

# UNIFORM TRUST CODE SECTION 503: APPLYING HAMILTON ORDERS TO SPENDTHRIFT INTERESTS

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*Editors' Synopsis: This Article examines the exceptions to spendthrift trust protection for child support and alimony creditors and proposes extending this exception to involuntary tort creditors. The author posits that the best way to reconcile the competing policy objectives of effectuating the settlor's right to dispose of his property as he chooses and those justifying exceptions to spendthrift protection is to remove all exceptions to spendthrift protection and to provide instead both support and tort creditors the ability to attach a spendthrift trust distribution, before it reaches the beneficiary, through the use of Hamilton orders.*

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## I. INTRODUCTION

A settlor of a trust can prevent trust beneficiaries from disposing of their interests or having their interests seized by a creditor by including a spendthrift provision in the trust document.<sup>1</sup> A spendthrift provision is ordinarily valid as long as it restrains both voluntary and involuntary transfers.<sup>2</sup> The primary policy justifications for allowing a settlor to prevent beneficiaries from losing their interests in a spendthrift trust are that (1) a settlor should have the right to dispose of his property as he chooses,<sup>3</sup> and (2) as part of that right, the settlor should have the opportu-

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<sup>1</sup> See RESTATEMENT (THIRD) OF TRUSTS § 58(1) (2003).

<sup>2</sup> See UNIF. TRUST CODE § 502(a) (amended 2005), 7C U.L.A. 523 (2006).

<sup>3</sup> See, e.g., *Frensley v. Frensley*, 58 P.2d 307, 315 (Okla. 1936).

nity to protect beneficiaries from creditors taking advantage of the beneficiaries' misfortune or improvidence.<sup>4</sup>

Most states provide exceptions that allow certain creditors to reach a beneficiary's interest in a spendthrift trust.<sup>5</sup> The two most common exceptions are for child support and alimony creditors.<sup>6</sup> The primary justifications for allowing child support and alimony creditors to reach a beneficiary's interest in a spendthrift trust are that (1) unlike ordinary creditors, child support and alimony creditors are unable to protect themselves from the debtor's irresponsibility, and (2) while a settlor should be able to protect a beneficiary from personal pauperism, a beneficiary should not be able to enjoy an interest in a spendthrift trust while neglecting to support those dependent on him.<sup>7</sup>

The same justifications that favor allowing child support and alimony creditors to reach a beneficiary's spendthrift interest support an exception for allowing involuntary tort creditors to reach a beneficiary's interest in a spendthrift trust: tort creditors are no more able than child support or alimony creditors to choose their debtors,<sup>8</sup> and tort creditors are equally at risk of being faced with a lack of financial support, especially when the injuries are serious.<sup>9</sup> Currently, however, only one state allows tort creditors to reach the interest of a spendthrift trust beneficiary,<sup>10</sup> and two states that previously provided this protection to tort creditors have enacted statutes that prevent tort creditors from reaching a spendthrift interest.<sup>11</sup>

The rationale for determining which creditors may reach a beneficiary's spendthrift interest and which creditors may not and the rationale for allowing any creditors to reach a beneficiary's spendthrift interest at

<sup>4</sup> See *Nichols v. Eaton*, 91 U.S. 716, 727 (1875).

<sup>5</sup> See *infra* Parts II.B, III.

<sup>6</sup> See UNIF. TRUST CODE § 503(b) (amended 2005), 7C U.L.A. 524 (2006); Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U.L.Q. 1, 4 n.11 (1995). For purposes of this Article, the term alimony encompasses both alimony and support of a spouse.

<sup>7</sup> See *Shelley v. Shelley*, 354 P.2d 282, 286–288 (Or. 1960).

<sup>8</sup> See *Sligh v. First Nat'l Bank*, 704 So. 2d 1020, 1027 (Miss. 1997), *superseded by statute*, MISS. CODE ANN. § 91-9-503 (2004); Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV. 179, 198 (1993) (“[O]ne can't check the credit of the driver of a car about to hit oneself.”).

<sup>9</sup> See *Sligh*, 704 So. 2d at 1027.

<sup>10</sup> See GA. CODE ANN. § 53-12-28(c)(1) (1997).

<sup>11</sup> See MISS. CODE ANN. § 91-9-503 (2004) (overturning *Sligh v. First Nat'l Bank*, 704 So. 2d 1020 (Miss. 1997)); 2004 La. Acts 521, § 2 (repealing LA. REV. STAT. ANN. § 9:2005(3) (2005)).

all, are both inherently problematic. The rationale for allowing child support and alimony creditors to reach a beneficiary's interest in a spendthrift trust, but preventing tort creditors from doing the same, is problematic because the same justifications for allowing the former support allowing the latter.<sup>12</sup> Accordingly, any state that allows a child support or alimony creditor to reach a beneficiary's spendthrift interest similarly should allow a tort creditor to do so. The rationale for allowing *any* creditor to reach a beneficiary's spendthrift interest is also somewhat problematic, however, because it directly conflicts with the goal of effectuating the settlor's intent. Therefore, the best way to reconcile the inherently competing policy objectives raised by allowing spendthrift protection is to remove all exceptions to spendthrift protection and, instead, to provide child support, alimony, and tort creditors the ability to attach spendthrift trust distributions before they reach the beneficiary through the use of the so-called *Hamilton* order.<sup>13</sup>

Part II of this Article provides the background necessary to understand the implications of spendthrift protection, including the evolution of spendthrift protection in the United States, the most common exceptions to spendthrift protection, the use of *Hamilton* orders as an alternative to spendthrift exceptions, and the trends in spendthrift law leading to the drafting of the Uniform Trust Code (UTC). Part III provides a survey of the current state of spendthrift protection in all 50 states, detailing which states provide exceptions for both child support and alimony creditors, which states provide exceptions for only child support creditors, and which states provide exceptions for neither child support nor alimony creditors. Part III also reviews the current status of state law regarding the ability of tort creditors to reach a beneficiary's spendthrift interest. This survey does not include other exceptions to spendthrift protection. Part IV presents a solution for reconciling the competing policy objectives sought to be achieved in determining which creditors should be allowed to reach a beneficiary's spendthrift interest, first by demonstrating why tort creditors should receive the same treatment as child support or alimony creditors, and second by explaining why it is desirable to increase the availability of *Hamilton* orders. Finally, Part V reiterates the author's conclusion that jurisdictions excepting support creditors from the applicability of spendthrift provisions should also except tort creditors, but that the

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<sup>12</sup> See GA. CODE ANN. § 53-12-28(c)(1); *Sligh*, 704 So. 2d at 1027; *supra* text accompanying notes 9–10.

<sup>13</sup> See *Hamilton v. Drogo*, 150 N.E. 496 (N.Y. 1926).

settlor's intent and the various policy objectives justifying exceptions to spendthrift protection could best be harmonized by eliminating both exceptions and proliferating the use of *Hamilton* orders.

## II. BACKGROUND

### A. Evolution of Spendthrift Protection

The general acceptance of spendthrift protection in the United States is credited to United States Supreme Court Justice Miller's opinion in *Nichols v. Eaton*,<sup>14</sup> pronouncing in dictum the approval of spendthrift trusts.<sup>15</sup> While Pennsylvania courts were the first to validate spendthrift provisions and had done so since the early 1800s,<sup>16</sup> the endorsement of the Supreme Court ensured that such protection would be respected.<sup>17</sup>

The trust involved in *Nichols* was actually a discretionary trust.<sup>18</sup> In *Nichols*, the testatrix created a trust for the benefit of her four children.<sup>19</sup> The trust provided that if one of the sons went bankrupt, that son's interest in the trust would terminate and the trustees could accumulate the income from that son's portion of the trust.<sup>20</sup> In addition, upon the son's bankruptcy, the trustees had discretion to apply that son's share of the trust property for the benefit of the son or his family.<sup>21</sup>

After one of the testatrix's sons went bankrupt, the assignee in bankruptcy attempted to invalidate certain provisions of the trust, arguing that the provisions at issue were an attempt to defraud the beneficiary's creditors.<sup>22</sup> As Justice Miller put it, "[i]t is strongly argued that these provisions are designed to evade the policy of the law already mentioned; that the discretion vested in the trustees is equivalent to a direction, and that it was well known it would be exercised in favor of the bankrupt."<sup>23</sup> With the bankrupt son as a cotrustee, this argument would seem especially compelling.<sup>24</sup> However, in upholding the provisions of the trust, Justice

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<sup>14</sup> 91 U.S. 716 (1875).

<sup>15</sup> See *id.* at 727.

<sup>16</sup> See Justin W. Stark, *Montana's Spendthrift Trust Doctrine: Analysis and Recommendations*, 57 MONT. L. REV. 211, 216–217 (1996).

