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FEED A TRUST AND STARVE A CHILD:  
THE EFFECTIVENESS OF TRUST PROTECTIVE TECHNIQUES AGAINST CLAIMS FOR SUPPORT AND ALIMONY

Carolyn L. Dessin†

INTRODUCTION

In its classic definition, a trust is an arrangement for dealing with property in which a settlor transfers property in trust to a trustee who is to hold the property for the benefit of one or more beneficiaries. In creating a trust, the settlor sets forth the trust’s dispositive provisions, which determine the interests of the beneficiaries. Because of the wide variety of dispositive plans that can be accomplished by using a trust, trusts are useful devices for the management and disposition of assets. A settlor may create a trust for any number of reasons, including: (1) a wish to support one or more beneficiaries; (2) a desire for professional management of assets; and (3) an attempt to transfer property in a way that obtains the most favorable tax treatment.

There is often, however, a concern that creditors of a beneficiary will attack the assets of the trust seeking payment of claims. To address this concern, many drafters include one or more protective devices in the trusts they draft. Such techniques can be very effective in fending off creditors’ attempts to reach assets held in trust.

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1. The term “settlor” technically refers only to one who creates an inter vivos, or lifetime, trust. AUSTIN W. SCOTT & WILLIAM F. FRATCHE, THE LAW OF TRUSTS § 3 (4th ed. 1987). The creator of a trust under a will is simply called “testator.” Id. For purposes of this Article, the term “settlor” will be used for any person who creates a trust, regardless whether the trust is inter vivos or testamentary.

2. See generally Erwin N. Griswold, Reaching the Interest of the Beneficiary of a Spendthrift Trust, 43 Harv. L. Rev. 63 (1929) (discussing various types of attacks on protected trust assets). For a discussion of various protective devices, see infra part II.

3. This Article discusses attempts to reach assets held in a trust. Once a
In light of the current nonsupport crisis, an important question arises when the attacking creditor of a trust beneficiary is a child making a claim for support or a former spouse making a claim for support or alimony. Should such individuals be treated differently from other creditors of the beneficiary, and should trust assets be used to satisfy those claims?

Resolution of this issue must take into account a number of competing interests. The law of trusts is replete with statements that the intent of the settlor should be paramount in any question involving interpretation of the trust, so long as that intent is neither illegal nor against public policy. Often, the needs of the beneficiary are considered as well. In a situation involving a claim against trust assets for support or alimony, however, the settlor and the beneficiary against whom the claim is leveled (the debtor-beneficiary) are not the only entities whose interests are implicated. The spouse or child making a claim has an interest in enforcing a support or alimony obligation. The state has an interest in assuring that its judgments are enforced and that those who suffer as a result of nonpayment of support and alimony do not become wards of the state. Additionally, the interest of any other beneficiaries of the trust may be adversely affected by distributions of trust assets to satisfy claims against a debtor-beneficiary. Finally, the interests of other creditors of the debtor-beneficiary may be implicated.

disbursement is made to a beneficiary, creditors can reach the distributed assets. See, e.g., Bucklin v. Wharton (In re Bucklin's Estate), 51 N.W.2d 412, 416 (Iowa 1952); Erickson v. Erickson, 266 N.W. 161, 163 (Minn. 1936) (holding assets of spendthrift trust free from claims until actually paid to beneficiary); RESTATEMENT (SECOND) OF TRUSTS § 152 cmt. j (1959) (commenting income of spendthrift trust paid to beneficiary can be voluntarily or involuntarily alienated). Further, this Article is limited to a consideration of attacks on private trusts. Cf. In re Marriage of Williams, 209 Cal. Rptr. 827 (Ct. App. 1985) (allowing ex-spouse limited execution against employee benefit plan benefits).


5. See generally SCOTT & FRATCHER, supra note 1, §§ 157, 157.1; M.L. Cross, Annotation, Trust Income or Assets as Subject to Claim Against Beneficiary for Alimony, Maintenance, or Child Support, 91 A.L.R.2d 262 (1960).

6. See Larsen, supra note 4, at 39 ("When fathers don't support their children, taxpayers must pay for swelling welfare rolls and rapidly escalating Medicaid costs.").
How then should these competing interests be balanced when a claim for support or alimony is made? This Article will examine the various types of protective techniques that trust drafters use to shield trust assets, explore and critique various legislative enactments and court decisions addressing the effectiveness of protective devices against claims for support and alimony, and propose a model for resolution of the issue.

I. Techniques for Protecting Trust Assets from the Creditors of Beneficiaries

A. General Rule: The Beneficiary of a Trust Can Alienate His or Her Interest in the Trust, and Creditors Can Reach the Interest

As a general rule, in the absence of a device protecting the trust assets or a statute providing to the contrary, a beneficial interest in a trust can be voluntarily alienated by the beneficiary. Thus, for example, a beneficiary could sell a beneficial interest to a third party.

In addition to voluntary transfers, an involuntary transfer of the beneficiary’s interest could occur if a creditor of the beneficiary looks to the trust assets to satisfy the creditor’s claim against the beneficiary. If no protective device is used to shield the trust assets, creditors can reach a beneficiary’s interest.

B. Should a Settlor Be Able to Protect Assets from Claims Against Beneficiaries?

It has long been acknowledged that a settlor should have at least some power to protect trust assets from creditors of trust beneficiaries. To justify this position, courts often rely on the idea that the settlor, as the creator of the trust, has the power to

7. See, e.g., In re Dodge Testamentary Trust, 330 N.W.2d 72 (Mich. Ct. App. 1982); Estate of Amend, 435 N.Y.S.2d 235 (Surr. Ct. 1980); see RESTATEMENT (SECOND) OF TRUSTS § 132 (1959); SCOTT & FRATCHER, supra note 1, § 132 (collecting cases). In several states, the power to transfer is restricted by statute. See RESTATEMENT (SECOND) OF TRUSTS § 152 cmt. p (1959).

8. See RESTATEMENT (SECOND) OF TRUSTS § 147 (1959). There are a variety of methods by which a creditor can reach a beneficiary’s interest. See id. § 147 cmt. c. In addition, it is interesting to note that every state has a statute that exempts some kinds of property from creditors’ claims. See id. § 149 cmt. b (noting homestead and tools of the trade of the debtor exemptions). The comment suggests that an equitable interest in the property would be similarly protected from claims. Id.
define and limit the beneficiaries' interests as the settlor pleases.\textsuperscript{9}

Courts frequently note, however, that this power is not without limit. For example, the Oregon Supreme Court recognized several judicially imposed limits of a settlor's right, including: (1) the limits of the Rule Against Perpetuities; (2) the constraints of the rule against restraints on alienation; and (3) the refusal of courts to enforce trusts for illegal or capricious purposes or for purposes contrary to public policy.\textsuperscript{10} It is this last category of limitation that is most relevant to the subject of this Article.

Additionally, it is important to note that settlors generally cannot avoid their own debts by putting assets into a trust. If the debts arise before the creation of the trust, the transfer to the trust may run afoul of fraudulent conveyance laws.\textsuperscript{11} If, on the other hand, the debts arise after the trust is created, no protective device will shield the assets in which the settlor has retained a beneficial interest.\textsuperscript{12} Thus, neither including a spendthrift clause\textsuperscript{13} nor styling the trust as a trust for support\textsuperscript{14}

\textsuperscript{9} See, e.g., Wagner v. Wagner, 38 N.W.2d 609, 611 (Iowa 1949) (honoring express direction that trust assets should be free from claims of beneficiary's wife); see also Nichols v. Eaton, 91 U.S. 716 (1875) (recognizing validity of spendthrift provision); Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882) (same).


\textsuperscript{12} See, e.g., Morton v. Morton, 147 A.2d 150, 152 (Pa. 1959) (holding income of trust created by husband in which he retained income interest not shielded from claims); see RESTATEMENT (SECOND) OF TRUSTS § 156 (1959); cf. Sheehan v. Sheehan, 395 N.Y.S.2d 596, 598 (Sup. Ct. 1977) (holding funds of "Keogh Plan" available to satisfy judgment for unpaid support and alimony).

\textsuperscript{13} See, e.g., KY. REV. STAT. ANN. § 381.180(7) (Michie/Bobbs-Merrill 1972) (providing interest of beneficiary who is also settlor of spendthrift trust is alienable by operation of law or by legal process); Commonwealth ex rel. Stevenson v. Stevenson, 40 Del. Co. 51 (Pa. Ct. C.P. 1952). For a discussion of spendthrift clauses, see infra notes 18-29 and accompanying text.

