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# IN SEARCH OF A UNIFYING PRINCIPLE FOR ARTICLE V OF THE UNIFORM TRUST CODE: A RESPONSE TO PROFESSOR DANFORTH

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Professor Robert Danforth's exploration of spendthrift trusts in *Article Five of the UTC and the Future of Creditors' Rights in Trusts*<sup>1</sup> is a superb piece of work. Professor Danforth analyzes with considerable acuity the ins and outs of the specific rights creditors and beneficiaries of trusts have under the Uniform Trust Code (UTC). His article clearly represents the most detailed analysis of the new Code's approach to spendthrift trusts.

Professor Danforth is determined to establish that Article V is not as creditor-friendly as its critics claim.<sup>2</sup> His article is essentially an apologia, coupled with some proposed modifications so as to leave no doubt about this. However, in his zeal to defend Article V and refute the contention that it is too creditor-friendly, Professor Danforth strikingly ignores its manifold shortcomings. Article V is a missed opportunity to legislate a coherent theory of creditor rights and spendthrift protections. As drafted, it is a disappointing amalgam of often contradictory, formalistic rules.

In a number of other areas of trust law, the drafters of the Code have introduced significant departures from traditional trust law principles.<sup>3</sup>

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<sup>1</sup> Robert T. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 CARDOZO L. REV. 2551 (2006).

<sup>2</sup> Professor Danforth identifies two attorneys, Mark Merric and Steven J. Oshins, as Article V's principal critics. See *id.* at 2555-57 nn.16-29 and accompanying text. Indeed, Professor Danforth appears to be particularly preoccupied with Mr. Merric, whose argumentation is described as "often murky, making it a challenge to formulate a response. Second, his writings are hyperbolic . . . . Finally, an essential premise for his position—the status of creditors under the common law—is, in my view, incorrectly understood or, at least, incorrectly described." *Id.* at 2555 n.20.

<sup>3</sup> One notable example is the recognition given to the noncharitable purpose trust, dispensing with the traditional sine qua non of trust beneficiaries. See UNIF. TRUST CODE § 409 (2005). Significantly, the noncharitable purpose trust has its origins offshore. However, the Code noncharitable purpose trust is intended to be more limited. See David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 168-69 (2002) (explaining that the drafters of the Code "specifically elected not to follow the offshore islands in their liberal authorization of the noncharitable purpose . . . trust"). See generally Alexander A. Bove, Jr., *The Purpose of Purpose Trusts*, PROB. & PROP., May/June 2004, at 34; Paul Matthews, *from Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust*, in EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS 203 (David Hayton ed., 2002).

Thus, Professor Danforth's routine invocation of tradition<sup>4</sup> or the "majority-of-states"<sup>5</sup> position as justification for adoption of the bulk of Article V falls short. Likewise, Professor Danforth's standard refrain that a particular rule does not really matter because a state can decide not to adopt the provision<sup>6</sup> also proves inadequate. It suggests lack of interest on the part of the drafters in formulating a principled and coherent body of trust law. In fact, the Code itself sends a mixed message. In some respects, the drafters' conception of the Code's purpose is quite unambitious. They describe the Code as an effort to afford "precise, comprehensive, and easily accessible guidance on trust law questions."<sup>7</sup> There is no indication of a purpose to reformulate, or to offer up a systematic body of law founded on certain consistent, tested principles.

In this vein, while Professor Danforth defends Article V on the ground that it really is beneficiary-friendly, his article fails to present any normative defense of this orientation. Presumably, he assumes that this is the *correct* position. But if, normatively, the *correct* policy is to favor creditors' interests, then Professor Danforth's contention that, in fact, Article V is beneficiary-friendly, strikingly misses the point.

The drafters, too, have chosen not to engage in a searching normative inquiry, but appear to have simply accepted the traditional rules as the baseline. As that baseline was the product of a less-than-coherent amalgam of case law modified by discrete statutory enactments, the Code has replicated this pre-existing incoherence. This is the critical conclusion to be drawn from an analysis of the current Article V.

