneficiary. Further, can a Florida trustee intentionally make distributions for the benefit of a beneficiary known to have a judgment against him for support without risking personal liability?

Although Florida law allows certain creditors to attach present or future distributions from Florida spendthrift trusts to or for the benefit of a beneficiary under limited circumstances22 and, specifically, states that other creditors can't reach an interest or a distribution by the trustee "before receipt of the interest or distribution by the beneficiary," it appears uncertain whether exception creditors may garnish a beneficiary's interest in a Florida discretionary trust so that before the distribution is made, the child, spouse or former spouse will insert his rights, as was the case in Bacardi.

Florida Statutes Sections 736.0503(2)(b) and 736.0504...
may provide support to the position that a discretionary trust created for a beneficiary, such as Mark in ‘Trust for Divorced Son,’ would be protected (that is, a creditor can’t attach or otherwise reach Mark’s interest in a discretionary trust once the trustee, in the trustee’s discretion, is ready to make a trust distribution to the beneficiary. Attorneys involved in drafting the FTC have differing views on whether Section 736.0504 was intended to overrule Bacardi with respect to garnishment of discretionary trusts. If Bacardi wasn’t intended to be overruled by Florida’s adoption of the UTC, a trustee should seek court approval before making a distribution to a beneficiary subject to a judgment in the form of support in favor of a child or former spouse.

Bacardi says a discretionary trust may be subject to a writ of garnishment. The court in Bacardi didn’t need to address how its ruling should apply to discretionary trusts. However, it did. In dicta, the court states:

We further limit this right of garnishment to disbursements that are due to be made or which are actually made from the trust. If, under the terms of the trust, a disbursement of corpus or income is due to the debtor-beneficiary, such disbursement may be subject to garnishment. If disbursements are wholly within the trustee’s discretion, the court may not order the trustee to make such disbursements. However, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment . . . We also note that where a continuing garnishment is appropriate, the trustee, if it wishes to make payments to the debtor-beneficiary in excess of alimony then due, should seek court approval before it makes such payments. The court may then authorize such payments if sufficient assets remain in the trust or if other provisions are made to secure the payment of alimony to the person who should receive it.

When reading the FTC in conjunction with Bacardi, a court could determine that once a trustee, in the trustee’s discretion, decides to make a distribution, an exception creditor of the beneficiary should be able to garnish such distribution before it reaches the beneficiary, or the trustee must first obtain court approval before making a distribution to the beneficiary. The preceding analysis highlights the types of consequences that occur when states adopt or modify Article 5 of the UTC, especially when existing common law may conflict. Nevada and South Dakota, neither of which has adopted the UTC, have provided additional clarity in their statutes that specifically prohibit exception creditors from reaching discretionary trust assets and authorize the trustee to make distributions on behalf of the intended trust beneficiary, even one subject to a judgment in the form of support in favor of children or a former spouse.

If State Addresses Exception Creditors
Based on Bacardi, it appears that although an exception creditor may garnish a present or future distribution to or for the benefit of the beneficiary of a trust, regardless of whether the trust contains a spendthrift provision, the exception creditor can’t compel distributions from discretionary trusts. If the exception creditor could garnish distributions intended to be made by the trustee of a discretionary trust, then, effectively, the donor’s objective—to provide funds to the beneficiary and not to the beneficiary’s former spouse—is thwarted. In Florida, the question as to whether an exception creditor can obtain a continuing garnishment over assets in a discretionary trust is likely to be determined by future case law or statutory clarification. Marc A. Chorney, in his Colorado continuing legal education publication, “Trusts in Divorce Property Revisions” (2011), cites Bacardi for the proposition that if a trustee of a discretionary trust exercises discretion and makes a disbursement, the disbursement may be subject to a writ of garnishment. Yet, it’s easy, based upon a literal reading of Florida Statutes Section 736.0504(2), to believe that Florida discretionary trusts can’t be reached or attached by exception creditors.

An article written in 2008 by Timothy J. Vitello surveying 50 states’ (and the District of Columbia’s) treatment of spendthrift trusts and exception
creditors concludes that, with respect to spendthrift trusts, 20 states include child support and alimony exception creditors, either by adopting the UTC, by statute independent of the UTC, or by case law. According to Vitollo, 10 jurisdictions (including the District of Columbia) include child support (but not alimony) exception creditors, and 20 states fail to fully protect spendthrift trusts from claims for child support or alimony. Vitollo's article doesn’t address exception creditors for discretionary trusts.

