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Gray's Ghost—A Conversation About the Onshore Trust

Karen E. Boxx
University of Washington School of Law

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* Assistant Professor of Law, University of Washington. I gratefully acknowledge the valuable comments and assistance of Professor Thomas Andrews, Todd Maybrown, and Kathleen Kim Coghlan.

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My modest task has been to show, that spendthrift trusts have no place in the system of the Common Law. But I am no prophet, and certainly do not mean to deny that they may be in entire harmony with the Social Code of the next century. Dirt is only matter out of place; and what is a blot on the escutcheon of the Common Law may be a jewel in the crown of the Social Republic.¹

As spendthrift trusts gained recognition at the turn of the nineteenth century, their primary foe, John Chipman Gray,² acknowledged defeat without surrendering his objections. Courts and commentators overrode Professor Gray's concerns without ever addressing them directly.³ Now at the beginning of the twenty-first century, we are faced once again with the debate as certain states are extending spendthrift trust protection to a grantor's interest in a trust. Four states—Alaska, Delaware, Nevada, and Rhode Island—now statutorily authorize self-settled spendthrift trusts.⁴ This dramatic extension of the doctrine raises issues of whether these protections will, in fact, prove effective and revives many of Professor Gray's concerns about the place in the U.S. legal system for such trusts.

I. INTRODUCTION

A trust is an arrangement whereby one person (the trustor)⁵ transfers property to another person (the trustee) and directs the trustee to hold the property for the benefit of another person (the beneficiary).⁶ Multiple persons may fill each role; for example, there can be several beneficiaries or co-trustees. One person may play several of these roles; for example, the trustor may also serve as trustee or may be a beneficiary of the trust. How-

¹. JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY x (2d ed. 1895).
². Professor Gray (1839-1915) was on the faculty of Harvard Law School for nearly 40 years and was, at the time of retirement, the Royall Professor of Law, a position he held for 29 years. He continued practicing law while on the faculty, in one instance working on a suit involving Benjamin Franklin's Will. His published works included: Restraints on the Alienation of Property (1883, which was also published in a second ed. in 1895); The Rule Against Perpetuities (1886), which is recognized as the standard authority on the Rule both in the United States and Great Britain; and Select Cases and other Authorities on the Law of Property, which was published in six volumes from 1888-1892. VII Dictionary of American Biography (Fraunces-Grimke) (A. Johnson & D. Malone eds., 1931).
⁴. See ALASKA STAT. § 34.40.110 (Lexis 1998); DEL. CODE ANN. tit. 12, § 3571 (Supp. 1998); NEV. REV. STAT. § 166.040(1)(b) (1999); R.I. GEN. LAWS § 18-9.2-2 to 18-9.2-5 (1999). As used in this Article, the term "self-settled trust" refers to a trust set up for one's own benefit, i.e., where the settlor has retained a beneficial interest.
⁵. A trustor, or settlor, is the person who establishes the trust and transfers his or her property into the trust. The terms "settlor" and "trustor" are used interchangeably. 1 AUSTIN W. SCOTT, TRUSTS § 3 (William Franklin Fratcher ed., 4th ed. 1987) [hereinafter SCOTT]. The term "grantor" is also frequently used to describe the person who sets up the trust. BLACK'S LAW DICTIONARY 700 (6th ed. 1990).
ever, if the same person plays all three roles alone, then no trust is created.\(^7\) A self-settled trust is a trust that a person settles, or establishes, for his own benefit—a trust where the trustor is also a beneficiary. A spendthrift trust is a trust that includes a provision either prohibiting the beneficiary’s creditors from reaching the beneficiary’s interest in the trust (an involuntary transfer) or prohibiting the beneficiary from assigning his or her interest to a third party (a voluntary restraint).\(^8\) A self-settled spendthrift trust is, therefore, an arrangement where the trustor names herself as a beneficiary and includes a spendthrift provision that protects the trustor’s interest in the trust from the trustor’s creditors.

