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Alan Newman

University of Akron School of Law, newman2@uakron.edu

Richard E. Davis

Krugliak, Wilkins, Griffiths & Dougherty, rdavis@kwgd.com

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Codify -- Not Modify

Creditor Remedies and the Ohio Uniform Trust Code

Richard E. Davis
Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A.

Alan Newman
The University of Akron School of Law

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In a number of states that have considered the Uniform Trust Code ("UTC"), Article 5, "Creditor's Claims; Spendthrift And Discretionary Trusts," has become a flash point of controversy.¹ The prefatory note to the UTC states that much of the UTC is a codification of the common law of trusts, but that it also introduces a number of innovative provisions. UTC critics, on the one hand, claim that more than a hundred years of common law have been tossed aside, giving creditors greatly expanded abilities to reach through once impenetrable barriers that previously protected trust beneficiaries, while supporters, on the other hand, assert that the innovative approach of the Code actually strengthens the rights of beneficiaries in a number of important areas. Much of this rhetoric actually has little application to the Ohio Uniform Trust Code ("OUTC"), as a concerted effort has been made to codify existing Ohio law in the area of creditor remedies, stripping away or modifying those provisions of the UTC that are at odds with our current law. This article will discuss remedies that creditors of trust beneficiaries currently have in Ohio, remedies that creditors would have under the "pure" UTC, and changes that Ohio's Joint Committee² has made to the UTC in the second draft of the proposed OUTC.

Background

As work on the OUTC has moved steadily along,³ a number of practitioners from Ohio and elsewhere have expressed concerns about the expansion of creditor remedies under the UTC. In order to address these concerns, on behalf of the Joint Committee the authors conducted a comprehensive study of creditor remedies under current Ohio law and suggested to the Joint Committee possible changes for it to consider that would help make the OUTC a codification of Ohio's existing law on this important subject. At its July, 2004 meeting, the Joint Committee made many substantive changes to the first draft of OUTC Chapter 5805 to help achieve that goal.

Discretionary and Support Trusts

The common law and Restatement of Trusts (Second) treat discretionary trusts and support trusts differently.⁴ The rights of beneficiaries of pure discretionary trusts arguably are sufficiently nebulous to fall short of being judicially recognized as constituting property interests for creditors' rights purposes.⁵ A beneficiary's entitlement to distributions under a support trust, on the other hand, is determinable enough to give the beneficiary the right to compel distributions pursuant to the applicable standard. In point of fact, however, almost all trusts are neither pure discretionary trusts nor pure support trusts, but instead have aspects of both. It was the recognition of this reality that caused the drafters of the UTC to follow the lead of Restatement of Trusts (Third) and remove the distinction between discretionary and support trusts.⁶ Critics have made much of the proposed elimination of the dichotomy between discretionary trusts and support trusts. The practical consequences of doing so, however, are quite limited for discretionary trusts that also have a spendthrift provision,⁷ because most creditors of a beneficiary may not reach the beneficiary's interest or trust assets (prior to their receipt by the beneficiary in a distribution from the trustee) regardless of whether the trust formerly would have been characterized as a discretionary trust or a support trust.⁸

Because most trusts have some type of distribution standard (e.g. health, education, maintenance, support, comfort), pure discretionary trusts, which generally have no standard, are not commonly used by practitioners and are rarely found in Ohio case law. Nevertheless, when a pure discretionary trust is used, Ohio case law suggests that no creditor, including a child support claimant, can reach the interest of the beneficiary.⁹ UTC §501, however, removes this protection by providing broad remedies to all creditors of beneficiaries of trusts, including pure discretionary trusts, if the instrument does not include a spendthrift provision, or if the creditor has a claim that is excepted from the protection the spendthrift provision provides. Because UTC §503 provides for exceptions to the effectiveness of spendthrift provisions, and because of the possibility of a pure discretionary trust not including a spendthrift provision, the loss of the protection that the common law afforded pure discretionary trusts is a serious concern.¹⁰

Ohio's Proposed "Wholly Discretionary Trust" and the Judicial Standard of Review of the Trustee's Exercise of Discretion