<sup>17</sup> See Emanuel, *supra* note 8, at 186–188.

<sup>18</sup> See *Nichols*, 91 U.S. at 723.

<sup>19</sup> See Emanuel, *supra* note 8, at 187.

<sup>20</sup> See *Nichols*, 91 U.S. at 722–23.

<sup>21</sup> See *id.* at 723.

<sup>22</sup> See *id.* at 721–22.

<sup>23</sup> *Id.* at 723.

<sup>24</sup> See Emanuel, *supra* note 8, at 187 nn.41, 44.

Miller delivered what now is “the most influential dictum in the history of American trust law”:<sup>25</sup>

[T]he doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator’s affection or generosity, is one which we are not prepared to announce as the doctrine of this court.<sup>26</sup>

Justice Miller then delivered a specific endorsement of spendthrift trusts:<sup>27</sup>

Nor do we see any reason . . . why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune and even his own improvidence or incapacity for self protection, should not be permitted to do so, is not readily perceived.<sup>28</sup>

Seven years after Justice Miller’s endorsement of spendthrift protection in *Nichols*, the Supreme Court of Massachusetts affirmed the validity of spendthrift trusts in *Broadway National Bank v. Adams*.<sup>29</sup> Over the

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<sup>25</sup> Stark, *supra* note 16, at 217.

<sup>26</sup> *Nichols*, 91 U.S. at 725.

<sup>27</sup> See Emanuel, *supra* note 8, at 180.

<sup>28</sup> *Nichols*, 91 U.S. at 727.

<sup>29</sup> 133 Mass. 170 (1882). See also Emanuel, *supra* note 8, at 180.

ardent protests of scholars such as John C. Gray<sup>30</sup> and Erwin Griswold,<sup>31</sup> the validity of spendthrift trusts soon became widely accepted.

#### B. Exceptions to Spendthrift Provisions

All states now recognize the validity of spendthrift provisions in some form.<sup>32</sup> Most states, however, have established certain exceptions to spendthrift protection.<sup>33</sup> Those exceptions are generally for one of the following types of claims: (1) claims for child support or alimony,<sup>34</sup> (2) claims for necessities provided to the beneficiary,<sup>35</sup> (3) claims for services to protect the beneficiary's interest in the trust,<sup>36</sup> (4) claims by a governmental entity,<sup>37</sup> and (5) claims for torts committed by the beneficiary.<sup>38</sup>

The first common exception to spendthrift protection is for child support and alimony claims. While many states provide at least an exception for child support, a significant minority comprised of 20 states provides an exception for neither child support nor alimony claims.<sup>39</sup> Curiously, while section 503 of the UTC provides an exception for both child support and alimony creditors, a number of states adopting the UTC left out this provision.<sup>40</sup> As noted in the introduction, the justifications for allowing child support and alimony creditors to reach a beneficiary's spendthrift interest are that such creditors are less able than ordinary

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<sup>30</sup> See JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY § 262, at 247 (2d ed. 1895) (“The general introduction of spendthrift trusts would be to form a privileged class, who could indulge in every speculation, could practise every fraud, and yet, provided they kept on the safe side of the criminal law, could roll in wealth.”).

<sup>31</sup> See generally ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS (2d ed. 1947). In his treatise, Griswold proposes a model statute where a spendthrift provision would be enforceable only as to trust income, any creditor could attach income in excess of \$5,000 per year or 10% of income in excess of \$12 per week, and the court would have discretion as to certain creditors “to make such order directing the payment of income . . . as shall be just under the circumstances.” *Id.* at 648–49.

<sup>32</sup> Only Alaska and Delaware recognize self-settled spendthrift trusts. See ALASKA STAT. § 34.40.110(a) (2006); DEL. CODE ANN. tit. 12, §§ 3570–76 (2007).

<sup>33</sup> See *infra* Part III.

<sup>34</sup> See RESTATEMENT (THIRD) OF TRUSTS § 59(a) (2003).

<sup>35</sup> See *id.* § 59(b).

<sup>36</sup> See *id.*

<sup>37</sup> See RESTATEMENT (SECOND) OF TRUSTS § 157(d) (1959).

<sup>38</sup> See GA. CODE ANN. § 53-12-28(c)(1) (1997).

<sup>39</sup> See *infra* Part III.C.

<sup>40</sup> See, e.g., IOWA CODE ANN. § 633A.2302 (West Supp. 2007) (providing an exception only for self-settled trusts); KAN. STAT. ANN. § 58a-503 (2005) (reserving section 503 of the Kansas Uniform Trust Code).

creditors to protect themselves from the debtor's irresponsibility, and that a beneficiary should not be able to enjoy a beneficial interest in a spendthrift trust while simultaneously refusing to support his dependents.<sup>41</sup>

A second common exception from spendthrift protection is for claims for necessities provided to the beneficiary. While an exception for necessities historically has been included in the restatements on trust law, the UTC, which is the only model statute addressing exceptions to spendthrift provisions, fails to provide such an exception.<sup>42</sup> This omission from the UTC represents a significant departure from the generally accepted law<sup>43</sup> by an extremely persuasive model statute that 21 states have adopted already.<sup>44</sup> The policy justification for allowing an exception for creditors providing necessities to the beneficiary is that the exception makes it easier for the beneficiary to obtain necessities by ensuring that those providing the necessities can receive payment.<sup>45</sup> Some states limit the exception to necessities that the claimant provided involuntarily.<sup>46</sup>

The third common exception from spendthrift protection is for claims relating to services provided to protect the beneficiary's interest in the trust. The justification for such an exception is very similar to that for creditors providing necessities: without such an exception, the beneficiary would have a difficult time obtaining help from attorneys and other professionals because the professionals would be prevented from looking to the beneficiary's interest as a source of payment.<sup>47</sup> Both the *Third Restatement*<sup>48</sup> and the UTC recognize this exception.<sup>49</sup>

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<sup>41</sup> See *Shelley v. Shelley*, 354 P.2d 282, 288 (Or. 1960).

<sup>42</sup> Compare RESTATEMENT (SECOND) OF TRUSTS § 157(d) (1959), and RESTATEMENT (THIRD) OF TRUSTS § 59(b) (2003), with UNIF. TRUST CODE § 503 (amended 2005), 7C U.L.A. 524-25 (2006).

<sup>43</sup> See Alan Newman, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771, 792 (2002). The drafters of the UTC reasoned that because sophisticated drafting normally could be used to evade this exception, "a necessities exception would be largely a trap for the unwary." *Id.* at 791 (quoting David M. English, *Is There a Uniform Trust Act in Your Future?*, PROB. & PROP., Jan.-Feb. 2000, at 25, 31).

<sup>44</sup> As detailed in Part III, the states adopting some form of the UTC are: Alabama, Arkansas, District of Columbia, Florida, Iowa, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wyoming.

<sup>45</sup> See RESTATEMENT (THIRD) OF TRUSTS § 59(b) cmt. c.

<sup>46</sup> See, e.g., GA. CODE ANN. § 53-12-28(c)(6) (1997).

<sup>47</sup> See RESTATEMENT (THIRD) OF TRUSTS § 59(b) cmt. d.

<sup>48</sup> See *id.*

<sup>49</sup> See UNIF. TRUST CODE § 503(b)(2) (amended 2005), 7C U.L.A. 525 (2006).

The fourth and final widely recognized exception is for claims by a governmental entity, such as for taxes. The scholarship on the rationale for this exception is scarce, perhaps because the policy justification for preventing the beneficiary of a spendthrift trust from avoiding his statutory obligations seems so intuitive. Indeed, while the *Restatement* provides a comment addressing the exception, the comment fails to discuss the rationale behind the exception.<sup>50</sup> Nonetheless, both the *Restatement*<sup>51</sup> and the UTC recognize this exception.<sup>52</sup>

A fifth exception from spendthrift protection, for tort creditors of the beneficiary, has been lauded highly by academics for a long time, but has never been popular among legislators. Legal scholars have pleaded for such an exception for almost as long as there have been spendthrift trusts, but with little success.<sup>53</sup> The rationale for allowing tort creditors to reach a beneficiary's spendthrift interest is similar to the rationale for allowing child support and alimony creditors to do so: like the beneficiary's dependent spouse and children, a tort victim has no power to prevent the tort of an irresponsible defendant<sup>54</sup> and is vulnerable to being unable to provide for himself.<sup>55</sup> Despite the compelling argument for a tort creditor exception, only one state has such an exception in its statutory law,<sup>56</sup> and the omission of such an exception from the UTC likely marks the end of its vitality.<sup>57</sup>

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<sup>50</sup> See RESTATEMENT (THIRD) OF TRUSTS § 59 cmt. a(1).

