The Uniform Trust Code: A Divorce Attorney's Dream

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As more states adopt the Uniform Trust Code, attorneys practicing in divorce law, estate planning, valuation and tax will begin to understand the huge impact this legislation will have on their practices. Mark Merric, Carl Stevens and Jane Freeman describe the implications of the Uniform Trust Code as a divorce attorney's dream, but the implications may be far more troubling than that terminology implies.

Typically, one of a client's primary estate planning goals is to protect a child's inheritance from a current or future estranged spouse. Most parents have little, if any, problem with a child's former spouse sharing in marital property created by the partnership of a child and the spouse during their marriage. However, the authors have yet to meet a client that believed a former son or daughter-in-law should share in assets left by the parents for their child—the child's inheritance.

Complicating the desire to protect a child's inheritance is the ever-spiraling divorce rate. Currently, over 50 percent of first marriages fail[1]; 70 percent of second marriages fail; 87 percent of third marriages fail within five years; and 93 percent of fourth marriages fail within five years.[2] The statistics are particularly telling with respect to third and fourth marriages. An estranged spouse is statistically more likely to be a child's creditor than any other creditor class. While many clients tend to ignore the statistical facts of reality, reality is not something that estate planners should overlook while protecting their client's interests.

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For this reason, when many estate planners discuss estate planning for tax purposes, these estate planners also discuss the asset protection component of estate planning—transferring property in trust. Almost always the client is pleasantly surprised to find out that he or she may substantially protect his children's inheritance by transferring the inheritance to the child in trust, rather than outright. Sometimes a client has already heard of using trusts to safeguard an inheritance and may be the one to initiate the discussion. When a client initiates the subject of protecting a child's inheritance from a present or future estranged spouse, often protection is the client's primary reason for implementing an estate plan.

Unfortunately, the Uniform Trust Code (U.T.C.), which contains a newly created legal theory known as a "continuum of discretionary trusts" combined with several distinctly minority case views,[3] is beginning to invade the states. This new view of favorable creditor recovery against non-self-settled trusts was first created and explained in detail in the Restatement (Third) of Trusts ("Restatement Third"). Further, the official comments to the U.T.C. indicate that the Restatement Third is a "particular" source of supplementation to the U.T.C.[4]

This new trust law likely will have the effect of bringing most beneficial trust interests into court because the estranged spouse will have the power to seek judicial consideration of the other spouse's interest in a trust in a manner previously unavailable in most jurisdictions. Because of the increased amount of potential litigation available under the U.T.C., the act almost certainly will become a divorce attorney's dream.

I. Summary of the Recovery Methods for an Estranged Spouse Under Common Law

Prior to the U.T.C. and the Restatement Third, the following four avenues have been used in some states to permit an alienated spouse to judicially proceed against a beneficiary's interest in trust, regardless of spendthrift protection:

1. Part or all of a remainder interests may be classified as "marital property."
2. A remainder interest, and in a few states a current beneficial interest,[5] were considered as "factors" in the equitable division of marital property.
3. Historical continuous distributions from a trust have been used as a measure of income to compute a beneficiary's alimony or child support obligation.
4. A spouse making a claim for alimony or child support could attach the beneficial interest of a support trust and possibly force a distribution from the trust to satisfy the claim.[6]

A. U.T.C. and Restatement Third

The U.T.C. and Restatement Third expand an alienated spouse's opportunities to judicially proceed against a beneficiary's trust interests, regardless of spendthrift protection:

- Part or all of *any* beneficial interest whether a current beneficial interest or a remainder interest, may be classified as "marital property."
- *All* beneficial interests can be considered as a "factor" in the equitable division of marital property.
- Income may be imputed from all trusts to determine the amount of alimony or child support awarded. This would include income not currently being paid to the beneficiary, rather than the common law standard of historical continuous distributions.
- A spouse making a claim for alimony or child support under the U.T.C. can attach a beneficial interest in *any* trust, including a discretionary trust under common law, and can force a distribution to satisfy the claim.
- A spouse making a claim for alimony or child support can request the judicial foreclosure sale of *any* beneficial interest, either a current beneficial interest or a remainder interest.[7]
- A spouse making any of the claims above may seek payment of attorney fees directly from the trust.[8]

When compared to the very limited recovery permitted from trusts under the common law, especially discretionary trusts, the U.T.C. is truly a divorce attorney's dream.

II. Common Law

A. The Nature of a Beneficial Interest in a Trust

Prior to the U.T.C., in determining the rights of creditors, generally there were two types of current beneficial interests identified: (1) discretionary interests, or (2) support interests.[9] There were also two primary methods of transferring a future interest to descendants: (1) a remainder interest, which vested with the current beneficiaries, or (2) an interest that did not vest with the current beneficiaries such as a dynasty interest.[10] With the possible exception of a new common law

trend in domestic relations cases regarding remainder interests discussed below, a former spouse only had the ability to attach a support interest for the purpose of collecting alimony or child support. Once attached, the former spouse often could force a distribution to satisfy his or her claim. Under common law, a former spouse, like all other classes of creditors, had virtually no claims against a discretionary interest[11] or a dynasty interest.[12] Because of the asset protection value of these strategies, many estate planners frequently transferred wealth from one generation to the next by using "discretionary dynasty trusts," sometimes known as "beneficiary controlled trusts."[13] Not only did this approach protect family wealth from general creditors, it also protected family wealth from statistically the most probable creditor—a former spouse.[14]

B. Permitting a Current Beneficial Interest to Be Considered a Factor in the Equitable Division of Marital Property

Some states allow a current beneficial[15] interest under common law to be used as a "factor" to determine the equitable division of marital property. For example, under the Colorado Supreme Court case of *In re Jones*,[16] the court correctly held that a discretionary trust interest was not property and therefore could not be marital property. However, based upon the factor of "economic circumstance," the court permitted the use of a discretionary interest to determine an equitable distribution of marital property.

In equitable division states, there are common factors a judge may use to justify giving one spouse more marital property than the other spouse. For example, Colorado uses the following factors:

- The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker
- The value of the property set apart to each spouse
- The economic circumstances of each spouse at the time of the division of the property
- Any increases or decrease in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes[17]

With a support trust, where a beneficiary has standing in court and an enforceable right to force a distribution pursuant to an ascertainable standard, a standard capable of judicial interpretation, allowing the trust to be a factor in determining a disproportionate distribution to the other spouse, may be an appropriate use of judicial discretion. However, with a discretionary trust under common law, where a beneficiary has no enforceable right to a distribution, but rather holds a mere expectancy,[18] and no distributions have been made to the beneficiary, such a holding appears logically flawed. Fortunately, most states have not addressed the issue of whether a discretionary trust should be considered a factor for the purpose of determining an equitable distribution of marital assets.

C. Classifying a Remainder Interest As Marital Property

Unfortunately, there is a growing trend under the common law to treat a remainder interest, even if such remainder interest is subject to defeasance or divestment,[19] as marital property—eligible for division in the event of a divorce. This trend may come as a shock to many planners and clients. Most estate planners remain convinced that a creditor, including a spousal creditor, may not reach a remainder interest. In most jurisdictions, this rule remains the strong majority rule because of the analysis for creditor recovery under Restatement (Second) of Trusts, Section 161. The Restatement Second enunciated several tests to be considered as part of the analysis. First, a court would not permit attachment if the remainder interest was contingent or remote. The Restatement Second took the position that outliving your parent was not a factor that made a remainder interest too remote. If a creditor was able to surmount the contingent or remote test, the court still needed to find that the remainder interest could be sold with fairness to the beneficiary. Because of the discretionary nature of the remainder interest, contingencies and special powers of appointment, seldom would there be a case when a remainder interest could be sold with fairness to the beneficiary. Finally, due to the spendthrift protection, only exception creditors should be able to attach a remainder interest. For these reasons, creditors were seldom able to reach a remainder interest under common law.