\textsuperscript{14} For a discussion of trusts for support, see infra notes 30-32 and accompanying text.
or a discretionary trust\textsuperscript{15} will protect the assets from the creditors of the settlor.\textsuperscript{16}

C. Types of Protective Devices

Several types of protective devices are popular with modern drafters. The first type expressly limits the ability of a trust beneficiary to alienate and the ability of the beneficiary's creditors to make claims against interests in trust assets. A spendthrift provision comes within this type. The second protective technique crafts the beneficiary's interest so that the beneficiary is entitled to distributions only under certain circumstances. Trusts for support and discretionary trusts fall within this category. The third device terminates the interest of a beneficiary who attempts to alienate the interest or whose creditors seek payment from the interest. Forfeiture provisions are of this type. These devices will be discussed seriatim.\textsuperscript{17}


The inclusion of a spendthrift provision in a trust to create a spendthrift trust is an often used technique for protecting trust

\textsuperscript{15} For a discussion of discretionary trusts, see infra notes 33-35 and accompanying text.

\textsuperscript{16} See RESTATEMENT (SECOND) OF TRUSTS § 156 (1959). Section 156 states:
(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest.
(2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.

\textit{Id.} For further discussion of trusts for support, see infra notes 30-32 and accompanying text. For further discussion of discretionary trusts, see infra notes 33-35 and accompanying text.

\textsuperscript{17} Some drafters combine more than one protective device in a single trust. For example, one might place a spendthrift provision in a discretionary trust because if a creditor attacks a protective provision can protect the trustee from liability for making payment to another after being served by a creditor. See RESTATEMENT (SECOND) OF TRUSTS § 155(2) (1959). Sometimes, as a result of unartful drafting, it is difficult to tell what type of protective device is intended. For example, the language "[m]y first purpose is to give to my said son ... the income each year from this land without any right for or in him to dispose of the same in advance but to keep the same as an annual income for his better support" could be read either as a spendthrift provision or as creating a trust for support. See Clay v. Hamilton, 63 N.E.2d 207 (Ind. Ct. App. 1945) (en banc); see also Martin v. Martin, 374 N.E.2d 1894 (Ohio 1978) (trust neither strictly support trust nor discretionary trust).
assets. The Restatement (Second) of Trusts defines a spendthrift trust as a trust which by its own terms or by statute imposes "a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary." The classic spendthrift trust gives an income interest to a beneficiary, but restricts the alienation of the income interest and states that the interest is not to be reached by creditors.

This arrangement protects both the trust assets and the beneficiary. The assets in the hands of the trustee are safe from most creditors' attacks. Additionally, the beneficiary cannot assign his income interest to anyone, thus protecting the beneficiary from the temptation to obtain ready cash by selling his interest at a bargain price. This dual protection is grounded on the premise that an interest that is not transferable is not subject to claims of creditors of the holder of the interest. Put another way, the power of creditors to reach assets is tied to the beneficiary's power to alienate. Courts have recognized a variety of salutary reasons for creating a spendthrift trust. These include: (1) protection of the trust's beneficiaries from their own improvidence; (2) shielding beneficiaries from their own financial inabilities; and (3) providing a fund for support of beneficiaries.

18. Although most spendthrift trusts contain an explicit clause restricting alienation, a court can also find that a trust not containing a spendthrift clause is a spendthrift trust. See, e.g., Watts v. McKay (In re Watts), 162 P.2d 82, 87 (Kan. 1945) (citing Everitt v. Haskins, 171 P. 632 (Kan. 1918)). The court will examine the trust's structure to determine whether a spendthrift trust is implied. Id. See generally William H. Wicker, Spendthrift Trusts, 10 Gonz. L. Rev. 1 (1974).

19. RESTATEMENT (SECOND) OF TRUSTS § 152(2) (1959). The Supreme Court of Illinois considered the use of a particularly complete spendthrift clause in In re Support of Matt, 473 N.E.2d 1310 (Ill. 1985). The clause read:

Neither principal nor income of the Trust herein established shall be pledged, transferred, sold, anticipated or encumbered by any beneficiary herein named, nor be in any manner liable, while in the possession of the Trustee, for any contract, debt or obligation, nor for any claim voluntarily or involuntarily created either legal or equitable against any beneficiary, including claims for alimony or support of any spouse of such beneficiary.

Id. at 1311.


21. See Bucklin v. Wharton (In re Bucklin's Estate), 51 N.W.2d 412, 414 (Iowa 1952) (citing RESTATEMENT OF TRUSTS § 152 (1935)).

22. See, e.g., Bucklin, 51 N.W.2d at 414-15; Erickson v. Erickson, 266 N.W. 161, 164 (Minn. 1936) (beneficiary's interest that is transferable can be reached by creditors).

23. See, e.g., Bacardi v. White, 463 So. 2d 218, 221 (Fla. 1985).
It should be noted that although the adjective "spendthrift" conjures up visions of hapless beneficiaries unable to protect themselves, lack of beneficiary competence is not a prerequisite to creating a spendthrift trust. Accordingly, courts do not focus on the abilities of the beneficiary when determining the validity of a spendthrift trust.

Sometimes, a settlor will give the beneficiary an interest in the principal of the trust in addition to or in lieu of the beneficiary's income interest. In that case, the settlor may wish to restrict the beneficiary's power to alienate the principal of the trust. Most states allow such restrictions. Some states, either by statute or by case law, prohibit such restrictions.

Some courts previously had difficulty holding spendthrift trusts valid. They considered whether the spendthrift restriction was an impermissible restraint on alienation. To uphold validity, many held that the power to alienate is not an essential part of an equitable estate. The validity of spendthrift trusts is now recognized in almost every state.

The Restatement (Second) of Trusts suggests four types of claims against trust assets that will not be precluded by a spendthrift provision. These are: (1) claims for support or alimony; (2) claims of providers of necessaries to the beneficiary; (3) claims by providers of services or materials that protect the beneficiary's interest; and (4) government claims against the beneficiary.

24. See RESTATEMENT (SECOND) OF TRUSTS § 152 cmt. g (1959).
25. Id. § 153 cmt. b.
26. See, e.g., Erickson v. Erickson, 266 N.W. 161, 163 (Minn. 1936) (finding no restraint on alienation because trustees could transfer legal title).
27. See, e.g., Bucklin v. Wharton (In re Bucklin's Estate), 51 N.W.2d 412, 415 (Iowa 1952) (quoting 54 AM. JUR. TRUSTS § 153 (1945)); see also Dunn v. Dobson, 84 N.E. 327 (Mass. 1908); Erickson, 266 N.W. at 162-63.
29. RESTATEMENT (SECOND) OF TRUSTS § 157 (1959). Section 157 provides:
Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,
   (a) by the wife or child of the beneficiary for support, or by the wife for alimony;
   (b) for necessary services rendered to the beneficiary or necessary supplies furnished to him;
   (c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary;
   (d) by the United States or a State to satisfy a claim against the beneficiary.
2. **Trusts for Support**

In a trust for support, the trustee is directed to pay only as much of the income, principal, or income and principal as is necessary to support the beneficiary.\(^{30}\) The trust need not include a provision that prevents attack on or alienation of the beneficiary's interest to protect trust assets. Rather, it is the very nature of the beneficiary's interest that protects it.\(^{31}\) That is, the trust assets can be used only for the purpose specified (i.e., support of the beneficiary).

The *Restatement (Second) of Trusts* recognizes four types of claims that will not be precluded by the fact that a trust is styled as a trust for support. These are: (1) claims for support or alimony; (2) claims of providers of necessaries to the beneficiary; (3) claims by providers of services or materials that protect the beneficiary's interest; and (4) government claims against the beneficiary.\(^{32}\)

3. **Discretionary Trusts**

Like a trust for support, the protection of the beneficiary's interest in a discretionary trust comes from the way that the trust is structured rather than from an express protective provision.\(^{33}\) The typical discretionary trust provides that the trustee is to pay income, principal, or income and principal to the beneficiary in the sole discretion of the trustee. Thus, the beneficiary has no enforceable right to receive a payment from

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\(^{30}\) See *Restatement (Second) of Trusts* § 154 (1959). Section 154 provides in pertinent part:

> [I]f by the terms of a trust it is provided that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education or support of the beneficiary, the beneficiary cannot transfer his interest and his creditors cannot reach it.

\(^{31}\) See, e.g., Seattle First Nat'l Bank v. Crosby, 254 P.2d 732, 739 (Wash. 1953) (en banc) (beneficiary of trust for support has no interest which he can assign); see *Restatement (Second) of Trusts* § 154 (1959). See generally ERWIN N. GRISWOLD, *Spendthrift Trusts* § 431 (1936) ("The limitation of the extent of the beneficiary's interest . . . shows with relative clarity the intention of the settlor that the interest should be inalienable.").