In light of the fact that as many as 30 states provide some type of exception creditor access to spendthrift trusts, it appears that for those beneficiaries known to have exposure, forum shopping for more protective jurisdictions may be advisable. Furthermore, based on “Trust for Divorced Son,” even for states that may have limited or eliminated rights of exception creditors, greater certainty should be provided. Jack's primary concern is what happens when a distribution is made to his son Mark. Even if Mark's former spouse couldn't force the trustee of Mark's trust to make a distribution, could the former spouse have a continuing garnishment as described in Bacardi? Even if the trust assets must first reach Mark, doesn't that create a game of cat and mouse, with the judgment creditor spouse forced to monitor Mark's accounts? Why not find a state that specifically prohibits a continuing garnishment and, by statute, permits a trustee to make distributions for the benefit of a beneficiary, even a beneficiary subject to a judgment for support from a spouse or child?

Bacardi serves as an example of how a court could rule when asked to determine if a continuing garnishment could be obtained by a former spouse or child with a judgment for support. If a court could rule that a continuing garnishment would be effective, it would also appear that a trustee who circumvents the continuing garnishment by making distributions for the benefit of a beneficiary could be liable to the creditor to the extent the trustee continues to make payments to or for the benefit of the beneficiary."

In the Matter of Goodlander & Tamposi is an example under New Hampshire’s UTC law, in which the court decided that a former spouse may reach limited funds in a discretionary trust with a judgment for support. The Supreme Court of New Hampshire held that a trial court’s award of alimony to the spouse of a beneficiary of a discretionary trust governed by New Hampshire law with the payment of the alimony amount contingent on the beneficiary’s spouse’s receipt of trust distributions was in error. The trial court had determined that the spouse of the trust beneficiary “...is awarded $50,000 per year in alimony to meet his ‘most basic needs’...” The trial court directed the trust beneficiary to “...pay him fifty percent of any distribution she receives from the EMT Trusts up to $50,000 per calendar year, which the EMT Trust trustee shall pay to him directly.” On appeal, the court stated that under the provisions of the UTC, a former spouse is entitled to seek a trust distribution to meet his most basic needs, regardless of whether a trustee makes a distribution to the beneficiary.

For those clients desiring greater certainty that their beneficiaries (and not the beneficiary's former spouses) will benefit from trust assets under existing law, advisors should suggest jurisdictions that provide greater protection of trust beneficiaries who may be subject to judgments resulting from divorce. Two of the jurisdictions that appear to be most protective of such beneficiaries are South Dakota and Nevada.

Comparison to UTC

Neither South Dakota nor Nevada adopted the UTC. Their protection of trust beneficiaries from claims of a spouse, former spouse or child as a result of a judgment in the form of support is clear and provides great latitude to trustees.

South Dakota. South Dakota’s statute leaves little room for misunderstanding. For example, unlike the UTC, which doesn’t define the word “reach,” South Dakota Codified Laws (SDCL) Section 55-1-24(6) states that a creditor can’t reach assets in a discretionary trust and defines “reach” as: “to subject the distribution to a judgment, decree, garnishment, attachment, execution, levy, creditor’s bill or other legal, equitable, or administrative process, relief, or control of any court, tribunal, agency, or other entity as provided by law.”

SDCL Section 55-1-35 states that a declaration in a trust that the interest of the beneficiary “shall be held
subject to a spendthrift trust” is sufficient to restrain voluntary or involuntary alienation.44 SDCL Section 55-1-35 additionally states:

Regardless of whether a beneficiary has any outstanding creditor, a trustee of a spendthrift trust may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a spendthrift trust.37

South Dakota law states that a beneficiary’s support interest doesn’t rise to the level of a property interest:45

If the trust contains a spendthrift provision, notwithstanding the beneficiary’s right to force a distribution with regard to a mandatory or support interest, no creditor may force a distribution [nor reach a present or future support distribution] with regard to a mandatory or support interest.39

Even if a beneficiary has an outstanding creditor, the trustee of a mandatory or support interest:

... may directly pay any expense on behalf of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a mandatory or support interest.40

Further, a discretionary interest is explicitly defined as a “mere expectancy” in South Dakota:

[n]o creditor may force a distribution with regard to a discretionary interest. No creditor may require the trustee to exercise the trustee’s discretion to make a distribution with regard to a discretionary interest.41

A South Dakota court can’t:

[ordering a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the fiduciary’s discretion. A fiduciary’s decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.43

