

Spendthrift Trust Clauses and Kansas Divorces: Does a Settlor's Intent Still Matter?

by

Calvin J. Karlin & Anna Smith



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Does a spendthrift clause protect trust assets from property division or claims for maintenance or child support? Is a divorcée treated like any other creditor? Does public policy demand that the family be assured adequate resources despite a settlor's ability to restrict the disposition of his or her own property?¹ What is the effect of the Kansas legislature omitting the sections of the Uniform Trust Code (UTC) regarding this from the Kansas Uniform Trust Code (Kansas UTC)? This article will provide background and analysis of these issues.

This article addresses only Kansas law. Consequently, there is no discussion of offshore trusts² or domestic asset protection trusts in those states that protect trust settlors from creditor claims.³ Also beyond the scope of this article are the exempt status of qualified retirement plans and the procedure for dividing them by Qualified Domestic Relations Orders (QDROs), federal Social Security benefits, and military retirement pay.

I. Background

A. K.S.A. 58a-502

The Kansas UTC recognizes the validity of a spendthrift provision in a trust.⁴ Stating that a beneficiary's interest is held subject to a "spendthrift trust" or using words of similar import "is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest."⁵ A spendthrift provision thus not only prevents a trust beneficiary from withdrawing or transferring an interest in the trust but also precludes a creditor or assignee of the beneficiary from reaching trust property or distributions prior to receipt by the beneficiary.⁶ Additionally, a creditor cannot compel a distribution that is subject to the trustee's discretion.⁷ That is so "whether or not a trust contains a spendthrift provision."⁸ That means that with discretionary trusts, the nature of the beneficiary's interest is considered more determinative than the settlor's intent to restrain alienation. With a spendthrift trust, the beneficiary may have an absolute right to distributions of income, principal, or both, whereas the beneficiary of a discretionary trust does not have a right to distribution until the trustee exercises discretion.⁹ Consequently, courts are more likely to allow claims for spousal maintenance and child support against spendthrift trusts than against discretionary trusts.¹⁰

B. *In re Watts*

A divorced spouse seeking alimony (now called "maintenance")¹¹ could not reach the corpus of a discretionary testamentary trust according to the Kansas Supreme Court in *In re Watts*.¹² The Court distinguished a discretionary trust from a spendthrift trust.¹³ In *Watts*, the beneficiary could not compel distributions from the trust, which were subject to the trustee's determination that the beneficiary had "sufficient business judgment" to handle them.¹⁴ That the *Watts* decision involved the trust's principal (corpus)¹⁵ should not preclude its application to a divorcée's claim against discretionary income payments from a trust, as the Kansas Supreme Court quoted a Restatement provision that recognized that a transferee or creditor of the beneficiary could not overcome the trustee's discretion and compel distributions of income or principal.¹⁶ Consequently, no creditor, including a divorced

spouse, should be able to compel a distribution of principal or income from a discretionary trust in Kansas.

C. Restatement (Third) of Trusts

The Restatement (Third) of Trusts firmly takes the position that a beneficiary's children, spouse, or former spouse can reach his or her beneficial interest in a spendthrift trust to satisfy an enforceable claim against the beneficiary for support and maintenance.¹⁷ That is based upon a public policy of not permitting the beneficiary to enjoy benefits while neglecting the support of a dependent.¹⁸

The UTC takes the same position as the Restatement.¹⁹ Both reflect the majority rule.²⁰ Twenty-four states have adopted the UTC.²¹ However, most states have modified the sections that relate to spousal attachment (Sections 503 and 504) to conform to their own common law.²²

D. The Law Outside Kansas

The United States Supreme Court has noted "the basic principle that a beneficiary's interest in a spendthrift trust ... can be reached in the context of divorce and separation."²³ Considerable case law from many states supports an exception allowing a child or dependent spouse to reach the accrued trust income and trust income to accrue in the future.²⁴ A few of those courts have reached that decision only if the creator of the trust intended that the dependents be supported out of trust income.²⁵ On the other hand, there are some states that have refused to allow a spouse to reach the trust assets when there is a spendthrift clause.²⁶ The Illinois Supreme Court and the Alabama Court of Appeals have created a hybrid rule, in which the spendthrift interest can be reached for child support but not alimony.²⁷

E. Kansas Uniform Trust Code

When the Kansas legislature adopted the Kansas UTC, it omitted Sections 503 and 504 of the uniform act. Sections 503 and 504 address the effect of spendthrift provisions and discretionary trusts on claims for child support and spousal maintenance. Section 503(b) of the UTC states that, "A spendthrift provision is unenforceable against ... a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance."²⁸ Such claimant "may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary."²⁹ The comment to that section notes that distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions that the trustee has otherwise decided to make, such as through the exercise of discretion.³⁰ However, Section 503(b) does not purport to authorize a spouse or child claimant to compel a distribution from the trust. Furthermore, Section 503(b) is limited to a court order for support or maintenance and thus does not apply to the division of property in a beneficiary's divorce.³¹

Section 504 of the UTC creates an exception to the general rule that creditors may not reach a beneficiary's interest in a discretionary trust, but only for a creditor who is a spouse, former spouse, or child of the beneficiary with a judgment or court order for support or maintenance and the trustee has either not complied with a standard for distribution or has abused the trustee's discretion.³² That section applies regard-

less of whether the trust contains express provisions to guide the trustee in exercising its discretion.³³ However, the UTC provides little help on what a spouse or child claimant would have to show to establish an abuse of discretion or failure to comply with a standard for distribution, an especially difficult task when the trust provides no standards for distributions.³⁴ If the claimant can establish the trustee's abuse or failure, the comment to Section 504 notes that the court must direct the trustee to pay the claimant an equitable amount under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to the beneficiary, keeping in mind that the family court has already considered the respective needs and assets of the family in setting the support award.³⁵

The impact of the Kansas legislature's omission from the Kansas UTC of UTC Sections 503 and 504 on a divorced spouse's ability to attach a beneficiary's interest in a spendthrift trust is not entirely clear. The Kansas Judicial Council supported adoption of UTC Sections 503 and 504, but the Kansas Bar Association objected.³⁶

Before the enactment of the Kansas UTC, the Kansas Supreme Court, in *State ex rel. Secretary of SRS v. Jackson*,³⁷ followed the Second Restatement of Trusts' spendthrift exception for "the United States or a state to satisfy a claim against the beneficiary," which is also a part of UTC Section 503.³⁸ The *Jackson* Court quoted all of the Restatement's exceptions to spendthrift provisions,³⁹ which may indicate that it would have approved the other exceptions, including the spousal exception, had those matters been before it. In addition, the

Kansas Judicial Council has suggested that the *Jackson* Court approved all of the exceptions⁴⁰ (including the spousal exception, although it was not actually before the Court).