\(^{32}\) See *Restatement (Second) of Trusts* § 157 (1959). For the text of section 157, see supra note 29.

\(^{33}\) See Watts v. McKay (In re Watts), 162 P.2d 82, 87 (Kan. 1945) (quoting *Restatement of Trusts* § 155 (1936); 1 AUSTIN W. SCOTT, *The Law of Trusts* § 155 (1st ed. 1939)).
the trust until the trustee decides to exercise the discretion to
pay. 34 If the trust has more than one beneficiary, and the
trustee is given discretion to exclude one of the beneficiaries
when making distributions, the assets are similarly
unreachable.35


Another way that a settlor can protect trust assets against
claims is to provide that a beneficiary’s interest will terminate if
the beneficiary tries to alienate the interest or if a creditor of the
beneficiary tries to attack the interest.36 Such a provision may
effectuate a settlor’s desire to keep the trust assets away from
non-beneficiaries, but does not provide any protection for the
continuing support of the debtor-beneficiary. Because of this
shortcoming, this type of provision is not often used in modern
trust drafting and will not be discussed further.

A permutation of the forfeiture provision is a clause providing
that if a beneficiary attempts to alienate his interest, the interest
will become discretionary.37 Under such a provision, the
creditors would be treated the same as the creditors of a
beneficiary under any discretionary trust.38

II. Judicial and Legislative Responses to Attempts
to Use Protective Techniques Against
Claims of Children and Former Spouses

Courts and legislatures have taken a wide variety of
approaches to using protective techniques against claims of
children and former spouses. One explanation for this farrago is
that many subissues exist that can inform the decision making
process. These are: (1) whether statutory enactments, or the lack
thereof, compel a result;39 (2) whether spendthrift trusts, trusts
for support, and discretionary trusts should be treated
differently;40 (3) to what extent the settlor’s intent should be
respected,41 (4) whether claims for support should be treated

34. RESTATEMENT (SECOND) OF TRUSTS § 155 (1959).
35. Id. § 155 cmt. d.
36. Id. § 150.
37. See e.g., Martin v. Martin, 374 N.E.2d 1384 (Ohio 1978).
38. RESTATEMENT (SECOND) OF TRUSTS § 150 cmt. c (1959).
39. See infra notes 47-79 and accompanying text.
40. See infra notes 80-105 and accompanying text.
41. See infra notes 106-13 and accompanying text.
differently from claims for alimony;\(^42\) (5) whether claims against principal should be treated differently from claims against income;\(^43\) (6) whether the interests of the debtor-beneficiary and other trust beneficiaries should be considered;\(^44\) (7) whether claims for support or alimony should have a preferred position above claims of other creditors;\(^45\) and (8) whether creative interpretation of the governing instrument is an appropriate way to avoid resolving more difficult issues.\(^46\) Although resolution of the question whether to use protected trust assets to satisfy support or alimony claims should take all of the subissues into account, a review of the legislation and case law suggests that legislatures and courts frequently focus on one or two of the subissues without considering the others.

A. Statutory Enactments and Case Interpretation

Some states have enacted statutes that directly address whether protected trust assets can be reached to satisfy support or alimony obligations. Other states have statutes that indirectly affect resolution of the issue.

In Texas, for example, the legislature has enacted a statute that expressly allows attacks for child support against trust

\(^{42}\) See infra notes 114-20 and accompanying text.
\(^{43}\) See infra notes 121-22 and accompanying text.
\(^{44}\) See infra notes 123-28 and accompanying text.
\(^{45}\) See infra notes 129-39 and accompanying text.
\(^{46}\) See infra notes 140-57 and accompanying text.
\(^{47}\) An interesting related issue that is beyond the scope of this Article is whether trust assets in which the debtor-beneficiary has an interest should be considered in calculating alimony or support payments. See, e.g., Athorne v. Athorne, 128 A.2d 910 (N.H. 1957). The Athorne court held that the court could take a former husband's interest in a discretionary trust into account when determining an alimony amount even though the funds could not be used to satisfy the award. Id. at 914. The Texas Court of Appeals engaged in a stunning bit of circular reasoning with respect to this question. Kolpack v. Torres, 829 S.W.2d 913 (Tex. Ct. App. 1992). Under § 14.055 of the Texas Family Code, the section that calculates child support payments, a father's child support obligation amounted to $105 per month. Id. If the § 14.055 formula were applied to the assets of a trust of which the father was a beneficiary, the amount came to $345 per month. Id. at 914. Section 14.05(c) of the Texas Family Code provided that a court could order the trustee of a trust of which the father was a beneficiary to make payments from a discretionary trust to satisfy a child support obligation. Id. The court interpreted the statute as applicable only if the debtor-beneficiary is first obligated to make the payment. Id. at 916 (citing In re Long, 542 S.W.2d 712 (Tex. Civ. App. 1976); Robinson v. Robinson, 694 S.W.2d 569 (Tex. Ct. App. 1985)). The court then, however, appeared to ignore the trust assets in calculating the amount that the father was required to pay. Id. at 916. Thus,
assets shielded by a protective device.\textsuperscript{47} Section 14.05(c) of the Texas Family Code provides:

The court may order the trustees of a spendthrift or other trust to make disbursements for the support of the child to the extent the trustees are required to make payments to a beneficiary who is required to make support payments under this section. If disbursement of the assets of the trust is discretionary in the trustees, the court may order payments for the benefit of the child from the income of the trust, but not from the principal.\textsuperscript{48}

The Texas statute appears quite liberal in allowing use of trust assets for child support. One seeking enforcement of a child support order in Texas could proceed against the assets of a spendthrift trust, a trust for support, or a discretionary trust. The statute does not make clear what circumstances should lead a court to order satisfaction of a child support claim. The decisions under the statute have denied enforcement of the orders in question for procedural reasons, so there is no case law to indicate the factors that Texas courts will find important.\textsuperscript{49}

California also has a fairly liberal statute providing that trust assets can be used to pay support judgments, which the statute defines as money judgments for support of a beneficiary's spouse, former spouse, or minor child.\textsuperscript{50} The statute draws a distinction between trusts in which the beneficiary has a mandatory beneficial interest\textsuperscript{51} (i.e., the beneficiary can compel the trustee to make distributions to the beneficiary) and trusts in which the beneficiary has a discretionary beneficial interest\textsuperscript{52} (i.e., the beneficiary has no right to distributions until the trustee determines, in the trustee's discretion, that a distribution is appropriate). If the beneficiary can compel payments, which

\textsuperscript{47} Tex. Fam. Code Ann. § 14.05(c) (West 1986).
\textsuperscript{48} See Kolpack, 829 S.W.2d at 916 (holding debtor-beneficiary must be ordered to make support payments before trustee can be ordered to make such payments); In re Long, 542 S.W.2d 712 (Tex. Civ. App. 1976) (same).
\textsuperscript{50} Cal. Prob. Code § 15305(b) (West 1991).
\textsuperscript{51} Id. § 15305(c).
would be the case in the classic spendthrift trust where the beneficiary receives an income interest for life,

the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the support judgment out of all or part of those payments as they become due and payable, presently or in the future.⁵³

Even if the beneficiary cannot compel payments, which would be the case in a trust for support or a discretionary trust, the court has the same discretion "to satisfy all or part of the support judgment out of all or part of future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary."⁵⁴ Finally, section 15305(d) states that it overrides any trust language to the contrary.⁵⁵ The legislative history of the 1990 enactment makes clear that the court in applying section 15305 is to weigh the interest of the debtor-beneficiary against the interest of the claimant.⁵⁶ Neither the statute nor the legislative history offers any guidance about other beneficiaries' interests.

Kentucky is another state that has enacted a statute directly addressing the availability of spendthrift trust funds to satisfy claims for support and alimony. Section 381.180 of the Kentucky Revised Statutes provides that the interest of a beneficiary in a spendthrift trust is subject to an enforceable claim by the spouse or child of the beneficiary for support or alimony.⁵⁷

The Texas, California, and Kentucky statutes are illustrative of statutes directly addressing this issue. All three statutes, however, leave open a number of questions. Before focusing on these deficiencies, it is instructive to examine several jurisdictions in which statutes indirectly affect this issue.