The protection afforded beneficiaries of common law pure discretionary trusts was deemed by the Joint Committee to be significant. In keeping with its goal of codifying, but not changing, Ohio's trust law in the area of creditor remedies, the Joint Committee has proposed the creation of a statutory safe harbor pure discretionary trust. In the second draft of the OUTC, this trust is referred to as a "wholly discretionary trust" ("WDT"), which §5801.03(24) defines as:

- (i) an irrevocable trust (ii) from which distributions of income or principal may be made to or for the benefit of the beneficiary only at the trustee's discretion, (iii)

from which the beneficiary does not have a power of withdrawal, (iv) the terms of which use "sole," "absolute," "uncontrolled," or language of similar import to describe the trustee's discretion to make distributions to or for the benefit of the beneficiary, (v) the terms of which do not provide any standards to guide the trustee in exercising its discretion to make distributions to or for the benefit of the beneficiary, (vi) of which the beneficiary is not the settlor, the trustee, or a cotrustee, and (vii) with respect to which the beneficiary does not have the power to become the trustee or a cotrustee. A trust may be a wholly discretionary trust with respect to one or more but less than all beneficiaries. If a beneficiary has a power of withdrawal, the trust may not be a wholly discretionary trust with respect to that beneficiary during the period the power may be exercised, but it may be a wholly discretionary trust with respect to that beneficiary during periods in which the beneficiary does not have a power of withdrawal. If the beneficiary and one or more others have made contributions to the trust, the portion of the trust attributable to the beneficiary's contributions may not be a wholly discretionary trust with respect to that beneficiary, but the portion of the trust attributable to the contributions of others may be. If a beneficiary has a power of withdrawal, then upon the lapse, release, or waiver of the power, the holder is treated as having made contributions to the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on the effective date of this Code, or as later amended. Notwithstanding (vi) and (vii), a trust may be a wholly discretionary trust if the beneficiary is, or has the power to become, a trustee only with respect to the management or the investment of the trust assets, and not with respect to making discretionary distribution decisions.

UTC §814(a) provides that a trustee must exercise a discretionary power "in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries," regardless of whether the trust instrument describes the trustee's discretion as, for example, "absolute," "sole," or "uncontrolled." Because the OUTC provides for two kinds of discretionary trusts – WDTs and discretionary trusts that do not meet the requirements of a WDT, such as one providing for the beneficiary's support – §5808.14(A) provides separate standards of review for each:

The judicial standard of review for discretionary trusts other than wholly discretionary trusts is that the trustee shall exercise a discretionary power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. The greater the grant of discretion by the settlor to the trustee, the broader the range of permissible conduct by the trustee in exercising it. The judicial standard of review for wholly discretionary trusts is that a reasonableness standard shall not be applied, and a court will only review the trustee's discretion if the trustee (i) acts with an improper motive; (ii) acts dishonestly; (iii) fails to act; or (iv) acts in bad faith.

An objective of the lower standard of review for WDTs is to protect, to the maximum extent possible, the trustee from attempts by the beneficiary to compel distributions, and to preclude a creditor of the beneficiary from arguing that it can reach the beneficiary's interest, because the beneficiary could do so. The standard of review for WDTs does not explicitly require the trustee to exercise good faith. Arguably, however, a good faith standard is no different from one that prohibits the trustee conduct described in (i) through (iv), above, and Ohio case law requires the trustee to act in good faith without regard to the trustee's discretion being described as, for example, "absolute and uncontrolled."¹¹ Even if that is the case, however, it does not make the second standard applicable only to WDTs unnecessary, because the WDT standard provides that WDTs are not subject to a reasonableness standard. Assuming that an action taken by a trustee could be found to be unreasonable yet still made in good faith, the addition of a reasonableness standard would be significant. At least some cases from other jurisdictions have found the absence of a reasonableness standard critical in shielding pure discretionary trusts from creditor attack.¹²

While the proposed statutory definition and judicial standard of review may be sufficient to give WDTs the complete creditor protection they enjoyed under the common law, the OUTC has added a new section, §5805.03, to make absolutely clear the lack of creditor remedies:

No creditor or assignee of a beneficiary of a wholly discretionary trust may reach the beneficiary's interest in the trust whether by attachment of present or future distributions to or for the benefit of the beneficiary, by judicial sale, by obtaining an order compelling the trustee to make distributions from the trust, or by any other means, regardless of whether the trust instrument includes a spendthrift provision.