<sup>51</sup> See *id.*

<sup>52</sup> See UNIF. TRUST CODE § 503(b)(3), 7C U.L.A. at 525 (2006).

<sup>53</sup> See, e.g., George P. Costigan, Jr., *Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined*, 22 CAL. L. REV. 471 (1934); Erwin N. Griswold, *Reaching the Interest of the Beneficiary of a Spendthrift Trust*, 43 HARV. L. REV. 63 (1929); William N. Antonis, Note, *Spendthrift Trusts: Attachability of a Beneficiary's Interest in Satisfaction of a Tort Claim*, 28 NOTRE DAME L. REV. 509 (1952); Jap. W. Blankenship, Note, *Trusts: Tort Claims as an Exception to the Spendthrift Trust Doctrine*, 17 OKLA. L. REV. 235 (1964); Laurene M. Brooks, Comment, *A Tort-Creditor Exception to the Spendthrift Trust Doctrine: A Call to the Wisconsin Legislature*, 73 MARQ. L. REV. 109 (1989).

<sup>54</sup> See AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 157.5, at 220 (4th ed. 1987); Emanuel, *supra* note 8, at 198; Newman, *supra* note 43, at 799.

<sup>55</sup> See *Sligh v. First Nat'l Bank*, 704 So. 2d 1020, 1027 (Miss. 1997), *superseded by statute*, MISS. CODE ANN. § 91-9-503 (2004).

<sup>56</sup> See GA. CODE ANN. § 53-12-28(c)(1) (1997).

<sup>57</sup> See Mary Louise Fellows & Gregory S. Alexander, *Forty Years of Codification of Estates and Trusts Law: Lessons for the Next Generation*, 40 GA. L. REV. 1049, 1075 (2006) (arguing that sections 502 and 503 of the UTC are likely to "prevent judicial

### C. *Hamilton* Orders

A *Hamilton* order allows the creditor of a discretionary trust to attach any distribution made by the trustee on behalf of a beneficiary prior to the beneficiary's receipt of the distribution.<sup>58</sup> In *Hamilton v. Drogo*,<sup>59</sup> the Duchess of Manchester created a discretionary trust for the benefit of the Duke of Manchester (her son) and his family.<sup>60</sup> Under the terms of the trust, the trustee had "sole and uncontrolled discretion" to distribute the annual income "for the benefit of all or any one or more" members of the Duke's immediate family.<sup>61</sup> After a creditor obtained a judgment against the Duke, the creditor sought and obtained a court order providing the creditor a lien on any part of the income distribution that the trustee allotted for the personal benefit of the Duke.<sup>62</sup>

Because a creditor's lien provided by a *Hamilton* order does not attach until a trustee exercises discretion to make a distribution, a *Hamilton* order does not allow a creditor to reach a beneficiary's interest in a pure discretionary trust.<sup>63</sup> Even if a trustee refuses to make a distribution in an abuse of discretion, only the beneficiary or a support or alimony creditor may compel a distribution.<sup>64</sup> In addition, if the trust does not require distributions for the beneficiary's support, a child support or alimony creditor likely will be unable to compel the trustee to make a distribution.<sup>65</sup> Therefore, the 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 benefits from the trust until the creditor's judgment is satisfied.

The creditor of a beneficiary of a spendthrift trust ordinarily is unable to obtain a *Hamilton* order.<sup>66</sup> Instead, unless the creditor is exempt from

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development of further exceptions, such as tort creditors, to the common law's spendthrift trust doctrine"). See also Newman, *supra* note 43, at 803 (citing *Scheffel v. Krueger*, 782 A.2d 410, 412 (N.H. 2001) as an example of a court being unwilling to find a tort creditor exception where the exception was not provided in the list of statutory exceptions).

<sup>58</sup> See UNIF. TRUST CODE § 502(c) (amended 2005), 7C U.L.A. 523 (2006).

<sup>59</sup> 150 N.E. 496 (N.Y. 1926).

<sup>60</sup> See *id.* at 496.

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* at 496–97.

<sup>63</sup> See *id.* at 497.

<sup>64</sup> See UNIF. TRUST CODE § 504(b)–(c) (amended 2005), 7C U.L.A. 529–30 (2006); Newman, *supra* note 43, at 803–804.

<sup>65</sup> See Newman, *supra* note 43, at 807.

<sup>66</sup> See UNIF. TRUST CODE § 502(c) (amended 2005), 7C U.L.A. 523 (2006).

the spendthrift provision, the creditor must attempt to uncover what trick the trustee will use to keep the creditor from seizing the distribution before the beneficiary has the opportunity to spend it.<sup>67</sup> While a spendthrift provision may provide significant protection against the ordinary creditor, a support creditor likely will be able to reach the beneficiary's spendthrift interest so long as the creditor's jurisdiction provides an exemption from the spendthrift provision.<sup>68</sup> Nonetheless, the settlor may prevent all creditors from reaching a beneficiary's interest by creating a pure discretionary trust to prevent creditors from compelling a distribution and inserting a spendthrift provision to thwart creditors seeking a *Hamilton* order.

#### D. Trends in Spendthrift Law

##### 1. Erosion of Spendthrift Protection

By the early 1990s, increasing exceptions and limitations steadily whittled away spendthrift protection in most states, or as one writer observed, "modern lawmakers . . . [have] ringed about the spendthrift trust a wide array of caveats."<sup>69</sup> The *Restatement (Second) of Trusts*, published in 1959, was particularly influential. It recited a nonexclusive list of four exceptions to spendthrift protection and invited states to create an additional exception for tort creditors.<sup>70</sup> The Mississippi Supreme Court accepted the *Restatement's* invitation by announcing in 1997 the first judicially created exception to spendthrift trusts for tort judgment creditors in *Sligh v. First National Bank*.<sup>71</sup>

##### a. *Restatement (Second) of Trusts*

While the drafters of the *Restatement (Second) of Trusts* did not go so far as to enumerate an exception to spendthrift protection for tort judgment creditors, the drafters hinted in a comment that such creditors may be able to avoid having their claim barred by a spendthrift provision.<sup>72</sup> In this comment, the drafters clarified:

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<sup>67</sup> See Hirsch, *supra* note 6, at 2.

<sup>68</sup> See Newman, *supra* note 43, at 807.

<sup>69</sup> Hirsch, *supra* note 6, at 72.

<sup>70</sup> See RESTATEMENT (SECOND) OF TRUSTS § 157 cmt. a (1959).

<sup>71</sup> 704 So. 2d. 1020 (Miss. 1997) (Prather, J., dissenting), *superseded by statute*, MISS. CODE ANN. § 91-9-503 (2004).

<sup>72</sup> See RESTATEMENT (SECOND) OF TRUSTS § 157 cmt. a.

The enumeration in this Section of situations in which the interest of the beneficiary of a spendthrift trust or of a trust for support can be reached is not necessarily exclusive. The interest of the beneficiary of a spendthrift trust or a trust for support may be reached in cases other than those herein enumerated, if considerations of public policy so require. Thus it is possible that a person who has a claim in tort against the beneficiary of a spendthrift trust may be able to reach his interest under the trust.<sup>73</sup>

The inclusion of this comment in a treatise purporting to be a restatement of the law was especially significant because at the time the *Restatement* was drafted, no state statutes allowed a tort creditor to reach a beneficiary's spendthrift interest.<sup>74</sup>

*b. Sligh v. First National Bank*

By virtue of its decision in *Sligh*, the Mississippi Supreme Court announced the first judicially created spendthrift exception for tort judgment creditors.<sup>75</sup> One of the plaintiffs in *Sligh* was paralyzed permanently due to a broken spine suffered in a motor vehicle accident caused by the uninsured defendant who was driving while intoxicated.<sup>76</sup> The plaintiffs sued the defendant in circuit court and obtained a default judgment when the defendant failed to appear. Because the defendant had no assets other than his interest in two spendthrift trusts that his mother established, the plaintiffs sought to satisfy their judgment by reaching the defendant's interest in the spendthrift trusts. The plaintiffs alleged that the defendant's mother knew that the defendant had been treated unsuccessfully for alcoholism, had been institutionalized, regularly had driven under the influence of alcohol, had been involved in a number of automobile accidents, and had been convicted of drunk driving numerous times. The plaintiffs also alleged that the defendant's mother established the two spendthrift trusts to enable the defendant to continue his lifestyle while being assured that the victims harmed by his actions would not be able to

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<sup>73</sup> *Id.*

<sup>74</sup> The only two states adopting a spendthrift exception for tort creditors did so after the *Restatement (Second) of Trusts* was published in 1959. See LA. REV. STAT. ANN. § 9:2005 (2005) (enacted in 1965), *repealed by* 2004 La. Acts 521, § 2, and GA. CODE ANN. § 53-12-28 (1997) (enacted in 1981, amended in 1996).