The Kansas Judicial Council concluded that UTC Section 504(c) would modify existing Kansas law on discretionary trusts as set forth in *Watts v. McKay*.⁴¹ Instead of adopting UTC Section 504, the Kansas legislature left it out, but added a provision to Section 502 providing:

Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion even if: (1) the discretion is expressed in the form of a standard for distribution; or (2) the trustee has abused the discretion.⁴²

In *Watts*, the Kansas Supreme Court had noted an existing conflict of authority on whether a former spouse could reach the interest of a beneficiary of a spendthrift trust to satisfy a judgment for alimony.⁴³ However, because the *Watts* court concluded that the trust before it was discretionary, it did not reach the spendthrift question.⁴⁴ The *Watts* opinion approvingly cited the Restatement⁴⁵ as to discretionary trusts, however.

Did the Kansas legislature's intentional omission of UTC Sections 503 and 504 signify a rejection of the Restatement principles set forth therein?⁴⁶ Does that mean that a spousal creditor cannot attach trust distributions even after the beneficiary receives them? It clearly would have been allowed if Section 503 had been adopted, but its omission may suggest that it is not the legislature's intent.

II. Trust Parties

A. Settlor

Under Kansas law, a spendthrift provision does not protect the property of a revocable trust from claims of the settlor's creditors.⁴⁷ Kansas law also provides that with respect to an irrevocable trust, a creditor can reach the maximum amount that can be distributed to or for the settlor's benefit.⁴⁸ The Kansas Statute of Frauds also provides that "All gifts and conveyances of goods and chattels, made in trust to the use of the person or persons making the same, shall to the full extent of both the corpus and income made in trust to such use, be void and of no effect, regardless of motive, as to all past, present or future creditors ..." ⁴⁹ Based upon the "full extent" and "void and of no effect" language, that long-standing statutory provision appears to provide more complete relief to a creditor as to a self-settled irrevocable trust than that of the Kansas UTC.⁵⁰

B. Beneficiary with Power of Withdrawal

The Kansas UTC treats a beneficiary with a power of withdrawal the same as the settlor of a revocable trust to the extent of the property subject to the power.⁵¹

C. Trustee

A trustee getting divorced does not have trust property exposed to spousal claims under the Kansas UTC.⁵² Unless the trustee is also the settlor or a beneficiary, all he or she has is legal title without a beneficial interest.⁵³

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D. Distributee

In dicta, the Kansas Supreme Court (in a prior appeal of *Watts*) stated that, "It may be conceded that if the trust created is a spendthrift trust many cases may be found holding that the income may be subjected to claims for maintenance of the wife or child, and some that it may be subjected to the satisfaction of alimony."⁵⁴ In the absence of any subsequent case law on the issue, that suggests that the Court may follow the Restatement and recognize an exception for spousal maintenance and child support claims at least as to income to be distributed to a trust beneficiary.

Mandatory trust distributions are available to pay spousal claims (as well as other creditors and assignees) regardless of any spendthrift provision.⁵⁵ That includes overdue mandatory distributions that are not made within a reasonable time.⁵⁶

III. Remedies

How does a divorcée enforce rights against trust distributions? Presumably the divorce court can compel the other party to exercise his or her rights as settlor or beneficiary and exercise its contempt powers for failure to do so.⁵⁷ Thus, spouses and children can collect overdue maintenance and support by attachment, garnishment, and execution, the same as any other judgment creditor.⁵⁸ In addition, they may pursue all available remedies against a trustee who violates a duty owed to a beneficiary.⁵⁹

As to the trustee, while it has been recognized in some states that a court having the power to apply income of a spendthrift or support trust to satisfy an obligation for maintenance or support also must have the power to order the trustee to make payments,⁶⁰ it is not the case in Kansas. In successive appellate decisions in the *Watts* case, the Kansas Supreme Court first held that a court, in an action for alimony without a divorce, cannot order the trustee to dispose of the corpus of a trust unless the trustee is a party to the action.⁶¹ Four years later, the Court noted that a Kansas court has no statutory authority to join a trustee as a defendant in a divorce case.⁶²

Subsequently, however, the Kansas Supreme Court disavowed *Watts*. In *Cadwell v. Cadwell*,⁶³ the Court allowed a third party who claimed ownership of property to intervene in a divorce action when the wife claimed that the divorcing couple owned the same property. The Supreme Court indicated that *Watts* had not addressed this issue and was "not intended to be, and is not, a binding adjudication of a plaintiff's right to join a third party as a defendant or of a third party's right to intervene in a divorce action for the sole purpose of obtaining a determination of property rights."⁶⁴ Although the Supreme Court has generally indicated that a "husband and wife are the only proper parties to an action for divorce,"⁶⁵ it has also stated:

[T]he right of a wife to name as defendants third parties to whom the husband has conveyed his property in fraud of her rights, or third parties having, or claiming to have an interest in property involved in a divorce action, is universally accepted as the prevailing rule on the ground that the court, in the exercise of its duty to determine a reasonable amount of alimony to be awarded the plaintiff, must determine whether the property is

in fact owned by the husband or by the third parties defendant.⁶⁶

Another question is whether the court can and should consider the value of trust funds in dividing property in a divorce.⁶⁷ That would seem to be appropriate only to the extent that the beneficiary had a clear right to receive it.⁶⁸

IV. Summary

An obligation to pay maintenance or support differs from ordinary debts.⁶⁹ It is subject to modification for changed circumstances.⁷⁰ It ceases to be effective upon the death of either party.⁷¹ It can be enforced by contempt proceedings.⁷² Maintenance and support obligations cannot be attached or garnished by judgment creditors,⁷³ nor are they dischargeable in bankruptcy.⁷⁴

Though statutory and case law continues to evolve in Kansas and elsewhere, the paramount public policy in a divorce setting seems to dictate that one party not starve while another lives in comfort. On the other hand, if the trust beneficiary cannot control distributions from the trust, then his or her children and former spouse should not be able to do so either.

