over the boxes to special administrator wwa, attorney Mr. Shepherd. Mr. Shepherd testified that the four boxes he received from Frederick contained legal documents, and $20,379.80 in cash.

As in the will contest filed by the plaintiff-appellants Jill, Thomas, Marcia and Debra in *Sferra v. Shepherd*, 2015-Ohio-2902, cited and discussed in the above article, wherein their father's last will dated August 19, 2013 was invalidated (which was obtained by, and favored Frederick and Bryan), exceptors testified that Frederick and Bryan isolated their father in his later years and limited father's contact with exceptors, while Frederick and Bryan testified that their father wanted such limited contact. Decedent's nephew testified that his uncle was closer to sons Frederick and Bryan. As explained in the above article, the said last will was set aside due to the undue influence exercised by Frederick and Bryan against their father.

In their single error on appeal relative to the dismissal of their exception to the amended inventory, exceptors raised six issues, most of which were related to the efforts, or really, non-efforts of the special administrator in determining if a large sum of money was missing and efforts to find the same, and did his mishandling of the missing money violate his fiduciary duties? Also was the trial court's decision arbitrary and unreasonable?

The appellate court reviewed the probate court's decision for abuse of discretion. *In re Estate of Luoma*, 11th Dist. Lake No. 2011-L-006, 2011-Ohio-4701. Under R.C. 2115.16, a summary proceeding, the probate court has to determine whether all of decedent's assets owned at the time of decedent's death are included therein. *In re Estate of* Platt, 148 Ohio App. 132, 2002-Ohio-3382. The exceptor has the burden of proving by clear and convincing evidence that the assets, which should have been included in the inventory at the death of the decedent, citing *In re Estate of Haas,* 10th Dist. No. 07 AP 512, 2007-Ohio-7011, actually existed at that time.

The appellate court noted that "clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence' but not to the extent of such certainty as is required in 'beyond a reasonable doubt' ," citing *Cross v. Ledford*, 161 Ohio St. 469.

The appellate court determined that the special administrator did not fail his fiduciary duties: he inspected decedent's home on several occasions, he hired a professional appraiser to value its contents, he identified decedent's bank accounts; and when he opened the four strongboxes, he invited representatives of both sides of the family to be present, but none of the exceptors attended. The appellate court instructed that if exceptors believed Frederick and Bryan had taken the allegedly missing money, they should have filed a concealment action under R.C. 2109.50 and "they never have."

Since there is no evidence or testimony that six strongboxes containing $130,000 each existed at Ralph Crain's death, exceptors failed to carry their burden, by clear and convincing evidence, that such assets should have been included in the estate inventory, the judgment of the Trumbull County Probate Court in dismissing the exceptions was affirmed by the appellate court.

(Note: Judge Timothy P. Cannon concurred in the judgment only, with a concurring Opinion.)

TRUST ASSETS IN DIVORCE: HOW TO BEST PROTECT AGAINST A BENEFICIARY'S PROSPECTIVE EX

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A divorce lawyer sagely stated: "Marriage is about love; divorce is about money." When a mar-

riage ends, several different bodies of law come together in the unwinding of the legal relationship. This confluence can cause unanticipated results for estate planning attorneys who carefully draft trusts so that their clients can preserve and pass on their wealth in the way the client desires. State laws on property division at divorce, the law of trusts, and the nature of property interests all converge in the proceedings, and the drafting attorney cannot know which state law (or even foreign country law) will apply. The result may be that a grandparent who has carefully left assets in trust for a beloved granddaughter may also end up leaving the property to the granddaughter's no-good-, soon-to-be-ex-husband.

For example, in 1991 the Massachusetts Supreme Judicial Court ruled that a divorcing man's contingent future interest in a spendthrift trust holding real estate that was established by his father was a "vested right" and was therefore considered property subject to division. Thus, part of the inheritance that the man was to receive in the future when the trust terminated was set over to his ex-wife if and when he did receive it. *Lauricella v. Lauricella*, 565 N.E.2d 436 (Mass. 1991). What can we do to best protect trust assets from the most unexpected and perhaps aggressive of creditors: the divorcing spouse?