Nevada. Nevada’s spendthrift trust statute dates back to 1939 and was significantly enhanced in 1999 by enlarging the class of permitted beneficiaries of spendthrift trusts and the types of spendthrift trusts to which the law of Nevada applied.46 There’s no statutory allowance for exception creditors, and Nevada specifically disallows claims of spouses, former spouses, children and dependents. Nevada Revised Statutes (NRS) Section 166.090 provides that a:

[p]rovision 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.44

NRS Section 166.080 adds that:

[t]he beneficiary or beneficiaries of such 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.45

The trustee’s exercise of his discretion in a Nevada discretionary trust can only be reviewed if the trustee acts “dishonestly, with improper motive or fails to act.”46

Regardless of whether a beneficiary has an outstanding creditor, a trustee of a discretionary interest may directly pay any expense on the beneficiary’s behalf and may exhaust the income and principal of the trust for the benefit of such beneficiary.47

Furthermore, creditors face an almost impossible task in trying to get a Nevada court to force a trustee to make a distribution out of a discretionary trust. NRS Section 163.417 provides:

1. A creditor may not exercise, and a court may not order the exercise of:

(a) A power of appointment or any other power concerning a trust that is held by a beneficiary;

(b) Any power listed in NRS 163.5553 that is held by a trust protector as defined in
NRS 163.5547 or any other person;
(c) A trustee’s discretion to:
(1) Distribute any discretionary interest;
(2) Distribute any mandatory interest which is past due directly to a creditor; or
(3) Take any other authorized action in a specific way; or
(d) A power to distribute a beneficial interest of a trustee solely because the beneficiary is a trustee...

3. A settlor may provide in the terms of the trust instrument that a beneficiary’s beneficial interest may not be transferred, voluntarily or involuntarily, before the trustee has delivered the interest to the beneficiary."

Picking the Best Jurisdiction

Planners who are aware of situations similar to those in "Trust for Divorced Son" should be aware of the significant differences in the law and consider the best jurisdiction if such facts arise. The law is clear for those states adopting UTC Sections 503 and 504 without modification: Trust assets are subject to limited claims of a spouse, former spouse or child. Greater analysis is required for states that modified or omitted these sections.

Remedies provided to exception creditors of spendthrift trusts and discretionary trusts vary from state to state. Based on uncertainty described above, issues such as the rights of an exception creditor to a continuing garnishment of a discretionary trust may come into dispute. Attorneys should review state laws to determine whether the beneficiary of a discretionary trust can be subject to a continuing garnishment that would cut the beneficiary off from any distributions the trustee decides to make or whether a trustee can make payments for the benefit of a beneficiary known to be subject to a judgment for support of a former spouse or child. South Dakota and Nevada statutes appear clear and most protective of beneficiaries and trustees. Attorneys should advise their clients that there are significant differences in treatment of exception creditors based on state laws, especially when clients consult their lawyers as to how to protect their children or other beneficiaries from potential judgments in the form of support.

Based on the UTC and the examples of clarity provided in Nevada and South Dakota, states that have a public policy to protect beneficiaries of an irrevocable spendthrift and/or discretionary trust should consider the inclusion of provisions such as Nevada’s and South Dakota’s and the deletion of exception creditors included in UTC Sections 503 and 504. However, many states will decide that public policy should be to protect former spouses and children having judgments in the form of support. These issues should be clarified to avoid future litigation.

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Endnotes

1. See Uniform Trust Code (UTC) Sections 502, 503 and 504.
2. This article doesn’t address self-settled asset protection trusts created in those states that have adopted such legislation. All references herein to a spendthrift and/or discretionary trust assume such trust was created by a third party for the beneficiary and not a trust created by the beneficiary for the beneficiary in a self-settled asset protection jurisdiction. However, for the reasons described below, it’s my opinion that, as of this date, Nevada and South Dakota provide greater protection to a beneficiary against claims of a child, spouse or former spouse to enforce a judgment for support. When faced with the question of how to best protect a client’s child or designated beneficiary, attorneys should consider whether the client should establish a trust in a jurisdiction outside of the client’s domicile state to enhance protection. The benefits of creating trusts in states that have enacted self-settled asset protection legislation is already frequently discussed. This article suggests that for those clients with specific concerns of protecting a child or other beneficiary from judgments in the form of support for the benefit of a former spouse or child, the protection provided in certain states as compared to others may warrant creation of an irrevocable trust outside of the domicile state. As reflected in the articles cited in endnote 37, infra, attorneys have advocated for their home states’ (such as Nevada and Delaware), stressing the virtues of their state law, while at the same time warning about potential attacks under the law of other (competing) states.
3. See "Treatment of Exception Creditors by UTC States," on our website, http://wealthmanagement.com/estate-planning/treatment-exception-creditors-UTC-states, which summarizes the modifications, if any, to Article 5 of the UTC by the jurisdictions that adopted it. See also ACET's Public website, www.acet.org/public/StateSurveys.asp.
4. This article addresses domestic planning techniques. Jack’s father indicated a preference of using a domestic rather than a foreign asset protection trust.
5. All references to the UTC refer to the UTC as amended in 2010.
6. Miller v. Kesser, 54 So. 3d 172, 175 (Fla. 4th DCA 2010). See UTC Section 502(c); Florida Statute Sections 736.0502, 736.0503 and 736.0506.