While the scope of the WDT may be narrower than the common law concept of the pure discretionary trust in that no distribution standard of any type may be used,¹³ the common law pure discretionary trust in Ohio has no clearly defined parameters, so a statutory safe harbor that sets forth with specificity the requirements should make up for its arguably more limited scope.

Creditor Remedies Under UTC §501

The basis for most creditor remedies under the UTC is found in §501. That section provides:

To the extent a beneficiary's interest is not protected by a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

The OUTC has moved UTC §501, in slightly modified form, to §5805.05, which addresses the rights of creditors of beneficiaries of mandatory distribution trusts in the absence of spendthrift protection. If UTC §501 were not limited to mandatory distribution trusts in the OUTC, it would have left discretionary trusts that are not WDTs (and not protected by a spendthrift provision) totally exposed to the remedies it lists. The inclusion of UTC §501 in the OUTC with respect to discretionary trusts that are not WDTs would have resulted in a significant expansion of creditor remedies in at least the following two areas:

- The Attachment Of Discretionary Distributions.¹⁴ Under current Ohio law, generally a creditor may not attach a beneficiary's discretionary interest unless (i) the trust was one under which the trustee was granted discretion to provide for the beneficiary's support (referred to in Ohio as an "equivocal trust"),¹⁵ and (ii) the creditor's claim was based on having provided support to the beneficiary.¹⁶ If those two requirements are met, under *Kreitzer*¹⁷ the state of Ohio as creditor may not only attach distributions the trustee decides to make, but may also compel distributions to the creditor. Similarly, under *Matthews v. Matthews*,¹⁸ a child support claimant of a beneficiary of a discretionary support trust may be able to reach the trust assets. Furthermore, dictum in *Martin v. Martin*¹⁹ suggests that other support creditors of a beneficiary of a discretionary support trust may reach the trust assets. But in a situation not covered by *Kreitzer*, *Matthews* or, possibly, *Martin*, the trustee may make discretionary distributions, and the creditor would have to try to collect from the beneficiary. The result, therefore, appears to be that in such situations, under current Ohio law, discretionary trusts without spendthrift clauses receive comparable protection to spendthrift trusts.
- The Attachment Of Distributions Made For the Benefit of the Beneficiary. By its express terms, UTC §501 also permits the attachment of distributions made "on behalf of" beneficiaries from trusts that are not protected by spendthrift provisions. Under current Ohio law, if the trustee of a discretionary trust (in a non-*Kreitzer*, non-*Matthews*, and, possibly, non-*Martin* situation) decided to make the distribution to a third party for the beneficiary's benefit instead of directly to the beneficiary, presumably the creditor would be unable to reach the distribution. The limitation of UTC §501 in the OUTC to mandatory distribution trusts should maintain current law regarding the inability of creditors to attach distributions made from third party special needs trusts for the benefit of the disabled beneficiary.

Some practitioners are concerned that the inclusion of the words "or other means" in UTC §501's listing of creditor remedies (when spendthrift protection is not present) will open the door to judicial sales of beneficiaries' interests. While the "or other means" language of UTC §501 would allow the judicial sale of a beneficiary's interest, it would seem very unlikely that a court would ever order the sale of a discretionary interest. In that regard, it has been the experience of Ohio practitioners that this is a remedy that is not used by creditors. To avoid the possibility of a judicial sale of a discretionary interest, however, OUTC §5805.04(C) specifically denies this remedy for discretionary

trusts that are not WDTs, even in the absence of spendthrift protection. (As discussed above, beneficiaries' creditors may not reach their interests in WDTs by any means, including judicial sales.)

For mandatory distribution trusts that are not protected by a spendthrift provision, the "or other means" language of §5805.05(A) would allow a judicial sale of a beneficiary's interest. That division, however, also provides two limitations on such a remedy. First, with respect to any creditor's award against a beneficiary's interest in a mandatory distribution trust, "[t]he court may limit an award under this section to such relief as is appropriate under the circumstances, considering among other factors determined appropriate by the court, if any, the support needs of the beneficiary, the beneficiary's spouse, and the beneficiary's dependent children." Second, "[i]f in exercising its power under this section the court decides to order either a sale of a beneficiary's interest or that a lien be placed on the interest, in deciding between the two, the court shall consider (among other factors it deems relevant, if any) the amount of the claim of the creditor or assignee and the proceeds a sale would produce relative to the potential value of the interest to the beneficiary."