<sup>75</sup> See *Sligh*, 704 So. 2d. at 1029.

<sup>76</sup> See *id.* at 1022. The defendant also received a felony conviction. See *id.*

hold the defendant accountable. Finally, the plaintiffs urged the court to adopt a public policy exception to spendthrift protection that would allow involuntary tort creditors to satisfy their tort judgment by reaching a defendant's spendthrift interest.<sup>77</sup>

The Mississippi Supreme Court began its evaluation of the plaintiffs' request by reiterating the three public policy justifications for spendthrift protection cited by earlier Mississippi courts: (1) the right of donors to decide how to dispose of their property, (2) the public interest in preventing spendthrift individuals from becoming burdens on the public, and (3) the obligation of creditors to investigate their debtor's creditworthiness.<sup>78</sup> The court then reviewed, in reverse order, each justification to see if it applied to involuntary tort creditors.<sup>79</sup>

In holding that it was sound public policy to provide involuntary tort creditors with an exception to a beneficiary's spendthrift protection, the court first determined that the obligation of creditors to investigate their debtor's creditworthiness did not apply because, quoting Austin W. Scott, "[a] man who is about to be knocked down by an automobile has no opportunity to investigate the credit of the driver . . . no matter what the resources of the driver may be."<sup>80</sup> Second, as far as preventing spendthrifts from becoming a public burden, the court reasoned that a tort victim was just as likely to be reduced to poverty and that "[i]f one must choose whom to reduce to personal pauperism . . . we are inclined to choose the party at fault."<sup>81</sup> Finally, the court noted that the right of donors to dispose of their property only extended to dispositions that did not violate public policy, and that allowing a beneficiary to enjoy a spendthrift interest without regard to harm inflicted on others violated public policy.<sup>82</sup>

## 2. *Legislative Response to Sligh v. First National Bank*

The *Restatement (Third) of Trusts* comments indicated that *Sligh* "may well prove to be influential elsewhere."<sup>83</sup> The drafters also included a clear reference to *Sligh* in one of the comments:

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<sup>77</sup> See *id.* at 1022–23.

<sup>78</sup> See *id.* at 1027.

<sup>79</sup> See *id.* at 1027–28.

<sup>80</sup> *Id.* at 1027 (quoting SCOTT & FRATCHER, *supra* note 54, § 157.5).

<sup>81</sup> *Id.* at 1027.

<sup>82</sup> See *id.* at 1028.

<sup>83</sup> See RESTATEMENT (THIRD) OF TRUSTS § 59 reporter's notes on cmts. a–a(2) (2003).

The nature or a pattern of tortious conduct by a beneficiary, for example, may on policy grounds justify a court's refusal to allow spendthrift immunity to protect the trust interest and the lifestyle of that beneficiary, especially one whose willful or fraudulent conduct or persistently reckless behavior causes serious harm to others.<sup>84</sup>

By the time the *Restatement* was promulgated, however, the Mississippi legislature had already overturned the Mississippi Supreme Court's 1997 decision in *Sligh*.<sup>85</sup> In fact, less than six months after the court handed down its decision in *Sligh*,<sup>86</sup> the Mississippi legislature passed the Family Trust Preservation Act of 1998, providing no exceptions to spendthrift protection, not even for support or alimony creditors.<sup>87</sup>

Louisiana's legislature, like Mississippi's legislature, was more motivated by the *Sligh* court's decision than it was impressed by the court's reasoning. Ever since Louisiana passed its first spendthrift statute in 1965, the statute included an exception for involuntary tort creditors.<sup>88</sup> In 2004, however, several years after *Sligh*, the Louisiana legislature repealed the subsection of the spendthrift statute exempting involuntary tort creditors.<sup>89</sup> While at least one scholar suggested that *Sligh* might lead other courts to create judicial exceptions to spendthrift statutes for involuntary tort creditors,<sup>90</sup> based on the actions of the Mississippi and Louisiana legislatures,<sup>91</sup> as well as recent court decisions refusing to recognize such an exception,<sup>92</sup> this seems unlikely.

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<sup>84</sup> *Id.* § 59 cmt. a(2).

<sup>85</sup> *See id.* § 59 reporter's notes on cmts. a-a(2). *See also* MISS. CODE ANN. § 91-9-503 (2004).

<sup>86</sup> *See Sligh*, 704 So. 2d at 1020.

<sup>87</sup> *See* MISS. CODE ANN. § 91-9-503 (2004) (approved March 23, 1998).

<sup>88</sup> *See* LA. REV. STAT. ANN. § 9:2005(3) (2005), *repealed by* 2004 La. Acts 521, § 2.

<sup>89</sup> *See id.* The inferential link between the actions of the Louisiana legislature and the Mississippi Supreme Court's decision in *Sligh* is merely one of timing; the Louisiana legislature may not have been influenced by *Sligh* at all.

<sup>90</sup> *See* Charles D. Fox, IV. & Rosalie Murphy, *Are Spendthrift Trusts Vulnerable to a Beneficiary's Tort Creditors?*, TR. & EST., Feb. 1998, at 57.

<sup>91</sup> *See* LA. REV. STAT. ANN. § 9:2005(3); MISS. CODE ANN. §§ 91-9-501 to -511; *supra* text accompanying notes 88-90.

<sup>92</sup> *See, e.g.,* Duvall v. McGee, 826 A.2d 416 (Md. 2003); Scheffel v. Krueger, 782 A.2d 410 (N.H. 2001).

### 3. Section 503 of the Uniform Trust Code

The National Conference of Commissioners on Uniform State Laws (NCCUSL) began drafting the UTC in 1994.<sup>93</sup> By the summer of 2000, NCCUSL approved and recommended the UTC for enactment.<sup>94</sup> The UTC reporter has heralded the Code as “the first comprehensive uniform act on the subject of trusts.”<sup>95</sup> As of August 2007, 21 states adopted the UTC.<sup>96</sup>

Section 503 of the UTC deals with a creditor’s ability to satisfy a debt by reaching a beneficiary’s interest in a spendthrift trust. Section 503 provides:

(b) A spendthrift provision is unenforceable against:

(1) a beneficiary’s child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance.

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

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

(c) A claimant against which a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.<sup>97</sup>

Ordinarily, a creditor of a spendthrift beneficiary cannot reach the beneficiary’s interest until the beneficiary actually receives it.<sup>98</sup> The UTC slightly modifies this rule with respect to three groups of creditors. Section 503(b) states that spendthrift provisions are “unenforceable” against child support, alimony, and government creditors. However, the official comments to the section state that the remedies available to these three are

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<sup>93</sup> See David M. English, *The Kansas Uniform Trust Code*, 51 U. KAN. L. REV. 311, 311 (2003).

<sup>94</sup> See Newman, *supra* note 43, at 771.

<sup>95</sup> English, *supra* note 93, at 312 (emphasis omitted).

<sup>96</sup> See *supra* note 44 and accompanying text.

<sup>97</sup> UNIF. TRUST CODE § 503 (amended 2005), 7C U.L.A. 524–25 (2006).

<sup>98</sup> UNIF. TRUST CODE §502(c), 7C U.L.A. 523 (2006).

limited by the application of subsection (c): “Subsection (c) provides that the only remedy available to an exception creditor is attachment of present or future distributions.”<sup>99</sup> Although subsection 503(c) limits the remedies available for a claim brought by the state or the United States, the comments also note that federal or other law could provide for much broader remedies, presumably including the right of the government to reach the principal of the trust prior to it being distributed.<sup>100</sup>

While the UTC as a whole has been accepted and promulgated widely, the adoption by the various states of the substance of section 503 has been far from uniform, as discussed in Part III. Convincing state legislators to agree on which creditors may reach a beneficiary’s interest in a spendthrift trust has proven to be a difficult task in a number of jurisdictions.<sup>101</sup> Among the states adopting the UTC, the trend has been predominantly toward greater protection of beneficiaries. Kansas for instance, the first state to adopt a form of the UTC,<sup>102</sup> reserved section 503 while omitting its substantive rule,<sup>103</sup> even though the exceptions enumerated in section 503 are also recognized by the *Restatements* on which the state’s courts traditionally have relied.<sup>104</sup> Arkansas omitted section 503 from its version of the UTC,<sup>105</sup> even though the Arkansas Court of Appeals had already recognized an exception for alimony.<sup>106</sup> Iowa’s version of the UTC also fails to provide an exception for child support or alimony

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<sup>99</sup> Comment to UNIF. TRUST CODE §503, 7C U.L.A. 526 (2006). The actual language of the comment reads, “Subsection (c) provides that the only remedy available to an exception creditor is attachment of present or future distributions of present or future distributions.” This is an obvious typo. The comment probably is a correct interpretation of the interrelationship of subsections (b) and (c) of section 503—that subsection (c) limits the remedies available to the creditors listed in (b). However, other interpretations of the language in subsection (c) might be possible.