7. See "Treatment of Exception Creditors by UK States" supra note 3, which summarizes the 24 states (and the District of Columbia) that have adopted the UTC and how the states that adopted the UTC incorporated, modified or deleted UTC Sections 503 and 504. See also Timothy J. Vitullo, "Uniform Trust Code Section 503: Applying Hamilton Orders to Spendthrift Interests," 45 Real Prop. Tr. & Est. Lab. L.J. 169 (2008-2009), for a 2008 article summarizing spendthrift laws in all 50 states as of 2007.


9. Ibid. at 219-220.

10. Ibid. at 220.

11. Ibid.

12. Ibid.

13. Ibid. at 220-21.

14. Ibid. at 220.

15. Ibid. at 222. See also landmark First Nat'l Bank v. Hayes, 467 So. 2d 839, 840 (Fla. 4th DCA 1985). In review of a spendthrift trust, in accord with Bacardi, the court held that the creditor may be entitled to a continuing garnishment against the trust, but that it won't be effective unless and until the trustee exercises discretion and elects to make payments to the beneficiary. The court may not order the trustee to make such disbursements.

16. Bacardi, supra note 8 at p. 222.

17. Ibid. (emphasis added.)


25. Bacardi, supra note 8 at pp. 222-23 (emphasis added). (Florida Trust Code preserves the ability for an exception creditor to reach a beneficiary's spendthrift interest "only as a last resort").


27. See Vitullo, supra note 7.

28. Professor Martin D. Begleiter, the co-author of the Iowa Trust Code, which isn't an enactment of the UTC, wrote "Son of the Trust Code—The Iowa Trust Code after Ten Years," 59 Drake L. Rev. 265 (Winter 2011). Iowa's Trust Code "was partially based on an early draft of the UTC, but has significant differences from the UTC." Iowa doesn't include exception creditors. When asked whether a former spouse or child may be able to obtain a garnishment over discretionary trust payments or whether a trustee could make payments for the benefit of a beneficiary when a former spouse or child has a judgment for support, Prof. Begleiter indicated that he thought the continuing garnishment was unlikely to be an effective remedy and had a less certain response to a trustee's payments on behalf of such beneficiaries. Prof. Begleiter thought that the trustee could lawfully decide to withhold all payments to beneficiaries while such a judgment existed. Prof. William H. Lyons, who co-wrote an extensive article with John M. Gradwohl, "Discretionary Trusts, Support Trusts, Discretionary Support Trusts, Spendthrift Trusts, and Special Needs Trusts under the Nebraska Uniform Trust Code," 86 Neb. L. Rev. 231 (2007), had a comment similar to that made by Prof. Begleiter.

29. See Wilcox v. Gentry, 274 Kan. 411 (Kan. 1994). Note that in Wilcox, there was no spendthrift clause in the trust.

The balancing of public policy to protect children and former spouses against the policy to allow settlor's intent to be satisfied is well described in Calvin J. Karlin and Anna Smith's 2012 article describing spendthrift trust clauses under Kansas law. See Calvin J. Karlin and Anna Smith, "Spendthrift Trust Clauses and Kansas Divorces: Does a Settlor's Intent Still Matter?" 1 Kan. B. Ass'n (May 2012).


31. Ibid.

32. Ibid. at 505-504.

33. Ibid. at 504.

34. Ibid.

35. S.D. Codified Laws Section 55-1-24(6) (emphasis added).

36. S.D. Codified Laws Section 55-1-33.


38. S.D. Codified Laws Section 55-1-42.

39. Ibid.

40. Ibid.

41. S.D. Codified Laws Section 55-1-43(1)-(2).

42. S.D. Codified Laws Section 55-13A-105(a).

43. See Assembly Bill 469, as introduced March 10, 1999, http://search.leg.state.nv.us/70th1999/Bills/70th1999_Bills.html (enter 469 in search query).