In addition, shouldn't the interests of other trust beneficiaries also be considered? Why should the current beneficiary's family benefit to the detriment of subsequent vested or contingent trust beneficiaries? That is certainly a reason to limit assignment in a divorce context to distributions actually made or required.



Must a settlor specify in the trust that a beneficiary's spouse is not to receive the beneficiary's share?⁷⁵ Isn't that an intent we all presume?

When the Kansas Supreme Court first approved the doctrine of "spendthrift trusts" in 1915 it stated that, "It deprives the creditor of no security to which he has the right to look, and it recognizes the right which the owner of property has to dispose of it, either by an absolute gift or by a conditional one ..."⁷⁶ Creation of exceptions to spendthrift clauses undermines the ability of a settlor to have his or her intent fulfilled.⁷⁷ Kansas courts have consistently recognized that the intent of a testator or settlor is paramount. This was most specifically addressed in the spendthrift trust context in *In re Estate of Sowers*.⁷⁸ Courts and legislatures should thus be reluctant to use public policy to subvert personal decisions as to one's private property.⁷⁹

So what is a draftsman to do? The best approach is to draft trust distributions as discretionary and to provide to the trustee specific guidance regarding such discretionary distributions.⁸⁰ Including co-beneficiaries or successor beneficiaries who may be affected would seem to be helpful.

An attorney engaged in estate planning or family law will need to consider these issues in the context of each client's situation. It will not be easy, but our work rarely is. ■

About the Authors



Calvin J. Karlin is a member of *Barber Emerson L.C. in Lawrence*. He is editor of the *KBA Real Estate, Probate & Trust Section Law newsletter* and a member of that section's executive committee. He is also a member of the *American College of Trust and Estate Counsel*.



Anna Smith is a third-year law student at the *University of Kansas School of Law* and an articles editor for the *Kansas Law Review*. She has been a law clerk with *Barber Emerson L.C. in Lawrence* for the past year.

ENDNOTES

1. See *Nichols v. Eaton*, 91 U.S. 716, 727, 23 L. Ed. 254, 257 (1875) (observing that a spendthrift provision supports owner's right to dispose of property as he or she desires). A spendthrift clause is designed to protect the beneficiary from himself and his creditors. 76 AM. JUR. 2d *Trusts* § 94 (2005).

2. An excellent summary as to offshore trusts can be found at Christopher M. Reimer, *Asset Protection: Then and Now*, 150 TR. & EST., Aug. 1, 2011, at 58, 60-61.

3. See John E. Sullivan III et al., *Fraudulent Transfer Claims*, TR. & EST. Dec. 1, 2011, p. 43, 43-49, for a discussion of the Alaska statute and the recent court rulings in regard thereto. Other states permitting self-settled spendthrift trusts include Delaware, Hawaii, Missouri, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming. All but one of these states (Oklahoma) require the trust to be irrevocable. Reimer, *supra* note 2, at 61.

4. K.S.A. 58a-502(a). K.S.A. 2010 Supp. 58a-103(15) defines a spendthrift provision as "a term of a trust which restrains either voluntary or involuntary transfer of a beneficiary's interest." The Kansas legislature specifically rejected the UTC definition's requirement that the trust term restrain "both voluntary and involuntary transfer of a beneficiary's interest." UTC 103(16) (emphasis added). The UTC's premise is that if a beneficiary can sell, encumber, or otherwise transfer the interest, then the beneficiary's creditors should be able to reach it. By using the disjunctive "or," Kansas accepts either restriction ("voluntary" or "involuntary") as a spendthrift provision. See David M. English, *The Kansas Uniform Trust Code*, 51 U. KAN. L. REV. 311, 333-34 (2003). See also C. Dessin, *Feed a Trust and Starve a Child: The Effectiveness of Trust Protective Techniques Against Claims for Support and Alimony*, 10 GEORGIA ST. L. REV. 691 (1994), for a review of case law as to spendthrift and discretionary terms in a divorce setting. Recognition of spendthrift provisions is consistent with longstanding Kansas case law. *Watts v. McKay*, 160 Kan. 377, 383, 162 P.2d 82, 87 (1945); *Everett v. Haskins*, 102 Kan. 546, 549, 171 P. 632, 633 (1918); *Sherman v. Havens*, 94 Kan. 654, 659, 146 P. 1030, 1032 (1915).

5. K.S.A. 58a-502(b). This seems to expand the ability to infer a spendthrift provision beyond the guidance in *In re Estate of Sowers*, 1 Kan. App. 2d 675, 680, 574 P.2d 224, 228 (1977) (noting that a requisite to the creation of a spendthrift trust is the settlor's clear manifestation of

intent to create the trust with spendthrift effect). But see *Everett*, 102 Kan. 546, 171 P. 632 (1918) ("It is not necessary that an instrument creating spendthrift trust should contain an express declaration that the interest ... shall be beyond the reach of his creditors ...") (quoting AM. & ENG. ENCYCLOPEDIA OF LAW 141, 142 (David S. Garland et al., eds. 2d. ed. 1896)).

6. K.S.A. 58a-502(c).

7. K.S.A. 58a-502(d). This is so even if (i) the distribution is to be based upon a standard for distribution or (ii) the trustee has abused the discretion. *Id.* A 2005 amendment to the UTC that Kansas adopted in 2006 excludes from the K.S.A. 58a-506 definition of a "mandatory distribution" those with a "support or other standard" that the trustee "may" or "shall" follow. See UNIF. TRUST CODE § 506 (amended 2005), 7C U.L.A. 541 (2006); K.S.A. 2010 Supp. 58a-503(a). Consequently, creditors, including divorced spouses and their children, cannot compel distributions from such trusts.