A hypothetical situation demonstrates why scholars are concerned with self-settled spendthrift trusts. Imagine a tragic automobile accident in Washington state caused by a drunk driver, Debra Diversified (“DD”), who is known for her wild ways but whom police have not previously arrested for driving while intoxicated. A young single mother, Polly Taft (“PT”), is rendered a quadriplegic. PT sues DD in Washington state court because both PT and DD are Washington state residents. PT obtains a $15 million judgment against DD, who has minimal insurance coverage but, at thirty-five years old, is a retired “dot-com” millionaire. When PT tries to enforce her judgment, however, she discovers that DD has transferred all of those dot-com millions into a trust with an Alaskan trust company. DD is a beneficiary of the trust, and the trust pays all of her expenses. The trust contains a spendthrift clause, which provides that DD’s creditors cannot reach the assets in the trust even though she is a beneficiary. Alaska law, contrary to the law in most other U.S. jurisdictions, states that such a spendthrift clause is enforceable. The result seems to be that the paralyzed young mother cannot enforce her judgment, while DD continues to enjoy her comfortable lifestyle.

Imagine further that prior to the accident, DD had entered into a business transaction with one of her former co-workers, Chuck Cash (“CC”). The two of them began a start-up company that grew rapidly and had some unexpected cash needs early on. They borrowed the needed cash, both giving the lender personal guarantees and agreeing (pursuant to their business agreement) that they would each be equally responsible for repayment of the loan. The company then failed, and the lender attempted to enforce the personal guarantees. The lender discovered, however, that DD had placed all of her assets in the Alaska trust, so it enforced CC’s personal guarantee for the full value of the debt. CC now seeks reimbursement from DD for her share of the debt, but DD claims she has no funds and that her interest in the trust is untouchable.

Will this dot-com millionaire succeed in protecting her millions from creditors? She is relying on the ultimate enforceability of Alaska’s new trust law. Alaska broke with longstanding legal tradition by promulgating a stat-

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7. 2 SCOTT, supra note 5, § 100, at 74.
8. REUTLINGER, supra note 6, at 162.
ute that allows self-settled spendthrift trusts. More recently, Delaware, Nevada, and Rhode Island have followed Alaska's lead. Generally, while U.S. courts will allow a trustor to establish a spendthrift trust for the benefit of a third party, such as the trustor's child, a trustor cannot set up such a trust for her own benefit. The primary policy reason for this distinction is that a trustor should be able to set whatever limits she chooses when making a gift to another, including spendthrift provisions, but should not be able to place her assets beyond her own creditors' reach, while still retaining use of those assets.

Certain foreign jurisdictions have no such policy concerns, particularly since the allowance of self-settled spendthrift trusts, together with other creditor hurdles and tax benefits, is advantageous to the local banking business. So long as "offshore trusts" remained offshore and expensive, their use was primarily limited to extremely wealthy individuals with specific liability concerns. Alaska, Delaware, Nevada, and Rhode Island have also decided to boost their state banking industries by allowing the self-settled trust to migrate to their shores. Currently, all four states have enacted statutes that allow a person to set up an irrevocable trust with a local trustee, name herself as a beneficiary, and include provisions that thwart her creditors' attempts to access the trust property. Although commentators have expressed concern about the viability of these trusts, their reactions have generally been guarded. One primary reason for the suspicion is that self-settled spendthrift trusts are contrary to longstanding tradition—given form by Professor Scott and the Restatement—that prohibits such trust.