Regardless of the common law rules that apply to all creditors, in some jurisdictions, the domestic relations courts seem to be carving out a judicial exception to the majority rule.

In *Davidson v. Davidson*,[20] there were marital property division issues involving a remainder interest under the testamentary trust of Henry L. Davidson's deceased father. Henry was to receive his

remainder interest outright at the death of his mother when he reached age 35. The court found that the remainder interest was within the outer limits of what constituted property for purposes of divorce. The court engaged in a survey of the treatment of similar interests by other courts. The court noted that, although Mr. Davidson's interest was fixed at the time of the divorce, subject only to the condition of survivorship, the trustees had uncontrolled discretion to invade principal for the benefit of Mr. Davidson's mother. The court further found that the trust was subject to a spendthrift clause which prevented Mr. Davidson's estranged wife from reaching any interest in the trust for satisfaction of a judgment or claim.

Nevertheless, the facts presented were *insufficient* to prevent the court from classifying the remainder interest as marital property subject to division. However, the court left it to the sound discretion of the trial judge to determine whether the trust interest should be included in the property to be divided after a consideration of all the factors. The court stated that in difficult cases of valuation, a trial judge might retain jurisdiction and reserve, in whole or in part, the question of division of property.

Many estate planners might argue that *Davidson* is not the rule in their state. It was not the rule in Colorado either until the earthshaking decision of *In re Balanson*[21] rocked existing law. In facts similar to *Davidson*, *Balanson* had the same contingencies in the trust under consideration—that the daughter's father might extinguish the trust for his own needs and that the daughter must outlive her father in order to receive her remainder interest. However, unlike *Davidson,* the surviving father had a special power of appointment which could defeat the daughter's interest entirely if he chose to use it.[22]

Using a property analysis, the Colorado Supreme Court concluded that all of the contingencies were immaterial. The court held that the remainder interest should be classified as a "vested remainder interest subject to defeasement." The court classified the trust as marital property based upon straight property law analysis.[23] A property interest is either (1) something that may be sold; or (2) an enforceable right. Because of spendthrift provisions, the daughter's remainder interest could not be sold. However, the court concluded that the daughter did have an enforceable right to the vested remainder interest.[24]

Even without the complications created by the U.T.C., other states have reached the same conclusion. There is a growing trend that, to a greater or lesser degree, remainder interests may be classified as marital property:

- Alaska[25]
- Colorado[26]
- Connecticut[27]
- Indiana[28]
- Massachusetts[29]
- Montana[30]
- New Hampshire[31]
- North Dakota[32]
- Ohio[33]
- Oregon[34]
- Vermont[35]
- Wisconsin[36]

Most of these states required that the remainder interest be "vested." However, a few of these states now allow contingent remainder interests to be considered marital property.[37]

While a growing minority provides for a new exception creditor to spendthrift protection for remainder interests, the majority rule remains that a spouse may not reach a remainder interest as an exception creditor. The rationale is that in a domestic relations context, many courts have found that a remainder interest in trust is indivisible.[38] Other courts have characterized a trust remainder interest as too remote to be classified as marital property.[39] One court even found that that a trust remainder interest is an inchoate right and is nothing more than a mere expectancy.[40]

D. Income Distributed from a Trust As Part of an Alimony or Child Support Computation

When distributions from a trust to a beneficiary have been made consistently, courts commonly determine that the distributions should properly be included in calculating a beneficiary's liability for alimony or child support.[41] Under common law, the only issue involved in the inclusion of actual distributions in the computation of alimony or child support was whether the distributions were made on a consistent basis. In the case *In re Tietz,*[42] a beneficiary received just over $347,000 from two trusts during a 28-year marriage. Approximately $18,000 was distributed in the year the divorce was finalized. The court considered the historic trust distributions, with an emphasis on the current distribution amount, to determine the amount of trust income which should be used to compute child support or alimony. In another case, *In re Marriage of Pooley,*[43] a trust made discretionary distributions to a beneficiary. The Colorado Appellate Court concluded that the historic distribution amount of $262 per month from a discretionary trust should be included in the beneficiary's child support computation.

In *D.L. v. G.L.,*[44] the court noted that a stream of income from a discretionary trust should be included in the beneficiary's computation of alimony and child support where the income historically and consistently had been distributed to the beneficiary. In this case, there were six discretionary trusts. Four of the trusts historically had made distributions to the beneficiary and two had not made any distributions. The Massachusetts Court of Appeals found that the trial court properly included the distributions of the four discretionary trusts in the computation of alimony and child support, with no inclusion for the discretionary trusts which made no distributions.

With one exception,[45] state courts appear to be in agreement with regard to historically consistent trust distributions without regard to whether the distributions of income are required, whether they are support distributions, or whether they are discretionary distributions. The determining factor is whether the distributions have been made on a consistent historical basis. If so, the distributions are used in the computation of the beneficiary's obligation for alimony or child support. Fortunately, the authors are unaware of any case under common law prior to the Restatement Third where a court imputed income from a discretionary trust in the computation of a beneficiary's alimony or child support obligation.

III. The Uniform Trust Code

The U.T.C., and its interpretive companion, the Restatement Third of Trusts, open Pandora's box in their treatment of trust interests in the context of divorce. The U.T.C. and the Restatement Third permit the argument to be made that all beneficial trust interests, current beneficial interests as well as future interests, are property or a sufficient enforceable right.[46]

Analyzing the expanded rights of an estranged spouse under the U.T.C. falls into a matrix-type of analysis. First, the courts must determine, based upon changes to the common law made by the U.T.C., whether the beneficial interest is (1) a property interest, or (2) "an enforceable right," which is not a property interest under state law. For example, under the common law prior to the U.T.C., the Colorado Supreme Court in *Balanson,* determined that a vested remainder interest was property, and therefore also marital property. However, in *In re Jones,* the Colorado Supreme Court determined that a current discretionary distribution interest was not property; it was nothing more than a mere expectancy. As discussed later in this article, the U.T.C. detrimentally changes the judicial review standards for current interests in discretionary trusts as well as possibly changing how remainder interests will be viewed by a court. Therefore, regardless of prior common law, a new analysis must be done to determine whether the beneficial interest is (1) a property interest, or (2) "an enforceable right."

