From 2006 Estate Planning and Probate Seminar(NCLE) (March, 2006)

Trusts & Divorce--An Unlikely Marriage?

> Felix: Oh, I'm awfully sorry. (Sighs.) It's a terrible thing, isn't it? Divorce?
>
> Gwendolen: It can be . . . if you haven't got the right solicitor.
>
> Neil Simon, *The Odd Couple* (1966)

Should an estate planner know anything about divorces? Many estate planners would prefer not to be told anything about divorce law, unless the divorce happens to be their own. However, when drawing up an estate plan, it may be important to keep divorces in mind. This paper will attempt to outline several ways trusts may impact on a divorce.[1]

I. <u>Changes to Existing Estate Plans</u>. The most obvious effect a divorce would have for an estate planner is to change some present plans--whether for the divorced couple, or for their parents. This is often overlooked, in several respects:

A. <u>Wills</u>. A failure to change a will may not be so disastrous because of § 30-2333, which says a divorce revokes the disposition in a will made to a former spouse, and the will is interpreted as if the former spouse predeceased the testator.

B. <u>Trusts</u>. There appears to be no similar provision for trusts. Section 30-2333 only applies to wills, although the section does revoke the appointment of a former spouse as a

trustee.

In the case of Clymer v. Mayo,[2] the Massachusetts Court invalidated the provisions in a pre-divorce revocable trust that provided for the ex-spouse, saying the Massachusetts statute that invalidated the provisions of a will for spouse after divorce operated against the revocable trust, since it was testamentary in character.

C. Payable on Death. Often overlooked in the divorce setting are investments that are payable on death to an ex-spouse, such as life insurance, annuities, etc. These should obviously receive just as much attention after a divorce as the will or trust.

II. Some Definitions. The word "spendthrift" or "spendthrift trust" often comes up in this topic. These terms are defined by the Nebraska Uniform Trust Code as follows:

A. "Spendthrift Provision." This phrase is defined under § 30-3803(16) of the Trust Code to mean "a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary's interest."

Under the Trust Code, for a "spendthrift provision" to be valid, it must prohibit both the voluntary and involuntary transfer of the beneficiary's interest.[3] For example, it's not a "spendthrift provision" if the settlor allows a beneficiary to assign the interest, while prohibiting a beneficiary's creditor from collecting, and vice versa.[4]

The official Comments to the Uniform Trust Code spell it out in more detail:

> "'Spendthrift provision' . . . means a term of a trust which restrains the transfer of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action of a beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary."[5]

B. A "Spendthrift Trust". Just saying the phrase can create a "spendthrift trust":

> "A term of a trust providing that the interest of a beneficiary is held subject to a 'spendthrift trust', or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest."[6]

On the other hand, it may arise because of a statute, the document itself, or an implication:

> "A trust may be a spendthrift trust because of a statute, or by reason of a term of the trust instrument expressing such an intent, or because of an implication as to the settlor's intent arising from the language of the instrument and the surrounding circumstances."[7]

C. Effect of a valid "Spendthrift Provision". If the spendthrift provision is valid, under most situations the creditor or assignee of the beneficiary can't reach the trust interest before its receipt by the beneficiary.[8]

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> "[Marriage is] the only war where one sleeps with the enemy."
>
> Anonymous: Mexican saying: Ned Sherrin, Cutting Edge (1984)

III. Marital Agreements. A valid marital agreement--
before or after marriage--can alter some of the rules mentioned in this paper:

> "Both antenuptial and postnuptial agreements between spouses have been upheld as valid contracts. However, the courts have held that neither an antenuptial nor a

> postnuptial agreement will be enforced where there had been fraud or failure to fully disclose assets on the part of one party or where the terms of the agreement were unconscionable at the time enforcement is sought."[9]

Nebraska law recognizes such agreements:

> "The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse."[10]

However, under that statute, the waiver isn't enforceable unless it is "voluntary", not "unconscionable", as well as a number of other restrictions, including the fact the spouse must have been given a "fair and reasonable disclosure of the property or financial obligations of the decedent."

In addition, Nebraska's Uniform Premarital Agreement Act allows the parties to a premarital agreement to contract with respect to "the modification or elimination of spousal support", but child support can't be "adversely affected" by the agreement.[11] To my knowledge, this Act hasn't been tested in either the Court of Appeals or the Supreme Court. A "possible" suggestion for use of this Act in a marital agreement is attached as Exhibit "A" to this paper.

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> "He taught me housekeeping; when I divorce I keep the house."
>
> Zsa Zsa Gabor, speaking of her fifth husband; Ned Sherrin in Cutting Edge

IV. <u>Trusts and the Augmented Estate</u>. While not relevant to this discussion about divorces, putting all your assets in a trust won't keep it from your spouse at death, either:

> "In most states providing an elective share, the courts have had to consider whether the surviving spouse's election extends to property transferred by the deceased spouse under one or more 'will substitutes'--for example, a revocable trust established by the deceased spouse prior to his or her death. Thus a spouse may have created a trust during his or her lifetime, generally for his or her own benefit for life, with remainder to others, reserving broad powers, including the power of revocation, the power to change the beneficiary of the remainder, or the power to appoint the remainder following his or her death. The question has arisen whether these trusts are 'illusory' because of the great amount of control which the settlor has over the subject matter, or were fraudulent in intent, and therefore mere testamentary substitutes, so that the trust assets are includible in the settlor's estate for purposes of determining the statutory share of the surviving spouse."[12]

Section 30-2314 of the Nebraska Probate Code[13] allows a surviving spouse to elect against the will, and the probate estate is to be augmented by lifetime transfers made by the deceased jerk during the marriage that are deemed "will substitutes" because of retained benefits or control. However, the augmented estate also includes property of the surviving spouse derived during lifetime from the deceased.

Keep in mind the special problem created by Myers v. Myers,[14] in which the deceased spouse left a marital and family trust for the widow, and the widow elected against those trusts, but failed to renounce the trusts as well. As a result, the Supreme Court said she was stuck with the trusts, since the value of her life use of the marital and family trusts was worth more than what she would have received otherwise. In other words, she wanted the assets outright, rather than in trust, but failed to renounce what the deceased spouse gave her, and because of the values, she was stuck with what he gave her.

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"Marriage is a wonderful invention; but, then again, so is a bicycle repair kit."