This Article will explore avenues that a creditor might use to attack the

11. 2A SCOTT, supra note 5, § 156.
12. For example, the Cayman Islands, Nevis, Jersey, and the Isle of Man allow self-settled spendthrift trusts. See Duncan E. Osborne et al., Asset Protection and Jurisdiction Selection, 33 U. MIAMI PHILLIP E. HECKERLING INST. ON EST. PLAN. 14-77 (1999) [hereinafter Osborne, Asset Protection].
13. The term "offshore trust" is used to describe the asset protection trust, or self-settled spendthrift trust, allowed in foreign jurisdictions. Elena Marty-Nelson, Offshore Asset Protection Trusts: Having Your Cake and Eating It Too, 47 Rutgers L. Rev. 11, 12 (1994).
14. However, offshore trusts are increasingly being used by lawsuit-vulnerable professionals, such as lawyers and doctors, and the total value of assets now held offshore is estimated to be between $1 trillion and $6 trillion. Eric Henzy, Offshore and "Other" Shore Asset Protection Trusts, 32 VAND. J. TRANSNAT'L L. 739, 740 (1999); Debra Baker, Island Castaway, 84 A.B.A. J. 54 (Oct. 1998).
17. See 2A SCOTT, supra note 5, § 156; RESTATEMENT (SECOND) OF TRUSTS § 156 (1959).
onshore self-settled spendthrift trust. The Article assumes that state courts (other than the courts of Alaska, Delaware, Nevada, or Rhode Island) will be offended at the notion of a self-settled spendthrift trust, and, therefore, the creditor will want the enforceability issue to be resolved by a court in a jurisdiction other than the four identified states. Using a hypothetical, Part III(A) of this Article addresses whether a non-Alaska court (using a Washington state court as the example) could rule on the enforceability of tort and contract creditors' judgments against the trust, despite the Alaska spendthrift provision. Before the court reaches the issue, however, the hypothetical creditors will face jurisdictional and choice of law hurdles, and full faith and credit problems as to whether Alaska will respect the Washington court's judgment. There are also other methods of attacking the trust. As described in Part III(B), the creditors could claim that the transfer to the trust was itself a fraudulent transfer under Washington's fraudulent transfer statute. 18 Part IV sets forth the possibility that the creditors could attempt to bring the matter before a U.S. bankruptcy court, thus eliminating most of the jurisdictional difficulties.19 As Part V discusses, the contract creditor might also claim that the Alaska statute violates the Contracts Clause of the U.S. Constitution.20

The Article further addresses, in Part VI, whether the self-settled spendthrift trusts will serve their secondary goal—federal estate tax savings. As a general proposition, if the grantor of a trust has relinquished sufficient control over the trust assets, then, under federal estate and gift tax principles, the transfer is a completed gift, subject to gift taxes, and the trust assets will not be included in the grantor's estate for estate tax purposes when the grantor dies.21 The estate tax advantage to such a trust would be that all post-transfer appreciation in value of the trust assets would not be subject to tax. Under the majority rule of self-settled spendthrift trusts, however, a grantor cannot get those tax benefits with a trust in which he retained an interest, because that retained interest would make the assets available to the grantor's creditors, and creditor access is deemed to be equivalent to continued ownership by the grantor.22 Removing creditor access raises the

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19. See infra notes 184-85 and accompanying text (describing the national jurisdiction of bankruptcy courts and how a bankruptcy court in one state could rule on an issue affecting a trust domiciled in another state).
21. The test used has two parts. First, the transfer is tested under gift tax rules to determine whether the gift is complete, and, when the donor dies, another test is applied to determine whether the donor retained sufficient control to bring the transferred property back into the donor's estate and subject it to estate tax. See infra notes 297-305 and accompanying text (discussing the two independent tests of completed gift for gift tax purposes and inclusion in the estate for estate tax purposes where control or interest has been retained).
22. See Estate of Paxton v. Commissioner, 86 T.C. 785, 814 (1986) (stating that retaining the right to use trust income as security to borrow money subjects the trust income to inclusion within the gross estate); Outwin v. Commissioner, 76 T.C. 153, 162 (1981) (holding that when a grantor's creditors retain the right to reach trust assets, the transfer is rendered incomplete for gift tax purposes), acq. in result, 1981-2 C.B. 2.
possibility that the trust grantor could put money in a trust and continue to live on those trust assets, even while capping his estate's tax liability at the value of the trust assets at the time he established the trust. Whether the estate tax liability is limited to the original transfer value depends, in part, on whether the trust actually prevents creditors from accessing it and, in part, on whether there are other grounds that the government may use to nevertheless include the trust assets in the grantor's estate at their full date-of-death value.