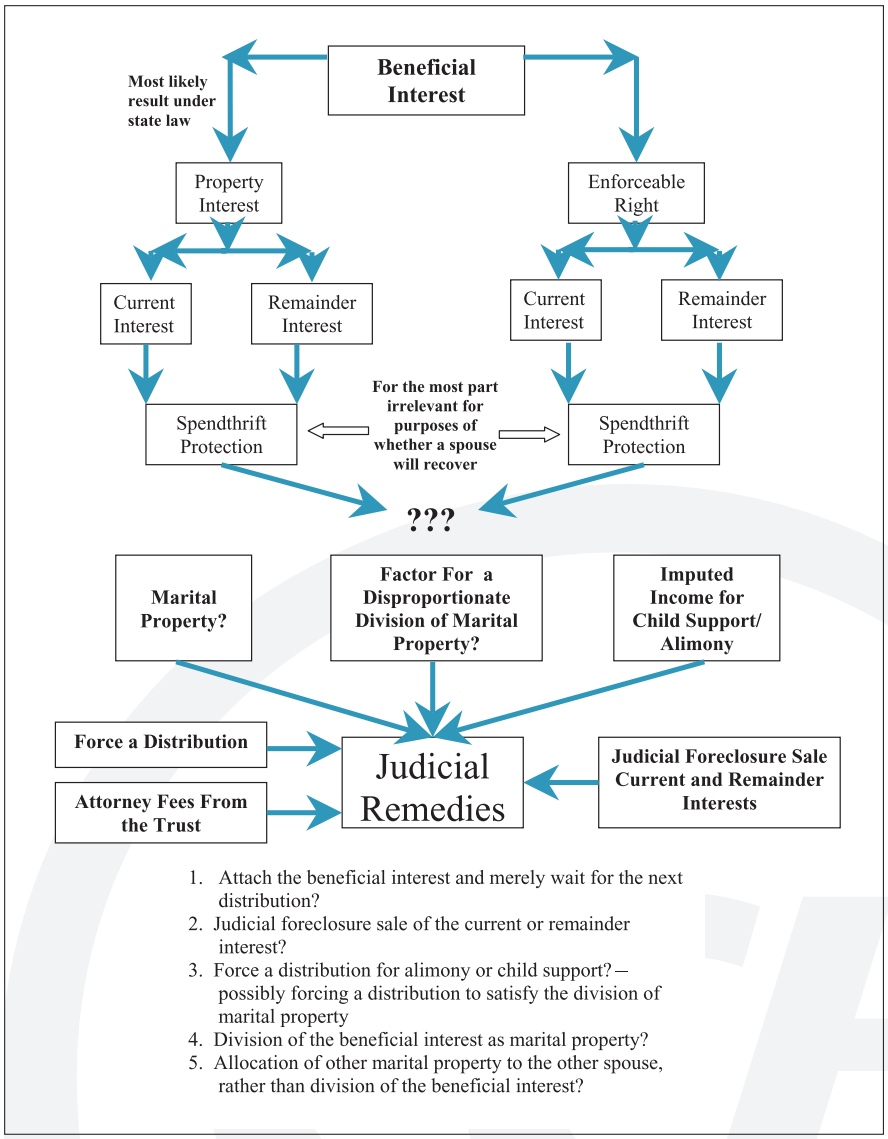
This analysis must be made for both current beneficial interests and future or remainder interests. Then the court must determine the extent of spendthrift protection for each beneficial interest: (1) current interests, and (2) remainder interests. Under the U.T.C., supplemental spendthrift exceptions may be statutory or judicially created.[47] After this portion of the analysis has been completed, the following six questions must be answered:

1. Whether the beneficial interest is marital property?
2. Whether the beneficial interest is a factor that should be used in determining an equitable division of other property?
3. Whether income should be imputed to a beneficiary to calculate the award of child support and/or alimony?
4. Whether a spouse should be able to force a distribution from a discretionary trust to satisfy a claim for alimony or child support and the proper amount of such a distribution?
5. Whether a court should order the judicial foreclosure sale of a current and/or remainder beneficial interest to satisfy a claim for alimony or child support?
6. Whether an estranged spouse is entitled to attorney fees from the trust for making any one of the above claims?

Figure 1 details the matrix of issues each court will need to resolve under the U.T.C. Based on the number of possible legal arguments needed to distinguish these various possibilities, combined with the judicial discretion to merely impute income, and the valuation of these beneficial interests, one may easily begin to see the burden the U.T.C. will place on the court judicial system.[48] Unfortunately, this burden is also at the expense of both the settlor and the beneficiary, but at the same time for the benefit of trial attorneys.

Rather than discussing the different legal possibilities for each possible matrix option above, the analysis in this article has been shortened. First, as discussed below, most courts will most likely

Figure 1



find that the beneficiary's current interest or remainder interest is a property interest under state law. Second, due to the remedies that a judge may use (discussed at section VIII of this article), spendthrift protection will generally become irrelevant in determining whether a spouse will recover. Third, in the case of a remainder interest, there is a growing trend in the courts to follow *Davidson* and *Balanson* and create a judicial exception to spendthrift protection for purposes of the division of marital property. Therefore, this article first will discuss whether the beneficial interest is a property interest and then discuss whether a current interest will most likely be classified as (1) marital property; (2) a factor for division in marital property; or (3) imputed income for child support or alimony. Finally, under the remedies portion of the analysis, this article will discuss situations involving (1) an estranged spouse forcing a distribution to satisfy a claim for child support or alimony; (2) the judicial foreclosure sale of a beneficial interest to satisfy a claim for child support or alimony; and (3) how an estranged spouse may recover from a beneficial interest.

A. Property Interest

Much of the property interest analysis has already been discussed in the case analysis of *Davidson v. Davidson*.[49] This case analysis is further supported by 11 other states[50] that have followed somewhat similar analysis. Of particular interest is the case of *Balanson*,[51] where the court concluded that once the determination is made that a property interest is marital property, the only issue remaining is one of valuation.

Generally under state law, an interest is considered a property interest if it (1) may be sold, or (2) is an enforceable right.[52] Since almost all trusts contain spendthrift provisions, the first test to determine whether a beneficial trust interest is a property interest is not met. However, the second test to determine whether an interest is a property interest is whether the beneficiary has an enforceable right. One must distinguish whether the beneficiary holds a remainder interest or a current beneficial interest. With a remainder interest, the beneficiary holds an enforceable right to receive the property at sometime in the future. By definition, remainder interests are uniformly classified as future property interests. In almost all cases, therefore, a remainder interest will be classified as a property interest[53] under state law.

Further, under the U.T.C. and its interpretive companion, the Restatement Third, it appears that a current beneficial trust interest will also be classified as a property interest. This is because of the following three changes the U.T.C. makes to the common law:

1. By statute, the U.T.C. gives all trust beneficiaries a recognized right to force a

distribution pursuant to the standard in the trust.[54]

2. The U.T.C. allows the court to review the trustee's discretion for good faith or reasonableness in the context of a discretionary trust under common law.
3. The U.T.C. abolishes the common law distinction between a discretionary trust and a support trust.

A brief review of the rights of a beneficiary to force a distribution under common law is important in order to understand the changes in the law that has been affected. With a discretionary trust, a beneficiary did not have a sufficient enforceable right, because the beneficiary could only sue the trustee if the trustee acted (1) dishonestly; (2) for an improper motive; or (3) failed to act. *In Re Jones* stated, "The beneficiary *cannot obtain the assistance of the court* to control the exercise of the trustee's discretion except to prevent an abuse by the trustee of his discretionary power ..." *If the settlor manifested an intention that the discretion of the trustee should be uncontrolled, the court will not interfere unless he acts dishonestly or from an improper motive, or fails to use his judgment.*[55] For a further review of the generally accepted common law principle for discretionary trusts, see the detailed analysis in SCOTT ON TRUSTS, §187 at page 15, where it is noted that if the distribution standard includes enlarged or qualifying adjectives such as "sole and absolute discretion" combined with "no fixed standard by which the trustee can be determined to be abusing his discretion ... the trustees discretion would generally be deemed final."[56] It should also be noted that the Restatement (Second) of Trusts held that a trustee of a discretionary trust could act "unreasonably."[57] In fact, Section 187 at page 408 of the Restatement (Second) of Trusts held that such qualifying adjectives dispensed with the standard of reasonableness. Since the judicial threshold of a review was so high, a beneficiary could not attach or force a distribution from a discretionary trust, and as a result, no creditor including an estranged spouse could stand in the shoes of the beneficiary.

Under the U.T.C. §504(d), a beneficiary has a recognized right to force a distribution pursuant to any standards in any trust. While U.T.C. §504(d) uses the phrase, force a distribution for "abuse," one must remember that the word "abuse" has been redefined to mean a trustee must make distributions in "good faith" pursuant to U.T.C. §814(a). While the concept of a "reasonableness" or a "good faith" standard was the common law rule for support trusts, the rule now applies to all trusts, whether support or discretionary. This enforceable right may result in all current beneficial interests being classified as property rights. The likelihood that all current beneficial interests will be classified as property interests is further enhanced by reduction of the judicial threshold for review of discretionary trusts to good faith or reasonableness.