In New York, for example, although a beneficial interest in a spendthrift trust can be voluntarily assigned by the debtor-beneficiary for support of a member of the assignor's family, there is no statutory provision allowing claims for support or alimony against spendthrift trusts.⁵⁸

⁵³. Id. § 15305(b).
⁵⁴. Id. § 15305(c); see Griswold, supra note 2, at 83 (noting that trustee is likely to refrain from making distributions to beneficiary who is debtor).
⁵⁵. CAL. PROB. CODE § 15305(d) (West 1991).
⁵⁶. Id. § 15305 cmt.
⁵⁸. N.Y. ESTATES, POWERS AND TRUSTS LAW § 7-1.5(d) (McKinney 1967); In re
Rather than a single statute, Illinois has enacted several statutes indirectly relating to this issue that created an interesting series of decisions in *In re Support of Matt.*\(^5\) In *Matt*, the trial court held that the assets of a trust created by the debtor-beneficiary’s mother, which contained a spendthrift clause that did not specifically exclude claims for child support, could be used to satisfy child support arrearages.\(^6\) The trial court relied primarily on the language of the spendthrift clause in reaching this result, noting that Illinois public policy would allow a spendthrift clause to protect trust assets from a claim for child support only if the clause expressly so stated.\(^7\) The intermediate appellate court reversed, relying on a portion of the Illinois Code of Civil Procedure that provided that the assets of a trust created in good faith by one other than the debtor-beneficiary could not be used to satisfy the debtor-beneficiary’s debts.\(^8\) The Supreme Court of Illinois reversed the intermediate appellate court, relying on a portion of the Illinois Non-Support Act.\(^9\) That Act provided that “income” could be withheld to secure collection of unpaid support obligations.\(^10\) The statute defined “income” as “any form of periodic payment to an individual, regardless of source, including, but not limited to: ...any other payments, made by any person [or] private entity.”\(^11\) The statute further stated that “[a]ny other State or local laws which limit or exempt income or the amount or percentage of income that can be withheld shall not apply.”\(^12\)


\(^{6}\) 473 N.E.2d 1310 (Ill. 1985).

\(^{7}\) See id. at 1311. For the text of the spendthrift clause in the trust, see supra note 18.


\(^{9}\) Id. at 537 (citing ILL. REV. STAT. ch. 110, para. 2-1403 (1983)). The statute relied on states: “No court shall order the satisfaction of a judgment out of any property held in trust for the judgment debtor if such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor.” ILL. REV. STAT. ch. 110, para. 2-1403 (1983).

\(^{10}\) *In re Support of Matt*, 473 N.E.2d at 1312 (citing ILL. REV. STAT. ch. 40, para. 1107.1 (1983)).


\(^{12}\) Id.

\(^{13}\) Id. ch. 40, para. 1107.1(A)(4)(e).
Thus, the supreme court found that the Non-Support Act trumped the Code of Civil Procedure restriction.\(^{67}\)

The *Matt* trilogy provides an excellent example of why a statute directly addressing the availability of protected trust assets to satisfy support obligations would be preferable to several statutes arguably addressing the issue. First, because neither statute directly spoke to the issue, the trial court felt comfortable relying on neither statute to support its decision.\(^{68}\) Second, the Code of Civil Procedure provision relies, in part, on a determination of whether the trust in question was created “in good faith.”\(^{69}\) It is not difficult to imagine that a court could find that a spendthrift trust created for the purpose of shielding assets from a debtor-beneficiary’s support obligation was not created in good faith. On the other hand, if the settlor’s purpose was one that the court would include in “good faith,” the assets would be protected. The legislative history provides no insight into the meaning of “good faith.” Thus, the statute invites litigation to determine the settlor’s motive in creating the trust, a difficult, if not impossible, task. Third, the Non-Support Act provision relied on by the supreme court would allow enforcement of support obligations only from trust distributions that could be classified as “periodic payments.”\(^{70}\) Finally, the supreme court noted that still another statute provided that only trust income, not trust principal, is available to satisfy delinquent support obligations.\(^{71}\) Thus, even though in *Matt* the obligation was ultimately paid, a single statute directly addressing the issue would avoid such confusion.

Looking at this wide array of statutes and the case law interpreting the statutes, one wonders, however, whether the legislature is the appropriate decision maker. Consider two discretionary trusts. Settlor A sets up trust A to benefit his three children. The trustee, a bank, is given full discretion to “sprinkle” trust income among the three children. Settlor A chose this arrangement because two of his children have severe congenital conditions that could require expensive and protracted treatment

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67. *In re Support of Matt*, 473 N.E.2d at 1312.
68. *Id*.
70. *See supra* notes 64-65.
and have no funds of their own. The third child is the debtor-beneficiary.

Settlor B sets up trust B with dispositive provisions identical to those of trust A. The trustee is settlor B's third child, who is also the debtor-beneficiary. Settlor B created the trust to avoid having any trust assets used for the support of B's wife and children. Settlor B's other two children are independently wealthy.

It would seem that the equities weigh more heavily in favor of support or alimony claimants against trust B than against trust A. It is difficult to imagine a statute that would adequately resolve both situations, unless it were a statute that did little more than give an appropriate court the power to resolve the issue, perhaps with a list of factors to be considered. The legislature, as the elected representative of the public, is, however, well suited to decide which of two public policies should prevail as a general rule, or at least to determine that two policies are equally important and that conflicts between the policies should be resolved on a case-by-case basis. Such legislative pronouncements would be useful to guide judicial decision making.72

In the absence of legislative action, courts should decide whether to allow claims for support and alimony against protected trust assets. Although some courts have held that the legislature is the only entity with the power to allow such claims to proceed,73 there is no reason why the courts cannot make decisions about this issue.74 Courts are frequently called upon to

72. In Arizona, for example, the competent children of the settlor of a trust for the children's benefit can terminate the trust notwithstanding a spendthrift provision. See First Nat'l Bank v. Taylor, 426 P.2d 663, 666 (Ariz. Ct. App. 1967) (holding statute's application limited to trusts with children as beneficiaries). This indicates the Arizona legislature's view that the beneficiaries should be able to overcome the intent of the settlor to protect assets if all of the beneficiaries agree. Id. A court could draw on this statute as an indication of how much respect should be accorded to the settlor's intent.


74. See, e.g., Shelley v. Shelley, 354 P.2d 282, 285-86 (Or. 1960) ("It is within the court's power to impose upon the privilege of disposing of property such restrictions as are consistent with its view of sound policy, unless, of course, the legislature has expressed a contrary view.").
consider public policy when resolving cases. Thus, in Bacardi v. White,\textsuperscript{75} the Florida Supreme Court espoused the position that where there are two competing policies and the legislature has not spoken, it is appropriate for the court to decide which policy will be given greater weight.\textsuperscript{76}

In a related area, no matter which entity resolves the issue, the question of retroactivity must be faced. If a court announces a decision in a case of first impression or changes its prior law or if a legislature changes a rule that previously existed, it can be argued that the new rule should be applied prospectively only. In Minnesota, for example, there is a long line of cases in which the Minnesota Supreme Court refused to recognize a public policy exception to the effectiveness of spendthrift provisions that would allow enforcement of support and alimony judgments from spendthrift trusts. The supreme court stated in dicta that if the rule were to be changed, it should be done by the legislature, and then only prospectively.\textsuperscript{77} The court reasoned that the long line of cases occasioned reliance by settlers and that reliance should not be ignored.\textsuperscript{78}

Assuming that there is an issue to be decided by a court, which court should have jurisdiction to decide the appropriateness of invading trust assets to satisfy a claim for support or alimony? There are three possibilities: (1) the court that entered the support or alimony order; (2) the court having jurisdiction over the administration of the trust; or (3) some other court of general jurisdiction.

This seems a fairly easy issue to resolve. For several reasons, the court having jurisdiction over the administration of the trust is particularly well suited to decide whether to allow the claim against the trust. First, the court having jurisdiction over the administration of the trust has expertise in resolving the types of issues presented by this claim. Such courts are frequently called

\begin{footnotesize}
\begin{enumerate}
\item 463 So. 2d 218 (Fla. 1985).
\item Id. at 221 (recognizing validity of spendthrift trusts against enforcement of alimony and child support orders).
\item Van Dyke v. First Nat'l Bank (In re Moulton's Estate), 46 N.W.2d 667, 676 (Minn. 1951).
\item Id.; cf. In re Support of Matt, 473 N.E.2d 1310, 1313 (Ill. 1985) (holding a statute addressing nonpayment of arrearages could be retroactively applied to arrearages that accrued before enactment of statute); In re Tafei's Estate, 296 A.2d 797, 802 (Pa. 1972) (relying on public policy to reverse longstanding Pennsylvania rule that adopted children would be excluded from class gifts unless expressly included).
\end{enumerate}
\end{footnotesize}
upon to interpret trust language, to balance the interests of various trust beneficiaries, and to recognize instances in which dispositive intent must yield to public policy concerns. Second, because jurisdiction over administration of a trust is in rem, some difficult jurisdiction issues are avoided.\textsuperscript{79} It is apparent from the absence of discussion of jurisdiction in the case law that the courts having jurisdiction over trust administration think that if the issue is justiciable, it is theirs to decide.