UTC critics also have expressed concerns about the possible judicial sale of beneficiaries' remainder interests. Absent spendthrift protection, the general rule is that a beneficiary's interest in a trust, whether a current or future interest, is a property interest that the beneficiary may alienate and that his or her creditors may reach.²⁰ In Ohio, the alienability of remainders has been codified in R. C. §2131.04, which states, "[r]emainders, whether vested or contingent, executory interests, and other expectant estates are descendible, devisable and alienable in the same manner as estates in possession." The alienability of remainders also has been recognized in Ohio case law. In *O'Connor v. O'Connor*,²¹ for example, the settlor created a trust for his surviving spouse for her lifetime, remainder to his son. After the settlor's death, and while the settlor's surviving spouse was still living, the son and his wife divorced. Asserting claims for alimony and child support, the son's wife attempted to reach the son's future interest in the trust. The court, citing RC §2131.04, allowed her to attach the son's interest, even though it was a remainder that would not become a current interest until his mother's death.

Creditors' Ability to Compel Distributions

UTC §504 specifically bars most creditors from being able to compel distributions from trusts that are subject to the trustee's discretion, even if the discretion is expressed in the form of a standard of distribution or if the trustee has abused its discretion.²² The classes of creditors not barred by this provision are limited to three: (i) children for whom an order or judgment for child support has been entered, (ii) the beneficiary's current spouse who has a judgment or court order for support or maintenance, and (iii) any former spouse of the beneficiary who has a judgment or court order for support or maintenance.²³ These creditors may compel distributions from trusts,

regardless of whether the trust instruments include a spendthrift provision, if the trustee has not complied with a standard of distribution or has abused a discretion.

This provision would make new law in Ohio in several respects. First, in *Matthews v. Matthews*,²⁴ the court held that a child support claimant could reach the beneficiary's interest in a discretionary *support* trust. A key component of that decision appears to be the court's finding that the trust did not specifically exclude the beneficiary's child for whom support was being sought from benefiting from the trust. We have not found an Ohio case addressing the ability of a child support claimant to reach the beneficiary's interest in a discretionary trust that either did not provide for the beneficiary/parent's support, or that explicitly excluded the beneficiary's children from benefiting from the trust. Second, in *Martin v. Martin*,²⁵ the Supreme Court rejected a former spouse's attempt to reach a beneficiary's interest in a discretionary support trust to enforce an alimony claim. Third, as discussed above, in *Kreitzer* the Supreme Court allowed the state to compel distributions from a discretionary support trust to reimburse it for the cost of institutionalized care it had provided the destitute beneficiary, and in *Martin*, the Court in dictum suggested that *Kreitzer* might be applicable to other creditors as well.

In order to make UTC §504 more closely track Ohio law, the ability to compel a distribution has been limited in §5805.04 to children and current spouses, and this remedy will not be applicable to (a) trusts in which the grantor has explicitly provided that the child or spouse is to be excluded as a beneficiary,²⁶ or (b) WDTs. The question of whether, and if so to what extent, *Kreitzer* applies to creditors other than the state has not been addressed in the OUTC, and thus will be decided, if and when raised, by the courts.²⁷

Spendthrift: Protection and Exceptions

The effect of a spendthrift provision under the OUTC is set forth in §5805.01(C): “A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision, and, except as otherwise provided in this Chapter, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.” While that part of §5805.01(C) is taken from the UTC, §5805.01(C) also includes additional language that is not included in the UTC making it clear that real property or tangible personal property owned by a trust, but properly made available for use by the beneficiary under the terms of the trust, will not be treated as having been distributed to the beneficiary for creditors' rights purposes.

UTC §503 provides that spendthrift provisions are unenforceable against three types of creditors:

- 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.