The U.T.C., in contravention to the judicial wisdom of virtually every state for the last 125 years, has abolished the discretionary-support trust distinction. In its place, the U.T.C. has substituted a new theory of trust law—"the continuum of discretionary trusts." Under this new theory, all trusts lie somewhere on a continuum of discretionary trusts from the most discretionary to the least discretionary. Unfortunately, neither the U.T.C. nor the Restatement Third provides any definition of the beginning, middle or end to this continuum of discretionary trusts. Only future litigation will begin to define the new continuum. Under this new theory of trust law, all trusts will have the same judicial standard of review regardless of whether words such as "in the trustee's sole and absolute discretion" are included.[58]

It is the abolition of the discretionary-support distinction, reducing the judicial threshold of review for discretionary trusts to good faith or reasonableness, and the recognized right of a beneficiary to force a distribution which most likely will create property interests out of all current distribution interests. Therefore, should a current distribution interest be classified as marital property under state law, current distribution interests as well as remainder interests would require valuations in a divorce.

An example of how the U.T.C.'s approach may significantly increase litigation involving current distribution interests is the case of *Comins v. Comins.*[59] It should be noted that *Comins* was not decided under the U.T.C. or Restatement Third. Also, *Comins* may no longer be good law in Massachusetts. The case of *D.L. v. G.L.* distinguished the *Comins* case and held that the current distribution interest in *D.L. v. G.L.* was too remote or speculative to be classified as marital property. The *Comins* case also provided virtually no analysis of how it came to its conclusion under common law. However, where prior to the U.T.C. and the Restatement Third,

a common law court would have little, if any, authority in arriving at the holding of *Comins*, the newly created theory of a continuum of discretionary trusts easily creates the scenario where a current beneficial interest in trust may be classified as a property interest, and then depending on state law possibly marital property.

The *Comins* court found a discretionary trust interest to be marital property eligible for division. In *Comins*, the wife was a co-beneficiary with her sister in a trust that provided "the trustee should in its discretion pay to [the wife] so much or all of the income and principal of [the trust] as in its discretion it deems advisable to provide for the *comfort, welfare, support, travel and happiness* of [the wife] ..."[60] Through reference to the case of *Lauricella v. Lauricella,*[61] the *Comins* court held that the wife's current *discretionary* distribution interest was a "*present, enforceable, equitable right to use the property for her benefit* (emphasis added)."[62] The *Comins* court provided no analysis of the difference in judicial review standards between a discretionary distribution interest and a support distribution interest, and whether a discretionary interest under Massachusetts was a sufficient enforceable right to constitute a property interest. Rather, the *Comins* court merely held that an *enforceable right* was marital property and referenced *Lauricella.*

The *Comins* case only involved the question whether a current discretionary distribution interest should be classified as marital property because the remainder interest did not vest in the beneficiary who was going through the divorce. The remainder interest vested in the beneficiary's children upon the beneficiary's death. The *Lauricella* case dealt with a trust where a duplex was held in trust for a son and daughter. During the marriage, the son lived in one unit of the duplex, and his sister lived in the other unit. The court noted that at the time of the divorce it was almost certain that the son's remainder interest would vest because the son was 26 years old and the remainder interest would vest in approximately 20 years. The court did not provide any analysis of the difference between a current beneficial interest and a remainder interest or any analysis of a discretionary interest compared to a support interest. From the facts of the case, it is unknown whether the *Lauricella* trust was a discretionary trust or a support trust. Rather, the *Lauricella* court held that both interests are "*present, enforceable, and valuable.*"[63] Therefore, the beneficial interest (which included the current and remainder interest) was classified as marital property.

It should be noted that like the *Comins* case, the *Lauricella* case was distinguished by *D.L. v. G.L.*[64]

The Comins case and the *Lauricella* case have been provided to demonstrate how a court may easily expand these poorly reasoned cases under the U.T.C. or the Restatement Third. Under common law, there is little, if any, support for the holdings of these cases as applied to a current discretionary distribution interest in trust. However, under the U.T.C. and Restatement Third, the missing link classifying a current discretionary interest as a property right has been provided. The discretionary-support dichotomy has been abolished. The beneficiary of a discretionary trust now has a recognized enforceable right to a distribution based on a good-faith standard of review by a court. In other words, both the U.T.C. and the Third Restatement codify for all trusts what most estate planners would view as incredibly bad law. This is noted in the only two cases (possibly one case)[65] the authors could find directly on point. The U.T.C. and Third Restatement using similar reasoning create a new frontier for the divorce attorney.

It should be noted that even if a judge does not determine a current beneficial interest to be a property interest under state law and instead holds that the current beneficial interest is merely an "enforceable" right, then the right might not be considered property. However, the court may still find the right to be marital property. In Massachusetts, for example, when holding that the definition of property was greater for purposes of marriage than under state trust law, the court held "the rejection of the notion that the content of the estates of divorcing parties ought to be determined by the wooden application of technical rules to the law of property."[66]

B. Factor or Economic Circumstance for the Purpose of Equitable Division of Marital Property

Prior to the U.T.C., the majority rule was that a discretionary interest was not a factor in determining whether an estranged spouse should receive more marital property than the spouse holding the trust interest. The issue was largely unaddressed in the support interest context. However, there is little doubt that a beneficiary has some type of enforceable right in all trusts under the U.T.C. The only questions are how much

income should be imputed to the beneficiary for purposes of assessing child support and alimony and what value should be assigned to the beneficial interest in order to determine the total amount of separate property, thus permitting a disproportionate amount of the marital property to be awarded to the estranged spouse.

It will be the responsibility of the trial attorneys to create a new volume of case law to answer these questions based upon the many different versions of discretionary and support language used in trusts.[67] This litigation must create standards to determine how much income should be imputed to a beneficiary based on the distribution language. The litigation must also determine the present value of the marital interest. In the event the beneficial interest is classified as a property interest, but not marital property under state law, then the beneficial interest will need to be valued to determine the total separate property the beneficiary spouse owns to determine how much of the interest may be used as a factor or economic circumstance to determine the equitable division of marital property in favor of the nonbeneficiary spouse. Valuation would include both current and remainder interests. As noted in *Lauricella,* "the fact that valuation of an interest is difficult does not alter its character as a divisible asset."[68]

C. Imputing Income to a Beneficiary

Prior to the newly created "continuum of discretionary trust" theory, imputing income to a beneficiary of a discretionary trust for assessment of alimony or child support was virtually unheard of. The rationale was that since a beneficiary did not have a present, enforceable, equitable right to use the trust property for his or her benefit, a creditor, including an estranged spouse, had no greater right.[69] Only in the case of a history of consistent payments was such income included as part of a beneficiary's income for the purpose of computing child support or alimony. The U.T.C. and its companion the Restatement Third, with their seemingly creditor-friendly bias, add a new dimension to recovery for an estranged spouse—the imputation of income from a trust, regardless of whether or not distributions have been made and whether or not the trust is discretionary or for support.

The U.T.C. is extremely contradictory in this area. U.T.C. §504(b) establishes the general rule that forbids a creditor from compelling a distribution from a trust. However, the second sentence in the comment discussing §504(b) immediately contradicts the general rule. It states that a trustee must always exercise its discretionary power in good faith under §814(a).[70] This means that a trustee must make distributions pursuant to the beneficiary's right to demand a distribution. The interpretive guide for the U.T.C., the Restatement Third provides further guidance in its contradictory explanation under Section 60, comment e., when it states, "The exercise of fiduciary discretion is always subject to judicial review to prevent abuse." The term "abuse" means "reasonableness" under the Restatement Third and "good faith" under the U.T.C. The next few paragraphs of the Restatement Third in essence change the exception so that it becomes the general rule.[71] In other words, both the U.T.C. and Restatement Third require a trustee to make distributions based on the beneficiary's ability to demand a distribution pursuant to the distribution standards contained in the trust. If a beneficiary has a right to demand an amount be distributed periodically, it is only reasonable that such distribution amounts be considered in the computation of child support or alimony.

The imputed income concept appears in yet another section of the U.T.C. U.T.C. §506 allows any creditor to attach a "mandatory" or an "overdue" distribution. The terms "mandatory" and "overdue" are undefined in the U.T.C. One might conclude initially that "mandatory" or "overdue" distributions mean only distributions such as "income quarterly or annually." However, one must again realize the interpretation of "overdue" may easily mean any amount that a beneficiary may force as a distribution from a trust.