Billy Connolly, as quoted by Duncan Campbell in *Billy Connolly* (1976)

V. Trusts Created for Oneself.

A. Spendthrift Trusts. Generally speaking, a person can't avoid his creditors by transferring his property to a spendthrift trust for himself:

> "Whether or not the terms of a trust contain a spendthrift provision, the following rules apply: (1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors."[15]

> "Under Nebraska law a person can not create a spendthrift trust for himself in order to enjoy the property and at the same time prevent creditors from getting to it. This prohibition is as a matter of public policy."[16]

Likewise, in a divorce setting, a person might try to create a spendthrift trust for himself, in an attempt to isolate the assets

from the spouse. That also will generally not be effective. While a valid marital agreement works, a trust to defraud a spouse won't:

> "[A transfer to a trust or other conveyance] may be ruled contrary to public policy because the trust or other conveyance was illusory in that the transferor retained control of the property with the intent of depriving the other spouse of his or her statutory rights."[17]

In addition, the Nebraska Uniform Fraudulent Transfers Act invalidates an gratuitous transfer to avoid one's creditors, including transfers into trust.[18]

B. Retirement Plans[19]. For divorce purposes, the Nebraska statutes include retirement trusts as a part of the "marital estate":

> "If the parties fail to agree upon a property settlement, which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities,
>
> and other deferred compensation benefits owned by either party, whether vested or not vested."[20]
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> ***
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> "It was partially my fault that we got divorced . . . I tended to place my wife under a pedestal."
>
> Woody Allen, "I

Had a Rough
Marriage"
(monologue, 1964)

VI. Trusts Created by Others.

A. The Spendthrift Trust, Generally.

The question of spendthrift trusts has been around a long time.[21] The general argument in favor of such a trust created by a third person is that a person's right to dispose of his property includes the power to prevent strangers from displacing the object of his bounty. This thought is usually traced back to an 1875 U.S. Supreme Court case, in which Chief Justice Wilmot made the following comment:

> "But the 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."[22]

The argument against a spendthrift trust generally follows the duty of a person to be a "good citizen" and pay his bills:

> "Critics . . . have denounced the legitimacy of a gift that is not subject to the rights of the donee's creditors and thus enables the recipient to indulge himself simultaneously in both luxury and indebtedness. The exercise of property rights, they insist, must conform to the dictates of public policy, a policy that prohibits any man from enjoying the advantages of wealth without its responsibilities."[23]

Similarly, in commenting on a Nevada spendthrift provision in 1939, an article in the Harvard Law Review took the state to task:

> "By a recent legislative correction of an omission in its legal attractiveness the state of Nevada has placed its banks and trust companies in a position scarcely less advantageous than that of its divorce lawyers and gambling houses. The statute, in utter disregard of legal commentators, permits an insulation of the spendthrift from his obligations of a completeness not even attained in Massachusetts, the original haven of the prodigal."[24]

The author then went on to point out exceptions to the spendthrift rule that are present in our Nebraska Trust Code:

> "The exceptional hardship involved in denying to certain classes of creditors recourse to interests in trust funds has led some courts to allow a 'reaching of the unreachable' in such cases. There are two methods of approach: by interpreting the terms of the restrict provisions as showing that the settlor did not intend to exclude the particular class of claimants from the protection of the trust, or, more realistically, by holding that as against certain classes of creditors such provisions are void as against public policy."[25]

Therefore, with exceptions, a spendthrift trust is generally valid in Nebraska. For example, § 30-3847 (UTC § 502) says a spendthrift provision is valid if it restrains both "voluntary and involuntary transfer of a beneficiary's interest". Commenting on this section, the National Conference of Commissioners of Uniform State

Laws pointed out the following:

> "Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. *Unless one of the exceptions under this article applies*, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made."[26]

The exceptions mentioned are found in Nebraska's § 30-3848, discussed below.

B. <u>Beneficiary as Trustee</u>. If the beneficiary is also the Trustee in a trust created by someone else, you have an additional problem, especially if the trustee has discretion in the distributions:

> "Comment g [to § 60 of Restatement (Third) of Trusts] provides that if the nonsettlor beneficiary is the trustee of a discretionary trust with the authority to determine his or her benefits, the beneficiary's creditors may reach from time to time the maximum amount the trustee-beneficiary can properly take. An ability of a nonsettlor beneficary-trustee to run up debts and have them satisfied from the trust estate is likely to be construed by the taxing authorities as a constructive general inter vivos power of appointment."[27]

However, Nebraska added the following language as subparagraph (e) to § 30-3849 (UTC 504), to provide an additional exception if there's an ascertainable standard:

> "(e) A creditor may not

> reach the interest of a beneficiary who is also a trustee or cotrustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard."

C. Gifts, outright or in trust.

1. Outright Gifts of Corporate Stock

While not directly on point for this paper, perhaps one of the greatest problems an estate planner will create for a divorce lawyer is the gift of assets by parents to an in-law, who then commences to divorce their beloved child.[28]

A typical result is found in the case of Gangwish v. Gangwish, 267 Neb. 901, 678 N.W.2d 503 (2004), in which Paul's father gifted family corporation stock to Paul, *and Paul's wife Kimberly.* The family corporation was Gangwish Seed Farms, and the father gave a total of 28 shares to Paul and Kimberley. Each gift was equal to Paul and Kimberley, and each time a gift was made to Kimberley, she subsequently turned around and gifted the stock to Paul.

Naturally, greedy Kimberley sued sweet Paul for divorce, and at the trial Paul's father, Leland, testified about his intent in making the gifts:

> "Leland testified that it was his desire to give all 28 shares to Paul, but out of concern for the tax consequences, he chose to gift half of the shares to Kimberley, with the intent that she would transfer them to Paul at a later time. Both Paul and Kimberley were aware of Leland's intent when he made the gifts." 267 Neb. at 909.

The trial court gave 14 of the shares to Paul, and the other 14 to Kimberley. The Supreme Court proceeded to cut the baby:

> "Our review of the trial

> court's decree suggests that the court determined that all 28 shares were marital property and simply allocated half to each party. As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. . . . Such exceptions include property accumulated and acquired through gift or inheritance. . . .
>
> "We agree the evidence showed that Leland wanted Paul to obtain eventual possession of all 28 shares of stock in Gangwish Seed Farms. However, the fact remains that Leland gave only 14 shares to Paul. Therefore, Paul is entitled to receive, as separate property, only the 14 shares of stock that he received from Leland as a gift. As to the 14 shares given to Kimberley, upon transferring ownership of the shares to Paul, they lost their status as a gift and became part of the marital estate. Because no value was assigned to the shares, we conclude that the parties should divide these 14 remaining shares equally. On remand, the trial court is ordered to amend its decree to award Kimberley seven shares of stock in Gangwish Seed Farms and the remainder to Paul." 267 Neb. at 909-10.