As to other possible decision makers, the court that entered the support or alimony judgment presumably has enforcement of that judgment as its primary goal. Although it is possible that the court could set aside its primary concern and weigh the interests of the other parties in interest, that court has little expertise in resolving trust issues. The same would be true for some other court of general jurisdiction. Therefore, the court having jurisdiction over the administration of the trust is the most logical decision maker.

\textbf{B. \textit{Nature of the Protective Device}}

Many courts have focused on the nature of the protective device used in a trust when considering whether the trust assets will be available to satisfy support or alimony judgments. Often, courts draw a distinction between spendthrift trusts and trusts for support on the one hand\textsuperscript{80} and discretionary trusts on the other.

Courts appear more willing to allow claims against spendthrift trusts and trusts for support than against discretionary trusts. The distinction is based on a perceived difference in the nature of the debtor-beneficiary’s interest in the trust.

In a trust that contains a spendthrift clause as the only protective device, the beneficiary has an absolute right to distributions of income, principal, or both. The spendthrift clause protects the assets as long as they remain in the trustee’s hands. Because there is no question that the beneficiary will ultimately receive the distributions, the only real question for the decision maker is whether the public policy favoring payment of support


\textsuperscript{80} Clay v. Hamilton, 63 N.E.2d 207, 210-11 (Ind. Ct. App. 1945) (en banc) (relying heavily on \textit{Restatement of Trusts} to hold that spendthrift trust would be treated the same as trust for support).
or alimony obligations outweighs the settlor's intent that the assets be protected.

A trust that provides that the trustee is to make distributions for the support of the beneficiary is conceptually similar to a spendthrift trust. The amount to which the beneficiary is entitled is based on his support needs. The trustee has no discretionary power over distributions.

When a discretionary trust is involved, however, the beneficiary does not have a right to distribution until the trustee exercises discretion. This has led to greater judicial reluctance to allow claims against this type of trust. 81

Many courts have allowed support and alimony claimants to proceed against the assets of spendthrift trusts. 82 The courts that have denied claims have focused on factors other than the nature of the protective device. 83

When considering discretionary trusts, however, some courts have denied relief based on the nature of the protective device, for example, styling the trust as a discretionary trust. 84 At the heart of these cases is the trust law principle that the beneficiary of a discretionary trust has no interest that is reachable by anyone until the trustee exercises discretion and makes a distribution. 85

On the other hand, some states are willing to permit some claims against discretionary trusts. For example, the Texas statute discussed earlier allows a court to order child support payments from the income of a discretionary trust, but not from its principal. 86

82. See, e.g., In re Williams, 209 Cal. Rptr. 827 (Ct. App. 1985); Bacardi v. White, 463 So. 2d 218 (Fla. 1985); Matthews v. Matthews, 450 N.E.2d 278 (Ohio Ct. App. 1981).
83. See, e.g., Erickson v. Erickson, 266 N.W. 161, 164 (Minn. 1936) (denying claim against spendthrift trust and holding settlor's intent controlling).
84. See, e.g., Shelley, 354 P.2d at 282; Watts v. McKay (In re Watts), 162 P.2d 82, 87-88 (Kan. 1945) (denying claim for alimony against corpus of pure discretionary trust).
85. See, e.g., Athorne v. Athorne, 128 A.2d 910, 914 (N.H. 1957) (holding corpus of discretionary trust not reachable by claimant for alimony); see Scott & Fratcher, supra note 1, § 155.
The New York Surrogate’s Court was faced with a claim for support against a discretionary trust in *In re Chusid’s Estate*. The *Chusid* court suggested that the trustee of a pure discretionary trust could be directed to prevent income beneficiaries from starving or becoming public charges. Thus, the court approved an order to the trustee to pay part of the income for support of the debtor-beneficiary’s children, who were also discretionary income beneficiaries of the trust. The *Chusid* court noted, however, that funds of a discretionary trust were protected from creditors. The *Chusid* court also expressed a willingness to reach the same result in trusts in which the children were intended, although not named, beneficiaries.

Taking a different approach that involved stretching the language of a trust, the Ohio Supreme Court was willing to characterize a trust that gave the trustees “sole and absolute discretion” to distribute trust income to the debtor-beneficiary for his “comfort, care, support and education” as not purely a discretionary trust.

The Supreme Court of New Hampshire has rendered several decisions suggesting that even the assets of discretionary trusts can be subjected to claims for support, but not to claims for alimony. In *Gardner v. O’Loughlin*, the court was faced with a request for support by the wife and children of an insane trust beneficiary. The claimants sought support from a trust that gave the trustee discretion whether to make income distributions to the beneficiary. The trust explicitly stated the distributions were to be solely for the benefit of the

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88. *Id.* at 771-72.
89. *Id.* at 772.
90. *Id.* at 771.
91. *Id.* at 772.
94. *Gardner*, 84 A. at 935.
95. *Id.* at 936.
96. *Id.*
beneficiary.\textsuperscript{97} Relying on the premise that the settlor probably would not have wanted to exclude the beneficiary's family from the benefits of the trust, a premise difficult to glean from the plain language of the governing instrument, the court found that payments to the wife and children were allowable under the trust's terms.\textsuperscript{98} Examining the facts presented in the court below, the supreme court affirmed the order directing the trustee to pay out the income of the trust to the guardian of the insane beneficiary, partly for the beneficiary's debts and partly for the support of the wife and children.\textsuperscript{99} In so doing, the court implied that what appeared to be unbridled trustee discretion was, in fact, reviewable and limited.\textsuperscript{100} Similarly, in \textit{Fowler v. Hancock},\textsuperscript{101} the court held that "benefit" to the beneficiary of a discretionary trust included benefit to his minor children.\textsuperscript{102} The New Hampshire court took a slightly different tack in \textit{Eaton v. Eaton},\textsuperscript{103} in which it held that a trustee with discretion could not be ordered by a court to pay a particular amount for child support.\textsuperscript{104} The court could, however, set a minimum and a maximum amount that would be reasonable under the circumstances of the particular case.\textsuperscript{105}

\section*{C. Settlor's Intent}

Intent of the settlor of a trust that its assets not be subjected to claims is the primary obstacle to using protected assets to satisfy support or alimony obligations. The settlor's intent is to be ascertained from the language of the governing instrument read in light of the surrounding circumstances.\textsuperscript{106}

Whenever a settlor includes a protective device in a trust, the logical inference is that the settlor desired to protect the trust from claims. Often, there is simply no way to ascertain whether the settlor intended the protection to extend to claims for support and alimony. If a spendthrift clause is broadly worded or the

\begin{thebibliography}{99}
\bibitem{97} Id.
\bibitem{98} Id.
\bibitem{99} Id.
\bibitem{100} Id.
\bibitem{101} 197 A. 715 (N.H. 1938).
\bibitem{102} Id. at 717.
\bibitem{103} 132 A. 10 (N.H. 1926).
\bibitem{104} Id. at 11.
\bibitem{105} Id.
\bibitem{106} \textit{See, e.g.}, Eaton v. Lovering, 125 A. 433 (N.H. 1924).
\end{thebibliography}
trust is a trust for support or a discretionary trust, the settlor probably did intend protection from all claims.

In an unusually strong showing of respect for settlor's intent, the Supreme Court of Minnesota has focused solely on that intent in deciding whether the assets of spendthrift trusts could be used to satisfy claims for support or alimony. Beginning in 1936 with *Erickson v. Erickson*, the Minnesota court has consistently upheld the validity of spendthrift trusts as a general principle and has further held that a spendthrift provision will protect both income and principal from creditors' attacks. With respect to claims for support and alimony, the Minnesota court has ruled that trust assets protected by a spendthrift provision are not available to support or alimony claimants unless the settlor intends otherwise and manifests that intent in the governing document. In so holding, the Minnesota Supreme Court has focused on the power of the settlor to do as the settlor pleases with property, so long as there is no statutory restriction. Thus, the court refused to recognize a public policy argument that the settlor's intent must yield to the public policy that favors enforcement of support and alimony obligations. In so doing, the *Erickson* court emphasized that it was respecting the wishes of the donor, not acting out of any particular concern for the debtor-beneficiary.

The Minnesota Supreme Court has not wavered from this position. The court in *Erickson* and later cases has recognized that there is much support for allowing claims against spendthrift trusts for support and alimony, but has refused to allow such claims to succeed.