Nowhere is this demonstrated more forcefully than with respect to section 505 of the Code. Traditionally, a settlor has not been able to achieve protection from creditors by transferring assets to a trustee, designating himself as beneficiary, and thereby shielding the transferred assets from the reach of his creditors.<sup>8</sup> Several states, by statute, have now altered this rule,<sup>9</sup> at least when the trustee is a person other than the settlor and the interests retained by the settlor are discretionary with the trustee or subject to a meaningful external standard. Notwithstanding these statutory developments, the drafters of the UTC, following the lead of the Restatement (Third) of Trusts, rejected this approach.<sup>10</sup> The explanation offered by the Code drafters is "policy grounds,"<sup>11</sup> although these are not

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<sup>4</sup> See, e.g., Danforth, *supra* note 1, at 2559.

<sup>5</sup> See, e.g., *id.*, at 2570.

<sup>6</sup> See, e.g., *id.*, at 2591.

<sup>7</sup> UNIF. TRUST CODE, prefatory note.

<sup>8</sup> *Id.* § 505 cmt. See generally 2A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 156, at 164-86 (4th ed. 1987).

<sup>9</sup> See, e.g., ALASKA STAT. § 34.40.110(a)-(b) (Michie 2000); DEL. CODE ANN. tit. 12, §§ 3570-3576 (2000); NEV. REV. STAT. ANN. § 166.010 (Michie 1993); R.I. GEN. LAWS §§ 18-9.2 (2000); UTAH CODE ANN. § 25-6-14(a)(ii) (2004).

<sup>10</sup> See RESTATEMENT (THIRD) OF TRUSTS § 58(2) & cmt. b (2003).

<sup>11</sup> The Comment to Code section 505 states: "The drafters of the Uniform Trust Code concluded

explicitly or implicitly articulated in the accompanying Comment to section 505.

The refusal to validate self-settled spendthrift trusts is difficult to reconcile with Article V's general validation of spendthrift trusts. A spendthrift trust involves two types of restraints on alienation—voluntary and involuntary. If a settlor wishes voluntarily to restrain his own discretion and authority to assign his wealth by making it subject to a spendthrift trust, there does not appear to be a moral or economic basis for curtailing this.<sup>12</sup> A common criticism of spendthrift trust protection is that it is paternalistic.<sup>13</sup> It deprives the beneficiary of authority and responsibility for his credit decisions. Impeding one's own ability to alienate is certainly less paternalistic than impeding some other beneficiary's ability to do so. Yet, the Code permits the latter while denying the former. Thus, to the extent paternalism is not a value to be fostered,<sup>14</sup> voluntarily imposed self-restraint should be allowed.

As for the restraint on involuntary alienation, the overriding concern critics have regarding self-settled trusts has been that settlors will incur debts, but shield their assets from liability.<sup>15</sup> In fact, the likelihood of this occurring is minimal.<sup>16</sup> As long as fraudulent conveyance laws are enforced and not easily evaded,<sup>17</sup> the settlor will not be able to impair creditors' access to the trust assets. When deception is not involved, the protection afforded the innocent settlor by reliance on the spendthrift trust is no different from the protection afforded to beneficiaries other than the settlor. If the settlor was not insolvent and was not aware of specific

that traditional doctrine reflects sound policy." UNIF. TRUST CODE § 505 cmt.

<sup>12</sup> For a thorough examination of this issue and a similar conclusion, see Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 83-86 (1995). See generally JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 557-60, 566-69 (7th ed. 2004), for a superb consideration of the issues involved.

<sup>13</sup> See generally Hirsch, *supra* note 12, at 16-17, 45-56. Hirsch refers back to John Chipman Gray, the venerable critic of the paternalism of the spendthrift trust. Gray argued that spendthrift protections were characterized "by that spirit, in short, of paternalism, which is the fundamental essence alike of spendthrift trusts and of socialism." JOHN C. GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY*, at ix (2d ed. 1895). For an argument that self-settled spendthrift trusts should not be enforced precisely because the paternalistic element is missing, see *Pitrat v. Garlikov*, 947 F.2d 419, 424 (9th Cir. 1991). See also Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom*, 85 CORNELL L. REV. 1035, 1044 (2000).