Finally, in Part VII, the Article will address whether the self-settled trust has any place in the U.S. legal system. The Article discusses this issue from the historical perspective of the original controversy over spendthrift trusts, and in light of the current justifications for these trusts. Supporters of the self-settled spendthrift trust cite the trend of enormous tort judgments as justification for allowing the introduction of a means to avoid all personal liability. Supporters also cite the other generous exemptions from creditor claims legally available, such as unlimited homestead exemptions in bankruptcy and the protection given to retirement plan and life insurance funds. Supporters inquire, why not allow a debtor to do directly what she can already do indirectly? These arguments ultimately fail, however. The other exemptions serve specific social policies and have limitations that discourage a debtor from placing all of her assets into the exempt form. The self-settled spendthrift trust, however, allows a debtor to place his entire savings into a trust and avoid all liability without affecting the debtor's lifestyle. The proposition that these trusts are merely an antidote to a tort system run amuck also fails because the solution is overbroad and threatens the entire system of liability, rather than just the abuses within that system. The Article concludes that the original concerns about self-settled spendthrift trusts, and the damage they could do to our system of civil enforcement, far outweigh any potential benefits that they may offer.

II. THE AMERICAN LAW OF SPENDTHrift TRUSTS AND THE RECENT STATUTORY DEPARTURES

A. THE SPENDTHrift TRUST

A spendthrift trust is a trust that prohibits attachment by creditors (and sometimes voluntary assignment by the beneficiary) of the beneficiary's interest in the trust. A typical spendthrift provision reads as follows:

No interest in any trust estate shall vest in any beneficiary until actual payment by the Trustee, and no part thereof shall be liable for the debts of any beneficiary or be subject to the right on the part of any creditor of any beneficiary to reach the same by any legal proceeding. No beneficiary shall have any power to dispose of, encumber, or anticipate any portion of said trust estate.

Spendthrift trusts should be distinguished from discretionary trusts. A discretionary trust is one in which distributions to the beneficiary are made only at the discretion of the trustee. In some circumstances, a discretionary trust can provide better creditor protection than a spendthrift trust with mandatory distribution provisions because the beneficiary cannot force
spendthrift trusts in the last part of the nineteenth century. In a departure from the English tradition forbidding restraints on alienation, spendthrift trusts gained judicial acceptance almost by accident. Although many commentators supported spendthrift trusts, Professor Gray was a vociferous opponent and waged a losing campaign against their acceptance when they first appeared. However, despite the scholarly debate, state legislatures and courts overwhelmingly recognized spendthrift provisions as enforceable. Currently, all states give spendthrift provisions some degree of recognition, although some states set limitations on enforcement of such provisions.

Courts will enforce a spendthrift trust when the beneficiary is someone other than the settlor. However, the general rule of the Restatement, following the trustee to make discretionary distributions, and a creditor will likewise not be able to force a distribution. On the other hand, even if the trust has spendthrift provisions, certain creditors, such as child support creditors or taxing authorities, can nevertheless reach the beneficiary's interest. That type of creditor can reach all distributions to the beneficiary mandated by the trust instrument (such as mandatory payments of income or distributions of principal upon the beneficiary's reaching a certain age). See Bank One Ohio Trust Co. v. United States, 80 F.3d 173, 174-75 (6th Cir. 1996) (holding that if a trust converts to discretionary distributions before a tax lien attaches, then the beneficiary would have no interest subject to attachment); see also First Northwestern Trust Co. of S.D. v. IRS, 622 F.2d 387 (8th Cir. 1980) (holding that a trustee in bankruptcy had no right to trust income in a discretionary trust).