Query: What's the result if Kimberley hadn't given the gifted shares to Paul? She keeps all 14 shares as gifts, because they're <u>not</u> marital property?

The <u>Gangwish</u> case illustrates the dilemma given to every estate planner. At the time of the gift, the marriage is stable, and your clients love the in-law. They want to give away as much as possible, so they overcome your fears, and insist you make the gifts. When the

marriage goes South, will you get the blame? Should you call Kimberley up to see what she's doing for supper?

Other than no gifts to Kimberley, were there other things the lawyer could have done? Would a restrictive stock purchase agreement help, saying if any stockholder gets divorced, the corporation can buy back the stock for what the stockholder paid for it? For a price determined by the stockholders annually? Would an equity court uphold this?

2. Gifts in Trust from Third Parties. The most recent changes occur in the area of discretionary trusts held for a child who's getting divorced, but the beneficiary isn't the trustee. This is the case where the parents come to see you and know Johnny is a spendthrift, so they want you to protect his share of their estates from creditors, especially his greedy ex-wife they never did like. You create a discretionary spendthrift trust for Johnny's share, with a disinterested third party as the trustee. Will that trust withstand an attack from Johnny's creditors, including his ex-wife, who claims unpaid alimony and child support?[29]

a. Johnny's Creditors, in General.

As mentioned above, a spendthrift trust in Nebraska is *generally* effective against a beneficiary's creditors. For example, § 30-3847 (UTC § 502) says a spendthrift provision is valid if it restrains both "voluntary and involuntary transfer of a beneficiary's interest". *Ignoring a creditor that's Johnny's ex-spouse*, the trust should be effective:

> "[O]ne can under current Nebraska law create a trust that limits the right of a creditor of a beneficiary other than the Grantor of that trust from attaching or otherwise having the creditors claim satisfied from those assets of the trust that are being held for the benefit of that beneficiary."[30]

The cases discussed below would all appear to support this conclusion.[31] However, note that under § 30-3851 any of Johnny's creditors can reach distributions the trustee is required to

make to Johnny, but doesn't distribute within a reasonable time-- regardless of the spendthrift provision:

> "Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date."

b. <u>Johnny's Alimony and Child Support Obligations</u>.

> "Children must be considered in a divorce-- considered valuable pawns in the nasty legal and financial contest that is about to ensue."
>
> P. J. O'Rourke, <u>Modern Manners</u> (1984)

Creditors that are Johnny's wife, ex-wife or children are another matter. These are now the "exceptions" mentioned above:

<u>Nebraska Statutes</u>

Several sections of the Nebraska Trust Code would apply to this area. Part 5 of the Uniform Trust Code applies to creditor's claims and spendthrift trusts. The drafters of the Uniform Trust Code found Part 5 especially difficult:

> Crafting the provisions of Article 5 on spendthrift protection and the rights of a beneficiary's creditors to reach the trust proved to be the most difficult task in drafting the Act. The area is controversial, and

> conflicting policy directions yield different results. The result was a compromise, responding at least in part to the concerns of the different factions.[32]

Part 5 is found as §§ 30-3846 through 30-3852 of the Nebraska Uniform Trust Code. These are attached to this paper as Exhibit "B".

i. Section 30-3848(b) (UTC § 503). In § 30-3848(b) (UTC 503), if it's about support, a spendthrift trust can't be used to exclude Johnny's wife, ex-wife or children:

> "Even if a trust contains a spendthrift provision, a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance, or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary."

The language "or a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust" appears to me to apply to lawyers who have helped the beneficiary get something from the trust.

Note this section doesn't authorize the spouse or child claimant to compel a distribution from the trust, but rather authorizes the creditor to attach present or future distributions. However, § 30-3849 (UTC 504) authorizes the spouse or child claimant to compel that distribution *only to the extent the trustee has abused a discretion, or failed to comply with a standard for distribution*.[33]

Subsection (c) of § 30-3848 provides that a spendthrift trust is unenforceable against a claim of the state of Nebraska or the United States, "to the extent a statute of this state or federal law so provides." Query: Does this apply to a Medicaid claim against the beneficiary? Under most conditions, Health and Human Services Finance and Support has a claim

against the "recipient of medical assistance benefits", and that claim is held in abeyance until death. See § 68-1036.02.[34]

Is alimony covered? I would think so, since the verbiage covers a "former spouse who has a judgment or court order against the beneficiary for support or maintenance". The Official Comment says "support" and "maintenance" mean the same thing. Section 30-3849 allows a former spouse to order distributions from the trust "to satisfy a judgment . . . for the support or maintenance of the beneficiary's . . . former spouse."

ii. Section 30-3849 (UTC § 504). As outlined, § 30-3849 allows a beneficiary's child, spouse or former spouse to attach present or future distributions to that beneficiary, to pay for support obligations.

Now, under § 30-3849(c) (UTC 504), if the trustee has not "complied with a standard of distribution", or has "abused a discretion", that beneficiary's child, spouse or former spouse can get a court order to require a distribution from the trust to "satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse."

In addition, under § 30-3849(c), the Court . . .

> "shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion."

Query: The commentators say this last quote only applies to a judgment already rendered for support[35], but doesn't it also cover the situation found in the case of In re Sullivan's Will, 144 Neb. 36, 12 N.W.2d 148 (1943), where the spouse sued the trustee for payments, because she and the minor children were destitute?

Nebraska Case Law.

While Nebraska doesn't have a large number of cases on the point, the ones we had before the adoption of the Uniform Trust Code were significant:

i. <u>In re Sullivan's Will</u>, 144 Neb. 36, 12 N.W.2d 148 (1943). This is the beginning in a triumvirate of Nebraska cases, engaging in enough liturgical goombah to give an Excedrin salesman a headache.

John T. Sullivan's will created a trust for his son, Lawrence P. Sullivan, described by John T. as an "invalid", with the executors as the trustees for John T., containing one-fifth of the estate. At the time of trial, the value of the trust was $14,825.80.

The trust provided that the trustees were to . . .

> "apply the proceeds or income therefrom for the proper use, support and maintenance of said son, Lawrence P. Sullivan, as the same is received by them or as his needs may require or necessitate, and for that purpose may use and apply any part or portion of the principal of said trust estate from time to time as in their judgment may be required or necessary therefor, they being the sole judges of such necessity without applying to the courts for authority so to do, and I declare that said executors shall have full and uncontrolled discretion as to the application of said income and trust estate for the uses aforesaid." 12 N.W.2d at 149.