<sup>14</sup> The question whether or not paternalistic policies yield more benefits than costs or are otherwise desirable is precisely the debate the drafters should be having.

<sup>15</sup> See, e.g., 2A SCOTT & FRATCHER, *supra* note 8, § 156, at 167 ("It is against public policy to permit a man to tie up his own property in such a way that he can still enjoy it but can prevent his creditors from reaching it.")

<sup>16</sup> The question can be asked: "Is doing business on a handshake something society wants to discourage to the extent of denying the creditor any access to otherwise unencumbered assets of the debtor?" Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV. 179, 198 (1993). If the answer is "yes," it should apply equally for the settlor-beneficiary as well as the nonsettlor-beneficiary.

<sup>17</sup> See Sterk, *supra* note 13, at 1046-48. Self-settled offshore asset protection trusts can bypass domestic fraudulent conveyance laws, *id.* at 1048-50, and thus may not be deserving of protection.

claims at the time the trust was created or property was transferred to the trustee, how have future creditors been abused? Just as when a non-settlor beneficiary is involved, a creditor can take account of the self-settled spendthrift trust in fashioning the credit/security package. A review of traditional authorities, such as *Scott on Trusts*,<sup>18</sup> reveals nothing more than conclusory pronouncements and “soft” moral criticism of self-settled spendthrift trusts. The recently drafted Restatement (Third) of Trusts unfortunately does the same, while failing to offer a more compelling rationale.<sup>19</sup>

By way of contrast, Dean Erwin Griswold, in his classic treatise on spendthrift trusts, found considerable merit in extending spendthrift protections, within limits, to self-settled trusts. He questioned why a “man who earns his own way should [not] have the same opportunity for protection from adversity as the man who takes his support from others.”<sup>20</sup> He also noted the statutory protections for insureds from their creditors and the statutory protections afforded those who purchase annuities and disability insurance.<sup>21</sup> These protections from creditors are still widely observed.<sup>22</sup>

Early in his article, Professor Danforth informs the reader that the one section of Article V that he will not be addressing in depth is section 505.<sup>23</sup> Instead, his article devotes considerable space to defending the Code’s elimination of the distinction in treatment of discretionary and support trusts<sup>24</sup> and the Code’s requirement of “good faith” on the part of the trustee.<sup>25</sup> Although these are important matters and Professor Danforth is compelling in arguing that these modifications have not shifted the balance toward creditors, section 505 is no less important and, indeed, is arguably of more contemporary significance. The spendthrift trust is no longer simply a tool for preserving family wealth from the profligacy of family trust beneficiaries. It is now also promoted offshore<sup>26</sup> and, to an increasing

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<sup>18</sup> See 2A SCOTT & FRATCHER, *supra* note 8.

<sup>19</sup> See RESTATEMENT (THIRD) OF TRUSTS § 58(2) (2003).

<sup>20</sup> ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS 644 (2d ed. 1947).

<sup>21</sup> See *id.* at 644-45. Admittedly, federal tax law is more expansive in determining when a settlor has retained economic control for gross income, gross gift, and gross estate purposes. However, these tax statutes have a distinctive purpose—to raise revenue by defeating schemes that seek to employ the formalities of property law to escape the taint of ownership. This is not the concern of spendthrift trusts. Even if it were, the same focus on economic enjoyment of benefits would argue against spendthrift protection for the *non-settlor* beneficiary who is entitled to enjoy presently the benefits of the trust fund.

<sup>22</sup> See JEFFREY A. SCHOENBLUM, 2005 MULTISTATE GUIDE TO ESTATE PLANNING, at tbls. 9.01, 9.02 (2005).

<sup>23</sup> See Danforth, *supra* note 1, at 2557.

<sup>24</sup> See *id.* at 2574-78.

<sup>25</sup> See *id.* at 2597-2602.