<sup>100</sup> *Id.*

<sup>101</sup> See, e.g., Martin D. Begleiter, *In the Code We Trust—Some Trust Law for Iowa at Last*, 49 DRAKE L. REV. 165, 211 (“[T]he Trust Code drafters . . . believed that including an exception for child and former spousal support was likely to generate . . . controversy.”) (footnotes omitted); English, *supra* note 93, at 334 (“[T]he UTC recognizes . . . public-policy exceptions . . . for child support and alimony. . . . [F]ollowing introduction of the UTC, the Kansas Bar objected.”).

<sup>102</sup> See English, *supra* note 93, at 311.

<sup>103</sup> See KAN. STAT. ANN. § 58a-503 (2005) (reserving section 503 of the Kansas Uniform Trust Code).

<sup>104</sup> See English, *supra* note 93, at 334.

<sup>105</sup> See Lynn Foster, *The Arkansas Trust Code: Good Law for Arkansas*, 27 U. ARK. LITTLE ROCK L. REV. 191, 231 (2005).

<sup>106</sup> See *Council v. Owens*, 770 S.W.2d 193, 197 (Ark. Ct. App. 1989).

creditors.<sup>107</sup> Iowa's omission is somewhat different, however, because no prior Iowa court decisions exempting such creditors existed.<sup>108</sup>

### III. FIFTY STATE SURVEY OF CREDITORS' ABILITY TO REACH SPENDTHRIFT PROPERTY

Even after the overwhelmingly positive response to the UTC as a whole, the various states' treatment of spendthrift exceptions continues to be quite varied. While this variation extends to all five of the categories of spendthrift exceptions discussed previously,<sup>109</sup> this Article only includes the variations concerning spendthrift exceptions for child support, alimony, and tort creditors. Thus, variation in the states' treatment of spendthrift exceptions for providers of necessities, services benefitting a beneficiary's interest, and governmental entities is beyond the scope of this Article.

Insofar as states differ in their treatment of child support and alimony creditors, three categories of alternatives exist for states to choose from: (1) exempt both child support and alimony creditors, (2) exempt only child support creditors, or (3) exempt neither child support nor alimony creditors. Each alternative position is reviewed in the above order.

#### A. States Excepting Both Child Support and Alimony Creditors

##### 1. UTC States Excepting Both Child Support and Alimony Creditors

Nine states have adopted an exception for both child support and alimony creditors as a part of their states' version of the UTC: Alabama, Florida, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, and Oregon.<sup>110</sup> When enacting its version of the UTC, Arkansas reserved section 503 without enumerating any exceptions;<sup>111</sup> however, a judicial exception for child support and alimony creditors had already been recognized.<sup>112</sup>

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<sup>107</sup> See IOWA CODE § 633A.2302 (West Supp. 2007).

<sup>108</sup> See Begleiter, *supra* note 101, at 211–12.

<sup>109</sup> See *supra* Part II.B.

<sup>110</sup> See ALA. CODE § 19-3B-503(b)(1) (LexisNexis 2007); FLA. STAT. ANN. § 736.0503(2)(a) (West 2005 & Supp. 2008); MO. ANN. STAT. § 456.5-503(2) (West 2007); NEB. REV. STAT. § 30-3848(b) (1995 & Supp. 2006); N.H. REV. STAT. ANN. § 564-B:5-503(b)(1)-(2) (LexisNexis 2006); N.M. STAT. ANN. § 46A-5-503(B) (LexisNexis 2004 & Supp. 2007); N.D. CENT. CODE § 59-13-03 (Supp. 2007); OHIO REV. CODE ANN. § 5805.02(B)(1) (LexisNexis 2006); OR. REV. STAT. § 130.310(2) (2005).

<sup>111</sup> See ARK. CODE ANN. § 28-73-503 (2004).

<sup>112</sup> See *Council v. Owens*, 770 S.W.2d 193, 197 (Ark. Ct. App. 1989).

Florida's enactment of the UTC was merely a codification of the state's existing case law.<sup>113</sup> In *Bacardi v. White*,<sup>114</sup> after a beneficiary with a substantial interest in a spendthrift trust refused to pay court ordered child support and alimony, the Florida Supreme Court held that the beneficiary's interest in the spendthrift trust could be reached to satisfy the beneficiary's child support and alimony creditors.<sup>115</sup> The Florida Trust Code preserves the *Bacardi* requirement that child support and alimony creditors reach a beneficiary's spendthrift interest "only as a last resort."<sup>116</sup>

Arkansas's decision not to codify the spendthrift exception provided to child support and alimony creditors by both the UTC and *Council v. Owens* is especially puzzling. The Arkansas study committee provided two explanations that appear to be contradictory. First, the committee purported to believe that codifying spendthrift exceptions for child support and alimony creditors would amount to a change in Arkansas trust law.<sup>117</sup> Second, the committee reported that in deciding not to codify exceptions for child support and alimony creditors, it did not intend to weaken *Owens*.<sup>118</sup> Because *Owens* expressly excepts child support and alimony creditors,<sup>119</sup> these two statements seem irreconcilable.

## 2. *States Recognizing an Exception for Child Support and Alimony Creditors by a Statute that Was Codified Independent of the UTC*

Eight states have a statutory exception to spendthrift protection that is not based on the UTC. The Arizona statute exempting child support and alimony creditors parallels the format of the *Restatement (Second) of Trusts*.<sup>120</sup> California, Georgia, Kentucky, Louisiana, Oklahoma, and South

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<sup>113</sup> See Deborah Meyer Ezatoff, Case Note, *Trusts—Garnishment of Spendthrift Trusts for the Enforcement of Court-Ordered Alimony or Child Support: A Public Policy Decision—Bacardi v. White*, 463 So. 2d 218 (Fla. 1985), 13 FLA. ST. U. L. REV. 433 (1985).

<sup>114</sup> 463 So. 2d 218 (Fla. 1985).

<sup>115</sup> See *id.* at 220.

<sup>116</sup> Compare FLA. STAT. § 736.0503(3) (West 2005 & Supp. 2008) (“[T]he remedies provided . . . apply to a claim . . . in paragraph (2)(a). . . . only as a last resort upon . . . showing that traditional methods of enforcing the claim are insufficient.”), with *Bacardi*, 463 So. 2d at 222 (allowing garnishment “only as a last resort”).

<sup>117</sup> See Foster, *supra* note 105, at 231 (quoting Tom Womack, the chair of the Arkansas study committee).

<sup>118</sup> See *id.* (citing Tom Womack).

<sup>119</sup> See *Council v. Owens*, 770 S.W.2d 193, 197 (Ark. Ct. App. 1989).

<sup>120</sup> Compare ARIZ. REV. STAT. ANN. § 14-7707 (2005), with RESTATEMENT

Dakota have statutes of varying formats that all lead to the same position as section 503 of the UTC, at least in regards to child support and alimony creditors.<sup>121</sup> Pennsylvania's statutory spendthrift law already allows child support and alimony creditors to reach a beneficiary's income interest in a spendthrift trust<sup>122</sup> and recently passed legislation allows a child support creditor to reach the beneficiary's interest in principal.<sup>123</sup>

### 3. States Recognizing a Judicial Exception for Child Support and Alimony Creditors

Three states—Delaware, Maryland, and Michigan—have recognized spendthrift exceptions for child support and alimony creditors by way of judicial decision. The Delaware Supreme Court exempted support creditors from spendthrift protection in *Garretson v. Garretson*<sup>124</sup> by holding simply that a support creditor was not a “creditor” within the meaning of Delaware's spendthrift statute.<sup>125</sup> Maryland first recognized a spendthrift exception for child support in *Zouck v. Zouck*,<sup>126</sup> after an exception for alimony had been recognized previously in *Safe Deposit & Trust Co. v. Robertson*.<sup>127</sup> Michigan first recognized a child support or alimony creditor's right to reach a beneficiary's income interest in a spendthrift trust in *Hurley v. Hurley*,<sup>128</sup> then reaffirmed and extended this right to a beneficiary's income interest in a discretionary trust in *Coverston v. Kellogg*.<sup>129</sup>

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(SECOND) OF TRUSTS § 157 (1959).