Upon Lawrence's death, the trust assets were to go to Lawrence's "heirs at law".

Lawrence's wife and children were in no better shape, with the wife being unable to support herself, and one of the children having a physical deformity, which required constant medical care and attention. The Supreme Court

agreed Lawrence was incapacitated, and there was "no possibility of his condition improving."

The wife sued the trustees, claiming they needed to provide "support and maintenance" for the wife and minor son. The district court entered a judgment against the trust for $50 a month in "support money", and the trustees appealed.

The Supreme Court said the trust could be used to pay money for Lawrence's wife and children:

> "We think the general rule is that a trust for the support and maintenance of a named beneficiary can be reached to satisfy the claim of a wife or minor child for support against such beneficiary. . . . This is so, even if the testamentary provision provides that the trustee is under a duty to support the named beneficiary and *the extent of its exercise is left to the judgment of the trustee*." 12 N.W.2d at 150 (emphasis added).

The Court then explained that when John T. said, "and I declare that said executors shall have full and uncontrolled discretion as to the application of said income and trust estate for the uses aforesaid", he eliminated the requirement that the trustees be "reasonable", but they still had to carry out the "purposes of the trust".

In other words, the Court <u>can</u> interfere . . .

> "if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust . . ." 12 N.W.2nd at 150 (quoting Restatement on Trusts).

Therefore, the lower court could have

intervened to see if the trustees were doing their duty under the trust:

> "We are of the opinion, therefore, that the trustees are required to act in respect to providing maintenance and support for plaintiff and her minor son in accordance with the provisions of the testamentary trust as construed herein. They cannot ignore testator's desire that 'they shall apply the proceeds or income therefrom for the proper use, support and maintenance of said son, Lawrence P. Sullivan,' by refusing his needy wife and son support from the trust fund created for his support. While it may be true that the judgment of the trustees, when exercised, is final and not subject to review by the courts under the wording of this particular trust arrangement, they are nevertheless required to act in respect to providing support for a wife and minor shown to be in need thereof." 12 N.W.2d at 150-51.

Using that standard, the lower court had screwed up when it ordered $50 per month support. When it did that, it was acting like a "substitute trustee". Instead, the district court should have ordered the trustees to carry out the terms of the trust and provide for the wife and minor children. If the trustees refused to do that, <u>then</u> the power of the court could be invoked:

> "In our opinion the district court erred in entering a judgment for support money in the amount of $50 a month to be paid from the trust fund. If the wife and minor son were in need of support as the court found, *the district court should have entered a decree pointing out the duties of the trustees under the will*

> *and directing that they proceed to act in accordance therewith*. If and when the trustees proceed to act as required by the trust provisions in the will and as directed by the court, whether their action meets the requirements of the will raises a question which is not now before the court." 12 N.W.2d at 151 (emphasis added).

In other words, because of the language in the trust, the Court can't set the amount, initially. Instead, the Court must compel the trustees to act as the Settlor "contemplated that they would act." Once the trustee acts, the Court can review the actions taken to see if they're in "accordance" with the settlor's intent. Presumably the Court could eventually set an amount the trustee must pay, if the trustee refuses.

The ruling in this case appears to me to be tempered by §§ 30-3847, 30-3848 and 30-3849 of the Nebraska Uniform Trust Code, which eliminate the distinction between discretionary and support trusts. Anything in the Sullivan decision that might be used by a creditor other than a spouse, ex-spouse or child, to claim the spendthrift trustee has abused his discretion in making a distribution would no longer apply because of § 30-3849:

> "Except as otherwise provided in subsection (c) of this section [relating to child, spouse or former spouse claims], whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if (1) the discretion is expressed in the form of a standard of distribution; or (2) the trustee has abused the discretion."

In addition, § 30-3847(b) (UTC 502) makes it clear a creditor will be unable to collect on a beneficiary's distribution prior to its receipt by the beneficiary:

> "A term of a trust providing that the interest of a beneficiary is held subject to a 'spendthrift trust', or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest."

This interpretation is restated under the Comments to UTC 502:

> Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made."[36]

ii. Smith v. Smith, 246 Neb. 193, 517 N.W.2d 394 (1994). In this case, Richard was the beneficiary and his parents had created a discretionary trust, authorizing the corporate trustee to distribute to Richard and his issue, "so much of the net income and principal of the trust" as the trustee deemed to be "in the best interests of each such person, from time to time." It then said the primary purpose was to provide for Richard's "health, support, care and maintenance", with Richard's issue being secondary.

Richard's ex-wife garnished the trustee, to pay a child support judgment of over $90,000.00. The Supreme Court refused to allow the ex-spouse to garnish the trust assets, but sent the case back to determine if the divorce contempt proceedings were truly detrimental to Richard's health. Depending on how that came out, the trustee had a duty to "consider the terms of the trusts and the circumstances of the beneficiaries", and then "make a good faith determination regarding payment of the arrearage." 246 Neb. at 201.

Most of this case appears to be superseded by §§ 30-3848 and 30-3849. Now, under § 30-3848, the ex-wife could get a court order "attaching present or future distributions to or for" Richard's benefit, because she has a judgment for support.

In addition, under § 30-3849, Richard's ex-wife could compel a distribution from the trust, but, *only to the extent the trustee has abused a discretion or failed to comply with a standard for distribution*.

iii. Doksansky v. Norwest Bank Nebraska, N.A., 260 Neb. 100, 615 N.W.2d 104 (2000). This is essentially a companion case to Smith v. Smith, 246 Neb. 193, 517 N.W.2d 394 (1994), involving the same people, only this time the ex-wife has re-married, the children are emancipated and the ex is trying to use a creditor's bill to attach future trust distributions to pay the child support judgment (now risen to $93,114). The trusts are worth about $600,000.00.

The ex-wife doesn't succeed here either, with the Supreme Court saying . . .

> "Richard would have no right to compel the co-trustees to distribute trust assets for the purpose of satisfying his child support arrearage even if he wished to do so. As noted above, the creditors rights with respect to property can be no greater than that of the debtor. Thus, because of the restricted purposes for which assets can be distributed to Richard under the discretionary support trusts, his beneficial interests therein do not constitute an interest in property which can be reached by an equitable assets creditor's bill in order to satisfy a judgment for child support arrearage where the children are emancipated." 260 Neb. at 107.

As in the Smith decision, the quoted language is now changed by §§ 30-3848 and 30-3849. Now, under § 30-3848, the ex-

wife could get a court order "attaching present or future distributions to or for" Richard's benefit, because she has a judgment for support, and under § 30-3849, to the extent the trustee has abused a discretion or failed to comply with a standard for distribution, she could compel a distribution from the trust.