OUTC 5805.02 has limited the scope of that section by recognizing only the first and third type of exception creditors and by permitting only current spouses, not former spouses, from being able to attach distributions. The first OUTC spendthrift exception, for the support claims of a child or spouse of the beneficiary, is consistent with Ohio law.²⁸ Similarly, under *Martin v. Martin*,²⁹ removing alimony claims of former spouses from the list is also consistent with Ohio law.

UTC critics are concerned that permitting an exception for judgment creditors who have provided services for the protection of a beneficiary's interest would result in more litigation by disgruntled beneficiaries against trustees over the administration of trusts, as this exception could be construed as permitting the beneficiary's legal counsel to attach the beneficiary's interest, regardless of the outcome or the merit of the lawsuit. It was for this reason as well as the lack of Ohio authority recognizing this class of exception creditor that the Joint Committee did not include this type of judgment creditor in OUTC §5805.02.³⁰

With respect to the spendthrift exception for certain governmental claims, if federal law gives the United States access to a spendthrift trust beneficiary's interest (as it does, for example, with respect to federal income tax liabilities), federal preemption would require that the federal law prevail over any attempt by the state to stop such claims. Similarly, inherent in the state's legislative power is the ability to enact legislation enabling it, as a creditor, to overcome spendthrift provisions.

The UTC does not include an express statement that the only spendthrift exceptions are those set forth in §503. UTC critics are concerned that silence on that point might be answered by Restatement of Trusts (Third), in which comment a to §59 provides that "special circumstances or evolving policy may justify recognition of other exceptions. . ." While such an argument presumably would be unsuccessful because UTC §502(c) provides that creditors may not reach the beneficiary's interest in a spendthrift trust "except as otherwise provided in this [article]," to avoid any question of a judicial expansion of the list of spendthrift exception creditors on public policy grounds, the OUTC includes a new division (D) to §5805.02, which provides that the only exceptions to the effectiveness of a spendthrift provision are those listed in that section.

Mandatory Distributions

Generally, the effect of a spendthrift provision is to preclude a beneficiary's creditor from reaching trust assets prior to their receipt by the beneficiary. To address the possibility of a trustee not making mandatory distributions to a beneficiary that his or her creditor could then reach, OUTC §5805.05(B), like UTC §506, allows a beneficiary's creditor to reach a "mandatory distribution," notwithstanding the existence of a spendthrift provision, if the trustee has not made it "within a reasonable time after the designated distribution date."

While the UTC does not define "mandatory distribution," the OUTC does. Under §5801.03(12), "'mandatory distribution' means a distribution of income or principal, including a distribution upon termination of the trust, that the trustee is required to make to a beneficiary under the terms of the trust. Mandatory distributions do not include distributions subject to the exercise of the trustee's discretion regardless of whether the terms of the trust (i) include a support or other standard to guide the trustee in making distribution decisions or (ii) provide that the trustee "may" or "shall" make discretionary distributions, including distributions pursuant to a support or other standard."

More generally, as discussed above, if spendthrift protection is not available, under §5805.05(A) creditors of a beneficiary may "attach present or future mandatory distributions to or for the benefit of the beneficiary, or...reach the beneficiary's interest by other means." However, also as discussed above, even if mandatory distributions are due to the beneficiary and there is no spendthrift provision, or the creditor is an exception creditor, §5805.05(A) authorizes the court to "limit an award under this section to such relief as is appropriate under the circumstances, considering among other factors determined appropriate by the court, if any, the support needs of the beneficiary, the beneficiary's spouse, and the beneficiary's dependent children."

Access of Decedent's Creditors to Revocable Trust Assets

UTC §505(a)(3) allows a decedent's creditors to reach assets in the decedent's revocable trust to the extent the probate estate is inadequate. In such a case, administrative costs, funeral expenses, and statutory allowances also may be satisfied out of the revocable trust. While this may be consistent with the law of most states, it would represent a significant change in Ohio. Under *Schofield v. Cleveland Trust Co.*,³¹ a creditor of a settlor of a revocable trust may not reach the trust's assets after the settlor's death. While the first draft of the OUTC included a modified version of UTC §505(a)(3), the Joint Committee, in furtherance of its mission of codifying, not modifying, Ohio law in the area of creditor remedies, subsequently decided that the OUTC should not address the *Schofield* issue one way or the other. Accordingly, UTC §505(a)(3) has been omitted from the OUTC.

