Irrevocable Trusts Under Attack: The Domestic Relations Angle

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A. The Institution Of Marriage (And Divorce)

1. **Question:** What percent of the U.S. population gets married?
   
   
   i. For the twelve months ending with September 2007, there were approximately 2,169,000 marriages in the United States. Sutton PD, “Births, marriages, divorces, and deaths: Provisional Data for September 2007,” National Vital Statistics Reports Vol. 56 No. 18 (National Center for Health Statistics, Hyattsville, MD 2008).

2. **Question:** What percent of the U.S. population gets divorced?
   
   a. The American divorce rate is between 40 and 50 percent. www.nwamarriages.com/about/marriage_facts.php
   
   b. In 2005, there were 1.2 million divorces. *Id.*
   
   c. About 9.9 percent of the U.S. population (almost 20 million people) are currently divorced. *Id.*
   
   d. Statistically, 40 percent of first marriages, 60 percent of second marriages, and 73 percent of third marriages end in divorce. *Id.*

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i. The probability of a first marriage ending in separation or divorce within five years is 20 percent. Bramlett MD and Mosher WD, “Cohabitation, Marriage, Divorce, and Remarriage in the United States,” *Vital Health Stat* 23(22) (National Center for Health Statistics 2002).

   (1) After 10 years, the probability of a first marriage ending in separation or divorce is 33 percent. *Id.*

ii. The probability of a second marriage ending in separation or divorce within five years is 23 percent. *Id.*

   (1) After 10 years, the probability of a second marriage ending in separation or divorce is 39 percent. *Id.*

3. **Question:** What percent of the U.S. population gets married more than once?


   b. In 2004, 43.5 percent of women previously divorced were remarried. *Id.*

**B. The Prevalence Of Trusts**

1. **Question:** How many trusts are created each year?

   a. There is no way to determine the number of new trusts created each year because the Internal Revenue Service does not provide specific information regarding the number of trusts created each year. However, in 2006, 3.7 million estates and trusts filed income tax returns. Table 2. Number of Returns Filed, by Type of Return, Fiscal Years 2005 and 2006, available at [www.irs.gov/taxstats/compliancestats/article/0,,id=97168,00.html](http://www.irs.gov/taxstats/compliancestats/article/0,,id=97168,00.html)

2. **Question:** How much property is held in trust, approximately?

   a. Again, there is no way to determine the value of property held in trust. However, one might extrapolate the significance of trust-owned property from the fact that, in 2003, estates and trusts reported aggregate gross income worth $85.2 billion, of which approximately 71 percent, or $60.6 billion, was trust income. Lisa Schreiber, *Fiduciary Income Tax Returns, Filing Years 2003 and 2004*, available at [www.irs.gov/taxstats/indtaxstats/article/0,,id=96425,00.html](http://www.irs.gov/taxstats/indtaxstats/article/0,,id=96425,00.html)

**C. Why Should We Care About These Statistics?**

1. At the risk of stating the obvious, the confluence of multiple marriages, and multiple divorces, with hundreds of billions or trillions of dollars of property held in trust for the benefit of one or the other of the spouses breeds contention over the issue of when trust property should be available to meet the obligations of a beneficiary to pay alimony (hereinafter generally referred to as “spousal support” or simply “support”).
D. What Is This Outline/Presentation About?

1. In the Summer 2002 edition of the Asset Protection Journal, Vol. 4, No. 2, the author presented an article entitled “When Your Child’s Marriage Goes Bad, So Might Your Child’s Trust: Spousal and Child Support Exceptions to Spendthrift Trust Protections.” This outline will serve to examine, in further and updated detail, the issue of spendthrift (and other types of trust) protections against attacks by a spouse or former spouse for support.

   a. For a quick reference on this issue, please refer to the state by state chart (with the District of Columbia included as well) at the end of this outline.

E. Types Of Trusts

1. As a preliminary matter, it is important to note the various types of trusts that may bear on the issue under discussion. Notably, trusts may contain features pertaining to one or more of the various types of trusts under discussion.