In addition, the discussion of a "discretionary" trust or a "support" trust wouldn't normally be relevant in these facts, because § 30-3849 now eliminates the distinction between the two:

> "This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories."[37]

D. <u>Solutions</u>? It's hard to know what to do in the situation of parents who don't want to exclude a spendthrift, but also don't want the assets to help meet the spendthrift's support obligations to his ex-spouse or children.

1. <u>Generation-Skipping?</u> The parents could obviously skip the spendthrift completely (or give him a smaller share), with the balance of his share going directly to the grandchildren, if that's acceptable. An acceptable trustee could watch it for the grandchildren, as opposed to the ex-in-law, assuming there's no generation-skipping tax problems.

2. <u>Sprinkling?</u> Should you suggest your clients make the spendthrift trust one that "sprinkles" the assets amongst a class consisting of the child, and the child's children, allowing the trustee the discretion to decide who benefits best by distributions? This would eliminate the ex-spouse problem prevalent in the payment of child support, where claims are made the ex-spouse is not using the support for the children. See Exhibit "C" attached to this paper for a possible form. Be sure to determine for yourself how the new rules in §§ 30-3848 and 30-3849 of the Nebraska Uniform Trust Code would affect the language in such a form.

3. <u>Incentives?</u> Instead of making the trust distributions in the trustee's discretion,

would we change this decadent deadbeat son's habits by requiring him to reach certain goals before the money is paid? In other words, would an incentive trust be of use here? Traditionally these are trusts that require the beneficiaries to reach certain milestones before money is distributed:

> "In traditional trusts, beneficiaries receive money at a certain age, but in incentive trusts, heirs must reach milestones or take actions. For example, children might receive a $25,000 bonus when they graduate from college or marry. Or they might receive funds matching money they earn."[38]

4. Siblings get it?. If you gave Johnny's share to his siblings, could they be trusted to make sure Johnny gets it, even though they have no legal obligation to help him?

5. Automatic Termination? Could the trust validly say it automatically terminates if any of Johnny's creditorsp are entitled to receive trust assets, and then the trust assets would go to beneficiaries other than Johnny? Even if it worked, would it be wise?

> One such device is the inclusion of a provision terminating the beneficiary's interest if the beneficiary attempts to alienate it, becomes bankrupt, or if the beneficiary's creditors attempt to reach it. Although such provisions are valid--even in jurisdictions in which direct restraints on alienation of the beneficiary's interest are not--the obvious shortcoming of that approach is that although it protects the trust assets from the beneficiary's creditors and assignees, it prevents the former beneficiary from continuing to benefit from the trust.[39]

***

'Suffer the little children
to come unto me.' You might
know Jesus wasn't married.

Alan Bennett,
Getting On (1972)

VII. <u>Other Nebraska Cases</u>. Somewhat related Nebraska divorce cases having trust issues include the following:

<u>Theisen v. Theisen</u>, 14 Neb. App. 441, ___ N.W.2d ___ (Court of Appeals, January 31, 2006) (Child support of $15,000 per month paid by the Trustee of an irrevocable trust. Husband claimed child support should be reduced by a material change in circumstances. Court of Appeals agreed);

<u>Ainslie v. Ainslie</u>, 249 Neb. 656, 545 N.W.2d 90 (1996) (wife's trust funds were non-marital and not subject to division, but court considered her income from the trust when determining alimony);

<u>Gerard-Ley v. Ley</u>, 5 Neb. App. 229, 558 N.W.2d 63 (1996) (a family trust designed to provide Husband with income, while preserving the corpus of the trust for the parties' children. Trust language did not rebut presumption of gift which arose when the parties placed residence in joint tenancy. Case was partially "disapproved" by the Nebraska Supreme Court on other grounds, in the case of <u>Schuman v. Schuman</u>, 265 Neb. 459, 658 N.W.2d 30 (2003));

<u>Wells v. Wells</u>, 3 Neb.App. 117, 523 N.W.2d 711 (1994) (Wife invested her inheritance in parties' business which failed, and court denied Wife's request that a constructive trust be placed on Husband's future inheritance from two trusts set up by Husband's grandparents in which Husband was vested beneficiary);

<u>Parker v. Parker</u>, 1 Neb.App. 187, 492 N.W.2d 50 (1992) (trust account created under Uniform Gifts to Minors Act, and held by Wife as custodian of 26 year-old son, was not marital property; but accounts, CDs and money market certificates held by Wife as trustee for son and granddaughter were marital property, since Wife retained control);

<u>Taylor v. Taylor</u>, 222 Neb.721, 386 N.W.2d 851 (1986) (Wife beneficiary of trust created by her

first husband; trial court included undistributed interest income held by the testamentary trust in the marital estate, and Supreme Court said even if it were set aside as separate property, the division was not abuse of discretion);

Maricle v. Maricle, 221 Neb. 552, 378 N.W.2d 855 (1985) (personal injury settlement held in trust by conservator for Husband's benefit included in marital estate), overruled by Parde v. Parde, 258 Neb. 101, 602 N.W.2d 657 (1999) (compensation for an injury that ex-husband had or would receive for pain, suffering, disfigurement, disability, or loss of post-divorce earning capacity would not equitable be included in the marital estate);

Ford v. Ford, 219 Neb. 13, 360 N.W.2d 495 (1985) (court considered distributions to Husband from family trusts in determining alimony);

Caddy v. Caddy, 218 Neb. 582, 358 N.W.2d 184 (1984)(omission by Husband from financial statement of amount in employee trust and retirement funds was not fraudulent where Husband could not reach such funds without quitting, retiring, being fired or dying);

Kullbom v. Kullbom, 215 Neb. 148, 337 N.W.2d 731 (1983) (the amount Husband was ordered to pay to wife from his pension and profit-sharing trust as part of the property division was to accrue interest from the date of the dissolution decree);

Johnson v. Johnson, 209 Neb. 317, 307 N.W.2d 783 (1981) (Husband beneficiary of mineral trust established by his mother after death of his father; the Court did not give Husband any credit for his mineral interest, which generated $49,655 during the marriage, and considered the mineral interest valued at $10,000 as marital property for the purpose of valuing the marital estate, even though it directly resulted from the mineral trust created for Husband by his mother);

Witcig v. Witcig, 206 Neb. 307, 292 N.W.2d 788 (1980) (property and savings accounts held jointly by Husband and his minor child excluded from marital estate, but ordered to be held in trust for the benefit of the minor child);