As Ohio estate planners, we typically rely on traditional third-party spendthrift provisions to protect our clients' wealth from claims of any beneficiary's creditors. But there are clearly exceptions for the claims of certain parties. As the previous example demonstrates, the divorcing spouse of a beneficiary (the "ex-to-be" or "ex") may be effective in breaking through the protections we assume will shield trust assets. The ex may be able to count all or part of the trust estate as property of the marriage or as part of the equation in determining a division of marital property which results in an award of more marital property to one party than the other. Similarly, the court in a divorce action can take into account a beneficiary's income interest in a trust when making calculations to award alimony payments by one party to the other. And according to the National Center for Health Statistics, for every 6.9 marriages that took place in 2014, 3.2 divorces occurred that same year, a ratio that reflects the current trend.[1] Given this current rate of divorce, estate planning attorneys would be wise to advise clients to consider the need to protect assets left for beneficiaries.

To properly discuss this topic, there are three legal doctrines that must be reviewed. They are the law of property in marriage and divorce, the law of spendthrift and discretionary trusts, and the law of present and future interests.

REVIEW OF PROPERTY LAW IN MARRIAGE AND DIVORCE

State law on property division at divorce is essentially a re-characterization of the property held separately or jointly by the couple using community property concepts. Regardless of how property is titled, property earned during the marriage is considered to be "marital property," and property that a spouse held before the marriage or acquired during marriage by gift or inheritance is that spouse's "separate property." States differ on whether the income from or the appreciation of separate property during the marriage is marital property. Ohio does not gross-up marital property with the income from or the appreciation on separate property or otherwise compensate the non-owning spouse, unless the personal efforts of the non-owning spouse were involved.[2]

In general, absent equities to the contrary, marital property at divorce is divided equally between the parties, and separate property is not subject to division.[3] In a small minority of states, such as Indiana, all property of either spouse is subject to division.[4] In Ohio and the majority of states that respect the distinction between marital and separate property, the court is generally free to apply equitable principles when dividing up marital property including awarding part of a spouse's separate property to the other spouse.[5] Under Ohio law, the factors for division of property in divorce that a court may consider are as follows: "(1) the duration of the marriage; (2) the assets and liabilities of the spouses; (3) the desirability of awarding the family home, or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage; (4) the liquidity of the property to be distributed; (5) the

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economic desirability of retaining intact an asset or an interest in an asset; (6) the tax consequences of the property division upon the respective awards to be made to each spouse; (7) the costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property; (8) any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses; (9) any retirement benefits of the spouses, excluding the social security benefits of a spouse except as may be relevant for purposes of dividing a public pension; (10) any other factor that the court expressly finds to be relevant and equitable."[6]

An award of spousal support (also known as maintenance or alimony) is a different issue altogether. A support award is determined after the division of marital and separate property has been made. The court will award support to a spouse, payable from the income or property of the other spouse, if justice so requires. When determining the need for and the amount of support, the court is typically instructed by statute to consider a variety of factors including: the standard of living established during the marriage, the income of the parties from all sources, the present and future earning capacity of each party, the education of the parties, and the duration of the marriage.[7]

States differ on the validity and effect of pre- and post-nuptial agreements as affecting property division and support.[8] But from the above discussion, we can appreciate that what is considered "property" is important in the context of property division. Furthermore, in Ohio, the court considers income from all sources, including trusts, in awarding support to a divorcing spouse. These concepts lead us to a discussion of beneficial interests in trusts and the income derived from such interests as property to be dealt with in a divorce. How should these property interests be characterized?

REVIEW OF THE LAW OF SPENDTHRIFT AND DISCRETIONARY TRUSTS

As previously stated, most trusts today contain a traditional spendthrift clause, and such clauses are valid and enforceable in almost all U.S. jurisdictions. Indeed, third-party spendthrift trusts have been the go-to vehicle for protecting a beneficiary's interest from creditor claims. Such trusts are settled by a grantor for the benefit of a beneficiary, such as a parent for the benefit of her children, or a grandparent for the benefit of his grandchild, where the beneficiary is not also the trustee of the trust. The Restatement (Third) of Trusts says regarding spendthrift trusts, "if the terms of a trust provide that a beneficial interest shall not be transferrable by the beneficiary or subject to claims of the beneficiary's creditor, the restraint on voluntary and involuntary alienation of the interest is valid."[9] Similarly, the Uniform Trust Code states that "a beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [Code], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary."[10] Thus, spendthrift trusts are widely held to be enforceable for the protection of the beneficiaries' interest, but there are exceptions for the claims of certain parties and, as we will see, for any claim if the beneficiary's interest is one that mandates distributions.