8. *Id.*

9. Dessin, *supra* note 4, at 707-08.

10. Dessin, *supra* note 4, at 707.

11. 2011 Kan. Sess. Laws 98 (to be codified at K.S.A. 23-2902).

12. 160 Kan. 377, 385, 162 P.2d 82, 88 (1945).

13. *Id.* at 384, 385, 162 P.2d at 87. In *Wilcox v. Gentry*, 18 Kan. App. 2d 356, 853 P.2d 74 (1993), *rev'd*, 254 Kan. 411, 867 P.2d 281 (1994), the Court of Appeals considered a discretionary trust that did not contain a spendthrift provision and held that neither the beneficiary nor a creditor of the beneficiary could compel the trustee to distribute income or principal to the beneficiary or a creditor and that the beneficiary had no vested right to a distribution until a disbursement was made. *Id.* at 360, 853 P.2d at 78.

14. *Watts*, 160 Kan. at 378, 385, 162 P.2d at 84, 88. See *Myers v. Kan. Dep't of SRS*, 254 Kan. 467, 476-78, 866 P.2d 1052, 1058-59 (1994), which treats a trust requiring that the trustee "shall ... pay over so much or all of the net income and principal to my son as my trustee deems advisable for his care, support, maintenance, emergencies, and welfare" as a discretionary trust from which the beneficiary or a creditor could only require the trustee to distribute funds if the trustee abused its discretion by acting arbitrarily, dishonestly, or improperly.

15. *Watts*, 160 Kan. at 377, 162 P.2d at 83.

16. *Id.* at 384, 87.

17. RESTATEMENT (THIRD) OF TRUSTS § 59 (2003). Both prior editions

of the Restatement also recognized those exceptions to the general effect of a spendthrift provision. RESTATEMENT (SECOND) OF TRUSTS § 157 (1959); RESTATEMENT (FIRST) OF TRUSTS § 152 (1935).

18. RESTATEMENT (THIRD) OF TRUSTS § 59, cmt. b. Some courts state that support for a spouse or child is a common-law obligation that does not establish a debt. *Keller v. Keller*, 284 Ill. App. 198, 202-06, 1 N.E.2d 773, 776 (Ill. App. Ct. 1936); *Marsh v. Scott*, N.J. Super 240, 248, 63 A.2d 275, 279 (N.J. Super. Ct. Ch. Div. 1949). The Restatement dodges that question (as did Section 157 of the prior Restatement (Second) of Trusts) by stating that public policy (not the absence of a debtor-creditor relationship) removes support obligations from the effect of a spendthrift provision. It is not due to an inability to construe a spendthrift clause as intentionally excluding the beneficiary's dependents. Domestic support obligations are also not dischargeable in bankruptcy under 11 U.S.C. § 523(a)(5).

19. UNIF. TRUST CODE § 503(b)(1) (amended 2005), 7C U.L.A. 525 (2006).

20. Kevin D. Millard, *Rights of a Trust Beneficiary's Creditors Under the Uniform Trust Code*, 34 ACTEC J. 58, 60 (2008).

21. Alabama, Arizona, Arkansas, the District of Columbia, Florida, Kansas, Maine, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming. *Acts: Trust Code*, UNIFORM LAW COMMISSION, <http://www.ncusl.org/Act.aspx?title=Trust%20Code> (last visited Jan. 27, 2012). Kansas was the first state to adopt a form of the UTC.

22. See Millard, *supra* note 20, at 61-64 (detailing the changes to UTC Sections 503 and 504 that each state has made). Those changes include omitting the sections entirely, omitting certain subsections, replacing the text to say there are no exception creditors, omitting children and spouses as exception creditors, allowing former but not current spouses as exception creditors, retaining the exception for only children's claims, limiting the exception to trusts allowing distributions for the beneficiary's support or providing mandatory distributions, limiting the exception to those court orders that expressly specify an amount attributable to the most basic needs, allowing children to reach the trust principal, excluding the exception from applying to special needs trusts, and allowing the settlor to explicitly exclude the beneficiary's child or spouse from benefitting from the trust, and creating a "wholly discretionary trust" unreachable by any creditors. *Id.*

23. *Boggs v. Boggs*, 520 U.S. 833, 850, 117 S. Ct. 1754, 1765, 138 L. Ed. 2d 45, 60 (1997); see also *Ridgway v. Ridgway*, 454 U.S. 46, 74, 102 S. Ct. 49, 64, 70 L. Ed. 2d 39, 60 (1981) ("[I]t is widely held, however, that even where such trusts are generally valid, the interest of the beneficiary may be reached for the support of his wife or children, or for the payment of alimony to his wife." (quoting E. GRISWOLD, SPENDTHRIFT TRUSTS 389 (2d ed. 1947))).

24. 24A AM. JUR. 2d *Divorce and Separation* § 800 (2008); see, e.g., *Council v. Owens*, 28 Ark. App. 49, 55, 770 S.W.2d 193, 197 (1989); *Seidenberg v. Seidenberg*, 225 F.2d 545, 550 (D.C. Cir. 1955); *In re Matt*, 105 Ill.2d 330, 335, 473 N.E.2d 1310, 1313 (1985); *Ford v. Ford*, 230 Ky. 56, 56-57, 18 S.W.2d 859, 860-861 (1929); *Eaton v. Eaton*, 82 N. H. 216, 132 A. 10, 11 (1926); *In re Knauth's Trust*, 12 N.Y. 2d 259, 263-64, 189 N.E.2d 482, 484-85 (1963); *Shelley v. Shelley*, 223 Or. 328, 341, 354 P.2d 282, 288 (1960); see also M. L. Cross, *Trust Income or Assets as Subject to Claim Against Beneficiary for Alimony, Maintenance or Child Support*, 91 A.L.R. 2d 262 (1963).