<sup>26</sup> The size of the offshore asset protection trust market is immense. See ROSE-MARIE BELLE ANTOINE, TRUSTS AND RELATED TAX ISSUES IN OFFSHORE FINANCIAL LAW 3 (2004).

degree onshore,<sup>27</sup> as a tool for securing private wealth from the quasi-public depredations of the tort system.<sup>28</sup> Owners of substantial capital, as well as providers of professional services, anticipating eventual exposure to liability because of their deep pockets and a manipulative jury system, seek to insulate their wealth from putative plaintiffs by use of a self-settled spendthrift trust with a situs for the trust in a jurisdiction that recognizes and stringently enforces restraints on involuntary alienation.

Section 505 is symptomatic of the overall approach of Article V, which, unfortunately, seems to have been drafted with less than thoroughgoing analysis, but with great deference to the grab-bag of disconnected rules that have gained sway over the course of the nineteenth and twentieth centuries. The remainder of this Comment will consider several of the other provisions of Article V, Professor Danforth's defense of them, and the root problems and contradictions they reveal.

Section 501 prescribes the rights of creditors when the trust instrument does not contain a spendthrift clause. The drafters of the Code have decided on a default rule that generally favors creditor interests and disfavors spendthrift protection. In contrast, a number of states have reached the opposite conclusion.<sup>29</sup> Although the Code's position is based on whether the settlor has expressed a wish for spendthrift protection, there is more than the settlor's intent at stake. Thus, whether spendthrift protection should be afforded is a policy matter beyond an inquiry into the expression of the settlor's intent or, more likely, the particular forms the drafting attorney happens to utilize.<sup>30</sup> If spendthrift protection is desirable from a public policy standpoint, then beneficiary protection as the default position is an appropriate outcome, whether or not the magic words have been intoned so as to establish intent.

In fact, the explanatory Comment to section 501 has nothing at all to say about why this particular default rule was adopted. Furthermore, section 501's default rule in favor of creditor rights is in direct conflict with the rest of Article V, which, as Professor Danforth convincingly

<sup>27</sup> See *supra* note 9.

<sup>28</sup> For a further exploration of this perceived threat, see generally Jeffrey A. Schoenblum, *Reaching for the Sky or Pie in the Sky: Is U.S. Onshore Trust Reform an Illusion?*, in *EXTENDING THE BOUNDARIES OF TRUSTS AND OTHER RING-FENCED FUNDS IN THE TWENTY-FIRST CENTURY*, *supra* note 3, at 291. But see Sterk, *supra* note 13, for an impressive critique of self-settled spendthrift trusts. Professor Sterk maintains that small states with few local trust users have an incentive to attract capital by giving spendthrift protection to the foreign settlor, while exporting the costs to the settlor's home state and/or other jurisdictions. He also argues for penalties, including incarceration, to deter use of offshore trusts. But see Lynn M. LoPucki, *The Death of Liability*, 106 *YALE L.J.* 1, 38 (1996).

<sup>29</sup> For a description of which states have a spendthrift trust default rule in the absence of specific language, see SCHOENBLUM, *supra* note 22, tbl. 9.05, pt. 1.

<sup>30</sup> See DUKEMINIER, *supra* note 12, at 548 ("In most jurisdictions, trusts are not spendthrift unless the settlor expressly insists on a spendthrift clause, but spendthrift provisions are routinely included in professionally drafted trusts, if only by rote inclusion of formbook boilerplate.")

argues, supports spendthrift trust protection.<sup>31</sup> No effort is made to explain this divergence. One might argue that, consistent with the general historical disfavor shown towards restraints in property law,<sup>32</sup> the default position should be in favor of alienability.<sup>33</sup> Again, this flies in the face of the rest of Article V. For example, rather than requiring difficult-to-satisfy language, section 502(b) allows for the imposition of voluntary and involuntary restraints on alienation merely by specifying that the beneficiary's interest "is held subject to a 'spendthrift trust,' or words of similar import."<sup>34</sup> The accompanying Comment makes clear that the objective is to *liberalize* the language required to impose restraints on alienation, not to impose a harsher standard, so as to limit the enforcement of such restraints. Thus, were consistency in policy the motivating concern, section 501's default position, arguably, ought to be spendthrift protection.