<sup>121</sup> See CAL. PROB. CODE § 15305(c) (West 1991); GA. CODE ANN. § 53-12-28(c)(4)–(5) (1997); KY. REV. STAT. ANN. § 381.180(6)(a) (LexisNexis 2002); LA. REV. STAT. ANN. § 9:2005(1) (2005); OKLA. STAT. ANN. tit. 60, § 175.25(B)(1)(a) (West 1994 & Supp. 2008); S.D. CODIFIED LAWS § 55-16-15(1) (Supp. 2007). For further reading on Louisiana's law of trusts, see Edward F. Martin, *Louisiana's Law of Trusts 25 Years After Adoption of the Trust Code*, 50 LA. L. REV. 501 (1990).

<sup>122</sup> See 20 PA. CONS. STAT. ANN. § 6112 (West 2005); 23 PA. CONS. STAT. ANN. § 4321 (West 2001).

<sup>123</sup> See S.B. 660, 189th Gen. Assemb., Reg. Sess. (Pa. 2006). See also 20 PA. CONS. STAT. ANN. § 7743 (West Supp. 2007).

<sup>124</sup> 306 A.2d 737 (Del. 1973).

<sup>125</sup> See *id.* at 740; DEL. CODE ANN. tit. 12, § 3536(a) (2007).

<sup>126</sup> 104 A.2d 573 (Md. 1954). The *Zouck* court found “that the agreement by a parent to support a child . . . constitutes an obligation which justifies the invasion of a spendthrift trust for its fulfillment.” *Id.* at 580.

<sup>127</sup> 65 A.2d 292 (Md. 1949). In *Roberstson*, the court thought “the rule that gives legal effect to spendthrift provisions . . . should not be extended to claims for [spousal] support or alimony.” *Id.* at 296.

<sup>128</sup> 309 N.W.2d 225 (Mich. Ct. App. 1981).

<sup>129</sup> 357 N.W.2d 705 (Mich. Ct. App. 1984).

Thus, 20 states allow both child support and alimony creditors to reach a beneficiary's spendthrift interest, making this a strong minority position.

## B. States Excepting Only Child Support Creditors

### 1. UTC States Excepting Only Child Support Creditors

Six states adopting a form of the UTC have included a spendthrift exception for child support creditors only. These six states are the District of Columbia, North Carolina, South Carolina, Utah, Virginia, and Wyoming.<sup>130</sup>

### 2. States Providing an Exception for Only Child Support Creditors by a Statute that Was Codified Independent of the UTC

Four states have created a statutory exception for child support creditors that was not based on the UTC. These four states are Illinois, Texas, Washington, and Wisconsin.<sup>131</sup> The Illinois statute providing an exception for child support creditors is merely a codification of the supreme court's decision in *Matt v. Matt*.<sup>132</sup> Recent Wisconsin legislation modified the state's spendthrift statute,<sup>133</sup> but primarily deals with self-settled spendthrift trusts and did not modify the section dealing with the rights of a child support creditor.

Overall, only 10 states have a spendthrift statute that provides an exception for child support creditors while denying the same opportunity to alimony creditors, making this a minority position. The fact that this is a minority position is somewhat ironic, since 20 states provide both a spendthrift exception for child support and alimony creditors. This paradox reflects how closely divided the states are in regard to spendthrift exceptions for child support and alimony creditors.

The policy justification for providing child support creditors an exception to spendthrift protection while denying alimony creditors such an exception is that parents have a moral obligation to support their

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<sup>130</sup> See D.C. CODE ANN. § 19-1305.03(b) (LexisNexis 2005); N.C. GEN. STAT. § 36C-5-503(b) (2007); S.C. CODE ANN. § 62-7-503(b) (2007); UTAH CODE ANN. § 75-7-503(2) (Supp. 2007); VA. CODE ANN. § 55-545.03(B) (2007); WYO. STAT. ANN. § 4-10-503(b) (2007).

<sup>131</sup> See 735 ILL. COMP. STAT. ANN. 5/2-1403 (West 2003); TEX. FAM. CODE ANN. § 154.005 (Vernon 2002); WASH. REV. CODE ANN. § 11.96A.190 (West 2006); WIS. STAT. ANN. § 701.06(4) (West 2001 & Supp. 2007).

<sup>132</sup> 473 N.E.2d 1310 (Ill. 1985).

<sup>133</sup> See A.B. 1038, 97th Leg., Reg. Sess. (Wis. 2006) (codified as WIS. STAT. ANN. § 701.06(6) (West Supp. 2007)).

children,<sup>134</sup> while marital duties between spouses arise from the marital contract.<sup>135</sup> Even courts recognizing exceptions for both child support and alimony creditors have acknowledged that the claims of child support creditors are more compelling.<sup>136</sup> In the end, however, such courts have found that a spouse's claim for alimony is at least compelling enough to justify invasion of a beneficiary's spendthrift interest.<sup>137</sup>

### C. States Excepting Neither Child Support nor Alimony Creditors

#### 1. *UTC States Excepting Neither Child Support nor Alimony Creditors*

Four states have adopted a version of the UTC without including an exception for child support or alimony creditors. These four states are Iowa, Kansas, Maine, and Tennessee.<sup>138</sup> Arkansas similarly adopted a version of the UTC while omitting section 503, but Arkansas already had case law providing an exception for child support and alimony claims.<sup>139</sup> Historically, Iowa courts had denied an exception for child support and alimony creditors, and the drafters of the Iowa Trust Code did not want controversy over the spendthrift exceptions provision to delay or prevent enactment of the Code.<sup>140</sup> Because Kansas courts attempting to decipher trust law historically have relied on the *Restatements*, which provide an

<sup>134</sup> See *Council v. Owens*, 770 S.W.2d 193, 197 (Ark. Ct. App. 1989) (“[C]hild support is a family duty.”); *Zouck v. Zouck*, 104 A.2d 573, 579 (Md. 1954) (“In the case of a child, the obligation . . . to support . . . cannot be bargained away.”).

<sup>135</sup> See *Zouck*, 104 A.2d at 579 (noting that divorced or separated spouses can waive their rights to spousal support).

<sup>136</sup> See *Owens*, 770 S.W.2d at 197 (“We pause, however, to acknowledge that there is a stronger public interest in subjecting such trusts to claims for child support than perhaps there is for alimony.”); *Shelley v. Shelley*, 354 P.2d 282, 287 (Or. 1960) (“The justification for permitting a claim for alimony is, perhaps, not as clear.”); *Zouck*, 104 A.2d at 579 (“There are differences between an agreement by a [spouse] for support and such an agreement as to a child.”).

<sup>137</sup> See *Owens*, 770 S.W.2d at 196; *Shelley*, 354 P.2d at 287; *Zouck*, 104 A.2d at 580.

<sup>138</sup> See IOWA CODE ANN. § 633A.2302 (West Supp. 2007) (creating a spendthrift exception only for self-settled trusts); KAN. STAT. ANN. § 58a-503 (2005) (reserving section 503 of the Kansas Uniform Trust Code); ME. REV. STAT. ANN. tit. 18-B, §§ 503–506 (Supp. 2007) (providing exceptions in limited circumstances involving self-settled trusts and abuse of discretion by a trustee); TENN. CODE ANN. § 35-15-503 (2007) (rendering spendthrift provisions unenforceable only as to claims by the state to the extent provided by a state statute).

<sup>139</sup> See ARK. CODE ANN. § 28-73-503 (2004); *Owens*, 770 S.W.2d at 197; Foster, *supra* note 105, at 231; *supra* text accompanying notes 111–12, 117–19.

<sup>140</sup> See Begleiter, *supra* note 101, at 211–12.

exception for child support and alimony creditors, at least one commentator has suggested that the decision not to enunciate an exception for child support and alimony creditors likely represents a change in the state's law.<sup>141</sup>

2. *States with Statutes that Are Not Based on the UTC and Do Not Enumerate an Exception for Support Creditors*

The following nine states have codified statutes that recognize the validity of spendthrift trusts without recognizing any exceptions for child support or alimony creditors: Alaska, Idaho, Indiana, Mississippi, Montana, Nevada, New York, Rhode Island, and West Virginia. Three of the nine states have statutes providing very narrow exceptions that provide no relief to child support or alimony creditors. Indiana, Rhode Island, and West Virginia recognize the validity of spendthrift trusts without addressing the possibility of exceptions.<sup>142</sup>

The other six states enacting spendthrift statutes that do not provide an exception for child support or alimony creditors have included language specifying the very limited circumstances when a spendthrift provision will not be fully enforced. Alaska has enacted a statute recognizing the validity of spendthrift provisions even in self-settled trusts, with the only significant exceptions coming into play when there has been a fraudulent transfer or when the settlor was more than 30 days late on a child support payment at the time of a transfer to the trust.<sup>143</sup> The Idaho spendthrift statute specifies that no exceptions exist except as otherwise provided, and has not yet provided any exceptions.<sup>144</sup> Mississippi's Family Trust Preservation Act of 1998 invalidated the Mississippi Supreme Court's decision in *Sligh*,<sup>145</sup> requires that all spendthrift provisions be given full effect, with self-settled spendthrift trusts being the only exception.<sup>146</sup> Montana statutes authorize full spendthrift protection for a beneficiary's income interest in a spendthrift trust, while enabling a creditor to obtain a *Hamilton* order attaching a payment due a beneficiary on account of the beneficiary's interest in principal.<sup>147</sup> Nevada law authorizes spend-

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<sup>141</sup> See English, *supra* note 93, at 334.