Exceptions to spendthrift protection from creditors come about when the beneficiary has the "equivalence of ownership," such as a presently-exercisable general power of appointment, or an enforceable right to a distribution. Examples of such enforceable rights are powers of withdrawal[11] and distributions upon the occurrence of an event such as a certain birthday or the death of a life income beneficiary. The Restatement also provides for certain exception creditors: "The interest of a beneficiary in a valid spendthrift trust can be reached in satisfaction of an enforceable claim against the beneficiary for support of a child, spouse, or former spouse."[12] In addition, the UTC allows any creditor to compel or attach a mandatory distribution, which is a distribution of income or principal that the trustee is required to make to a beneficiary according to the trust's terms.[13] The UTC also states that a spendthrift provision is not enforceable against "a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance."[14] Ohio's version of the UTC limits the exception creditor to the beneficiary's child and current spouse only.[15] Thus, in Ohio, specific excep-

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tion creditors to spendthrift protections are a child and current spouse, and any other creditor when the beneficiary has the equivalence of ownership, an enforceable right to a distribution, or a mandatory distribution.

On the other hand, beneficial interests that are purely discretionary, meaning distributions are made subject to the trustee's discretion, provide significantly greater protection from creditor claims. The UTC specifically frustrates a creditor's ability to *compel* a distribution (as opposed to attach a current or future distribution) from a discretionary trust, unless the creditor is seeking child or spousal support, and even then under limited circumstances.[16] The relevant UTC sections taken together mean that no creditor may *compel* a distribution from a discretionary trust, except that an exception creditor for support may compel a distribution to the extent that a trustee has abused its discretion or has failed to abide by a standard of distribution. Any exception creditor may attach a distribution that is to be made currently under the terms of the trust or that is to be made in the future under such terms but may not otherwise compel a distribution.

The Ohio Trust Code is tighter still in that a former spouse does not enjoy a remedy and, in the case of a child or a current spouse, the court may not order a distribution if the trust instrument specifically provides that the beneficiary's spouse or child is excluded from benefitting from the trust.[17] Here in Ohio, the state has put trust assets of a certain "wholly discretionary trust" outside the reach of not only the support claims of a child, spouse, or former spouse, but from claims of the United States, the State of Ohio,[18] and any other creditor.[19] There are simply no exception creditors to a wholly discretionary trust at all. Ohio law defines a wholly discretionary trust as one wherein "the terms of the trust do not provide any standards to guide the trustee in exercising its discretion to make distributions to or for the benefit of the beneficiary," and the beneficiary is not serving as trustee.[20] Thus, for a trust to be completely out of the reach of creditors, the trustee cannot be bound by any distribution standard, such as health, education, maintenance and support, or any other.

In summary, except in the case of Ohio's wholly discretionary trust, a beneficiary's current spouse, who has a support award, is an exception creditor and enjoys the remedy of attachment of current and future distributions and, under more limited circumstances, the remedy of compelling a distribution that would otherwise be protected by being subject to the trustee's discretion. Regarding the subject of marital property division, neither the Restatement, the UTC, nor Ohio law give the divorcing spouse any special rights or remedies. With respect to mandatory or overdue distributions, these sources make clear that a creditor can reach the underlying assets. Thus, assets subject to such a distribution would probably be treated as the property of the beneficiary and, in the context of divorce, these assets may be subject to division.

Further, the ex-to-be may be successful in counting the spouse's beneficial trust interest as property for purposes of determining either the amount of spousal support or the overall marital property award. Here, the ex does not reach the trust estate (except in the limited case of delinquent support), but he or she benefits by successfully counting assets or income of the trust into the overall pool for purposes of division of property or determining support. When analyzing beneficial interests in trusts, courts sometimes use property law doctrines of present and future interests as applied to trusts. As you might imagine, such application has led to inconsistent and sometimes inaccurate characterizations, such as the *Lauricella* case first discussed above.

In order to appreciate how courts can misapply property law concepts in the context of beneficial interests in trusts, we turn to a primer on the law of present and future interests.