Explaining that trust-related proceedings are equitable in nature, the Comment to section 501 recognizes that a court "may appropriately consider the circumstances of a beneficiary and the beneficiary's family."<sup>35</sup> Thus, notwithstanding the default rule just considered, a court, apparently, may restrict alienability. The Comment fails to explain why under certain circumstances the default rule should shift; nor does it explain why a beneficiary and the beneficiary's family should be given preferential treatment over the beneficiary's other creditors in this regard. The entitlement of the beneficiary's "family" is also mystifying. Who is "family?" What entitlement should they have if they have not been named as beneficiaries by the settlor and may not even be the beneficiary's dependents? "Needs," too, is left undefined.

The standard invoked by the Comment is also troublesome. The court "may appropriately consider the circumstances" of the beneficiary and his family. This is one of those limitless standards that will have one meaning for one judge and a different meaning for another. Indeed, it represents an expansion, even beyond the prior language of the Comment, that permitted consideration of the "support needs" of the beneficiary and his family. Ironically, then, a settlor who does not wish to insulate his beneficiaries from their creditors cannot be confident that this outcome can be assured.

Much of the preceding analysis has focused on the Comment to

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<sup>31</sup> See Danforth, *supra* note 1.

<sup>32</sup> See RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. (2003). For a superb exploration of the topic, see Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985). For the extreme effects that restraints on alienation can have when property is held in trust or trust-like constructs, see Jeffrey A. Schoenblum, *The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust*, 32 VAND. J. TRANSNAT'L L. 1191, 1206-07 (1999).

<sup>33</sup> See GRISWOLD, *supra* note 20, at 302-04.

<sup>34</sup> UNIF. TRUST CODE, § 502(b) (2005).

<sup>35</sup> *Id.* § 501 cmt.

section 501. The precise status of the Comment is itself problematic. Some Code states may not enact the Code with Comment.<sup>36</sup> Even if the Comment is included as part of the enactment, the authority carried by the Comment is disputable. In some instances, as with section 501, the Comment can be regarded as actually running counter to the statutory language itself and, arguably, ought not be given any weight.

Just as in the case of section 501, section 502 reinforces the conclusion that the Code's drafters were not focused on developing a coherent approach to restraints on alienation and creditors' claims. Section 502(a) provides that "[a] spendthrift provision is valid only if it restrains *both* voluntary and involuntary transfer of a beneficiary's interest."<sup>37</sup> Professor Danforth argues in defense that this is the traditional rule observed in most states.<sup>38</sup> However, he offers no explanation as to the merits of such rule. If the settlor's expression of intent is key, as section 501 indicates, then the settlor ought to be able to limit voluntary alienation by a beneficiary. To allow the settlor to do so would not interfere with creditors' rights. Indeed, Professor Austin Scott reached precisely this conclusion.<sup>39</sup>

One approach taken by states has been to extend spendthrift protection to involuntary alienation if the settlor has only expressed an intent as to voluntary alienation. One rationale offered for this construction is that the settlor surely intended a restraint on creditors as well.<sup>40</sup> However, the exclusive reference to a restraint on voluntary alienation could just as readily be interpreted as implying no intent to restrain creditors, as the claims of creditors would surely have been taken into account if a restraint on voluntary alienation was considered.<sup>41</sup>

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<sup>36</sup> One such example is the District of Columbia. The Code is set forth in sections D.C. CODE §§ 19-1301.01 through 19-1311.03. At the end of each section, the following statement appears: "This section is based upon §[ ] of the Uniform Trust Code." The specific section of the Code is indicated. No reference is made to the Comment. The issue raised has been much debated with regard to the Uniform Commercial Code. See John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 415-18 (2000); see also Gary L. Monserud, *Judgment Against a Non-Breaching Seller: The Cost of Outrunning the Law to Do Justice Under Section 2-608 of the Uniform Commercial Code*, 70 N.D. L. REV. 809, 834 n.161 (1994). See generally Sean Michael Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962 (1990).

<sup>37</sup> UNIF. TRUST CODE § 502(a) (emphasis added).