2. Spendthrift Trusts

   a. “The term ‘spendthrift trust’ refers to a trust that restrains voluntary and involuntary alienation of all or any of the beneficiaries’ interests.” Restatement (Third) of Trusts §58, General Comment (ALI 2003).

   b. “Trusts in which the interest of a beneficiary cannot be assigned by him or reached by his creditors have come to be known as ‘spendthrift trusts.’” 2A Austin W. Scott & William F. Fratcher, The Law of Trusts §151, at 83 (4th ed. 1987).

3. Discretionary Trusts

   a. A “discretionary” trust is a trust in which distributions to the beneficiary are left wholly within the discretion of the trustee, generally without regard to any ascertainable standard.

   b. A discretionary trust is a trust “where the trustee or another party has the right to accumulate (rather than pay out) the income for each year. Depending on the terms of the trust instrument, such income may be accumulated for future distributions to the income beneficiaries or added to corpus for the benefit of the remaindermen.” Black’s Law Dictionary 467 (6th ed. 1990).

4. Support Trusts

   a. A “support trust” is “[a] trust in which the trustee has the power to pay the beneficiary only so much of the trust income as is necessary for the beneficiary’s support, education and maintenance.” Black’s Law Dictionary 1513 (6th ed. 1990). See also, Restatement (Second) of Trusts §154, cmt. d (1959) (A “support trust” is one in which “by the terms of the trust the amount to be paid to or applied for the beneficiary is limited to so much of the income or principal as is in fact necessary for his education or support.”)

   c. In essence, support trusts are a subset of discretionary trusts in which the trustee’s discretion to make a distribution to the beneficiary is limited to reasons of the beneficiary’s support.
i. The legal distinction between “discretionary” trusts and “support” trusts is, however, disappearing.

(1) “[T]his Restatement Third does not attempt to draw a bright line between ‘discretionary’ interests . . . and ‘support’ interests . . . The so-called ‘support trust,’ for example, is viewed here as a discretionary trust with a support standard. This in turn requires asking and examining all of the questions that follow from that view, such as how a particular standard, in context, is to be interpreted and whether a beneficiary’s other resources are to be taken into account in making a fiduciary judgment about appropriate distributions to the beneficiary.” Restatement (Third) of Trusts §60, Comment a.

(2) The Uniform Trust Code similarly provides but a single rule and a single section for all discretionary trusts, including ones in which the trustee’s discretion is subject to a support standard.

   a. A trust might contain a provision that would effect a forfeiture of a beneficiary’s trust interest upon an attempt by the beneficiary to transfer it or an attempt by the beneficiary’s creditors to reach it.
      i. An example provided by the Restatement (Second) of Trusts illustrates:

         (1) “A transfers property to B in trust to pay the income to C for life and to pay the principal, on C’s death, to D. By the terms of the trust, if C conveys his interest or if his creditors should attempt to reach it, or if he should become bankrupt, his interest under the trust should cease and the income should be paid to C’s wife during the remainder of C’s life. C becomes bankrupt. His interest under the trust terminates.” Restatement (Second) of Trusts §150, illust. 1 (1959).

F. The Nature Of The Protection

1. Each of the various types of trusts provides some protection against spousal support claims, but the basis behind the protection differs depending on the type of trust. It is, obviously, important to understand why a trust may or may not be protective.

2. Spendthrift Trusts
   a. Spendthrift trusts are free from creditors’ claims because the settlor has explicitly provided, through the incorporation of a spendthrift provision in the governing instrument, that the trust fund shall be exempt from the claims of the beneficiary’s creditors. The spendthrift trust carries out a stated intent of the settlor.

3. The maxim “cujus est dare, ejus est disponere,” or “[w]hose it is to give, his it is to dispose” is frequently cited in connection with references to the validity of spendthrift trust restrictions.
   a. “The validity of a spendthrift provision in a trust is predicated upon the [public policy] consideration that a person is free to make any desired disposition of his property.” Estate of Johnson, 252 Cal. App.2d 923, 925 (1967).