REVIEW OF LAW OF PRESENT AND FUTURE INTERESTS

With our apologies, we now review basic property law interests. The good news is that, for the benefit of judges and lawyers (and perhaps the good of humanity), the Restatement Third of Property-Wills and other Donative Transfers (2010) adopts simplified terminology for classification that is descriptive of property interests.[21] Under its terminology there are present interests and future

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interests, and within the ambit of future interests there are only contingent and vested future interests. "Present interests" are those that give a present benefit to the beneficiary that entitles the beneficiary to possession or enjoyment, such as an income interest for life or a term of years. [22] A present interest is thus enforceable by the beneficiary. In contrast, "future interests" involve postponed enjoyment.[23] A future interest may be contingent or vested.

A future interest is contingent if, for any reason, it might never take effect in enjoyment.[24] Contingent future interests include those that take effect in enjoyment depending upon a future condition such as surviving another person or living until a certain age. In contrast, a future interest is vested if it is certain to take effect in enjoyment. In the context of trusts, there is no future interest that is vested, except in the case of a corporate taker, such as a charitable organization (because the organization always has a successor in interest), or the estate of a named or ascertained beneficiary (as opposed to a default taker such as the deceased beneficiary's issue) who does not survive an event.[25] In the context of common split-interest trusts, the interest of a charitable organization of a charitable remainder trust is a vested future interest. In contrast, the interest of an individual who takes only if he or she survives another person or attains a specific age is a contingent future interest if failure to survive would result in the taking by another under the terms of the trust, such as the decedent's issue. Practitioners rarely draft trusts with no default takers, so the estate of a deceased beneficiary is an unlikely recipient. As a result, almost all future interests in the trust context are contingent, not vested.

With these legal doctrines and classifications of property in mind, we now turn to the diverse case law on property division and spousal support that considers whether or not a beneficial interest in a trust is considered to be "property."

CASE LAW

A spendthrift clause is often meaningless to protect assets in a divorce because the court is not typically ordering a third-party trustee to distribute property. Instead, the court is considering such property in making an overall property division or determining support.[26] When the court knows that a beneficiary has a present or future interest in trust property it may give more marital assets to the spouse without that beneficial interest as a way to equalize the property division. It may award a higher support amount payable to the spouse without the beneficial interest or, conversely, a lower award of support to a spouse with a beneficial interest. The following are cases in which the trust beneficiary enjoys a particular property interest in a trust, and the court's treatment of these interests.

FUTURE INTERESTS

Courts have been fairly liberal in counting remainder interests as marital property.[27] The Massachusetts case discussed at the outset is an example of an award based on a mischaracterized contingent future interest. In the *Lauricella* case, the husband was a beneficiary of a spendthrift trust established by his father that had real estate as its sole asset and that was to end 21 years after his father's death. The father had died a few years before the beneficiary's divorce action, so that 21-year period had begun to run. The court found that the son enjoyed a "vested right" to take his share of the real estate upon termination of the trust according to its terms, because at the son's age of 26, he was "likely to survive" to take title to his share. The court held that this interest was therefore divisible property.[28] This is an example of a court that likely mischaracterized the remainder interest as a vested right. Unless the trust instrument did not name the husband's issue as a contingent remainder beneficiary (which omission would be unusual) and it was clear that the gift lapsed, the interest was a contingent future interest, an interest which, because of its uncertainty, should not be characterized as property subject to division. Other courts have not allowed remainder interests to be considered marital property.[29] And it should be noted that regardless of the nature of a spouse's beneficial interest, if the spouse's interest is subject to complete divestment by the possible exercise of a power of appointment held by another, then the interest is typically not to be included as marital property.[30]

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PRESENT INTERESTS

In contrast, a mandatory income interest is an example of a present interest because the beneficiary has current enjoyment and an enforceable right. Because the trust is generating current income and this income stream is capable of valuation, a mandatory income interest makes for an easy target when a court makes an award of property.[31] Some courts have reached a different conclusion,[32] but we will shortly suggest drafting tips to protect trust assets from the ex-to-be.

DISCRETIONARY INTERESTS IN INCOME OR PRINCIPAL (EXPECTANCIES)

Current interests in discretionary spendthrift trusts are not categorized by property law as present or future interests, but are generally known as expectancies. A recent (2016) Massachusetts case takes a well-grounded view of discretionary interests. In *Pfannenstiehl v. Pfannenstiehl*, the Massachusetts Supreme Judicial Court overturned a previous finding that included the present value of a husband's beneficial interest in a discretionary spendthrift trust as divisible marital property. Here the husband was a beneficiary of a trust established by his father that had an open class of current beneficiaries, namely the descendants of the settlor living from time to time. The trust instrument provided that the trustees "shall pay to, or apply for the benefit of, a class composed of any one or more of the Donor's then living issue in such amounts of income and principal as the Trustee, in its sole discretion, may deem advisable from time to time" under a HEMS standard for each or all members of the class. The settlor's descendants, including the husband, had received substantial distributions from the trust, but the distributions to the husband ceased upon his filing for divorce.