<sup>38</sup> See Danforth, *supra* note 1, at 2570.

<sup>39</sup> See 2A SCOTT & FRATCHER, *supra* note 8, § 152.3, at 179.

<sup>40</sup> See GRISWOLD, *supra* note 20, § 265 (citing older cases, but not offering any basis for this presumption of settlor intent, especially in light of the general bias against restraints on alienation).

<sup>41</sup> The RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. b(2) (2003) argues "for reasons of policy" that a restraint only on voluntary alienation ought to be invalid because it "does not protect the interests from creditors and is thus insufficiently effective as a practical matter to justify a departure from the law's general policy against restraints or alienation." But why, "as a practical matter," would it not be effective? A settlor might wish to guard against irresponsible voluntary alienation by a beneficiary who is, for example, susceptible to cult membership, but may not wish to deny legitimate creditors their rightful due. Moreover, if a restraint on voluntary alienation is not

Giving the settlor the option of restraining solely involuntary alienability is more problematic. Allowing the beneficiary to alienate freely on a voluntary basis, but barring his creditors from reaching his beneficial interest, does have a bad odor to it, even if one concludes that creditors are well-situated to protect their own interests. At worst, then, section 502 should allow partial spendthrift trusts whereby the restraint is imposed exclusively on voluntary alienation.<sup>42</sup>

Strikingly, section 502 actually denies spendthrift protection *altogether* if only one of the restraints on voluntary or involuntary alienation is sought. This is difficult to rationalize in terms of the purported beneficiary-friendly character of Article V. It also represents a break with the approach of the Second<sup>43</sup> and Third Restatements and case law,<sup>44</sup> which would allow the implication of coverage for the restraint on alienation not mentioned.

The Comment to section 502 also states that a trustee may “choose to honor the beneficiary’s purported assignment.”<sup>45</sup> No guidance is given as to the standard to be applied by the trustee. The rationale for this provision is difficult to grasp. If the basis for spendthrift trust enforcement is the settlor’s intent, then there seems no reason to allow the beneficiary to defeat it with the help of a compliant trustee. If the reasoning behind the Comment is to assist the beneficiary’s creditors, this would run counter to the dominant theme of Article V, according to Professor Danforth<sup>46</sup>—insulating the trust assets from the beneficiary’s creditors.

The absence of an overarching rationale is placed in especially bold relief by section 503. On the surface, this section appears to deviate strikingly from the heretofore general theme favoring restraints on alienation. Section 503 introduces exceptions for support orders for current spouses, former spouses, and children, as well as for judgment creditors who have provided services. In contrast, no exception from spendthrift protection is afforded for “creditors who have furnished necessary services or supplies to the beneficiary.”<sup>47</sup> There is also no exception allowed for claims against trust beneficiaries who are tortfeasors.

The exception for current spouses, former spouses, and children with a support judgment or court order for support and maintenance is a predictable, reflexive response by the drafters that is again defended by Professor Danforth on the ground that it is the majority rule among the

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justifiable on its own, then why credit it merely because a restraint on involuntary alienation is intended?

<sup>42</sup> See 2A SCOTT & FRATCHER, *supra* note 8, § 152.3.

<sup>43</sup> RESTATEMENT (THIRD) OF TRUSTS § 152 cmts. d & e.

<sup>44</sup> *Id.* § 58 cmt. b(3).

<sup>45</sup> UNIF. TRUST CODE § 502 cmt (2005).

<sup>46</sup> See Danforth, *supra* note 1, at 2569.