107. 266 N.W. 161 (Minn. 1936).
108. Id.
109. Id.
110. Id. at 164.
111. Id.
112. Id.
113. See, e.g., Campbell v. Campbell (In re Trusts of Campbell), 258 N.W.2d 856 (Minn. 1977); Van Dyke v. First Nat'l Bank (In re Moulton's Estate), 46 N.W.2d 667 (Minn. 1951); cf. Smith v. Smith, 253 N.W.2d 143 (Minn. 1977) (holding beneficiary of trust had right to withdraw assets of spendthrift trust and upholding assignment of assets); Commentary, *The Application of the Doctrine of Unconscionability to Spendthrift Trusts*, 25 ALA. L. REV. 641 (1973) (discussing attempted assignments of trust assets). The Appeals Court of Massachusetts noted a similar respect for settlor intent in Pemberton v. Pemberton, 411 N.E.2d 1305 (Mass. App. Ct. 1980). The *Pemberton* court stated that such deference was accorded "even in the face of strong public policy arguments favoring . . . recovery." *Id.* at 1312 (citing Town of Randolph
D. Claims for Support Versus Claims for Alimony

Some courts have focused on the nature of the obligation underlying the claim in deciding whether to allow payment from protected trust assets. To some courts, a claim for support of a family member is different from a claim for payment to someone whose familial relation has been severed. For example, the Supreme Court of New Hampshire has drawn a distinction between support of a wife or child and alimony of a divorced spouse to allow claims for support but not for alimony. The court has probably made this distinction because it includes support of the beneficiary's family, which it defines as a wife and child but not an ex-wife, in the definition of support of a beneficiary.

Without offering any indication of the reasons underlying its statement, the New York Surrogate's Court opined that the public policy favoring payments to dependent children is stronger than that favoring spouses. This statement may have been based on the argument that adults can provide their own support while minor children cannot.

Other courts have not denied claims based on the familial status of the claimant. For example, the Appellate Court of Indiana opined that an alimony claim could proceed against protected trust assets. In so doing, the court approvingly


115. See Fowler, 197 A. at 715; Eaton, 132 A. at 10; Gardner, 84 A. at 935; see also Whelan v. Connolly, 80 N.Y.S.2d 691, 694 (Sup. Ct. 1948) (holding ex-wife of debtor-beneficiary not entitled to income from trust for support of debtor-beneficiary "and his family"); cf. England v. England, 223 Ill. App. 549 (1922) (relying on spousal unity to hold that wife of debtor-beneficiary acquired equitable interest in trust that allowed court to order payment of alimony from trust); Thompson v. Thompson, 5 N.Y.S.2d 604 (Sup. Ct. 1889) (holding direction to pay alimony proper).


117. See Council v. Owens, 770 S.W.2d 193 (Ark. Ct. App. 1989). After noting that there may be a stronger public interest in allowing child support claims against protected trust assets than in allowing alimony claims against such assets, the Court of Appeals of Arkansas concluded that even claims for alimony should be permitted. Id. at 197. In so holding, the court noted that if either type of claim is precluded, the state may be called upon to support the claimant. Id.

cited section 157 of the Restatement of Trusts which states that claims for either support or alimony can proceed against protected trust assets.\footnote{119} In holding that in some circumstances a spendthrift provision will not bar the claim of a former spouse for alimony, the Florida Supreme Court noted that its reasoning was equally applicable to claims for support.\footnote{120}

\textbf{E. Claims Against Principal Versus Claims Against Income}

Another factor that some courts have considered is whether the claimant is seeking recovery from the principal or the income of the trust. Some courts have allowed the claimants to proceed against trust income only. For example, the Supreme Court of Illinois has noted that only the income of a spendthrift trust is subject to garnishment.\footnote{121}

Other courts have allowed claims against principal as well as income. Thus, the Supreme Court of Minnesota stated that “there seems to be no logical distinction between income and principal so long as it remains in the hands of the trustee and subject to the provisions of the trust instruments.”\footnote{122}

\textbf{F. Interests of the Debtor-Beneficiary and of Other Trust Beneficiaries}

Courts have taken the needs of the debtor-beneficiary into account in determining the amount of trust assets that are to be paid to the support or alimony claimant.\footnote{123} Further, the size of the trust corpus and available income is relevant to balancing the interests of those claiming trust assets.\footnote{124} Courts should not simply divide the debtor-beneficiary’s interest in half, as some courts have done.\footnote{125} Nor should the courts unthinkingly award

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\item \footnote{119} Id. at 211 (quoting \textit{RESTATEMENT OF TRUSTS} § 157 (1935)); \textit{see also} Shelley v. Shelley, 354 P.2d 282 (Or. 1960).
\item \footnote{120} Bacardi v. White, 463 So. 2d 218, 220 n.2 (Fla. 1985).
\item \footnote{121} \textit{In re} Support of Matt, 473 N.E.2d 1310, 1312 (Ill. 1985).
\item \footnote{122} Erickson v. Erickson, 266 N.W. 161, 163 (Minn. 1936) (citing \textit{Boston Safe Deposit & Trust Co. v. Collier}, 111 N.E. 163 (Mass. 1916); Lathrop v. Merrill, 92 N.E. 1019 (Mass. 1910); \textit{Broadway Nat'l Bank v. Adams}, 133 Mass. 170 (1882); Haskell v. Haskell, 125 N.E. 601 (Mass. 1920); \textit{see also} Sefton v. San Diego Trust & Sav. Bank, 106 P.2d 974, 986 (Cal. Ct. App. 1940) (allowing claims for support or alimony against trust corpus).
\item \footnote{123} \textit{See} Eaton v. Eaton, 132 A. 10, 11 (N.H. 1926).
\item \footnote{124} \textit{See id.}; Shelley v. Shelley, 354 P.2d 282 (Or. 1960).
\item \footnote{125} \textit{See, e.g.}, Ford v. Ford, 18 S.W.2d 859 (Ky. 1929); Robinson v. Robinson, 19
\end{itemize}
the support or alimony claimant the full amount of the claim.126 Rather, courts should look to the respective needs of the debtor-beneficiary and the support or alimony claimant.127

In addition, courts should consider that any decision to satisfy support or alimony claims out of anything other than income or principal to which the debtor-beneficiary is absolutely entitled by the trust’s dispositive provisions has an impact on other beneficiaries of the trust. It is surprising, then, that none of the statutes and few of the decisions addressing this issue make any reference to the interests of other trust beneficiaries. The few decisions that note the issue do nothing more than state that other beneficiaries’ interests would be adversely affected by allowing claims.128

Perhaps the legislatures’ and courts’ seeming indifference is a result of the notion that the only decision is between debtor-beneficiary and claimant. This is true, however, only in those situations in which the debtor-beneficiary is absolutely entitled to payment. In any other circumstance, the decision maker must take the effect on other beneficiaries into account.

N.Y.S.2d 44 (Sup. Ct. 1940).

126. See RESTATEMENT (SECOND) OF TRUSTS § 157 cmt. b (1959). Comment b provides:

It is a matter for the exercise of discretion by the court having jurisdiction over the administration of the trust as to how much of the income under the trust should be applied for such support and how much the beneficiary himself should receive. Even though the beneficiary’s wife has obtained a decree for alimony directing the beneficiary to pay certain sums to her, she cannot compel the trustee to pay her the full amount so decreed unless the court which has jurisdiction over the administration of the trust deems it to be fair to the beneficiary himself to compel the trustee to make such payment. The result is much the same as though the trust were created, not solely for the benefit of the beneficiary, but for the benefit of himself and his dependents.

Id. But see Lippincott v. Lippincott, 42 Pa. D. & C. 566 (Pa. Ct. C.P. 1941) (holding all income of spendthrift trust to be used to satisfy claim for separate maintenance).

127. See, e.g., Council v. Owens, 770 S.W.2d 193, 197-98 (Ark. Ct. App. 1989) (holding where a wife could reach income of spendthrift trust court should make equitable apportionment between beneficiary and wife); Fayer v. Orgill, 191 N.E.2d 373, 376 (Ohio Ct. C.P. 1963) (“Equity should not feed the husband and starve the wife no more than should equity feed the wife and starve the husband.”).

G. Claims of Other Creditors

Another question that courts must face is whether claims for alimony and support should be elevated in priority over the claims of other creditors. In this regard, it is reasonable for courts to draw a distinction between voluntary and involuntary creditors. When one voluntarily extends credit to the beneficiary of a trust, it seems appropriate to make that creditor take the responsibility for that action. Put another way, if the potential creditor is relying on the beneficiary's interest in trust assets when deciding whether to extend the beneficiary credit, the potential creditor can demand a copy of the trust instrument from the debtor as a condition of the deal. If the trust contains a protective device, the voluntary potential creditor can simply refuse to deal with the beneficiary.