Trusts Terminate if Against Public Policy

Under UTC §410(a), a trust terminates if its purposes become contrary to public policy. This is a significant concern. In *Young v. Ohio Department of Human Services*,³² Justice Stratton, in dissent, wrote that special needs trusts violate public policy. The inclusion of this provision in the OUTC is of particular concern to practitioners who draft special needs trusts.

Perhaps part of the rationale for this provision in the UTC is that with the elimination of the rule against perpetuities and the advent of perpetual dynasty trusts, it is thought necessary for courts to have the ability to terminate trusts that are deemed to offend then existing public policy. We are not aware of any Ohio cases, however, in which the court has terminated a trust because its purposes were deemed to have become, subsequent to the trust's creation, contrary to public policy.³³ In another effort not to change existing Ohio law, the Joint Committee decided to eliminate the statutory authority for the judicial termination of trusts on the basis that a judge decides that the purpose of the trust has become against public policy. While the statutory power has been removed from the OUTC, no affirmative statement is made that courts lack this power, thereby leaving Ohio law wherever it may currently be on this issue.

Rights of Holders of Presently Exercisable Powers of Appointment

OUTC §5805.06(B)(1), like UTC 505(b)(1), treats the holder of a power of withdrawal (e.g., a Crummey power holder) as the settlor of a revocable trust, thus making the property subject to the power subject to the claims of his or her creditors.³⁴ That is the case, however, only during the period the power may be exercised. To accommodate the use of Crummey trusts, division (B)(2) also provides that if the power is not exercised, the holder continues to be treated as a settlor of a revocable trust only to the extent the value of the property subject to the power exceeds the greater of the annual exclusion or the 5 x 5 amount. Thus, if a beneficiary has a 30-day right to withdraw \$11,000 from a trust, the beneficiary will be treated as the settlor of the trust for creditors' rights purposes only to the extent of the \$11,000 and only during the 30-day withdrawal period. (As to the latter, the comment to UTC §505 provides that the creditor "would have to take action prior to the expiration of the 30-day period.")

The basis for the rules of the preceding paragraph apparently is the UTC's assumption that in the enacting jurisdiction, property subject to an unexercised, but presently exercisable, general power of appointment is subject to the claims of the power holder's creditors. (The rationale for that rule, as set forth in the comment to UTC §505, is that such a power is functionally equivalent to a power to revoke a revocable trust.) While that is the law by statute in some states³⁵ (and under federal bankruptcy law),³⁶ at common law it was not, because a "power" over property was not treated as an "interest" in property.³⁷ However, the common law rule in most states was that if a general power is exercised, in favor of the power holder or a third party, the power holder's creditors could reach the property subject to the exercise.³⁸ In Ohio, however, two cases from the 1800s³⁹ held that property subject to an exercised general power is not subject to the

claims of creditors of the power holder. Thus, if those cases remain good law, property subject to a presently exercisable general power apparently may not be reached by the power holder's creditors in Ohio whether the power is exercised or not. Because it appears doubtful that an Ohio court would follow those old cases, however, the OUTC follows the UTC's rules on treating the holder of a presently exercisable general power as the settlor of a revocable trust (but only with respect to the property subject to the power) for creditors' rights purposes during the period in which the power may be exercised.

Summary Table

The following table summarizes the types of creditor remedies that are available under the OUTC against beneficial interests in basically three different types of trusts: (1) the new statutory wholly discretionary trust, (2) trusts that have spendthrift provisions, showing remedies for trusts that (a) provide for "mandatory" distributions as defined in the OUTC, (b) are discretionary trusts that are not wholly discretionary trusts, that have a distribution standard other than one that references the beneficiary's support, and (c) are discretionary trusts that do have a support standard, and (3) trusts that do not have spendthrift provisions, broken down into the three subcategories, (a) those that provide for mandatory distributions, (b) discretionary trusts that have a distribution standard that is not determined by reference to the beneficiary's support, and (c) discretionary trusts that do have a support standard. The answers are often not as simple as "YES" or "NO." In several cases a complete answer requires explanation, and in a small number of instances the answer will be found in Ohio case law rather than in the OUTC. Nevertheless, it is hoped that this table will offer a quick overview of creditor remedies under the second draft of the OUTC.