<sup>47</sup> UNIF. TRUST CODE § 503 cmt.

states. He also defends the exception on the ground that a state is free to omit the exception if it wishes to do so.<sup>48</sup>

Consideration of the Comment to section 503 reveals that the exception is more theoretical than real. Access to the trust fund by the excepted class of persons is actually severely restricted. The Comment states:

Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. [The provision] does not authorize the spousal or child claimant to compel a distribution from the trust.<sup>49</sup>

Indeed, Professor Danforth emphasizes that “an exception creditor’s remedies are quite limited.”<sup>50</sup> He explains that creditor access to “distributions” from the trust is far less effective from the creditor’s standpoint than access to the assets of the trust itself. As long as the trustee does not exercise its discretion and there are no mandated distributions, the spouse or child is entitled to nothing. This is the case even if the person is the sole beneficiary and the issue is just one of time and manner of distribution. It is also the case even if the discretion of the trustee is limited by an ascertainable standard.<sup>51</sup>

The exception provision of section 503(b) reveals an ambivalence that suffuses Article V. The drafters cannot decide whether to be consistently pro-beneficiary or pro-creditor. Instead, often when leaning one way or the other, they cut back in conceptually incoherent ways. The central question the drafters need to confront is why certain judgment creditors should be preferred. For example, a former spouse who has a judgment may not be in “need,” while a tradesman may be. Put another way, the drafters ought to explain why some claims ought to overcome the settlor’s intent and others should not.

A similar questionable exception is granted for those providing services “for the protection of a beneficiary’s interest in the trust.”<sup>52</sup> In sharp contrast, no similar access is granted to those providing “necessary services or supplies.”<sup>53</sup> The reduction of rights of creditors who provide necessary services or supplies is a departure from the Second<sup>54</sup> and Third<sup>55</sup>

<sup>48</sup> See Danforth, *supra* note 1, at 2591.

<sup>49</sup> UNIF. TRUST CODE § 503 cmt.

<sup>50</sup> See Danforth, *supra* note 1, at 2571.

<sup>51</sup> The Comment to the 2005 amendment to section 506 of the Code provides: “Under both Sections 504 and 506, a trust is discretionary even if the discretion is expressed in the form of a standard, such as a provision directing a trustee to pay for a beneficiary’s support.” UNIF. TRUST CODE § 506 cmt. Furthermore, the amendment “addresses the situation where the terms of the trust couple language of discretion with language of dictation . . . . Despite the presence of the imperative ‘shall,’ the provision is discretionary, not mandatory.” *Id.*

<sup>52</sup> *Id.* § 503(b)(2).

<sup>53</sup> *Id.* § 503 cmt.

<sup>54</sup> *Id.* § 157(b).

Restatements. The drafters explain that “[m]ost of these cases involve claims by governmental entities, which the drafters concluded are better handled by the enactment of special legislation as authorized by subsection (b)(3)” of section 503.<sup>56</sup> Yet necessary supplies and services, including, for example, medical assistance or groceries,<sup>57</sup> may be provided by private parties and may prove even more critical to the beneficiary’s well-being than the attorney hired to protect the beneficiary’s interest in the trust. Thus, the provision has the flavor of special interest group rent-seeking by attorneys.

The premise underlying the “necessaries” exception rejected by the Code drafters is that a settlor would not have intended to deny access to trust funds if essential for the beneficiary’s basic well-being. Admittedly, this conclusion as to settlor intent is disputable. But having accepted the premise in the case of the beneficiary’s attorney, the Code should consistently apply it to other providers of essential benefits. If providers are not protected, then they will lose incentive to meet essential needs.<sup>58</sup> Of course, as the drafters suggest, legislation can be enacted to add them, but this is not an adequate response. The same could be said of any other Code provision. The Code *qua* Code ought to present a comprehensive, integrated body of rules. The drafters should strive, to the extent attainable, for uniform adoption.

The failure of Article V to recognize an exception for tort claimants is also curious. This failure is especially difficult to reconcile with the exceptions for current spouses, former spouses, and children. When the tort causes grievous injury, the claimant may be in more desperate straits than, for example, the former spouse, who, in contrast, may be fully capable of supporting himself. Why, then, recognize an exception for the spouse and not the victim of the tort? A rationale offered for the exception for a spouse or child is that the spouse or child did not enter into the relationship on a commercial basis like other creditors and was, thus, unable to protect himself.<sup>59</sup> This contention, however, is of little merit, at least with respect to a spouse, if we assume that he has independent judgment and an *ex ante* ability to negotiate the financial conditions of the relationship. Moreover, to the extent it is true, it is no less true of the victims of torts perpetrated by trust beneficiaries.