24. See ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS §§ 25-33 (1936) (outlining the historical development of the law of spendthrift trusts in the United States). The acceptance of spendthrift trusts is primarily attributable to dicta in the U.S. Supreme Court case of Nichols v. Eaton, 91 U.S. 716 (1875), a case that involved a trust that was not a spendthrift trust but converted to a discretionary trust upon the bankruptcy of the beneficiary. See supra, § 29. Justice Field nevertheless chose to use the occasion to discuss extensively the validity of the spendthrift trust. Id. That dicta was cited by state courts and commentators as law, establishing the validity of the spendthrift trust. Id. §§ 25-27, 30-31.

25. See GRISWOLD, supra note 24, § 30 (analyzing the effects of early commentators' support of spendthrift trusts).

26. See JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY iii-iv (1st ed. 1883) (setting forth Gray's objections).

27. See Emmanuel, supra note 3, at 181 n.14 (noting that an overwhelming majority of states recognize the validity of spendthrift trusts).

28. For example, most states have statutes that invalidate spendthrift provisions for claims of child support, and some include spousal support. 2A SCOTT, supra note 5, § 157. Creditors who have provided necessary goods or services can usually reach assets in a spendthrift trust. See id. § 157.2 (explaining how the doctrine of necessities interacts with spendthrift trusts). Tax claims are another exception. See, e.g., Bank One Ohio Trust Co., 80 F.3d at 176 (holding that the spendthrift provision was not effective to prevent federal tax lien from attaching); United States v. Rye, 550 F.2d 682, 685 (1st Cir. 1977) (same); La Salle Nat'l Bank v. United States, 636 F. Supp. 874, 877 (N.D. Ill. 1986) (same). Some states limit the dollar amount of assets that can be protected under a spendthrift provision. See, e.g., CAL. FROB. CODE § 13006 (West 1991) (stating that up to 25% of a spendthrift trust distribution can be reached by beneficiary's judgment creditor); OKLA. STAT. ANN. tit. 60, § 175.25 (West 1999) (providing that income of spendthrift trust in excess of $25,000 is reachable by beneficiary's creditors); VA. CODE ANN. § 55-19(B) (Michie 1999) (limiting the amount sheltered in a spendthrift trust to $1 million). Georgia and Louisiana statutes allow tort creditors to reach assets held in a spendthrift trust. GA. CODE ANN. § 53-12-28 (1997); LA. REV. STAT. ANN. § 9:2005 (West 1991).

29. RESTATEMENT (SECOND) OF TRUSTS § 156 (1959). This Restatement rule allowing
owed in all states except Alaska, Delaware, Nevada, and Rhode Island, provides that a spendthrift provision will not prevent creditors from reaching trust assets if the settlor of the trust is also the beneficiary. There are two primary reasons for this distinction. First, the underlying policy supporting spendthrift trusts—that the grantor should be able to dictate the terms of the gift—does not apply to self-settled spendthrift trusts. Second, there is strong public policy in preventing individuals from creating an interest in their own property that is exempt from their own creditors. The source of the general rule is a fifteenth century English statute, which stated, “All deeds of gift of goods and chattels, made or to be made in trust to the use of that person or persons that made the same deed or gift, be void and of none effect.” The Restatement describes the rule as follows:

(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.

Professor Scott has also explained:

It is immaterial that in creating the trust the settlor did not intend to defraud his creditors. It is immaterial that he was solvent at the time of creation of the trust. 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.