Pfeiffer v. Pfeiffer, 203 Neb. 137, 277 N.W.2d 575 (1979) (court apparently considered wife's income as a life beneficiary of a testamentary trust for purposes of alimony, but did not

specifically mention trust in the property division);

Campbell v. Campbell, 202 Neb. 575, 276 N.W.2d 220 (1979) (proceeds from a trust included in the property division, but no information about the trust provided by the court);

Blome v. Blome, 201 Neb. 687, 271 N.W.2d 466 (1978) (stocks and bonds acquired from funds accumulated during the course of the marriage and held in joint tenancy by Husband and son were held in constructive trust for the Husband and Wife, and court directed son to make transfers in accordance with the decree);

O'Shea v. O'Shea, 191 Neb. 217, 214 N.W.2d 486 (1974) (divorced beneficiary of trust and the trustee agreed to have trust pay the beneficiary's child support payments, but trustee failed to properly distribute the payments; judgment against the trustee for $2,845.42);

Dodendorf v. Dodendorf, 186 Neb. 144, 181 N.W.2d 438 (1970) (court denied Husband alimony award from Wife's separate property which she had placed in a revocable trust for the benefit of their children);

Wade v. Wade, 183 Neb. 268, 159 N.W.2d 570 (1968) (employee trust account included in property division);

Coker v. Coker, 173 Neb. 361, 113 N.W.2d 329 (1962) (separation agreement providing for purchase of house for Wife and minor daughter with title in trust for daughter was, when approved by court and incorporated in divorce judgment, binding on parties; trustee was no more than nominal party to proceeding for sale of home purchased in accordance with the judgment);

Workman v. Workman, 164 Neb. 642, 83 N.W.2d 368 (1957) (Husband's property had been transferred to corporations and trusts and court considered corporate and trust property in awarding alimony);

Haussener v. Haussener, 147 Neb. 489, 23 N.W.2d 700 (1946) (in alimony determination, court considered income Wife received from trust funds established by estates of Wife's relatives).

***

But not always was Lawyer Gooch the

> keen, armed, wily belligerent, ready with his two-edged sword to lop off the shackles of Hymen. He had been known to build up instead of demolishing, to reunite instead of severing, to lead erring and foolish ones back into the fold instead of scattering the flock. Often had he by his eloquent and moving appeals sent husband and wife, weeping, back into each other's arms. Frequently he had coached childhood so successfully that, at the psychological moment (and at a given signal) the plaintive pipe of "Pap, won't you turn home adain to me and muvver?" had won the day and upheld the pillars of a tottering home.
>
> Unprejudiced persons admitted that Lawyer Gooch received as big fees from these reyoked clients as would have been paid him had the cases been contested in court. Prejudiced ones intimated that his fees were doubled, because the penitent couples always came back later for the divorce, anyhow.
>
> O. Henry, "The Hypotheses of Failure", in *Whirligigs* 37 (1910)

VIII. <u>Miscellaneous Trust Issues</u>. Some other possible uses of trusts in the divorce area include:

A. <u>Alimony Trusts</u>. Alimony and separate maintenance trusts may provide a way for a payor-spouse to retain control over the transferred property, and still meet obligations under a divorce decree. For example, stock in a closely-held business transferred to such a trust would enable the payor-spouse to avoid selling the stock, but still meet alimony or maintenance obligations and retain voting rights in the stock. <u>See</u> discussion in G. Bogert, <u>The Law of Trusts and Trustees</u>, §§ 234 (p. 62) and 270.10 (p. 116) (1992).[40]

B. <u>Charitable and Marital Deduction Trusts?</u>. The argument has been made that you can use a charitable trust to fund the duty to support:

> "In the right circumstances, combining a trust for

> charity with one to fund the support obligation can make sense and avoid capital gain on low basis assets. The transferor would get an immediate income tax deduction, subject to the applicable income limits, for the value of the remainder interest passing to charity, assuming the trust otherwise qualified as a charitable remainder trust under Section 664 and the regulations thereunder. . . .
>
> If a typical charitable remainder trust is created prior to the divorce of the parties, Section 2523(g) provides that where the spouse is the sole noncharitable beneficiary of such a charitable remainder trust other than the donor, the gift to the spouse qualified for the marital deduction. Of course, the spouses must be married at the time of the creation of the trust, but there do not appear to be any limitations on the use of this type of trust because it is structured in contemplation of divorce. Rev. Rule. 576-506, 1957-2 C.B. 65, sanctioned a similar arrangement."[41]

C. Custodial Trusts for Child Support. Child support is often a bone of contention if the payor-spouse claims the custodial parent doesn't use the money for the child's benefit. Some courts have expressly ordered the custodial parent (or a third party) to take title to the child support payments as a trustee.[42] However, what if the Court decree doesn't impose such a trust? Can the payor-spouse claim the custodial parent holds the child support payments in trust? There is a split in other jurisdictions, with some courts saying there is a trust.[43]

***

> "I've known for years our marriage has been a mockery. My body lying there night after night in the wasted moonlight. I know now how the Taj Mahal must feel."
>
> Alan Bennett, *Habeas Corpus* (1973)

IX. Conclusion.

Even though a "preferred family creditor" can reach the assets in a spendthrift trust under the new changes in the Nebraska Uniform Trust Code, that doesn't mean you should get rid of the spendthrift trust. It's still effective against almost all other creditors.

However, for the parents who are trying to protect their estates from Johnny's alimony creditor, the estate planner must pay close attention to the discretion given to a trustee:

A. Under § 30-3848, the ex-spouse with a support judgment can only attach "present or future distributions".

B. Under § 30-3849, that same ex-spouse can only compel distributions "to the extent a trustee has not complied with a standard of distribution or has abused a discretion". In the Smith decision, the Supreme Court outlined some of the discretions to consider:

> "Ordinarily, the trustee of a discretionary support trust should consider factors such as the degree of need experienced by the beneficiaries, the standard of living experienced by the beneficiaries at the time the trust was created, and the financial relations between the settlor and the beneficiaries prior to the formation of the trust."[44]

Would it be wise to include a special

paragraph, helping the trustee understand what *you* mean by "standards of distribution" and "abuse of discretion":

> Manipulation of trust language rewards the drafter and the client who are clever enough, or prescient enough, to be explicit in expressing the settlor's wishes. Many of the cases that have construed language of fairly broad spendthrift clauses as not barring claims for support and alimony leave the reader with the distinct impression that the court has done the precise opposite of what the settlor intended.[45]

***

No course of bad treatment on one side more than on the other.
Blame balanced as six and half a dozen.
Mutually mean.
He mean enough to seek divorce.
She mean enough to resist.
Parties too much alike ever to have been joined in marriage.
Also too much alike to be separated by divorce.
Having made their own bed must lie down in it.
Lying out of it, no standing in court.
Decree refused.