¹ Proposed Revised Code Chapter 5805 is the OUTC counterpart of UTC Article 5.

² The Joint Committee consists of members of the Ohio Bankers League Legal, Legislative and Regulatory Committee and the Ohio State Bar Association's Estate Planning, Trust and Probate Law Section. The Ohio Association of Probate Judges is also participating in preparation and review of the proposed OUTC.

³ The OUTC has previously been discussed in the *Probate Law Journal of Ohio*. See Newman, "The Ohio Uniform Trust Code Takes Shape," 14 PLJO 72 (March/April 2004); English, "The Uniform Trust Code (2000) and Its Application to Ohio," 12 PLJO 1 (Sept./Oct. 2001); and Locke, et. al., "Uniform Trust Code," 11 PLJO 49 (Mar./Apr. 2001).

⁴ Sections 154 and 155 of the Restatement (Second) distinguish between discretionary trusts, which provide no standards for the exercise of the trustee's discretion, and support trusts, which require the trustee to use the income and principal of the trust only for the beneficiary's support.

⁵ The classic definition of a trust includes the bifurcation of title of trust property between the trustee, who holds legal title, and the beneficiary, who holds equitable title, to the trust assets. Further, trust beneficiaries clearly have interests that they may protect from, for example, breach of duty by the trustee. Still, for creditors' rights purposes, courts have held that beneficiaries of discretionary trusts have a "mere expectancy" in undistributed trust assets until the trustee exercises its discretion to make a distribution. See, e.g., *United States v. O'Shaughnessy*, 517 N.W.2d 574 (Minn. 1994).

⁶ See Comment to UTC §504, which states: "This section, similar to the Restatement [of Trusts (Third)], eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting

within either of the former categories." The UTC, including its Comments, can be found on the NCCUSL web site at www.nccusl.org, under tabs "Trust Code" and then "Final Act."

⁷ Under the OUTC, a "spendthrift provision" is simply one that "restrains both voluntary and involuntary transfer of a beneficiary's interest." OUTC §5801.03(19). Because spendthrift trusts were not valid in Ohio until relatively recently (*Scott v. Bank One Trust Co., N.A.*, 62 Ohio St.3d 39, 577 N.E.2d 1077, 1081 (Ohio 1991)), Ohio practitioners frequently included provisions in trust instruments that converted the trust to a discretionary trust if a creditor attempted to reach the beneficiary's interest. Such a conversion feature, however, is not part of a spendthrift provision, as defined in the OUTC.

⁸ OUTC §5805.01(C).

⁹ *Domo v. McCarthy*, 66 Ohio St.3d 312, 612 N.E.2d 706, 710 (Ohio 1993); *Scott v. Bank One*, supra. (In *Matthews v. Matthews*, 50 Ohio App3d 140, 450 N.E.2d 278 (Ohio App. 1981), the court allowed a child support claim against the interest of a beneficiary of a discretionary support trust. In explicitly noting that the trust was not a purely discretionary trust, the court arguably indicated that had it been a purely discretionary trust, even a child support claimant would not have been able to reach the beneficiary's interest in the trust.)

¹⁰ As explained below, under the OUTC, the creditors whose claims are not barred by a spendthrift provision consist of (a) the federal government and the state of Ohio, to the extent that federal law or a statute of the Revised Code provides that spendthrift provisions do not constitute a bar to their claims, (b) current spouses or children with support claims, (c) all creditors of beneficiaries to whom the trustee was required to make, but did not make, mandatory distributions within a reasonable time of their due date, and (d) all other creditors of trusts that do not include a spendthrift provision.

¹¹ See, e.g., *Bushong v. Castle*, 1998 WL 767453 (Ohio App. 10 Dist.). In *Estate of Winograd*, 65 Ohio App3d 76, 582 N.E.2d 1047 (Ohio App. 1989), the settlor granted the trustee the "sole" discretion to make distributions pursuant to a broad support standard. The court acknowledged that the trustee was given "wide discretion," but stated that it still had a "continuing duty to act reasonably and in the best interests of the trust's beneficiaries." Id. at 1050.

¹² See, e.g., *In Re Jones*, 812 P.2d 1152 (Colo. 1991).