U.S. courts have accepted the spendthrift trust as a valid means of protecting a gift to someone who may face creditor difficulties, but that acceptance has never been extended to permit a person to place his own assets beyond the reach of creditors, while still retaining use of those assets.
B. ALASKA'S SECTION 110

In 1997, Alaska broke with tradition and created a new type of trust with the following features: the trust is irrevocable, the grantor may be a beneficiary, and the assets of the trust cannot be reached by creditors of any trust beneficiary, including the grantor. The Alaska legislation also included jurisdictional provisions intended to ensure that Alaska law would apply when enforcing these trust protections. It also limited the reach of the traditional exceptions to spendthrift protection (such as child support claims).

Alaska Statutes section 34.40.110 sets forth the trust's characteristics. Former section 110 of the Alaska code provided that creditors of a trustor could reach assets held for the benefit of the trustor. New section 110 provides that if a trust contains a provision restricting access by creditors to a beneficiary's interest, then such creditors cannot satisfy a claim by from the beneficiary's interest in the trust, unless:

1. there was actual intent to defraud creditors;
2. the trustor has the power to revoke or terminate the trust without consent of a person who would be adversely affected if the trust were terminated;
3. there are any mandatory distributions of principal or income to the trustor; or
4. at the time the trust is established, the trustor owes back child support.

If any of these four conditions exist, the creditor can reach only that part of the trust to which the condition applies.

Therefore, under new section 110, the trustor may be a beneficiary of a trust and receive spendthrift protection for her interest, so long as the trust is irrevocable and distributions to the trustor are at the complete discretion of the trustee. If the trustor retains the right to revoke the trust, or if the trust agreement requires any mandatory payments to the trustor, the protection against creditors will not be available. Further, the trustor can neither use a section 110 trust to avoid paying back child support, nor to

36. ALASKA STAT. § 34.40.110 (Lexis 1998).
37. Id. § 13.36.310.
38. Id. § 13.36.310(b) (added by the 1998 amendments that are applicable only to trusts established after September 14, 1998, or registered or reregistered after that date with a statement in the registration that the act will apply; providing that trust assets reachable only to extent necessary to satisfy the permitted claim).
39. The Alaska statutory provisions pertaining to self-settled spendthrift trusts are reproduced in the Appendix to this Article.
40. Former section 110 read as follows: "A deed of gift, a conveyance or a transfer or assignment, oral or written, of goods and chattels or things in action made in trust for the person making the deed, conveyance, transfer, or assignment is void as against creditors, existing or subsequent, of the person." ALASKA STAT. § 34.40.110 (Michie 1962) (repealed 1997). Alaska law prior to the 1997 legislation was, therefore, consistent with the rule of the Restatement prohibiting self-settled spendthrift trusts.
41. ALASKA STAT. § 34.40.110(a)-(d) (Lexis 1998).
intentionally defraud creditors.

Section 110's protection against creditors extends to claims of creditors existing at the time the trustor establishes the trust as well as to the trustor's future creditors. Moreover, there is a short limitations period applicable to claims against section 110 trusts that come within one of the four above-listed exceptions. An existing creditor must commence any action against the trustor claiming actual intent to defraud within four years of establishment of the trust, or one year after discovery of the trust, if later. Future creditors must bring a fraudulent conveyance claim within four years of establishment of the trust. After the trust's fourth anniversary, the statute absolutely protects the trust's assets from claims of these so-called "future" creditors—or those creditors who postdate the trust's creation. The Alaska fraudulent conveyance statute, which generally provides that any transfer made with intent to defraud creditors is void (with no applicable limitations period), was amended so that it does not apply to section 110 trusts.

Alaska modified its jurisdictional statutes in an effort to assure Alaska court jurisdiction over section 110 trusts and to strengthen Alaska choice of law provisions contained in the trust instruments. Alaska Statute section 13.36.035(c) provides that an Alaska choice of law provision is "valid, effective, and conclusive" if all of the following requirements are met: some or all of the trust assets are in Alaska, one of the trustees is an Alaska resident, the trustee has the power to maintain trust records and file income tax returns for the trust, and part of the administration of the trust, including physical maintenance of records, occurs in Alaska. The section also provides that if a trust has a "state jurisdiction provision," then Alaska law determines the "validity, construction, and administration" of the trust, including:

(1) capacity of the settlor;
(2) powers, obligations, liabilities, and rights of the trustees, and the appointment and removal of the trustees; and
(3) existence and extent of powers conferred or retained, including a trustee's discretionary powers, the power retained by a beneficiary of the trust, and the validity of the exercise of a power.