Further, the imputation of income is no more than the application of the same legal principal used for imputing income from special needs trusts. In Ohio, when the courts reduced the threshold judicial review standard for discretionary trusts to something less than (1) an improper motive, (2) dishonesty, or (3) failure to act, and the trust contained any distribution standard, the court allowed the government to attach the beneficiary's interest[72] or impute income to the beneficiary resulting in the beneficiary's failure to qualify for governmental aid.[73] Ohio law demonstrates the problems associated with a discretionary trust when one moves from the common law bad-faith

judicial review standard towards a good-faith standard. Coincidently, this is the standard that has been adopted by the U.T.C. and the Restatement Third.

With all of the legal precedents, one would assume that it is not possible for the courts to extend this logic into the domestic relations arena. However, in the only reported case in the area of imputed income that references the Restatement Third, this is exactly what happened. The case was *Dwight v. Dwight.*[74] On the first reading of *Dwight,* the authors were unable to reconcile the holding of the case with that of any other discretionary trust case. No other discretionary trust case had imputed income in the domestic relations context. It is only under this newly created theory of a continuum of discretionary trusts where the holding of *Dwight* makes perfect sense.

In *Dwight v. Dwight,*[75] upon dad's death, 60 percent of dad's estate was distributed outright to his daughters, and the remaining 40 percent went to his son in a discretionary trust. The trust was created approximately two years after this second son was divorced. The court concluded that the trust had a discretionary distribution standard. The beneficiaries of the trust were the son and the son's issue. During the nine years prior to the Massachusetts Appellate Court decision, the trust corpus grew from $435,000 to a value of $984,000, and the trustee made one discretionary distribution of $7,000 to the son.

The trial court judge concluded that son's father placed the son's inheritance in trust in order to defeat a claim for alimony. Further, the trial court concluded that the son had access to additional funds based on two facts:

1. The broad purposes for which the trustee was permitted to make payments to the son
2. A statement the son made to the trustee that he did not need any additional money

Without discussing that under common law a beneficial interest in a discretionary trust is nothing more than a mere expectancy, the Appellate Court's decision is void of any analysis of how it concluded that a spouse for the purpose of alimony could reach a current discretionary interest, and how the Appellate Court concluded it should impute income from the current discretionary trust. The opinion only references the Restatement Third spendthrift exceptions under §59, which details the exception creditors. So how could the Appellate Court come to a conclusion that seems to fly straight in the face of common law?

If one places *Dwight* in the U.T.C.'s and Restatement Third's newly created continuum of discretionary trusts, the decision makes perfect sense. Under the Restatement Third as well as the U.T.C.,[76] the distinction between a discretionary trust and a support trust is abolished, and a spouse can reach the assets of a discretionary trust for alimony and child support. Further, a judge may determine what amount the trustee should "reasonably" distribute or what amount should be distributed in "good faith."[77] The broad distribution standards must be analyzed to determine whether distributions should have been made and therefore become part of the alimony computation. In *Dwight,* the court determined that defeating an alimony claim was not an acceptable purpose. Therefore, under both the U.T.C. and the Restatement Third, the court was within its authority to impute income to the husband as the basis of alimony, even though he only received a token of what was imputed to him.

Some might argue that *Dwight* is a bad fact case making bad law. However, as noted above, the holding of *Dwight* is completely consistent with the newly created continuum of trust theory adopted by the U.T.C. and the Restatement Third. It is also consistent with the special needs trust analogy of a discretionary trust with a lowered judicial standard of review to something approximating "good faith." Further, the holding is consistent with the Massachusetts case of *Comins,* if *Comins* had been interpreted under the U.T.C. and Restatement Third position of creating property rights in discretionary interests.[78] Finally, while denial of review by the Massachusetts Supreme Court is not determinative of the merits of the case, it is an indication that the Massachusetts Supreme Court did not find the issue sufficiently important to justify review.[79]

V. A Possible Simple Solution?

When a client is confronted with the fact that every time one of their children goes through divorce, the client may now receive a subpoena from an estranged spouse asking for a copy of an irrevocable trust as well as disclosure of the trust assets, the client may seek a simple solution to the problem. What if the client settles the trust in a non-U.T.C. jurisdiction that does not require notice to a beneficiary of the existence of a trust? What if the client never tells the children that the client

has created a trust for their benefit? Finally, assume no distributions have been made from the trust to a child beneficiary, and that the child honestly does not know of the trust's existence or the underlying trust assets,[80] what are the implications in the child's divorce?

When the child beneficiary who is going through a divorce receives the interrogatory question, "Are you a beneficiary of any trust?" does the child have the obligation to verify the answer to this question with his or her parents? Or may the child merely respond "no"? The authors would suggest that trial attorneys will improve their interrogatories and discovery methods so that children will soon have an obligation to confirm with their parents and grandparents the existence of any trusts.

On the other hand, in the event the trust is created in a non-U.T.C. state, the trustee is in the same non-U.T.C. state, and the underlying assets of the trust also reside in the non-U.T.C. state, a judge may decide that under conflict of law principles, the law of the non-U.T.C. state should apply, rather than the law where the beneficiary resides.[81] In this event, should a court follow the common law discretionary-support distinction and not inadvertently mistake the Restatement Third for the common law,[82] a discretionary dynasty trust or a beneficiary controlled trust would remain one of the strongest asset protection tools available to protect a beneficial interest.

VII. Also An Appraiser's Dream

In addition to being a divorce attorney's dream, the U.T.C. also could be considered an appraiser's dream. Significant additional work will be generated valuing beneficial trust interests including current and remainder interests. One only need remember when retirement plan interests were not valued for the purpose of divorce. These retirement plan interests were considered mere expectancies incapable of valuation. However, with modern actuarial principles, retirement plan interests today are considered marital property capable of division in virtually every court.

A. Valuation of a Remainder Interest

The courts in both *Davidson*[83] and *Balanson*[84] draw the analogy of valuing a beneficial trust interest to valuing a retirement plan. Most courts consider a vested pension plan to be marital property for the purpose of divorce. A vested[85] remainder interest is comparable to a defined contribution plan. An actuary is able to estimate the growth of a trust based upon current distributions and an assumed earnings rate. However, the *Davidson* court went further and included other interests as marital properties which were more speculative in value such as nonvested pension rights. The court noted that including nonvested pension rights as marital property was the trend in both common law and community property states. When computing the value of a nonvested pension right, the appraiser makes an assumption of the probability that an employee will complete the years of service or other requirements necessary for the pension plan to vest. A contingent remainder interest is comparable to a nonvested pension right. An analogy may be drawn to the nonvested portion of a defined benefit plan. In the case of the contingent remainder, an appraiser will assign a mortality probability that a beneficiary will outlive an upper tier beneficiary and adjust the value of the future interest accordingly.

B. Valuation of a Current Discretionary Interest

Under the continuum of discretionary trusts theory, a judge determines how much should have been distributed by a trustee not to constitute abuse under a good-faith standard of review. Therefore, a current beneficial interest might be valued by taking the imputed distribution and applying a present value to each future distribution. The result is that a discretionary interest can be valued like an annuity taking into account a rate of return on the trust assets, the present value of future imputed distributions, and the anticipated time period over which the beneficiary would receive current distributions. It should be noted that in *Comins,* without explaining how the computation was made, the court agreed with the trial court's valuation of the current distribution interest at $469,769.[86] As in *Comins,* the value of the current beneficial discretionary interest may be marital property or an economic factor to determine a disequitable distribution of marital property.