<sup>142</sup> See IND. CODE ANN. § 30-4-3-2(a) (LexisNexis 2000); R.I. GEN. LAWS § 18-9.1-1 (2003); W. VA. CODE ANN. § 36-1-18(a) (2005 & Supp. 2007).

<sup>143</sup> See ALASKA STAT. § 34.40.110(a)-(b) (2006).

<sup>144</sup> See IDAHO CODE ANN. § 15-7-502 (2001 & Supp. 2007).

<sup>145</sup> See *supra* text accompanying notes 88-89.

<sup>146</sup> See MISS. CODE ANN. §§ 91-9-503, -509 (2004).

<sup>147</sup> See MONT. CODE ANN. §§ 72-33-301, -302 (2007). See also Stark, *supra* note 16

thrift provisions and allows such beneficiaries to voluntarily alienate their interests only if the trust fails to provide the beneficiaries any opportunity to receive or request payment from the trust.<sup>148</sup> Finally, New York statutory law establishes a presumption that all trusts are spendthrift trusts but also allows a beneficiary to voluntarily transfer or assign his interest to someone the beneficiary is obligated legally to support.<sup>149</sup>

3. *States Recognizing Spendthrift Protection as a Matter of Case Law Without Recognizing Any Exceptions for Child Support or Alimony Creditors*

Six states have given judicial recognition to spendthrift provisions without providing exceptions for child support or alimony creditors. The Supreme Courts of Massachusetts and Minnesota have held explicitly that a spendthrift provision remains enforceable against child support and alimony creditors: the Massachusetts Supreme Court did so in *Bucknam v. Bucknam*,<sup>150</sup> and the Minnesota Supreme Court did so in *Erickson v. Erickson*.<sup>151</sup> The courts of four other states have recognized the validity of spendthrift trusts as a matter of case law but have not yet decided whether spendthrift protection bars the claim of a child support or alimony creditor. The Colorado Supreme Court first recognized the availability of spendthrift protection in *Snyder v. O'Conner*<sup>152</sup> and recently reaffirmed this holding in *In re Cohen*.<sup>153</sup> The Connecticut Supreme Court recognized the validity of spendthrift protection in *Greenwich Trust Co. v. Tyson*,<sup>154</sup> a New Jersey court first did so in *Moore v. Moore*,<sup>155</sup> and the Vermont Supreme Court first did so in *In re Manley*.<sup>156</sup>

All together, 20 states fail to provide a spendthrift exception for either child support or alimony creditors. The policy justification that courts cite for not allowing either a child support or alimony creditor to reach a beneficiary's spendthrift interest is that the goal of effectuating the

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(analyzing Montana law in regards to spendthrift trusts).

<sup>148</sup> See NEV. REV. STAT. ANN. § 166.120(1) (LexisNexis 2003).

<sup>149</sup> See N.Y. EST. POWERS & TRUSTS LAW § 7-1.5(a), (d) (McKinney 2002).

<sup>150</sup> 200 N.E. 918 (Mass. 1936).

<sup>151</sup> 266 N.W. 161 (Minn. 1936).

<sup>152</sup> 81 P.2d 773 (Colo. 1938). "We know of no reason why [a spendthrift clause] should not be enforced in Colorado." *Id.* at 774.

<sup>153</sup> 8 P.3d 429 (Colo. 1999). The court said: "In general, spendthrift trusts are valid and enforceable in Colorado." *Id.* at 430 n.1.

<sup>154</sup> 27 A.2d 166 (Conn. 1942).

<sup>155</sup> 44 A.2d 639 (N.J. Ch. 1945).

<sup>156</sup> 24 A.2d 357 (Vt. 1942).

settlor's intent to provide financial protection to the beneficiary overrides the public policy interest in seeing that a beneficiary provides for his dependents.<sup>157</sup> Of all the states surveyed, the four states where courts have recognized spendthrift protection without passing on the availability of exceptions—Colorado, Connecticut, New Jersey, and Vermont—would seem the most susceptible to a change in law.

#### D. State Treatment of Involuntary Tort Creditors

##### 1. *Treatment of Involuntary Tort Creditors Under Statutory Law*

As previously noted, Georgia is the only state with a true statutory exception for tort creditors.<sup>158</sup> A spendthrift provision has no effect on a tort judgment creditor under Georgia law unless the beneficiary has been determined medically to be disabled physically or mentally.<sup>159</sup> California does not allow a tort creditor to reach a beneficiary's interest in a trust but does allow the creditor to obtain a *Hamilton* order, attaching the payments due to the beneficiary under the spendthrift trust if the creditor received restitution or money damages as a result of conduct for which the beneficiary was convicted of a felony.<sup>160</sup> South Dakota has a very narrow statutory tort creditor exception that permits an involuntary tort creditor to reach any portion of a beneficiary's spendthrift interest that was transferred to a spendthrift trust on or after the day that the tort was committed.<sup>161</sup> Also, Louisiana passed a statute in 1965 that exempted tort creditors from spendthrift protection; however, the Louisiana legislature repealed the part of the statute that provided this exception in 2004.<sup>162</sup>

##### 2. *Treatment of Involuntary Tort Creditors Under Judicial Law*

The Mississippi Supreme Court is the only court to have created a judicial exception for involuntary tort creditors.<sup>163</sup> The exception for tort

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<sup>157</sup> See, e.g., *Bucknam v. Bucknam*, 200 N.E. 918, 921 (Mass. 1936) (“To permit a [spouse] to collect out of spendthrift trust funds any decree for alimony which [the spouse] might obtain . . . would often deprive an improvident beneficiary of all the protection which the testator intended to give him.”).

<sup>158</sup> See GA. CODE ANN. § 53-12-28(c)(1) (1997). See also *supra* text accompanying notes 10, 56.

<sup>159</sup> See GA. CODE ANN. § 53-12-28(c)(1).

<sup>160</sup> See CAL. PROB. CODE § 15305.5 (West 1991 & Supp. 2008).

<sup>161</sup> See S.D. CODIFIED LAWS § 55-16-15(2) (Supp. 2007).

<sup>162</sup> See LA. REV. STAT. ANN. § 9:2005(3) (2005) (enacted in 1965), *repealed by* 2004 La. Acts 521, § 2.

<sup>163</sup> See *Sligh v. First Nat'l Bank*, 704 So. 2d. 1020, 1029 (Miss. 1997) (Prather, J.,

creditors under Mississippi law was short lived, however, as the Supreme Court's decision was overruled statutorily less than six months later.<sup>164</sup> Since the swift legislative response to the decision of the Mississippi Supreme Court, only two courts have had the opportunity to create a judicial exception and have declined the invitation: the New Hampshire Supreme Court did not find such an exception in *Scheffel v. Krueger*,<sup>165</sup> and the Maryland Court of Appeals followed suit in *Duvall v. McGee*.<sup>166</sup>

#### IV. HARMONIZING INCONSISTENT POLICY OBJECTIVES

##### A. Policy for Creating an Exception for Involuntary Tort Creditors

The argument for treating an involuntary tort creditor the same as a child support or alimony creditor is no more and no less compelling today than it was at any previous time. The only three justifications for allowing a settlor to prevent a beneficiary from disposing of an interest in a trust or having it seized by a creditor are: (1) the right of a settlor to decide how to dispose of his property,<sup>167</sup> (2) the public interest in preventing spendthrift beneficiaries from being left with nothing<sup>168</sup> and becoming public burdens,<sup>169</sup> and (3) the obligation of creditors to check the creditworthiness of their debtors.<sup>170</sup> Neither of these justifications apply any more to involuntary tort creditors than the justifications apply to child support or alimony creditors.<sup>171</sup>

However, as best demonstrated by the legislative reaction to the Mississippi Supreme Court's decision in *Sligh*, the desire to provide financial protection to one's beneficiaries strikes a more powerful emotional chord with the public than does the plight of injured tort victims.<sup>172</sup>

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dissenting), *superseded by statute*, MISS. CODE ANN. § 91-9-503 (2004). For a discussion of *Sligh*, see *supra* Part II.D.1.b.