In addition, section 13.36.035(c) now provides that a court can exercise jurisdiction over a trust with a principal place of business in another state if

42. Id. § 34.40.110(b).
43. Id. § 34.40.110(d)(1).
44. Id. § 34.40.110(d)(2).
45. Id. § 34.40.010.
47. Id. § 13.36.035(c).
48. Presumably this phrase is referring to a "provision that the laws of [Alaska] govern the validity, construction, and administration of the trust and that the trust is subject to the jurisdiction of this state." Id. § 13.36.035(c).
49. Id.
the trust meets the requirements of section 13.36.035(c) as stated above.\textsuperscript{50}

The Alaska legislature also provided specific protection against attacks on section 110 trusts. A trust that satisfies the section 13.36.035(c) jurisdictional requirements will withstand a third-party challenge, based on the third party's personal (including marital) or business relationship with the settlor, unless the challenge survives the limitations set forth in section 110.\textsuperscript{51} If there is a claim that comes within the exceptions to section 110 protection (i.e., back child support or actual intent to defraud creditors), then a court will set aside the trust and enforce the claim against trust assets only to the extent necessary to satisfy the claim.\textsuperscript{52} Claims for administrative expenses of the trust, including attorneys fees and trustee fees, have priority over third-party claims, and third-party claimants cannot reach any distributions made to the trustor or another beneficiary before the commencement of the action to set aside the trust.\textsuperscript{53}

The protections of section 110 do not extend to forced-share claims of a surviving spouse.\textsuperscript{54} A section 110 trust is included in the calculation of the augmented estate for purposes of determining the value of a surviving spouse's forced share.\textsuperscript{55} Furthermore, the forced share may be paid out of the section 110 trust, if assets otherwise passing to the surviving spouse and assets of the probate estate are inadequate.

C. \textit{Delaware's Provision}

Shortly after Alaska enacted its new trust statute, the Delaware legislature enacted similar legislation.\textsuperscript{56} The statute defines certain trusts as "qualified dispositions."\textsuperscript{57} To be classified as a qualified disposition, a trust must:

1. be an irrevocable spendthrift trust which limits principal distributions to the trustor to distributions made only at the discretion of a trustee,
2. have a trustee who is not a relative or subordinate of the trustor, and
3. contain a Delaware choice of law provision.\textsuperscript{58}

The statute appears to allow the trustor to retain a right to mandatory in-

\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} § 13.36.310(a) (Lexis 1998).
\textsuperscript{53} \textit{Alaska Stat.} § 13.36.035(c) (Lexis 1998) (codifying provisions added by 1998 amendments and applicable only to trusts established after September 14, 1998, or registered or reregistered after that date with a statement in the registration that the act will apply).
\textsuperscript{54} A forced share, also called an elective share, is the right of a surviving spouse to claim a statutorily defined percentage of the deceased spouse's estate in lieu of the provisions for the surviving spouse in the deceased spouse's will. \textit{Unif. Probate Code} § 7-203 (amended 1993), 8 U.L.A. pt. II 496 (1998).
\textsuperscript{55} \textit{Alaska Stat.} § 13.12.205 (Lexis 1998).
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
come distributions, a right to discretionary principal and income distributions limited by an ascertainable standard, a right to veto distributions, and a testamentary limited power of appointment. The spendthrift provision is effective as to the trustor, and the gift is complete, so long as the trust meets all of the requirements of the qualified disposition. However, the assets of the trust are fully subject to claims for child and spousal support, claims arising out of torts that occurred before establishment of the trust, and claims arising out of fraudulent transfers within the statutory time limits.