C. What Appraisers Will Likely Miss in the Computation

When a beneficiary goes through a divorce, both the husband and wife will need to employ appraisers for beneficial interests similar to business or pension valuations. For example, if a wife owns both a discretionary beneficial interest in

trust and a remainder interest, the estranged husband likely will appear with a high beneficial interest valuation and the wife with a low beneficial interest valuation. Missing from the estranged husband's valuation may well be two facts that are virtually incapable of valuation:

1. The estimated medical cost of a surviving parent beneficiary's last illnesses.
2. A discount in valuation attributable to a special power of appointment which allows the surviving parent beneficiary to disinherit the divorcing child and appoint the property to other beneficiaries.

In many trusts such as a QTIP trust, a credit shelter trust, an ILIT or an irrevocable trust, the surviving spouse is often a trust beneficiary with the children. Most of a person's medical expenses are incurred in the last two years of life. Many times, a large portion of the trust assets will be consumed by payment of these medical expanses of a surviving beneficiary spouse.

A special power of appointment is a significant valuation issue. The fair market value of an asset is determined by a willing buyer and a willing seller, not the intrinsic value to the beneficiary. There is presently no market[87] to draw any reference how large a discount should be placed on an interest if the trust property is subject to a special power of appointment. Most estate planners would conclude the discount should be close to 100 percent as the property is close to worthless on the open market. If the beneficial interest were sold on the open market, the surviving parent would merely exercise the special power of appointment and the purchaser would receive nothing. It is highly unlikely that the husband's appraiser would agree with such a discount and would value the interest as if the special power of appointment would never be exercised to disinherit the daughter.

D. What If an Interest Is Too Speculative for Valuation?

Based upon all of the valuation issues involved in the valuation of a beneficial trust interest, a court may determine that an interest is too speculative for valuation purposes. However, the court is not precluded from seeking an appropriate remedy if the beneficial interest is also classified as marital property. The court may follow the example set by the North Dakota Superior Court in *van Ossting v. van Ossting*.[88] In *van Ossting*, the court held that where the present value of the husband's vested credit trust was subject to contingencies too speculative to calculate, the proper method of distribution was to award the wife a percentage of future payments.

VIII. Remedies

Proponents of the U.T.C. have defended the new "continuum of trust law theory" on the grounds that a spouse may only force a distribution from the trust for alimony or child support.[89] While this statement may be true, this does not even begin to address the indirect methods that an estranged spouse and other creditors may use to recover from a trust under the U.T.C. First, with regard to forcing a distribution, prior to the U.T.C. and depending on state spendthrift law, an estranged spouse could only force a distribution from a support trust. Now such a power vests with an estranged spouse on all trusts.

Second, for the purposes of child support and alimony an estranged spouse may attach the beneficial interest and attach all future distributions as well as wait for the remainder interest to vest. Third, an estranged spouse may ask a judge for the judicial foreclosure sale of either a current distribution interest or remainder interest to satisfy a claim for child support or alimony.

In states that classify a remainder interest as marital property and the estranged spouse becomes an exception creditor, the estranged spouse may follow the remedy of attaching all future distributions or seeking a judicial foreclosure sale of the beneficiary's interest. In the event that current distribution interests are classified as property interests under state law, to the extent that they constitute marital property, an estranged spouse would have the same remedies as against a remainder interest. However, in the situation where a beneficial interest is classified as marital property or an economic circumstance to disproportionately divide marital property in favor of an estranged spouse, a court may not need to resort to one of the above remedies. Rather, the court may merely value the marital interest or economic circumstance, and award the estranged spouse other marital property. If valuation of an interest is too contingent, a court may award the estranged spouse a percentage of future distributions or a percentage of the remainder interest when it vests.

Even if an estranged spouse is not classified as an exception creditor under the U.T.C., due to the ambiguous drafting in the U.T.C., an estranged spouse may

possibly attach all future distributions or wait for the remainder to vest. This is because U.T.C. §501 allows attachment of present or future distributions to or for the benefit of a beneficiary or by other means "except to the extent a beneficiary's interest is not protected by a spendthrift provision." However, under current law,[90] spendthrift provisions only protect an interest until the property is distributed.[91] Therefore, the question becomes, does a spouse for any purpose (child support, alimony, or division of marital property), as well as any other creditor, have a right under U.T.C. §501 to attach the beneficial interest and wait until the next distribution is made? Unfortunately, the Restatement Third and the official comments provides little guidance on whether this is the case. The text of the Restatement Third §56 comment e. refers to creditor and does not mention whether attachment of the beneficial interest is limited to an "exception creditor," nor does the text discuss the effect of a spendthrift clause. However, illustration 1 mentions that no spendthrift clause is included in the trust. In the event a judge interprets U.T.C. §501 to mean any creditor may attach the trust (including a spouse to satisfy a claim for a division of marital assets), the estranged spouse would not need to be classified as an exception creditor.

In the event that a judge interprets U.T.C. §501 to mean *any creditor* may attach the trust, the U.T.C. does not slightly change common law, it almost completely destroys the purpose of spendthrift protection. This is because under U.T.C. §501, a trustee may no longer make any payments for the benefit of a beneficiary. *Any* creditor could attach and merely wait for satisfaction of his or her claim.[92] Distributions, other than those a court may order to satisfy a claim for alimony or child support under U.T.C. §504, will be frozen with one minor exception. In determining whether or not a creditor may attach to all of any present or future distributions, the court may consider the support needs of a beneficiary and the beneficiary's family.[93]

IX. Conclusion—The Divorce Attorney's Dream

To a divorce attorney, the U.T.C. is one of the finest pieces of legislation that has ever been devised. In the area of domestic relations, to settlors, trust beneficiaries and estate planners, the U.T.C. appears to be the exact opposite. Unfortunately, many divorce attorneys do not make money by amicably and easily settling domestic relations cases. Rather, it is the clients with money and complicated legal and valuation issues where many divorce attorneys make their living. This is particularly true when reasonable minds may easily come to incredibly different conclusions regarding what constitutes property or how an indefinite property interest should be valued. In an area where there typically was little trust litigation, due to the myriad of possible combinations in the flowchart, a newly created undefined "continuum of discretionary trusts," with remedies that were previously unavailable in many states to an estranged spouse, makes the the U.T.C. a divorce attorney's dream.

ENDNOTES

1 U.S. National Center for Health—2002 statistic.

2 Stepfamily Association of America 1997.

3 Mark Merric, Asset Protection Strategies, Vol. II, Ch. 3 (ABA 2004).

4 *See* Official Comments to U.T.C. §106

5 *In re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991); *In re Marriage of Pooley,* 996 P.2d 230 (Colo. App. 1999).

6 "Ignoring the cases involving self-settled trusts and the cases involving only accrued income otherwise payable to a beneficiary, a majority of the cases decided without the aid of a statute rejected an exception for alimony and support of a former spouse." *Trust Income or Assets as Subject to Claim Against Beneficiary for Alimony, Maintenance, or Child Support,* 91 A.L.R.2d 262; Also, the cases on child support were about evenly split. Bogert & Bogert §224, at 465 (2d rev. ed. 1992); Beglieter, *In the [Iowa Trust] Code We Trust—Some Trust Law for Iowa at Last,* 49 Drake L. Rev. 165, at note 276 (2001).

7 Under U.T.C. §504(c)(1), the spouse is an exception creditor for child support or alimony. Under the comment under U.T.C. §501, an exception creditor may judicially foreclose on a beneficiary's interest.

8 U.T.C. §503(b).

9 For a detailed discussion of how a current beneficial interest is classified as either a discretionary or support interest under common law, please *see* Merric, *supra* note 3. *Also see* Merric & Oshins, *The U.T.C. May Reduce the Asset Protection of Non Self-Settled Trusts,* Estate Planning, Aug. 2004.