25. 24A AM. JUR. 2d *Divorce and Separation* § 801 (2008).

26. See, e.g., *Schwager v. Schwager*, 109 F.2d 754, 757-59 (7th Cir. 1940) (applying Wisconsin law); *Bucklin v. Wharton*, 51 N.W.2d 412, 417 (Iowa 1952); *Pemberton v. Pemberton*, 9 Mass. App. Ct. 9, 19-21, 411 N.E.2d 1305, 1312-13 (1980).

27. See *Ex parte Boykin*, 656 So.2d 821, 827 (Ala. Civ. App. 1994); *Miller v. Miller*, 268 Ill. App. 3d 132, 143, 643 N.E.2d 288, 294 (1994).

28. UNIF. TRUST CODE § 503(b)(1) (amended 2005), 7C U.L.A. 525 (2006).

29. UNIF. TRUST CODE § 503(c) (amended 2005), 7C U.L.A. 525 (2006).

30. UNIF. TRUST CODE § 503(b) cmt. 7C U.L.A. 525 (2006).

31. UNIF. TRUST CODE § 503(b)(1) (amended 2005), 7C U.L.A. 525 (2006).

32. UNIF. TRUST CODE § 504(c), 7C U.L.A. 529-30 (2006).

33. Alan Newman, *The Rights of Creditors of Beneficiary Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771, 803-04 (2002).

34. *Id.* at 806-07.

35. UNIF. TRUST CODE § 504 cmt., 7C U.L.A. 531 (2006).

36. English, *supra* note 4, at 333-34.

37. 249 Kan. 635, 641, 822 P.2d 1023, 1037 (1991) (quoting RESTATEMENT (SECOND) OF TRUSTS § 157 (1957)).

38. UNIF. TRUST CODE § 503(b)(3) (amended 2005), 7C U.L.A. 525 (2006).

39. 249 Kan. at 640-41 (quoting RESTATEMENT (SECOND) OF TRUSTS § 157 (1957)). Interestingly, the Kansas Supreme Court apparently previously rejected the Restatement exception that permits creditors to reach spendthrift trust assets to satisfy claims for necessary services provided to a beneficiary. *Pond v. Harrison*, 96 Kan. 542, 542, 152 P. 655, 656-57 (1915) (not requiring payment to lumber supplier for rebuilding home after fire).

40. National Conference of Commissioners on Uniform State Laws, *Proposed Uniform Trust Code with Comments and Kansas Comments*, KANSAS JUDICIAL COUNCIL § 503 Kan. cmt. (2000), <http://www.kansasjudicialcouncil.org/uniformtrust.shtml>.

41. *Id.* at § 504 Kan. cmt.

42. K.S.A. 58a-502(d).

43. *Watts v. McKay*, 160 Kan. 377, 384, 162 P.2d 82, 87 (1946).

44. *Id.*

45. *Id.* The Kansas Supreme Court reiterated its *Watts* citation (with approval) of the Restatement in the later case of *State ex rel. Secretary of SRS v. Jackson*, 249 Kan. 635, 640, 822 P.2d 1033, 1037 (1991).

46. See English, *supra* note 4, at 334; Timothy J. Vitollo, *Uniform Trust Code Section 503: Applying Hamilton Orders to Spendthrift Interests*, REAL PROP., TR. & EST. L.J. 169, 190 (Spring 2008).

The Kansas case law addressing variances from uniform acts does not provide guidance where entire sections are deleted due to some inconsistency with prior case law. See *In re K.M.H.*, 285 Kan. 53, 72, 169 P.3d 1025, 1038 (2007); *Landon v. Artz*, 6 Kan. App. 2d 617, 620-21, 631 P.2d 1237, 1239-40 (1981); *Dunn v. Hindman*, 18 Kan. App. 2d 537, 540; 855 P.2d 944, 997-98 (1993).

47. K.S.A. 58a-505(a)(1). This is consistent with the well-established rule that a settlor cannot create a spendthrift trust for his or her own benefit. 2A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 156.2 (4th ed. 1987); RESTATEMENT (THIRD) OF TRUSTS § 58(2) (2003).

The Johnson County Family Law Guidelines § 4.20(A) (2001 Rev.) treats assets of a settlor in a revocable or amendable trust as though "not in trust."

48. K.S.A. 58a-505(a)(2). If there is more than one settlor, the amount that a creditor may reach cannot exceed the debtor/settlor's interest in the portion of the trust attributable to that settlor's contribution. K.S.A. 2010 Supp. 58a-103(14).

49. K.S.A. 33-101. See also *Herd v. Chambers*, 158 Kan. 614, 622-28, 149 P.2d 583, 588-594 (1944); *In re Estate of Sowers*, 1 Kan. App. 2d 675, 681, 574 P.2d 224, 229 (1977). See also K.S.A. 33-102, under which transfers made "with intent to hinder, delay or defraud creditors of their just and lawful debts" are "deemed utterly void and of no effect."

50. The initial clause of K.S.A. 58a-505(a) recognizes the applicability of K.S.A. 33-101, 33-102 and the Kansas Fraudulent Transfer Act found at K.S.A. 33-201.

51. K.S.A. 58a-505(b)(1). See K.S.A. 58a-505(b)(2) if the power lapses.

52. K.S.A. 58a-507. Also, K.S.A. 2010 Supp. 58a-105(b)(5) prevents trust terms from overriding the creditor protections in Article 5 of the Kansas UTC.

53. See Kenneth W. Kingman, *A Beneficiary Serving as Trustee May Affect Asset Protection*, ESTATE PLANNING, April 2011, 22, 22-26, which discusses the Uniform Trust Code and Restatement (Third) of Trusts and suggests that in states, like Kansas, that did not adopt UTC section 504, the trustee should have a co-trustee, co-beneficiaries, and ascertainable

standards for distribution, and might even resign as trustee, for creditor protection purposes. See also K.S.A. 59-1703; *Kline v. Orebaugh*, 214 Kan. 207, 519 P.2d 691 (1974). Property in which the trustee holds legal title as trustee is also not part of a trustee's bankruptcy estate. 11 U.S.C. § 541(d).