The same argument cannot be made, however, about an involuntary creditor. Although not always expressed, perhaps this is the rationale that has driven many of the decisions in this area. A support or alimony claimant presumably does not engage in the economic calculus that precedes a decision to extend credit. In a similar vein, an individual having a tort claim against the beneficiary of a trust would be an involuntary creditor who might be able to recover against trust assets.

129. Contra Campbell v. Campbell (In re Trusts of Campbell), 258 N.W.2d 856 (Minn. 1977). Relying on a line of Minnesota cases, the Campbell court opined that claims for support and alimony would not be given special consideration when determining whether funds protected by a spendthrift provision should be used to pay the claims. Id. at 863; see also Bucknam v. Bucknam, 200 N.E. 918, 921 (Mass. 1936) (holding alimony claimant stands in no better position than other creditors).

130. See SCOTT & FRATHER, supra note 1, § 157 ("[V]oluntary creditors have only themselves to blame if they extend credit to [a person] without first ascertaining the amount of his resources that are available for the discharge of his debts.").

131. Bucklin v. Wharton (In re Bucklin's Estate), 51 N.W.2d 412, 416 (Iowa 1952) (recognizing voluntary creditors could exercise due diligence and discover that the debtor-beneficiary's interest is inalienable) (citing Nichols v. Eaton, 91 U.S. 716 (1875)).


133. See Safe Deposit & Trust Co. v. Robertson, 65 A.2d 292 (Md. 1949). Quoting extensively, the Safe Deposit court opined that claims for support by spouses and children are based on public policy. Id. at 295 (quoting SCOTT, supra note 33, § 157.1). This, the court suggested, put such claimants “in a different position from creditors who have voluntarily extended credit.” Id. at 295 (quoting SCOTT, supra note 33, § 157.1).

134. See RESTATEMENT (SECOND) OF TRUSTS § 157 cmt. a (1959); Griswold, supra note 1, at 80; Laurence M. Brooks, Comment, A Tort-Creditor Exception to the Spendthrift Trust Doctrine: A Call to the Wisconsin Legislature, 73 MARQ. L. REV. 109.
Thus, some courts have elevated claims of involuntary creditors above claims of voluntary creditors.135

A second possibility is for courts to find that public policy elevates some claims over others. It is not unreasonable to conclude that the State has a greater interest in seeing that support and alimony obligations are fulfilled than in seeing a contract creditor's claim enforced. Some courts have squarely disagreed with this notion, noting that because a support or alimony obligation is a debt, a spendthrift clause that prohibits payment of debts of the beneficiary will prevent satisfaction.136

In a related vein, at least one court has focused on the apparent need of the claimant. In In re Bucklin's Estate,137 the Supreme Court of Iowa considered a claim by a former spouse for unpaid child support. In denying the claim, the Bucklin court noted that the children were already adults and suggested that the claim was not made while the children were in present need of support.138 In addition to considering the needs of the claimant, some courts have noted the necessity of considering the needs of the debtor-beneficiary.139

H. Creative Interpretation of the Governing Instrument

One means that courts have used to allow payment of support and alimony obligations from protected trusts is interpreting the governing instrument in a way that allows the assets to be used for that purpose. There are two possible ways to accomplish this.

First, the court can find that the claimants are beneficiaries of the trust.140 In Shelley v. Shelley,141 for example, the Oregon

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136. Erickson v. Erickson, 266 N.W. 161, 164 (Minn. 1936). The Erickson court did acknowledge, however, that the obligation for support and alimony may be "of higher rank than other debts" and "paramount." Id. It nevertheless relied on the nature of the support or alimony obligation as a debt and declined to raise it above other debts. Id.
137. 51 N.W.2d 412 (Iowa 1952).
138. Id. at 417. The Bucklin court noted, however, that there was some doubt whether the claimant was arguing that her status as a former spouse raised her claim above those of other creditors. Id.
139. See, e.g., Eaton v. Eaton, 132 A. 10, 11 (N.H. 1926) (holding determination of child support made without reference to needs of debtor-beneficiary or size of fund not appropriately made).
140. The Minnesota Supreme Court was apparently presented with this argument in
Supreme Court addressed a claim by two former wives and two sets of children of a trust beneficiary. The trust, established by the beneficiary's father, provided that at the time the claim was made, the income was to be paid to the debtor-beneficiary. In addition, the trustee was given the discretion to distribute the principal of the trust for the “use and benefit” of the debtor-beneficiary or his children “in case of any emergency arising whereby unusual and extraordinary expenses are necessary for the proper support and care of [the debtor-beneficiary and his children].” The court held that nonsupport was an emergency that allowed distribution to the children.

Alternatively, the court can conclude that the spendthrift provision was not intended to exclude claims by the beneficiary's dependents. Some courts have accomplished this by holding that the language of the specific spendthrift clause in question does not exclude claims for support or alimony. For example, if the clause prohibits use of trust assets to pay the “debts” of a beneficiary, the court may find that a claim for support or alimony is not technically a debt.

Erickson, 266 N.W. at 164 (“To hold that the testator intended the trust to benefit the grandchildren, who were contingent beneficiaries of the trust, would be a manifest perversion of his positive language, and there are no circumstances other than his relationship supporting any such implication.”). The Minnesota court faced a similar argument in Campbell v. Campbell (In re Trusts of Campbell), 258 N.W.2d 856 (Minn. 1977). In Campbell, the governing instrument named the debtor-beneficiary's children as contingent beneficiaries. The Minnesota court found that this did not entitle the children to distributions while the primary beneficiary was living. Id. at 860-61. The court relied solely on the language of the instrument, refusing to look to extrinsic evidence that might have shown the settlor's intent to provide for the needs of the debtor-beneficiary's family. Id. at 864. Further, although the trust provided for the “support” of the debtor-beneficiary, the court was not willing to hold that support of a person included support of his family. Id. at 861-62.

141. 354 P.2d 282 (Or. 1960).
142. Id. at 283-84.
143. Id. at 284.
144. Id. at 289-90. Similarly, the Supreme Court of Washington held that a testamentary trust that gave a contingent interest to the debtor-beneficiary's children showed the settlor's intent to support them. Seattle First Nat'l Bank v. Crosby, 254 P.2d 732, 743 (Wash. 1953) (en banc). Thus, the court allowed a claim for child support against a trust for support. Id.
146. See, e.g., In re Moorehead's Estate, 137 A. 802 (Pa. 1927). The trust in Moorehead provided that it was not to be liable for the debts of the beneficiary. In holding that the wife of the beneficiary was entitled to support from the trust, the court stated: “[h]ow can it be claimed that the status of creditor and debtor is established between [husband and wife], when it is a question of the mutual
In this writer's opinion, the technique of creatively interpreting a governing instrument to allow enforcement of support and alimony orders out of trust assets is inappropriate.\textsuperscript{147} I use the word "creative" somewhat euphemistically; more often the courts have stretched language beyond any possible intention of the settlor.\textsuperscript{148}

Why then do courts engage in such a tortured process? Courts are frequently asked to interpret trust language. In the overwhelming majority of jurisdictions, courts deciding trust cases look primarily to the language of the governing instrument. Courts are accustomed to manipulating language to achieve a desired result.

In some jurisdictions, manipulation of language may be the only way to subject trust assets to claims for support or alimony. The Supreme Court of Minnesota has stated: "If alimony or support money is to be an exception to the protection offered by spendthrift provisions, it must be by some justifiable interpretation of the donor's language by which such implied exception may be fairly construed into the instrument of trust."\textsuperscript{149} The Minnesota court would undoubtedly take the same position, or perhaps one even less likely to allow payment of claims, with respect to trusts for support or discretionary trusts. Thus, in Minnesota, the only road to success for the support or alimony claimant is to argue that the language of the trust should be interpreted to allow the claim.

\textsuperscript{147} See Schwager v. Schwager, 109 F.2d 754 (7th Cir. 1940). The Schwager court reviewed a number of decisions in which it believed that courts had stretched to find that settlers had not intended to preclude claims for support or alimony. \textit{Id.} Taking a critical view of such manipulation, the Schwager court stated:

\textit{[I]t may also be said that the courts have extended themselves at great length to ascertain a favorable intent on the part of the settlor and, in fact, in some of the cases have indulged in a reasoning indicative of the desire sought to be achieved. In such cases the intent has been found because of a failure to express a non-intent.}

\textit{Id. at 757.}

\textsuperscript{148} See Burrage v. Bucknam, 16 N.E.2d 705, 707 (Mass. 1938) (declining to find that support claimants were intended beneficiaries of trust, stating: "In some of the cases [holding that claimants were intended beneficiaries] the court seems more concerned to discover means of avoiding the spendthrift clause than to ascertain the intent of the testator").