Restatement Third §60, comment a. argues that the distinction between a discretionary and support trust is artificial and arbitrary and costly to determine. In reply it should be noted that the distinction between support and discretionary trusts is one the courts and citizens have relied upon and been able to make work. The alleged cost of litigation will not be reduced by the Restatements "modern" view since additional parties will now be litigating whether the terms of the discretionary trust allow a court to attach a distribution, force the judicial foreclosure sale of all interests, force a distribution in favor of an estranged spouse and in limited cases under §506 any creditor may arguably litigate whether the discretionary distributions are in fact "mandatory" considering the purposes of the trust. Further, the authors would suggest that the litigation under the discretionary-support distinction is miniscule when compared to the amount of litigation that will most likely result under

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the newly created undefined "continuum of discretionary trusts" discussed later in this article.

[10] A trust that provides that interest may be distributed to the settlor's children with the remainder to vest in the grandchildren is also an interest that does not vest with the current beneficiaries of the trust.

[11] The Colorado courts allowed a current discretionary interest and the remainder interest to be considered a factor in the equitable division of marital property. *Jones* and *Pooley, supra* note 5.

[12] In the following cases, the court noted that the intergenerational nature of a dynasty interest prevented attachment by an estranged spouse. *In re Marriage of Guinn*, 2004 WL 352083 (Colo. App. 2004); *In re Marriage of Muelhaupt,* 439 N.W.2d 656 (Iowa 1989); *D.L. v. G.L.*, 811 N.E.2d 1013, 61 Mass. App. Ct. 488 (2004).

[13] The term "beneficiary controlled trust" was coined by Richard and Steve Oshins.

[14] One of the drafters of the Iowa Trust Code has implicitly criticized the approach of the U.T.C. The draft of the Iowa Trust Code did not include the "debatable" provisions concerning child support and alimony claims, preferring instead that the legislature should consider an over-all statute dealing with the many diverse forms of income and that the legislature should perhaps consider that most other sources of income are owned directly by the debtor-spouse while spendthrift trusts are third party creations. Beglieter, *supra* note 6, at fn. 278.

[15] *Pooley, supra* note 5; *D.L. v. G.L., supra* note 12; *Loeb v. Loeb,* 324 S.E.2d 33, 72 N.C. App. 205 (1985).

[16] *Jones, supra* note 5.

[17] *See, e.g.* Colo. Rev. Stat. §14-10-113

[18] *Jones, supra* note 5; G. Bogert, Trusts and Trustees §228 (2d ed. 1979).

[19] A remainder interest subject to defeasement is one in which the beneficiary has an enforceable interest that may be extinguished, for example, the funds are spent on the current beneficiary, a party who has a power of appointment over the trust assets exercises it to the detriment of the beneficiary or if the beneficiary fails to outlive the current beneficiary.

[20] *Davidson v. Davidson,* 474 N.E.2d 1137, 19 Mass. App. Ct. 364 (1985), *but see, D.L. v. G.L., supra* note 12; *Williams v. Massa,* 728 N.E.2d 932, 431 Mass. 619 (2000).

[21] *In re Balanson*, 25 P.3d 28 (Colo. 2001).

[22] However, in *S.L. v. R.L.,* 774 N.E.2d 1179, 55 Mass. App. Ct. 880 (2002), the court held that a special power of appointment where the parent could divest a child from receiving the remainder interest made the remainder interest equivalent to an expectancy under a will, and therefore should not be considered marital property.

[23] While the Massachusetts courts have used an expanded definition of property for purposes of determining the marital estate (*Davidson v. Davidson, supra* note 20), Colorado restricted its definition of property only to an interest that would be classified as property under all state laws.

[24] Once the court determined the interest was property, it engaged in a further analysis as to which portion was marital since in Colorado inherited property is considered separate or nonmarital, however the enhanced value of such property during marriage is considered marital. In Massachusetts, the *Davidson* court noted that the entire inherited property is part of the marital estate.

[25] *Burrell v. Burrell,* 537 P.2d 1 (Alaska 1975) (vested remainder interest).

[26] *Balanson, supra* note 21. Appreciation on a vested remainder interest subject to complete divestment was marital property.

[27] *Carlisle v. Carlisle,* 194 WL 592243 (Superior Ct. of Conn. 1994).

[28] *Moyars v. Moyars,* 717 N.E.2d 976 (Ind. Ct. App. 1999). This is not a trust case. Rather, this case distinguishes a trust case where a contingent remainder interest was not held to be marital property because the interest was too indefinite or remote. *Loeb v. Loeb,* 301 N.E.2d 349 (Ind. 1973). In *Moyars*, the real property interest would eventually vest in the Husband's estate, even if the Husband predeceased his mother. Therefore, in the trust context, it appears that where remainder interests absolutely vest, these remainder interests will be considered marital property in Indiana.

[29] *Davidson v. Davidson, supra* note 20; *but see, D.L. v. G.L., supra* note 12; *Williams v. Massa, supra* note 20.

[30] *Buxbaum v. Buxbaum,* 692 P.2d 411, 214 Mont. 1 (1984).

[31] *Flaherty v. Flaherty*, 638 A.2d 1254, 138 N.H. 337 (1994). It should be noted that the court addressed the issue of spendthrift protection in this case, but decided that they did not apply to the remainder interest.

[32] *Van Ossting v. Van Ossting,* No. 940003 (N.D. Sup. Ct. 1994). In this case, the court found that the remainder interest was too speculative for current division, and therefore allowed the wife a percentage of the future payments.

[33] *Martin v. Martin* , 374 N.E.2d 1384, 54 Ohio St. 2d 101 (1978).

[34] *Benston v. Benston* , 656 P.2d 395, 61 Ore. App. 282 (1983). Vested as well as contingent remainder interests are subject to division as marital property.

[35] *Chilkott v. Chilkott,* 607 A.2d 883, 158 Vt. 193 (1992).

[36] *Trowbridge v. Trowbridge,* 114 N.W.2d 129, 16 Wis.2d 176 (1962).

[37] Please note the definition of "contingent" in terms of a property interest may vary from state to state. The majority rule as mentioned by the Restatement (Second) of Trusts is that outliving a parent is not considered contingent. Restatement (Second) of Trusts §162, Illustration 1.

[38] *Hussey v. Hussey,* 312 S.E.2d 267, 280 S.C. 418 (1984); *Frank G.W. v. Carol M.W.,* 457 A.2d 715 (Del. 1983); *Khroha v. Khroha*, 578 S.W.2d 10, 265 Ark. 170 (1979); *Bacher v. Bacher*, 520 So.2d 299 (Fla. Dist. Ct. App. 1988); *In re Marriage of Rosenblum*, 602 P.2d 892, 43 Colo. App. 144 (1979).

[39] *Loeb v. Loeb, supra* note 28.

[40] *Storm v. Storm*, 470 P.2d 367 (Wyo. 1970) Note that since Wyoming has adopted the Uniform Trust Code, it is most likely that *Storm v. Storm* has been overturned by the Uniform Trust Code and its interpretation through the Restatement Third. This is because under the U.T.C. §501 and its comments, all beneficial interest (*i.e.,* current remainder interests and remainder interests) may be sold at a judicial foreclosure sale. If a remainder interest may be sold, it is not an inchoate right and is something more than a mere expectancy.

[41] *In re Marriage of Poole,* 996 P.2d 230 (Colo. App. 1999); *In re Marriage of Muelhaupt*, 439 N.W.2d 656 (Iowa 1989); *In re Marriage of Tietz*, 605 N.E.2d 670, 238 Ill. App. 3d 965 (1992); *D.L. v. G.L., supra* note 12; *Williams v. Massa, supra* note 20; *Ainsilie v. Ainsilie,* 538 N.W.2d 175, 4 Neb. App. 70 (1995).

[42] *Tietz, supra* note 41.

[43] *Pooley, supra* note 5.

[44] *D.L. v. G.L., supra* note 12.

[45] *Dwight v. Dwight*, 761 N.E.2d 964, 435 Mass. 1107 (2001) provides another example of why the newly created continuum of discretionary trust theory creates far more problems than solutions when compared to common law. *Dwight* is fully analyzed in Section III, C. of this article.