> Judge Henry A. Fuller, in the divorce case of Kmicz v. Kmicz, 50 Pa. C. 588, 588 (1921) (obviously before no-fault)

Exhibit "A"

1. UNIFORM PREMARITAL AGREEMENT ACT. The parties have entered into this Agreement pursuant to the terms of the Nebraska Uniform Premarital Agreement Act.

2. RIGHT OF PARTY UPON SEPARATION OR TERMINATION OF MARRIAGE. The parties agree that in the event of a separation or marital dissolution between the parties, each shall be entitled to retain all of his or her right, title and interest in and to the property, and

all income, whether from property or personal income, of any kind or nature brought into this marriage, together with any other assets retained by a party in his or her name alone or assets which were acquired through the consideration or efforts of a particular party, during the period of the marriage, and each party hereby waives, disclaims and renounces any and all interest of any nature whatsoever in such property and all income, present or future, of the other and this Agreement shall be binding upon the parties as to the division of the property and income described in this contract; and the parties further agree that each shall make no claim to the property or income of the other. In addition, neither party shall be entitled to spousal support from the other party in the event of such an action for separation or dissolution, including, but not limited to, any claim for alimony.

Exhibit "C"

DISCRETIONARY SPRINKLE PROVISION

In the event that Settlor's child, _____ shall survive the Settlor, the balance of the trust assets shall be administered by the Trustee as follows:

a. The trustee shall pay or apply so much of the net income and principal of this trust as, in its discretion, it may deem proper, in quarterly, annual or more frequent installments, to or among a class consisting of Settlor's child, _____, and those of _____'s children who survive the Settlor. Any such distributions shall be in such proportions and amounts as the successor Trustee shall determine in its absolute and uncontrolled discretion, provided, however, any such distributions shall be for the health, education, support or maintenance of the beneficiary for whom the distribution is made. Any income not so paid or applied shall be added to principal periodically, at least annually. Such distributions need not be equal amongst said beneficiaries.

b. Upon the death of Settlor's child, _____, the trustee shall distribute all property then belonging to the principal of the trust, including any accrued and undistributed

interest and income therein, in equal shares to the following persons, with a share by right of representation to the issue of a deceased named beneficiary, to-wit:

_____
_____
_____

c. Without in any way limiting the uncontrolled discretion of the trustee over distribution of income and principal from this trust, Settlor suggests to the Trustee:

(1) The trustee give consideration to the needs of _____, before the needs of _____.

(2) The trustee attempt to maintain for _____ the standard of living to which (he/she/they) (is/are) accustomed at the time of Settlor's death.

(3) The trustee consider the other sources of income and principal available to any beneficiary under the trust.

(4) In making such distributions, the Trustee may take into consideration any unusual circumstances of the beneficiaries, including any serious illnesses, college or post-graduate education.

(5) The trustee exercise its discretion in regard to said beneficiaries so as to give assistance to them to establish a home, invest in a business in which the beneficiary will materially participate in the management (which has a reasonable chance of success), establish a professional practice, provide for wedding expenses or to meet any other expenses related to support, health and education, so long as such payment will not so deplete the principal of the trust as to jeopardize the probable future needs of all beneficiaries.

For other articles:

<u>See</u> Chorney, "Interests in Trusts as Property in Dissolution of Marriage: Identification and Valuation", 40 <u>Real Property, Probate and Trust Journal</u> 1 (Spring 2005)

[1]While there are many areas a trust may be relevant to divorces, this paper is meant to have you tell me the ones I missed.

[2]473 N.E.2d 1084 (Mass. 1985). For a general discussion of this area, see Van Houten, "Divorce Negotiations Carry Substantial Estate Planning Implications", 14 Estate Planning 344 (Nov./Dec. 1987).

[3]Section 30-3847, R.R.S. 1943.

[4]Uniform Trust Code Comment to § 502 of the UTC. National Conference of Commissioners of Uniform State Laws.

[5]Uniform Trust Code Comment to § 103 of the UTC. National Conference of Commissioners of Uniform State Laws. Note that under § 30-3837(b) of the Trust Code, the beneficiaries of a noncharitable irrevocable trust may terminate it, upon the consent of all the beneficiaries if the court concludes the trust's continuance is not necessary to achieve "any material purpose" of the trust. Nebraska added subsection (c) to that section, saying a spendthrift provision is presumed to be a "material purpose" of the trust.

[6]Section 30-3847(b) of the Nebraska Uniform Trust Code.

[7]G. Bogert, The Law of Trusts and Trustees, § 225, p. 479 (1992) See also Restatement, Second, Trusts, § 152, Comments *c*, *d*, *e* and *f*.

[8]Section 30-3847(c) of the Nebraska Uniform Trust Code. There are exceptions to this general rule, most of which are discussed in various sections of this paper, and found in §§ 30-3846 to 30-3852 of the Nebraska Uniform Trust Code.

[9]G. Bogert, The Law of Trusts and Trustees, § 211, pp. 82-86 (1992) (Citations omitted).

[10]Section 30-2316 of the Nebraska Probate Code.

[11]Nebraska Uniform Premarital Agreement Act, §§ 42-1001 through 42-1011.

[12]G. Bogert, The Law of Trusts and Trustees, § 211, pp. 91-93 (1992) (Citations omitted).

[13]Section 2-202 of the Uniform Probate Code.

[14]256 Neb. 817, 594 N.W.2d 563 (1999).

[15]Section 30-3850 of the Nebraska Uniform Trust Code.

[16]Nebraska Comment (1) to § 30-3850, citing First National Bank of Omaha v. First Cadco Corporation, 189 Neb. 734, 205 N.W.2d 829 (1973), from "Sourcebook on The Nebraska Uniform Trust Code (Nov. 2003).

[17]G. Bogert, The Law of Trusts and Trustees, § 211, pp. 81-82 (1992) (citations omitted). See also Annot.,

"Validity of Inter Vivos Trust Established by One Spouse which Impairs the Other Spouse's Distributive Share or Other Statutory Rights in Property", 39 A.L.R.3d 14 (1971),

[18]Sections 36-701 through 36-712 ("Person means . . . trust, or any other legal or commercial entity." Section 36-702(9)).