54. *Watts v. Watts*, 158 Kan. 59, 67, 145 P. 128, 134 (1944).

55. K.S.A. 2010 Supp. 58a-506(b). Conversely stated, the rights of one spouse to collect from a trust for the other spouse should not be greater than the rights of the beneficiary to receive distributions.

K.S.A. 2010 Supp. 58a-501 gives authority to attach present or future distributions if a beneficiary's interest is not subject to a spendthrift provision. That is consistent with the effect of a garnishment of an estate executor or administrator. K.S.A. 60-732(c)(2). See also *Wilcox v. Gentry*, 18 Kan. App. 2d 356, 363, 853 P.2d 74, 79 (1993).

56. K.S.A. 2010 Supp. 58a-506. The UTC does not define what is a "reasonable time" to make a distribution. Absent a spendthrift provision, payments made by a trustee to a beneficiary are subject to creditor claims. K.S.A. 2010 Supp. 58a-501. See also *Wilcox*, 254 Kan. at 413-16, 867 P.2d at 283-285.

57. K.S.A. 20-1204a; *Dozier v. Dozier*, 252 Kan. 1035, 1038, 850 P.2d 789, 792 (1993)

("[C]ourt-ordered alimony can be enforced by an attachment for contempt."); *Crumppacker v. Crumppacker*, 239 Kan. 183, 185, 718 P.2d 295, 297 (1986) ("Court orders for child support are enforceable by proceedings in indirect contempt."); *Nicholas v. Nicholas*, 31 Kan. App. 2d 457, 463, 66 P.2d 929, 936 (2003), *aff'd in part, rev'd in part*, 277 Kan. 171 (2004) ("Generally, if an individual fails to do something ordered by the court, that individual may be held in civil contempt."). See also *Hoppe v. Hoppe*, 181 Kan. 428, 433, 312 P.2d 215, 220 (1957); *Kemmerle v. Kemmerle*, 171 Kan. 312, 232 P.2d 215, 220 (1951); *Johnson v. Johnson*, 148 Kan. 682, 84 P.2d 888 (1938); *Barton v. Barton*, 99 Kan. 727, 163 P. 179 (1917).

Kansas did not adopt UTC Section 503(c), which authorizes an exception creditor to obtain a court order attaching present or future distributions to or for the benefit of a beneficiary. Such orders have been referred to as "Hamilton orders," named for the ruling in *Hamilton v. Drogo*, 241 N.Y. 401, 150 N.E. 496 (1926). In *Hamilton*, a judgment creditor obtained a court order for a lien on any part of the income distribution allotted to the debtor. The lien provided by a *Hamilton* order does not attach until a trustee uses its discretion to make a distribution. See Vitollo, *supra* note 46, at 178-179. "[T]he practical significance of a *Hamilton* order is that while the creditor may not be able to satisfy a claim by reaching a beneficiary's interest in a discretionary trust, the creditor will be able to prevent a beneficiary from receiving any benefit from the trust until the creditor's judgment is satisfied." *Id.* at 178.

58. *Haynes v. Haynes*, 168 Kan. 219, 224, 212 P. 2d 312, 316 (1949); *Cheever v. Kelly*, 96 Kan. 269, 269 150 P. 529, 529-30 (1915). The maximum amount subject to wage garnishment is higher, however. 15 U.S.C. § 1673; K.S.A. 60-2310(e). Each unpaid installment of support becomes a final judgment that creates a lien on the debtor's real estate. *Riney v. Riney*, 205 Kan. 671, 674, 473 P. 2d 77, 80 (1970); *Brieger v. Brieger*, 197 Kan. 756, 760, 421 P.2d 1, 4 (1966).

59. See K.S.A. 58a-1001.

60. See Cross, *supra* note 24, § 8[a].

61. *Watts v. Watts*, 151 Kan. 125, 128, 98 P.2d 125, 128 (1940).

62. The Supreme Court indicated that a wife seeking support for herself and her child should first ask the trustee to pay her a portion of the trust income, and if the trustee refuses, should petition the court to order payments in the trust administration proceedings. *Watts v. Watts*, 158 Kan. 59, 64, 145 P.2d 128, 133 (1944).

63. 162 Kan. 552, 178 P.2d 266 (1947).

64. *Id.* at 557, 270.

65. *Breidenthal v. Breidenthal*, 182 Kan. 23, 28, 318 P.2d 981, 985 (1957). The *Breidenthal* Court did acknowledge a prior holding in *Wohlfort v. Wohlfort*, 123 Kan. 142, 254 P. 334 (1927) that third parties "are properly made parties defendant where their presence is necessary for the determination of what property is owned by the husband." *Breidenthal*, 18 Kan. at 29, 318 P.2d at 985. (The *Wohlfort* case was for

alimony only, and not divorce, so is consistent with the first *Watts* case.)

66. *Breidenthal*, 182 Kan. at 28, 318 P.2d at 985. See also *Edwards v. Edwards*, 182 Kan. 737, 747, 324 P.2d 150, 159 (1958). There may be issues as to jurisdiction over a non-Kansas trustee. See *Hanson v. Denkla*, 357 U.S. 235, 254-55, 78 S. Ct. 1228, 1240-41, 2 L. Ed. 1283, 1298-99 (1958). The trust may also be subject to the law of another state. See, e.g., *Trowbridge v. Trowbridge*, 16 Wis. 2d 176, 186-87, 114 N.W.2d 129, 133-36 (1962).

67. Property division adjusts accumulated property and accrued rights, but maintenance deals prospectively with future support. *Beck v. Beck*, 208 Kan. 148, 149, 490 P.2d 628, 629 (1971). Neither maintenance nor property division can be fixed without giving consideration to the other. *Almquist v. Almquist*, 214 Kan. 788, 793, 522 P.2d 383, 387 (1974).