[46] Even in the case of a discretionary trust, under common law, a beneficiary has the right to sue the trustee for a distribution if the trustee is (1) acting dishonestly; (2) acting with an improper motive; or (3) failing to act. However, due to the high threshold a beneficiary had to surmount for judicial review of the trustee's distribution decision, the beneficiary did not have a "sufficient" enforceable right to question the reasonableness of the trustee's decision.

[47] The U.T.C. is silent on whether exception creditors may continue to be added judicially. From the author's discussions with members of the Ohio U.T.C., North Carolina U.T.C. and South Carolina U.T.C., it was these members' opinion that exception creditors could still be created judicially.

[48] One of the more overlooked impacts of the U.T.C. is the fiscal impact it will have on the courts by an increasing caseload. The original U.T.C. that was submitted to the Colorado legislature contained a $1 million fiscal note for the burden to the judiciary.

[49] *Davidson v. Davidson, supra* note 20.

[50] *See* Section II, C. of this article.

[51] *In re Balanson, supra* note 21.

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[52] *Id.*

[53] For a further discussion of the issues of contingent or indefinite remainder interests please *see* Chapter 3 of the treatise MARK MERRIC, ASSET PROTECTION STRATEGIES, VOL. II (Alexander A. Bove, Jr., ed. 2004).

[54] U.T.C. §504(d).

[55] Citing SCOTT ON TRUSTS §130, at 409 (4th ed. 1989).

[56] Further §187.2 states, "Even though there is no standard by which it can be judged whether the trustee is acting reasonably or not, or though by the terms of the trust he is not required to act reasonably, the court will interfere where he acts dishonestly or in bad faith, or where he acts from an improper motive." Section 187.3 discusses when a trustee fails to use his judgment. Section 187.4 discusses where the trustee acts dishonestly, and §187.5 discusses when a trustee has an improper motive.

[57] Restatement (Second) of Trusts §187, at 409 (1959).

[58] It should be noted that the Restatement Third §50 comment c. holds out the promise that the grant of extended discretion might provide some relief. However, this comment makes clear that it will be a matter of judicial interpretation whether such discretions "manifests an intention to relieve the trustee of *normal judicial supervision and control* in the exercise of a discretionary power over trust distributions" (emphasis added).

[59] *Comins v. Comins,* 595 N.E.2d 804, 33 Mass. App. Ct. 28 (1992).

[60] *Id.,* 595 N.E.2d 804, at 806.

[61] *Lauricella v. Lauricella,* 565 N.E.2d 436, 409 Mass. 211 (1991).

[62] *Supra* note 60.

[63] *Lauricella v. Lauricella, supra* note 61, 565 N.E.2d, at 439.

[64] *D.L. v. G.L., supra* note 12.

[65] As noted in the text, it is uncertain whether the trust in *Lauricella* was a discretionary or a support trust under common law. In the event the trust was a support trust, then the beneficiary did in fact have a sufficient enforceable right under common law.

[66] *Davidson v. Davidson, supra* note 20.

[67] Even if a standard is omitted, the court will still apply a good-faith judgment, "based on the extent of the trustee's discretion, the various beneficial interests created, the beneficiaries' circumstances and the relationships to the settlor, and the general purposes of the trust" to created a standard for judicial interpretation. Restatement of Trusts (Third) §50, comment d., adopted on May 16, 2001, by the American Law Institute, published 2003.

[68] *Lauricella v. Lauricella, supra* note 61, 565 N.E.2d, at 439.

[69] *Lauricella v. Lauricella, supra* note 61.

[70] U.T.C. §504, comment—fourth paragraph thereunder, National Conference of Commissioners on Uniform State Laws 2001.

[71] Restatement of Trusts (Third) §60, comment e. and e.(1).

[72] *Bureau of Support in the Department of Mental Hygiene and Correction v. Kreitzer,* 243 N.E.2d 83, 16 Ohio St. 2d 147 (1968). *Also see* the following unreported appellate cases that follow the *Kreitzer* analysis: *Matter of Gantz,* 1986 WL 12960; *Samson v. Bertok,* 1986 WL 14819 (however, the creditor did not recover because it was not a governmental claim); *Matter of Trust of Stum,* 1987 WL 26246.

[73] *Metz v. Ohio Dept. of Human Services,* 762 N.E.2d 1032, 145 Ohio App. 3d 304 (2001).

[74] *Dwight v. Dwight,* 756 N.E.2d 17, 52 Mass. App. Ct. 739 (2001). *Dwight* references the Restatement Third §59 and *Gershaw v. Gershfield,* 751 N.E.2d 424, 52 Mass. App. Ct. 81 (2001). Section 59 contains the exceptions to spendthrift trusts. *Gershaw* is a support trust case. Therefore, under common law, the exception creditors of alimony and child support are appropriate to a support trust. However, *Dwight* is a discretionary trust. Prior to the U.T.C. and Restatement Third, there are no exception creditors to a discretionary trust.

[75] *Dwight v. Dwight, supra* note 74.

[76] U.T.C. §504.

[77] Restatement (Third) of Trusts §50, comment b.; U.T.C. §814(a).

[78] As previously noted, *Comins* was decided without reference to the U.T.C. and Restatement Third. Similar to *Dwight* it appears to fly in the face of common law. However, similar to *Dwight, Comins* makes perfect sense under the newly created continuum of discretionary trusts.

[79] *Dwight v. Dwight, supra* note 45.

[80] An interesting observation is made in *D.L. v. G.L., supra* note 12. When the court determined that the trust was a discretionary intergenerational trust and that it was not to be considered as marital property, the court cited as a favorable fact that the child beneficiary had no knowledge of the trust assets.

[81] For a further analysis of conflict of law issues regarding trusts, *see* ENGEL, LOCKWOOD AND MERRIC, THE ASSET PROTECTION PLANNING GUIDE—A STATE-OF-THE-ART APPROACH TO INTEGRATED ESTATE PLANNING, Ch. 10 (**CCH** 2000). However, it should be noted that again the U.T.C. adopts a minority view in trust law, by using a strong public policy argument to allow a judge to use the "most significant relationship" in determining choice of law. U.T.C. §107.

[82] Due to the Restatement Third creating trust law in the area of creditor recovery, Texas is currently drafting anti-Restatement Third legislation. Other estate planning attorneys have also noted that to retain the common law of the discretionary-support distinction as well as several other creditor recovery areas where the Restatement Third appears to adopt minority positions, anti-Restatement Third legislation will be needed.

[83] *Davidson v. Davidson, supra* note 20.

[84] *In re Balanson, supra* note 21.

[85] As previously noted, states have different definitions of what constitutes a "vested" or a "contingent" remainder interest. For purpose of this discussion, outliving a parent would not constitute a contingent remainder interest; rather the interest would be a vested remainder.

[86] *Comins v. Comins, supra* note 59, 595 N.E.2d, at 806.

[87] However, with the comment to §501 of the U.T.C. allowing the judicial sale of all interests, market data on this subject may actually develop in the near future.

[88] *Supra* note 32.

[89] U.T.C. §504(c).

[90] Early common law took the position that a spendthrift provision generally protects a distribution received by a beneficiary from attachment. *Bucknam v. Bucknam,* 200 N.E. 918, 294 Mass. 214 (1936); *Jackson Square Loan & Sav. Ass'n v. Bartlett,* 53 A. 426, 95 Md. 661 (1902); *Boston Safe Deposit & Trust Co. v. Collier,* 111 N.E. 163, 222 Mass. 390 (1916).

[91] Restatement (Second) of Trusts §152, comment j. (any distributions received from a beneficiary were not protected by spendthrift protection). *See also Lundgren v. Hoglund,* 711 P.2d. 809, 219 Mont. 295 (1985); *Guidry v. Sheet Metal Workers Int'l Ass'n,* CA-10, 10 F3d 700 (1993).

[92] LORING, A TRUSTEE'S HANDBOOK §5.3.3, at 171 (Rounds ed. 2004).

[93] Comment to U.T.C. §501.