[19]Any true examination of retirement plan benefits in divorces is beyond this paper, but good discussions of the area may be found in two articles, Alan H. Handel, "Handling Retirement Plan Benefits When a Couple Divorce", 18 Estate Planning 269 (Sept./Oct. 1991) and Donna G. Barwick, "Divorce: Right Up There with Death and Taxes--Estate Planning Techniques in the Context of Divorce", apparently unpublished but available on the American College of Trust and Estate Counsel website, www.actec.org.

[20]Section 42-366(8), R.R.S. 1943. For some examples of what happens to retirement plans in a divorce, see generally Hosack v. Hosack, 267 Neb. 934, 678 N.W.2d 746 (2004); Longo v. Longo, 266 Neb. 171, 663 N.W.2d 604 (2003) (military retirement); Tyma v. Tyma, 263 Neb. 873, 644 N.W.2d 139 (2002); McGuire v. McGuire, 11 Neb. App. 433, 652 N.W.2d 293 (2002); Brunges v. Brunges, 260 Neb. 660, 619 N.W.2d 456 (2000);

[21]One of the most cited works is Griswold, Spendthrift Trusts (1936).

[22]Nichols v. Eaton, 91 U.S. 716, 725 (1875) (dictum).

[23]"A Rationale for the Spendthrift Trust", 64 Columbia L. Rev. 1323, 1324 (1964). For other discussion on the use of trusts to avoid a beneficiary's creditors, see Kelley, Ludtke & Steinmeyer, 2 Estate Planning for Farmers and Ranchers, §21:21, at 21-21 (2002).

[24]"Notes and Legislation", 53 Harvard L. Rev. 296 (1939).

[25]"Notes and Legislation", 53 Harvard L. Rev. 299-300 (1939). Compare §§ 30-3846 through 30-3852 of the Nebraska Uniform Trust Code. See also G. Bogert, The Law of Trusts and Trustees, § 224, pp. 456-79 (1992), discussing "public policy" exceptions to spendthrift trusts.

[26]Official Comment to Uniform Trust Code § 502 (Sourcebook on The Nebraska Uniform Trust Code, Nov. 2003) (emphasis added).

[27]Loring, A Trustee's Handbook, § 5.3.3, at 179 (2005) (Updated by Prof. Charles E. Rounds, Jr.).

[28]Steve Flodman is a very good divorce lawyer in Lincoln, who, when asked about the topic of this paper, said the one thing that really drove him nuts were parents who gifted corporate stock to both the child and the

child's spouse.

[29]For an excellent general discussion of this area, see Gradwohl & Lyons, Constitutional and Other Issues in the Application of the Nebraska Uniform Trust Code to Preexisting Trusts, 82 Univ. Neb. L. Rev. 312, 343 (2003).

[30]Nebraska Comment to Uniform Trust Code § 501, Sourcebook on The Nebraska Uniform Trust Code, at 159 (November 2003).

[31]See, e.g., In re Sullivan's Will, 144 Neb. 36, 12 N.W.2d 148 (1943); Smith v. Smith, 246 Neb. 193, 517 N.W.2d 394 (1994) and Doksansky v. Norwest Bank Nebraska, N.A., 260 Neb. 100, 615 N.W.2d 104 (2000). Cf. First National Bank of Omaha v. First Cadco Corporation, 189 Neb. 734, 205 N.W.2d 829 (1973).

[32]Professor David M. English, "Is There a Uniform Trust Act in Your Future?", Prob. & Prop., at 25, 30 (Jan.-Feb. 2000)

[33]See the discussion of §§ 503 and 504 under the Comments of the National Conference of Commissioners of Uniform State Laws, found in Sourcebook on The Nebraska Uniform Trust Code (November 2003), at 164-69.

[34]The argument against the claim that a Medicaid creditor is excepted can be found in the fact that the drafters of the Uniform Trust Code refused to put in § 503 (Nebraska § 30-3848) an exception for those who have furnished "necessary services or supplies" to the beneficiary--an exception that is found in the Restatement (Second) of Trusts at § 157. For a fuller discussion of this argument, see Newman, "The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise", 771, 791 (2002) and the Official Comment to UTC § 503 (found in Sourcebook on The Nebraska Uniform Trust Code at 165 (November 2003).

[35]"Subsection (c) creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance." Comment on UTC 504(c) by the National Conference of Commissioners of Uniform State Laws, reprinted in Sourcebook on The Nebraska Uniform Trust Code, at 169 (November 2003).

[36]Reprinted in Sourcebook on The Nebraska Uniform Trust Code at 161 (November 2003).

[37]This is from the Official Comment to § 504, of the National Conference of Commissioners of Uniform State Laws, citing Restatement (Third) of Trusts § 60 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). Sourcebook on The Nebraska Uniform Trust Code, at 169 (November 2003).

[38]"In Some Trusts, the Heirs Must Work for the Money", The New York Times, Business Section, p. 6 (January 29, 2006). Such trusts are often criticized as being attempts by the dead to control the living. See discussion in "Planning and Drafting for the Use of Incentive Trusts", by P. Daniel Donohue. Examples of such trusts may be found in "What They Don't Teach You in Form Books", by Jon J. Gallo and Anne K. Hilker.

[39]Newman, "The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise", 69 Tenn. L. Rev. 771, 773 (2002).

[40]If you're helping someone who has divorce as a problem--
either for themselves or a child--there is such a thing as a "Certified Divorce Financial Analyst". See the website of the Institute for Divorce Financial Analysts at www.institutedfa.com.

[41]Donna G. Barwick, "Divorce: Right Up There with Death and Taxes--Estate Planning Techniques in the Context of Divorce", apparently unpublished but available on the American College of Trust and Estate Counsel website, www.actec.org.

[42]See, e.g., Miller v. Miller, 29 Ore. App. 723, 732, 565 P.2d 382, 387 (1977) (Johnson, J., specially concurring).

[43]See, e.g., Henady, 165 B.R. 887, 892 (1994) (Indiana); Dept. Of Health and Rebanilitative Services v. Holland, 602 So.2d 652 (Fla. Dist. Ct. App. 1992); Cumberland v. Cumberland, 564 So. 2d 839, 847 (Miss. 1990); Ditmar v. Ditmar, 293 P.2d 759 (Wash. 1956). For a general discussion of the question, see Loring, A Trustee's Handbook, § 8.29, at p. 629 (2005) (Updated by Prof. Charles E. Rounds, Jr.).

[44]Smith v. Smith, 246 Neb. 193, 199, 517 N.W.2d 394 (1994), citing Abravanel, "Discretionary Support Trusts", 68 Ia. L. Rev. 273 (1983).

[45]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, 723 (1994).