The Court vacated the previous holding and declared that the husband's interest in the trust was "so speculative as to constitute nothing more than an expectancy," and thus not assignable to the marital estate. "A divorcing spouse's enforceable right to an asset generally permits that asset to be included in the marital estate," it wrote, but "when interests are properly characterized as mere expectancies . . . they may not be included in the divisible estate of the divorcing parties.[33]

In the context of an award of spousal support, a New Jersey appellate court in *Tannen v. Tannen*, 416 N.J. Super. 248 (2010), *aff'd* 208 N.J. 409 (2011) ruled that the wife's current beneficial interest in a discretionary trust subject to a standard could not be taken into account in determining spousal support owed to her by her husband. The wife was the sole trust beneficiary but had never received a direct monetary distribution. The trial court, which ordered the joinder of the trustees of the trust (the wife and her parents), had ruled that the trust assets and their income should be taken into account in determining the husband's alimony obligations and had ordered the trustees to distribute $4,000 per month to the wife. Such an order served to substantially reduce what the husband would otherwise have owed her as spousal support. The appellate court reversed (and the Supreme Court of New Jersey affirmed), and held as follows: "[wife's] beneficial interest in the [trust] was not an asset held by her. It was, therefore, improper to impute income from the [trust] to [wife] in determining [husband's] alimony obligation." In arriving at this conclusion, the court gave weight to the settlor's intent. The trust instrument provided that "it was the express intention of the Grantors . . . that [wife] shall not be permitted, under any circumstances, to compel distributions of income and/or principal prior to the time of final distribution." The court further held that the trial court had no power to order the trustees to make a distribution and that the trustees were not proper parties to the litigation.

It is important to distinguish *Tannen's* decision as to whether to include trust assets and income in determining an award of spousal support from the power of an ex who has a judgment for support and who seeks to enforce it against the beneficiary's interest in the trust, as an exception to the spendthrift clause under common law and the UTC.

As in *Pfannehstiehl*, when the spouse is one of several beneficiaries and the trustee has complete discretion in distributing principal and income among them, courts have generally not considered such beneficial interests to be marital property. In the Colorado case of *In re Marriage of Jones*, 812 P.2d 1152 (Colo. 1991), the trust was created for the benefit of the wife's father, the wife, and the

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wife's descendants. The trustee had complete discretion to distribute income and principal to any one or more of the beneficiaries. Upon the death of the wife's father, the wife did not take; instead, the trust would continue for the remainder of her life for the benefit of her descendants and her. At her death (or the later of the death of her father and her), her descendants took outright. The court concluded that the wife's interest was a "mere expectancy" and its appreciation in value during the marriage could not be considered as part of marital property, as would otherwise be the case under Colorado law. The court said that the wife had no "vested 'property' right to receive payment from the trust."

Recent cases out of both Connecticut and Massachusetts concern perhaps the most expensive and contentious divorce proceedings underway at the present time, that of Michael Ferri and Nancy Powell-Ferri, residents of Connecticut who fought over (among many other things) Michael's beneficial interest in a trust established by his father under the laws of Massachusetts. In 2014, a Superior Court in Connecticut rendered a well-reasoned opinion when it determined that the assets of a purely discretionary trust set up in 2011 (referred to in the opinion as the "2011 Trust") could not be taken into account for purposes of both property division and determination of spousal support.[34] The court stated that "the evolution of the doctrine of includable property . . . cannot be construed to extend to property of a trust that a beneficiary has no present or future legal entitlement to absent the approval of the trustee, where said approvals are solely in the trustee's discretion and control, as it is here." The court stated further that the husband's expectant interest in the 2011 Trust was not vested in any way, and that the expectancy was "entirely conjectural," lacking the indicia of property that would be included in the marital estate.[35]

In rendering its opinion, the Superior Court in Connecticut mentioned that the 2011 Trust resulted from a decanting of the original trust (the "1983 Trust") that Michael's father set up for him at that time. The decanting of the 1983 Trust by the trustees to themselves as trustees of the 1991 Trust occurred after the Connecticut divorce proceedings were instituted.