¹³ In other jurisdictions, discretionary trust status has been found even in cases where the distribution standard was tied to support. See, e.g., *In Re Jones*, supra.

¹⁴ UTC §501 contemplates a creditor obtaining an order that would not compel the trustee to exercise its discretion to make a distribution, but that would direct that if the trustee did so, part or all of the distribution would have to be paid to the creditor (similar to a charging order). According to an unreported Court of Appeals decision, that is not the law in Ohio. *Samson v. Bertok*, WL 14819 (Ohio App. 1986).

¹⁵ *Bureau of Support v. Kreitzer*, 16 Ohio St.2d 147, 243 N.E.2d 83 (Ohio 1968).

¹⁶ *Samson v. Bertok*, supra; *Schierer v. Ostafin*, WL 493940 (Ohio App. 1999).

¹⁷ *Bureau of Support v. Kreitzer*, supra.

¹⁸ *Matthews v. Matthews*, supra.

¹⁹ *Martin v. Martin*, 54 Ohio St.2d 101, 374 N.E.2d 1384 (Ohio 1978).

²⁰ See Restatement (Second), §147; Scott on Trusts, §147.

²¹ *O'Connor v. O'Connor*, 141 N.E.2d 691 (Ohio Com. Pleas 1957).

²² This provision appears to overturn the Supreme Court decision in *Bureau of Support v. Kreitzer*, supra. In that case, the court held that a beneficiary of a discretionary support trust may compel the trustee to furnish the beneficiary with minimal support, notwithstanding the fact the trust grants the trustee absolute discretion, and that the equitable doctrine of subrogation permits the state to reach the trust to reimburse it for support it provided to the beneficiary.

²³ The amount the spouse or child may reach is what the court determines is "equitable under the circumstances," but not more than what the trustee should have distributed to or for the benefit of the beneficiary. OUTC §5805.04(B)(2).

²⁴ *Matthews v. Matthews*, supra.

²⁵ *Martin v. Martin*, supra.

²⁶ The ability of the grantor to prevent this remedy is unique, because under UTC 105(b)(5) and OUTC §5801.05(5), the Code's creditors' rights provisions generally are mandatory and may not be overridden by the settlor.

²⁷ See OUTC §5801.06, which provides that: "The common law of trusts and principles of equity supplement this Code, except to the extent modified by this Code or another statute of the Revised Code."

²⁸ See *Albertson v. Ryder*, 85 Ohio App3d 765, 621 N.E.2d 480 (Ohio App. 1993) (child support; dictum); *Payer v. Orgill*, 191 N.E.2d 373 (Ohio Ct. Com. Pleas 1963) (spousal support); *O'Connor v. O'Connor*, supra, (child support). For a case holding to the contrary, see *McWilliams v. McWilliams*, 140 N.E.2d 80 (Ohio Ct. Com. Pleas 1956).

²⁹ *Martin v. Martin*, supra.

³⁰ OUTC §5810.04 gives a court discretion to award attorney fees in proceedings involving the administration of a trust. In a departure from the UTC, §5810.04 expressly authorizes such awards even if the trust instrument includes a spendthrift provision. UTC 503, by contrast, is not subject to the court's discretion.

³¹ *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328, 78 N.E.2d 167 (1939).

³² *Young v. Ohio Department of Human Services*, 76 Ohio St.3d 547, 668 N.E.2d 908 (Ohio 1996).

³³ Racially discriminatory trusts may be terminated or modified years after their creation for being in violation of the Fourteenth Amendment's equal protection clause. See, e.g., *Commonwealth of Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957).

³⁴ Under §5805.06(A)(1): "During the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors."

³⁵ See, e.g., Cal. Civ. Code §1390.3 (1989); Wis. Stat. Ann. §702.17 (1981).

³⁶ 11 U.S.C.A. §541(b) (1993).

³⁷ See, e.g., *Gilman v. Bell*, 99 Ill. 144, 150-51 (1881).

³⁸ See Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts, and Estates* 707 (6th ed. 2000).

³⁹ *Meehan v. Burr, Trustee*, 51 N.E. 1099 (Ohio 1898) and *Donley's Administrators v. Shields*, 14 Ohio 359 (1844).