The Johnson County Family Law Guidelines § 4.20 (B) (Rev. 2001) indicates that, for property division purposes, the court should ignore the assets in a revocable trust established by a living person who is not one of the divorcing parties. Example B therein indicates that if the settlor of such a trust has died and the trust has become irrevocable, whether to include the value of the beneficiary's interest should be evaluated on a case-by-case basis. Factors to consider include "what interest the beneficiary has, the valuation of the interest, under what conditions the beneficiary gets income and/or principal, [and] whether the distributions are mandatory or discretionary with the Trustee." The example indicates that the court should consider mandatory income distributions in establishing maintenance and support but should ignore even a mandatory principal distribution scheduled for 10 years hence for property division purposes. No citation is made to legal authority for that position, nor is any reference made to whether the trust in the example contains a spendthrift provision.

To the extent that the value of trust assets are to be included for property division purposes, one commentator has suggested that they be valued similarly to prospective pension plan payments. Marc A. Chorney, *Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation*, 40 REAL PROP., PROB. & TR. J. 17, 20 (Spring 2005). (Interestingly, K.S.A. 23-2802 specifically addresses the valuation of retirement plans for property division purposes, but says nothing about trusts. 2011 Kan. Sess. Laws 97-98 (to be codified at K.S.A. 23-2802)). Chorney references the myriad of trust designs, provisions and ambiguities that will confront courts that value trust interests. Chorney at 22. He addresses discounts for delayed receipt or the possibility of forfeiture. *Id.* at 25. He also discusses potential discovery as to extrinsic matters. *Id.* at 26-27. Chorney discusses IRS methodology for valuation of future interests versus consideration of facts and circumstances, such as the health of the beneficiaries and specific assets in the trust. *Id.* at 30-33.

Chorney references *McCain v. McCain*, 219 Kan. 780, 549 P.2d 896 (1976) as evidence of

the Kansas approach to trust valuation. That is mistaken, however, as *McCain* did not involve a trust, but vested remainder interests in two tracts of land, which made the federal estate tax valuation methodology appropriate. *Id.* at 780-81, 898. *McCain* does not provide precedent as to valuing trust interests (except perhaps a vested remainder following a life estate equivalent). This is also discussed in § 4.1.2(i) (2) of the PRACTITIONER'S GUIDE TO KANSAS FAMILY LAW (Scott M. Mann ed., 2d ed. 2010), which recognizes that trusts will usually involve "spendthrift provisions which keep the remainder interests from being property, although the income stream might be used for spousal maintenance or child support purposes."

See also Annotation, *Divorce Property Distribution - Treatment and Method of Valuation of Future Interest in Real Estate or Trust Property Not Realized During Marriage*, 62 A.L.R. 4th 107 (1988).

68. That is the case, for example, when the beneficiary is the settlor or a mandatory (not discretionary) distributee. In *Tannen v. Tannen*, 416 N.J. Super. 248, 263, 3 A.3d 1229, 1238 (2010), the New Jersey Superior Court recognized "in other contexts that an asset is properly considered to be on the economic ledger sheet of one divorcing party if that party controls the asset." The *Tannen* court cited *Mey v. Mey*, 79 N.J. 121, 125, 398 A.2d 88, 89 (1979) for its holding that a husband's interest in trust principal was available for equitable distribution purposes only when "he acquired unimpaired control and totally free use and enjoyment." *Tannen*, 416 N.J. Super. at 264, 3 A.3d at 1238. The *Tannen* court also cited cases from Colorado and Iowa. *Id.* at 267, 1240. In *In re Marriage of Jones*, 812 P.2d 1152, 1156-57 (Colo. 1991), the Colorado Supreme Court held that a wife, who was beneficiary of a discretionary support trust, had no current enforceable right to compel distribution and therefore it could not consider the trust an asset subject to equitable distribution. In *In re Marriage of Rhinehart*, 704 N.W.2d 677, 681 (Iowa 2005), the court held that it could not consider as a current source of financial support, which would alleviate her need for alimony, undistributed trust income to which the wife had no current right.

The *Tannen* court indicated that, "We have come across no reported case that considered § 50 of the Restatement (Third) of Trusts in the context of recognizing a beneficiary's enforceable interest to trust income or corpus for purposes of alimony, child support, or equitable distribution." 416 N.J. Super. at 272, 3 A.3d at 1243.

The New Jersey Superior Court held that it was error for the trial judge to order the divorce case plaintiff to file an amended complaint naming the trusts as third-party defendants because the court could not compel trust disbursements to defendant (so there was no reason for the trusts to be parties to the divorce litigation). *Id.* at 273, 1244.

See also Cross, *supra* note 24.

69. Although some commentators and judges have indicated that family members differ

from ordinary creditors, who have only themselves to blame if they extend credit without determining the limitation on available resources due to a spendthrift clause, it actually seems that a spouse is more like a lender (who has a choice) and that children are similar to involuntary tort victims (who do not have a choice). See Vitollo, *supra* note 46, which proposes extending spendthrift clause exceptions to involuntary tort creditors.

In *Garretson v. Garretson*, 306 A.2d 737 (Del. Ch. 1973), the court rejected the suggestion that a payee under a separation agreement becomes a creditor.

70. 2011 Kan. Sess. Laws 105 (to be codified at K.S.A. 23-3005); 2011 Kan. Sess. Laws 98 (to be codified at 23-2902 (c)); *Brady v. Brady*, 225 Kan. 485, 488, 542 P.2d 865, 869 (1979) ("[C]hild support may be modified at any time circumstances render such a change proper."); *In re Marriage of Evans*, 37 Kan. App. 2d 803, 805, 157 P.3d 666, 668 (2007) ("A trial court retains the power to modify court-ordered maintenance at any time.").

71. *In re Marriage of Steven*, 30 Kan. App. 2d 794, 796, 48 P.3d 1284, 1285 (2002) (listing death of the payor as one of three events that automatically terminate child support obligations); *Sweeney v. Merchants Nat'l Bank of Topeka*, 210 Kan. 216, 224-25, 500 P.2d 56, 63-64 (1972) ("The general rule is that periodic payments of alimony to a divorced wife terminate upon the former husband's death in the absence of a provision in the settlement agreement or in the decree, which expressly so states."); see also *Brady v. Brady*, 225 Kan. 485, 491, 592 P.2d 865, 870 (1979) (death of payee); *Bourman v. Bourman*, 155 Kan. 602, 604, 127 P.2d 464, 466 (1942); *Noonan v. Noonan*, 127 Kan. 287, 287-88, 273 P. 409, 410-11 (1929) (death of payee).