In *Ferri v. Powell-Ferri*, SJC-12070, 2017 Mass. LEXIS 198, the Massachusetts Supreme Judicial Court took up the questions of law certified to it. The Court stated that the 1983 Trust established two methods by which trust assets would be distributed to the beneficiary. First, the trustee could "pay to or segregate irrevocably" trust assets for the beneficiary. Second, the beneficiary had certain rights of withdrawal of fixed percentages on specific birthdates; he could request 25% of principal at age 35, and so on at other ages, with a final, complete right at age 47. The husband had not received many distributions, and at the time of the decanting, had a right to request a withdrawal of up to 75% of the principal. During the pendency of the protracted litigation, he turned 47.

The Court went on to say that when the trustees of the 1983 Trust learned of the husband's impending divorce, they independently created the 2011 Trust and subsequently distributed substantially all of the assets of the 1983 Trust to themselves as trustees of the 2011 Trust. The husband was still the sole beneficiary of the 2011 Trust, but the 2011 Trust did not provide any withdrawal rights, even over the 75% of the 1983 Trust in which, until the decanting, the husband had enjoyed a present withdrawal right. The Massachusetts court was asked to determine if the decanting was valid, among other questions. Unlike Ohio, Massachusetts does not have statutory provisions allowing decanting, so the court looked to its common law tradition. It determined that the trustee of an irrevocable trust may be given the authority to decant in further trust through language in the trust agreement and relevant evidence of the settlor's intent. The court held that in examining the "extremely broad authority and discretion afforded the trustees by the 1983 Trust," as well as the trustees' power to "segregate irrevocably" the income and principal of the trust for the husband's benefit and the trust's anti-alienation provision, the terms of the 1983 Trust, as a whole, permitted the decanting.

The court emphasized that it was this very broad, expansive discretion on the part of the trustee and existing throughout the trust instru-

ment that required this outcome. Courts in other states will determine wither they will follow the Massachusetts Supreme Judicial Court in interpreting decanting laws of their own states, and therefore necessarily whether the vested right was abrogated all together. In Ohio, our decanting statute does not expressly prohibit such a result;[36] Ohio courts may or may not find otherwise.

DRAFTING RECOMMENDATIONS

First, we recommend the use of multi-generational discretionary pot trusts for beneficial interests of children and further descendants. The *Jones* case illustrates the premise that a purely discretionary, multi-generational pot trust provides the best protection against creditors. Such trusts also serve to protect beneficiaries from their own destructive habits or tendencies because a beneficiary never has a mandatory right to income or principal. To best protect against creditors and imprudent beneficiaries, trust instruments should omit any standards to guide the trustee in making discretionary distribution decisions. Such standards may provide a toehold for a creditor, for example, seeking to claim a trustee's abuse of discretion for not making distributions, or as a way of arguing that the trust interest is a present interest includable in the marital estate. The following are suggested clauses to consider in drafting a multi-generational discretionary pot trust for the benefit of children and further descendants:

> **Interests of Beneficiaries**. No beneficiary of any trust created under this Agreement shall enjoy any right or entitlement to a distribution of income or principal. Any distribution that may be made shall be at the discretion of the fiduciary holding the power to make or direct the distribution. The Settlor intends that the interest of each beneficiary in the trust estate be that of a mere expectancy.
>
> **[Definition of] Discretion**. A Trustee, Distribution Advisor, Protector, or other person's "discretion" means in all cases the person's sole, absolute, and unfettered discretion. The Settlor has not provided any standards to guide any such person in exercising its discretion. This definition, like the other definitions contained in this Trust Agreement, is a substantive part of it.
>
> **Discretionary Distributions**. The authorization of a fiduciary of a trust created under this Trust Agreement to distribute all or any part of either the net income, the principal, or both, may be exercised in the discretion of the fiduciary, by distributions to or applications directly for a beneficiary in cash or in kind, at any time and from time to time, but the existence of such authority shall not require the fiduciary to make any distribution to or for any person. Furthermore, such authority shall permit the fiduciary to terminate such trust by such distributions. If there shall be more than one beneficiary of such trust, any such distribution may be made to or for all or any one or more of such beneficiaries in such equal or unequal proportions and amounts as the fiduciary in its discretion may determine, and no adjustment among said beneficiaries by reason of any such distribution is required to be made. Any net income of a trust which shall not be distributed by reason of the fiduciary's exercise of discretion shall be accumulated and added to the principal of such trust. The decision of the fiduciary in the exercise of the discretion conferred upon the fiduciary under this Agreement shall be final, binding, and conclusive upon all persons whomsoever.