\textsuperscript{149} Erickson v. Erickson, 266 N.W. 161, 164 (Minn. 1936).
Similarly, the Supreme Court of Ohio refused to allow a claim for alimony against the assets of a trust.\textsuperscript{150} The Ohio court looked to the trust language for evidence of settlor intent that the beneficiary's income interest could be used to pay alimony.\textsuperscript{151} The court found no such intent.\textsuperscript{152} The court did, however, allow the alimony claim against distribution at the termination of the trust.\textsuperscript{153}

The result of this manipulation, however, is to reward the client of the drafter who drafts language that cannot be construed to allow attacks for alimony or support. In a jurisdiction in which the case law suggests a willingness to stretch language to allow attack, the careful drafter would simply expressly state that in no event are trust assets to be used to satisfy the obligation of any beneficiary for alimony or support.

The better approach is to recognize that the settlor who uses a protective device in a trust probably intends that no creditors of a beneficiary should be able to reach the trust assets.\textsuperscript{154} There are, however, times when public policy concerns will outweigh this desire. The public policy comes in part from the notion that the state may be forced to support those who are not otherwise supported.\textsuperscript{155} The policy is also informed by the duty of one spouse to support another, and of a parent to support children.\textsuperscript{156} Recognition of the public policy that favors payment of support and alimony obligations has enabled courts to allow claims in spite of expressed settlor intent to the contrary.\textsuperscript{157}

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\textsuperscript{150} Martin v. Martin, 374 N.E.2d 1384 (Ohio 1978).
\textsuperscript{151} Id. at 1390.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 1391.
\textsuperscript{154} See, e.g., In re Support of Matt, 473 N.E.2d 1310, 1311 (Ill. 1985) (reciting spendthrift clause expressly prohibiting all voluntary and involuntary claims, including claims by spouse of beneficiary for alimony or support).
\textsuperscript{155} See Shelley v. Shelley, 354 F.2d 282 (Or. 1960).
\textsuperscript{157} See, e.g., Seidenberg v. Seidenberg, 126 F. Supp. 19, 23 (D.D.C. 1954) (holding child support payable from trust that intentionally excluded children from benefits); In re Moorehead's Estate, 137 A. 802 (Pa. 1927).
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III. A Proposal for Balancing the Interests

The resolution of this complex issue should turn on the economic reality of the beneficiary’s interest in the trust. That interest is an economic benefit to the beneficiary and should be available to satisfy support and alimony claims against the beneficiary. To cut off claims against protected trusts entirely ignores this economic benefit. Further, to base denial of a claim on the type of protective device used exalts form over economic substance.

Courts and legislatures also must take into account the sophistication of modern estate planning. Most drafters are well aware of how far they can go in a document to give a beneficiary virtual control of the assets in a trust while avoiding responsibilities that normally accompany ownership. For example, one typical plan gives a beneficiary an income interest for life coupled with a discretionary power in the trustee to distribute principal for the health, support, maintenance, or education of the beneficiary. The trust assets are protected by a spendthrift provision. Often, the beneficiary is given the power to remove the trustee and appoint a new trustee. The beneficiary may even have the power to name himself sole trustee. Under these provisions, if the support or alimony claimant would have a good chance of satisfaction from the trust income, in spite of the spendthrift provision, the debtor-beneficiary could simply ask the trustee to invest in assets that would produce less income. Because the dispositive provisions relating to principal create either a trust for support or a discretionary trust, the claimant would be less likely to succeed in a claim against the principal. Presumably, the debtor-beneficiary would be the only person with standing to complain about the investment of the assets, unless a court were willing to consider the claimant a party in interest. Therefore, the assets would probably be difficult for a claimant to reach. Once the claimant ceased to press the claim, the assets could be reinvested. This example shows that if a court decides that assets protected by a spendthrift clause will be subject to claims for support and alimony, but assets of a discretionary trust will not, clever drafting and administration can easily keep the assets from the support and alimony claimants.

If courts decide that protected trust assets should be available to satisfy claims for support and alimony, they could rely on the principle that a trustee has a duty to treat all beneficiaries of a
trust fairly to determine the amount of assets to be so used.\textsuperscript{158} Fairly does not necessarily mean equally; rather, it means in a reasonable manner within the discretion given in the provisions of the trust.\textsuperscript{159}

This duty of fairness could allow courts to get over the hurdle seemingly presented by the nature of the beneficiary’s interest in a trust for support or a discretionary trust. If fully discretionary, the court should allow the support or alimony claim to reach the beneficiary’s “share.” Thus, if the debtor-beneficiary is the sole beneficiary, the whole of the assets should be considered; if the beneficiary is one of a group, a fractional share of the assets should be considered. In the latter case, if there is clear evidence that the settlor intended a primacy among beneficiaries, the fraction could be adjusted accordingly. This is not to suggest, however, that the courts should honor a direction by the settlor that if a beneficiary becomes a debtor, the beneficiary’s share is to be decreased. To be respected, the primacy would have to be unrelated to status as a debtor.

The settlor’s intent should be respected only to the extent that it does not contravene public policy. A settlor should not be permitted to give a substantial benefit to a beneficiary and, at the same time, protect the benefit from claims by persons who the beneficiary is obligated to support. This is not to say, however, that the settlor’s intent has no part in this calculation. The settlor defines the interests of the trust beneficiaries. If the settlor makes it clear that one beneficiary is to be favored over another for purposes unrelated to status as a debtor, that intent should be respected.

This principle should apply whether the attack is against the income or the principal of the trust. Rather than drawing a distinction based on the character of the beneficiary’s interest as a principal or income interest, courts should focus on the economic benefit that the interest gives the beneficiary.

Claims for alimony and support should have priority over claims of other creditors. It is difficult to imagine an obligation that is more compelling than one that arises out of the family relationship, be it marriage or parentage. Further, the distinction between voluntary and involuntary creditors seems reason

\textsuperscript{158} See generally Scott & Fratcher, supra note 1, § 183.  
\textsuperscript{159} Id.
enough to allow claims for support and alimony while denying claims by contract creditors.

One last consideration is whether the assets of a trust should be available to satisfy claims only as last resort (i.e., in cases in which the debtor-beneficiary is judgment proof and the claimant has exhausted other methods of enforcing arrearages). Because this type of obligation falls primarily on the spouse or parent who is ordered to pay support or alimony, it seems only fair to require that person to bear primary responsibility for meeting those obligations. Legislatures and courts should not, however, make the claimant take such extraordinary measures that the debtor-beneficiary will simply win a war of attrition. It seems appropriate to make the holder of a judgment for support or alimony take reasonable steps to enforce that judgment against the debtor. If the debtor is judgment proof, or if enforcing the judgment would require such hardship that the claimant is unlikely to proceed, the claimant should be permitted to attempt to enforce the judgment against trust assets.

CONCLUSION

In sum, then, decision makers, primarily courts, have fallen short in two respects. First, they often fail to consider all of the ramifications of this complex issue. Second, many have taken the easy way out, either by relying on trust law platitudes or by stretching language beyond all recognition to achieve a desired result.

The mechanical distinction drawn by most courts between spendthrift and discretionary trusts is an impediment to alleviating the current crisis in nonpayment of support and alimony. Although appealing as technical trust law, the argument that the beneficiary has no interest in a discretionary trust until the trustee exercises discretion ignores economic reality. Further, the decision whether to allow a spouse or child to recover from the assets of a trust with one beneficiary is not logically different from the same decision about a trust with more than one beneficiary. In either case, the court will be called upon to balance the interests of the parties, a task to which courts

160. See Bacardi v. White, 463 So. 2d 218, 222 (Fla. 1985); see also In re Support of Matt, 473 N.E.2d 1310, 1312 (Ill. 1985) (holding trust assets reachable only where debtor-beneficiary cannot be located or takes no steps to avoid garnishment).
having jurisdiction over the administration of trusts are accustomed.

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.

A better solution would allow the court having jurisdiction over the administration of the trust to weigh all of the competing interests and reach a decision about whether the claim should be allowed, how much should be paid from the trust assets, and when the payments should be made. Because the court has continuing jurisdiction during the administration of the trust, a great amount of flexibility of remedy is possible. This flexibility, it is submitted, will produce results that respect the important public policy favoring payment of support judgments while taking into account the interests of the settlor and the beneficiaries of the trust.