72. See *supra* note 57.

73. K.S.A. 60-2308.

74. 11 U.S.C. §§ 101(14A), 523(a)(5), 523(a)(15).

75. See *Schwager v. Schwager*, 109 F.2d 754 (7th Cir. 1940), in which a will stated that upon notice of an attempt to reach the beneficiary's interest, the trustees were to apply the income only to the beneficiary and his dependents but specifically excluding his ex-wife and any of his children by her. The public policy approach set forth in Section 59 of Restatement (Third) of Trusts would presumably override such a clear expression of a settlor's intent as that in *Schwager*. In the frequently cited case of *In re Moorehead's Estate*, 289 Pa. 542, 551, 137 A. 802, 806 (1927), the court stated that an interpretation to exclude support for the wife would be "in direct antagonism to every recognized claim of morality and to every purpose of public policy." See SCOTT AND ASCHER ON TRUSTS § 15.5.1 for split of authority nationally regarding recognition of settlor's intent versus public policy.

In a non-divorce situation, the Kansas Supreme Court rejected public policy as a reason to keep intact a devise of real estate by a testator's will that clearly provided for a forfeiture if the devisee had any creditor attempting to

collect against the property. *Hinshaw v. Wright*, 124 Kan. 792, 794, 262 P. 601, 603 (1928).

The ability to specify that certain creditors should not be permitted to take trust assets has an analogy in special needs trusts (whereby government resources are not to be displaced by trust resources).

76. *Sherman v. Havens*, 94 Kan. 654, 656, 140 P. 1030, 1032 (1915).

77. The relevant Latin maxim of "Cujus est dare, ejus est disponere" translates to "whose it is to give, his it is to dispose."

78. 1 Kan. App. 2d 675, 680, 574 P.2d 224, 228 (1977).

79. Kansas courts should avoid the temptation to consider the historical record of payments in determining the need (or other discretionary standard) for payments as was suggested in *Tannen v. Tannen*, 416 N.J. Super. 248, 278, 3 A.3d 1229, 1246 (2010). The *Tannen* court stated that the trial judge "should not turn a blind eye to this reality. To do so would clearly result in a windfall to defendant and be entirely inequitable to plaintiff." *Id.* The authors of this article maintain that such a "blind eye" is required to fulfill the testator's or settlor's intent as to his or her own property. When a creditor enters the scene, the circumstances applicable to prior distributions change, and a blind eye cannot be turned to the testator's or settlor's in-

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tent. Otherwise, it will only open the door in an unpredictable manner to established Kansas Supreme Court precedent as in the *Watts v. McKay* case.

80. *E.g.*, “The trustee shall also consider whether distributions the trustee makes will benefit the intended beneficiary or will instead benefit a creditor of the intended beneficiary with no apparent benefit to the beneficiary in determining whether a distribution is appropriate.” There are an infinite number of permutations of such a provision. They may include only certain beneficiaries, certain creditors, certain types of distributions, (income, principal, specified amounts, or percentages, etc.). See *Simpson v. Kan. Dep’t of SRS*, 21 Kan. App. 2d 680, 684, 906 P.2d 174, 178 (1995), *rev. denied*, 259 Kan. 928 (1996), where a trust provided “absolute discretion” to make unequal payments among a group (or even exclude some).

K.S.A. 58a-814 would appear to support a trustee being allowed to exercise such specified discretion to adjust distributions due to a creditor being the actual recipient. K.S.A. 58a-814 provides that, “the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” This is consistent with the *Simpson* decision, which stated as follows: “Where the trust instrument establishes a discretionary trust as defined by Restatement (Second) of Trusts § 155 (1) and comment (b) (1957), a beneficiary may not be required to take legal action to force the trustee to make distributions because the probability of such an action being successful is minimal, at best.” *Simpson*, 21 Kan. App. 2d, 906 P.2d at Syl.

2. The *Simpson* court also rejected the SRS’s position that the beneficiary had to seek the trustee’s removal. *Id.* at 686-87, 179-180. Discretionary trusts “are normally not subject to control by the beneficiary, the creditors of a beneficiary, or a trial court.” *Id.* at 688, 181 (citing *Myers v. Kan. Dep’t of SRS*, 254 Kan. 467, 866 P. 2d 1052 (1994); *Wilcox v. Gentry*, 254 Kan. 411, 867 P. 2d 281 (1994); *State ex rel. Secretary of SRS v. Jackson*, 249 Kan. 635, 822 P. 2d 1033 (1991)). The trustee’s exercise of discretion should not be disturbed absent bad faith. *Jennings v. Murdock*, 220 Kan. 182, 201, 553 P. 846, 862-63 (1976).

The marital and trust laws of every state that may be applicable to a particular divorce at some future time are impossible to anticipate. Although the Restatement (Third) of Trusts and the UTC are designed to reflect generally the applicable law, they too are evolving and are far from being universally accepted.

A trust settlor might try to require a beneficiary to maintain residence in a particular state, but the laws of that state might change and there could be constitutional challenges to such a restriction. Michael Diehl, *The Trust in Marital Law: Divisibility of a Beneficiary Spouse’s Interest on Divorce*, 64 TEX. L. REV. 1301, 1356-57 (1986). Providing for distributions directly to third parties (*e.g.*, medical providers, educational institutions) for the benefit of a beneficiary (so as to bypass distributions to the beneficiary) apparently would not be helpful in Kansas. See *Wilcox v. Gentry*, 18 Kan. App. 2d at 360-61, 853 P.2d 74, 77 (1993), *rev’d*, 254 Kan. 411, 867 P. 2d 281 (1994) for the Kansas Supreme Court’s rejection of such an approach.