We also offer the suggested language of discretion in the dispositive provisions of the trust:

> The Trustee may distribute, at any time and from time to time, all or as much of the net income and principal of the trust estate to any or all of the [class of beneficiaries] as may be living from time to time as the Trustee determines in is discretion to be advisable.

In Ohio, we can use the "wholly discretionary trust" so as to further isolate the trust from exception creditors. Drafters should bolster such intent with a statement such as:

> Settlor intends that this trust (or any trust created under it), for so long as the administration and construction of any such trust is governed by the laws of the State of Ohio, be

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> administered and construed as a "wholly discretionary trust" pursuant to Section 5805.03 of the Ohio Revised Code.

For those clients who would like to make his or her non-binding wishes for distributions known, instead of including such suggestions in the trust instrument, the settlor may put these in a separate "letter of wishes."

Second, we recommend the use of liberal decanting clauses to change beneficial interests in the event of a problem (such as a divorce), which worked well in the *Ferri v. Powell-Ferri* case. The following is an example of a broad decanting power.

> **Trustee's Power to Distribute in Further Trust/Decanting**. Settlor specifically authorizes and empowers the Trustee or other applicable fiduciary to distribute any or all of the principal and accumulated but undistributed income of any trust created under this Agreement, at any time and from time to time, in further trust as may be permitted under the laws of the jurisdiction governing the administration of this trust at such time, and regardless of whether such laws existed at the time of execution of this trust. Such authorization includes, but is not limited to, the distribution of assets to a trust that benefits fewer than all of the beneficiaries of the trust over which the Trustee is exercising the power or that otherwise alters or terminates the beneficial interests of one or more such beneficiaries. The trustee of such further trust need not be within the jurisdiction of the courts of the State of Ohio; the validity, construction and administration of such trust need not be governed by the laws State of Ohio; and the principal place of administration of the trust need no longer be within the State of Ohio. The Trustee shall not be required to give notice to the beneficiaries of an exercise of such power. In exercising such power, the Trustee or other applicable fiduciary may liquidate all or any part of the trust estate in order to facilitate or expedite the transfer. Notwithstanding any other provisions of this Agreement, the Trustee and the Protector (if applicable) shall be indemnified against and held harmless from the tax or investment consequences to the trust or any beneficiaries of any such liquidation of the trust estate and for expenses associated with the carrying out of the exercise of such power.

To make clear that the interests of beneficiaries are intended to be expectancies as opposed to enforceable present interests, consider this language:

> **Interests of Beneficiaries**. No beneficiary under any trust created under this Agreement shall enjoy any vested right or entitlement to a distribution of income or principal. Any distribution that may be made shall be in the discretion of the fiduciary holding the power to make or direct the distribution. The settlor intends that the interest of each beneficiary in the trust estate is that of a mere expectancy.

Lastly, we offer two thoughts on what not to do in your documents. Although it solves the problem of an ex getting hands on family assets, settlors rarely want forfeitures. Do not provide automatic forfeiture clauses in the event that a divorcing spouse or other creditor attempts to reach trust assets or include the assets in the determination of the division of overall property. Settlors usually desire a different outcome in such an instance. When a client has asset protection as a goal of his or her estate planning, discuss this in some detail. And do not require or specifically enable the trustee to fund a beneficiary's divorce litigation should the ex-to-be make an attempt to include the beneficial interest. A provision like this may only serve to draw the attention of the court in a detrimental way.

In conclusion, with the national divorce rate holding steady estate planners who counsel clients with concerns about protecting trust assets should understand the basics of property divisions in divorce, the laws of spendthrift and discretionary trusts, and the ins and outs of property law's present and futures interests as applied to trusts. Estate planners can make use of multi-generational discretionary pot trusts for children and descendants, an outstanding vehicle for the succession and protection of family wealth. And in Ohio, we have tools such as wholly discretionary trusts and decanting statutes and should use them when

clients desire to protect trust assets from a prospective ex-spouse.