The exceptional treatment of spouses and children is further reflected

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<sup>55</sup> *Id.* § 59(b), applying to both “services or supplies provided for necessities or for the protection of the beneficiary’s interest in the trust.”

<sup>56</sup> *Id.* § 503 cmt.

<sup>57</sup> See RESTATEMENT (THIRD) OF TRUSTS § 59 cmt. C (2003).

<sup>58</sup> See *id.*

<sup>59</sup> See, e.g., 2A SCOTT & FRATCHER, *supra* note 8, § 157.1, at 192. The “public policy,” a.k.a. moral, dimension is what truly bothers Professor Scott: “It would be shocking indeed to permit a husband to receive and enjoy the whole of the income from a large trust fund and to make no provision for his needy dependents.”

in section 504. That section entitles them to sue the trustee directly, if the trustee has not complied with a standard of distribution or has abused his discretion. Other creditors are barred from suing the trustee, even though there is trustee abuse. Rather, only the beneficiary can sue. No explanation is given as a justification for the distinction drawn. Again, no indication is offered as to how other creditors are to vindicate their rights. Section 504 thus lends particular credence to Professor Danforth's argument that the Code is not particularly creditor-friendly, at least with respect to a claimant who is not a current spouse, former spouse, or child with a judgment or court order for support or maintenance.

Unlike distributions from trusts in which the trustee has absolute discretion or is governed by a standard, section 506 allows a creditor to reach a *mandatory* distribution that has been improperly withheld. Especially since this provision would not apply to trusts governed by a standard, its applicability appears limited. Even in the case of a mandatory distribution, however, the creditor must wait a "reasonable time after the designated distribution date."<sup>60</sup> The drafters express concern that if the creditors can demand immediate payment, the spendthrift provision "would become largely a nullity."<sup>61</sup> To justify the creditors reaching directly into the trust, the Comment to section 506 states that "payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets."<sup>62</sup>

But why does an agency relationship only arise after a "reasonable time?" Moreover, if this agency relationship arises for mandatory payments, why not also in cases of trustee abuse, when payments subject to a standard or discretion are involved? Precisely because a legal fiction is involved, the drafters owe an explanation as to why one abusive situation allows invasion of the trust and another does not. Unfortunately, no explanation is forthcoming.

## CONCLUSION

Professor Danforth has produced an excellent, comprehensive study of the workings of Article V of the UTC. He has successfully debunked the argument that, *taken as a whole*, Article V undermines spendthrift trusts. However, the story is more complex than he lets on. The question of restraints on alienation, as Dean Griswold emphasized, is fundamentally a policy question.<sup>63</sup> It entails inevitable normative judgments, which ought

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<sup>60</sup> UNIF. TRUST CODE § 506(b).

<sup>61</sup> *Id.* § 506 cmt.

<sup>62</sup> *Id.*

<sup>63</sup> See GRISWOLD, *supra* note 20, § 555 ("The fundamental question, then, is whether spendthrift  
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to be based on extensive data and debate. Little of this appears to have occurred in the case of Article V.

One response to this critique might be that Article V aims simply to preserve the traditional protections accorded debtor-beneficiaries. If so, the merit of those “majority-of-states” rules should be explained. Their age or popularity ought not be the determining factor.<sup>64</sup> Another response might be that Article V represents a sensible balancing of competing interests of settlor intent, beneficiary protection, and creditor claims. This argument is no more persuasive. Without a principled foundation for the overall regime, the individual rules cannot be defended as part of an integrated Code, and the utility of a Code itself is called into question. Hopefully, as part of their periodic review, the drafters will engage in the future in a more serious consideration of the underlying issues associated with Article V. Article V is a central component of the Code, one with great practical significance. It deserves greater reflection and deeper analysis than the current version demonstrates.

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trusts *should* be sustained.”).

<sup>64</sup> Karl Llewellyn’s insight is helpful here: “[T]he rule follows where its reason leads; where the reason stops, there stops the rule.” KARL LLEWELLYN, *THE BRAMBLE BUSH* 157-58 (1951).