<sup>164</sup> See *supra* Part II.D.2.

<sup>165</sup> 782 A.2d 410 (N.H. 2001).

<sup>166</sup> 826 A.2d 416 (Md. 2003).

<sup>167</sup> See *Sligh*, 704 So.2d at 1027.

<sup>168</sup> See *Nichols v. Eaton*, 91 U.S. 716, 727 (1875).

<sup>169</sup> See *Sligh*, 704 So. 2d. at 1027.

<sup>170</sup> See SCOTT & FRATCHER, *supra* note 54 § 157.5.

<sup>171</sup> See *supra* text accompanying notes 78–82.

<sup>172</sup> See *supra* Part II.D.2.

## B. Effectuating the Settlor's Intent Through the Use of *Hamilton* Orders

The most compelling argument for the validity of spendthrift trusts is the desirability of giving effect to the settlor's intent.<sup>173</sup> Indeed, effectuating the deceased's intent long has been the highest aim of all probate law.<sup>174</sup> The initial problem with providing any exceptions to spendthrift protection is that allowing any creditor to reach a beneficiary's interest violates the settlor's intent of preventing the beneficiary's interest from being alienated involuntarily. The UTC resolves this conflict by preventing alimony, child support, and governmental creditors from actually reaching the beneficiary's interest. Instead, as discussed in Part II, they may obtain from a court an order attaching present or future distributions to or for the benefit of the spendthrift beneficiary.

The provisions of the UTC must be compared to those of the *Restatement (Third) of Trusts*. The *Restatement (Third) of Trusts* enumerates the types of claims for which a creditor will be able to reach the beneficiary's interest. The *Restatement* provides a set of claims for which "[t]he interest of a beneficiary in a valid spendthrift trust can be reached."<sup>175</sup> The *Restatement* provides no qualifications as to how or what extent the interest can be reached by an excepted creditor; the authority to reach the beneficiary's interest is unlimited.

In contrast, the UTC merely allows certain claimants to "obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary."<sup>176</sup> Thus, the UTC allows claimants granted an exception to obtain a *Hamilton* order. While a creditor granted an exception by the UTC, including a child support or alimony creditor, would be able to attach present or future distributions, the creditor would not be able to reach any undistributed interest the beneficiary had in the trust. Thus, the exception the UTC provides is only an exception to the require-

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<sup>173</sup> See *supra* text accompanying notes 26–29.

<sup>174</sup> See, e.g., *Wing v. Wachovia Bank & Trust Co.*, 272 S.E.2d 90, 95 (N.C. 1980) ("[T]he intent of the testator is the polar star that must guide the courts in the interpretation of a will." (quoting *Trust Co. v. Bryant*, 128 S.E.2d 758, 760 (N.C. 1963)); *Baum v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 230 F.2d 377, 381 (7th Cir. 1956) ("[T]he intention of the testator is the pole star by which a court is guided in ascertaining the meaning of a will."); *Buffaloe v. Blalock*, 59 S.E.2d 625, 626 (N.C. 1950) ("The intent of the testator is the polar star that must guide courts in the interpretation of a will."); *Hormann v. N. Trust Co.*, 114 F.2d 118, 122 (7th Cir. 1940) ("[T]he intention of the testator is the polestar by which the court is guided.").

<sup>175</sup> RESTATEMENT (THIRD) OF TRUSTS § 59 (2003).

<sup>176</sup> UNIF. TRUST CODE § 503(c) (amended 2005), 7C U.L.A. 525 (2006).

ment that the creditor be prevented from attaching the interest until the beneficiary receives it.<sup>177</sup> Because the settlor would seem to have less of an interest in the trust assets once a payment is due to a beneficiary, the approach of the UTC is more desirable as a closer approximation of the settlor's intent.

The distinction between the exception in the *Restatement* and that in the UTC seems more significant once each is applied to the facts of *Sligh v. First National Bank*.<sup>178</sup> The defendant in *Sligh* was the exclusive beneficiary of the spendthrift trusts at issue and had an interest in the entire corpus of both trusts.<sup>179</sup> Thus, acting in accord with the *Restatement* approach, the Mississippi Supreme Court held that all of the trusts assets could be used immediately to satisfy the previous judgment rendered in favor of the plaintiffs.<sup>180</sup> If the court had treated the plaintiffs the same as creditors provided an exception under the UTC, the plaintiffs would only have been entitled to receive payments from each trust as they became due to the beneficiary.

By limiting excepted creditors to attaching payments owed to the beneficiary, such creditors are denied any immediate relief. However, careful examination of the primary policy justification for allowing support or tort creditors to reach a beneficiary's interest in a spendthrift trust reveals that this is the most appropriate result. The primary policy justification for allowing support or tort creditors to reach a beneficiary's interest in a spendthrift trust is that a beneficiary should not be allowed to enjoy the income stream provided by an interest in a spendthrift trust while neglecting to provide for those the beneficiary has an obligation to support.<sup>181</sup> At the same time, respecting the settlor's intent would dictate that the support creditors should have no greater access to the beneficial interest in the trust than would the beneficiary. Just as the beneficiary does not have immediate access to the trust corpus, neither should the support creditors. Once the support creditors have the ability to receive

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<sup>177</sup> See *id.* § 502(c), 7C U.L.A. at 523.

<sup>178</sup> 704 So. 2d 1020 (Miss. 1997), *superseded by statute*, MISS. CODE ANN. § 91-9-503 (2004).

<sup>179</sup> See *id.* at 1023, 1028–29.

<sup>180</sup> See *id.* at 1029.

<sup>181</sup> See *Shelley v. Shelley*, 354 P.2d 282, 286–88 (Or. 1960). For a more complete discussion of the competing policy concerns implicated by a support creditor's attempt to reach a beneficiary's interest in a spendthrift trust, see generally Carolyn L. Dessin, *Feed a Trust and Starve a Child: The Effectiveness of Trust Protective Techniques Against Claims for Support and Alimony*, 10 GA. ST. U. L. REV. 691 (1994).

the same access to the interest as the beneficiary, the policy justification for overriding the settlor's intent is no longer applicable.

In addition, limiting the relief provided to support creditors of the beneficiary of a spendthrift trust to the ability to attach future payments to the beneficiary also helps unify the treatment of support creditors under the law of spendthrift and discretionary trusts. If the support creditor of a spendthrift beneficiary is allowed to reach the beneficiary's interest prior to payment by the trustee, then the support creditor of the spendthrift beneficiary could receive immediate payment while the support creditor of a beneficiary of a discretionary trust would not receive any payment until the trustee exercised discretion to pay the beneficiary.<sup>182</sup> Thus, the support creditor of the spendthrift beneficiary would have an advantage over the support creditor of a beneficiary of a discretionary trust. Under the UTC, however, the remedy of a support creditor of the spendthrift beneficiary is limited to the ability to attach future payments due to the beneficiary, putting the support creditor of a spendthrift beneficiary in the same position as the support creditor of a discretionary trust beneficiary. Thus, while neither can receive immediate payment, both are able to attach future payments to the beneficiary.

## V. CONCLUSION

While states finally have come to a uniform conclusion on the validity of spendthrift trusts, states' views continue to be widely divergent as to which claimants should be granted exceptions to spendthrift protection and to what extent.<sup>183</sup> The reason for this disagreement is the inherently competing public policy goals of effectuating a settlor's right to dispose of his property as he chooses and preventing beneficiaries from receiving a steady income while avoiding their moral obligations to other members of society.<sup>184</sup> Because the second goal cannot be accomplished without infringing on the first, entire reconciliation of the two competing policy goals is impossible. Instead, the author offers two suggestions for reconciling these policy goals as best possible: first, provide tort creditors the same ability as support creditors to avoid spendthrift protection; and second, follow the lead of the UTC by limiting the exception for deserving creditors to the ability to obtain a *Hamilton* order attaching present

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<sup>182</sup> See GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, TRUSTS & TRUSTEES § 228, at 524-25 (2d ed. rev. 1979).

<sup>183</sup> See *supra* Part III.

<sup>184</sup> See *supra* Part II.B.

and future payments. An exception allowing tort creditors the same preference as support creditors always has been justified by the same policy rationales and is long overdue.<sup>185</sup> The decision by the drafters of the UTC to limit an excepted claimant's right to the ability to obtain a *Hamilton* order came just in time.

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<sup>185</sup> *See supra* Part IV.A.