ENDNOTES:

[1]National Marriage and Divorce Rate Trends, National Vital Statistics System, Centers for Disease Control and Prevention. www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm. U.S. Department of Health & Human Services as of 2/11/17. (Note the divorce figure is likely higher because data for four states reported in the marriage figure was unavailable for divorces.)

[2]ORC § 3105.171(A)(3)(a) and (A)(6)(a).

[3]E.g. ORC § 3105.171(B)-(D)

[4]Ind. Code § 31-15-7-4.

[5]An award from separate property is referred to as a "distributive award." ORC § 3106.171(A)(1) and (F).

[6]*Id.* and (F)(1)-(10).

[7]ORC § 3105.18 (emphasis added).

[8]Pre- and post- nuptial agreements and their effect on property division and support are beyond the scope of this article.

[9]Restatement (Third) of Trusts § 58(1)

[10]UTC 502(c)

[11]Restatement (Third) comment b to Section 58

[12]*Id.* at Section 59

[13]UTC Section 506 (a)

[14]UTC Section 503(b)(1)

[15]ORC 5805.02

[16]UTC Section 504. Discretionary Trusts; Effect of Standard.

[17]Ohio Rev. Code § 5805.04.

[18]Such as Medicaid claims against a beneficiary of a third-party settled trust who has received benefits, provided the third-party settlor is not the spouse of the recipient.

[19]ORC 5805.03

[20]ORC 5801.01(Y)(1)(e)

[21]Restatement (Third) Property-Wills and Other Donative Transfers (2010). Gone are interests such as "vested subject to being divested," "indefeasibly vested," and "vested subject to a condition."

[22]*Id.* 24.1 and comment d

[23]*Id.* 25.1 comment c.

[24]*Id.* 25.3 and comment f.

[25]See Restatement Third 25.3, comment 4, comment g, illustration 8.

[26]A trial judge indeed issues such an order in one case, but was overturned on appeal for other reasons. In that case, the spouse was also a co-trustee, and it is presumed that personal jurisdiction was attained based on the co-trusteeship. *Tannen v. Tannen*, 3 A.3d 1229 (N.J. Sup. Ct. 2010).

[27]*Buxbaum v. Buxbaum*, 692 P.2d 411 (Mont. 1984); *Zuger v. Zuger*, 563 N.W.2d 804 (N.D. 1997); *In re Balanson*, 25 P.3d 28 (Colo. 2001); *In re Marriage of Dale*, 87 P.3d 219 (Colo. Ct. App. 2003); *Trowbridge v. Trowbridge*, 114 N.W.2d 129 (Wis. 1962); *Davidson v. Davidson*, 474 N.E.2d 1137 (Mass. Ct. App. 1985).

[28]*Lauricella v. Lauricella*, 565 N.E.2d 436 (Mass. 1991).

[29]*See Loeb v. Loeb*, 301 N.E.2d 349 (Ind. 1973); *Solomon v. Solomon*, 611 A.2d 686 (Pa. 1992); *Rubin v. Rubin*, 204 Conn. 224 (1987) (referring to the interest as an "expectancy").

[30]*See S.L. v. R.L.*, 774 N.E.2d 1179 (Mass. App. Ct. 2002); *D.L. v. G.L.*, 811 N.E.2d 1013 (Mass. App. Ct. 2004).

[31]*Eg. Fox v. Fox,* 592 N.W.2d 541 (N.D. 1999).

[32]*Eg. Sayer v. Sayer*, 492 A.2d 238 (Del. 1985); *In re Marriage of Guinn*, 93 P.2d 568 (Colo. St. App. 2004).

[33]*Pfannenstiehl v. Pfannenstiehl*, 55 N.E.3d 933, 938-39 (Mass. Sup. Jud. Ct. 2016)

[34]*Powell-Ferri v. Ferri*, 2014 Conn. Super. LEXIS 1993, 2014 WL 4638030 (Superior Court, 2014).

[35]*Id.*

[36]ORC § 5808.18.

LENDING TRUST FUNDS TO BENEFICIARIES

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For anyone accustomed to administering trusts, it is not uncommon to be asked at some point to lend trust funds to a trust beneficiary.

How should a trustee react when asked to make a loan to a trust beneficiary?

Under what circumstances should a trustee consider making a loan?

Does it make a difference whether the beneficiary is a current or remainder beneficiary?

Should the loan be made with terms comparable to that of a commercial transaction?

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