D. NEVADA

Nevada and Rhode Island are the most recent converts to the self-settled spendthrift trust, passing statutes in 1999. Nevada's law extends spendthrift protection to self-settled trusts so long as they are irrevocable and all distributions to the settlor are discretionary. The statute sets a two-year statute of limitations for fraudulent conveyance claims concerning transfers to spendthrift trusts and gives existing creditors six months after learning of the transfer to file a complaint, if longer. The choice of law rules provide that the Nevada spendthrift provisions apply if at least one trustee is a Nevada resident or is a bank or trust company that maintains a Nevada office, and:

1. any of the trust property is located in Nevada,
2. the trustor is domiciled in Nevada,

59. See id. § 3570(10)(b)(3) (prohibiting only mandatory principal distributions).
60. Id. § 3570(10)(b)(4). A typical example of such a right of principal distributions might read as follows: "the trustee shall distribute so much of the principal as the trustee deems necessary for the beneficiary's health, maintenance, education, and support." This type of provision is better for the beneficiary than a provision that gives the trustee unrestricted discretion to make distributions, because under the former provision, the beneficiary may be able to compel distributions if she can prove she actually needs funds for health, maintenance, education, and support.
62. Id. tit. 12, § 3570(10)(b)(2). By contrast, the trustor of an Alaska section 110 trust cannot have a right to any mandatory distributions from the trust. However, it appears that the Alaska trustor could retain all of the other rights enumerated for Delaware trustors. See ALASKA STAT. § 34.40.110 (Michie 1998) (listing the other permissible powers). Of course, if a Delaware trust required mandatory income distributions to the trustor, those income distributions would be reachable by his creditors. DEL. CODE ANN. tit. 12, § 3571 (Supp. 1998); see John E. Sullivan, III, Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts, 23 DEL. J. CORP. L 423, 459 (1998) (exploring the effect of mandatory distributions and powers in third parties).
63. DEL. CODE ANN. tit. 12, § 3574 (Supp. 1998). The statute originally allowed access to the trust assets to creditors who were induced to lend by the trustor's representations that the trust assets would be available to satisfy debt. 71 Del. Laws 159, § 1 (1997), amended by 71 Del. Laws 254, § 39 (1997). That provision was removed, because it would have allowed the trustor to gain access to trust assets by lying to a creditor, and that would have made it an incomplete gift for tax purposes. See 71 Del. Laws 254, § 36 (1997) (deleting section (2) of DEL. CODE ANN. tit. 12, § 3573 (Supp. 1998) and renumbering section (3) to section (2)).
64. Nev. REV. STAT. § 166.040(1)(b) (1999).
(3) the trustor created the trust in Nevada, or
(4) the local trustee maintains records and prepares tax returns for the trust and at least part of the trust is administered in Nevada.\(^6\)

E. RHODE ISLAND

Rhode Island's statute applies to trusts that have a Rhode Island trustee.\(^6\) It appears to be modeled after the Delaware statute, describing the trusts as "qualified dispositions,"\(^6\) containing a four-year limitations period\(^6\) and exempting claims for existing alimony, child support, spousal property settlement, and tort claims where the injury occurred before the trustor created the trust.\(^7\)

F. COMPARISON OF THE STATUTES

Although there are variations among the four state statutes, they are substantially similar. They all require that the trust be irrevocable and that at least one of the trustees be local. The statutes all prohibit giving the trustor a right to distributions and require that payments to the beneficiary be at the discretion of the trustee.\(^7\) The most significant differences lie in the states' dissimilar definitions of fraudulent conveyance. Alaska requires a showing of actual intent to defraud for a creditor to be successful in its challenge to the trust,\(^7\) whereas Delaware, Nevada, and Rhode Island all allow a showing of constructive fraud to prove a trust fraudulent as to creditors.\(^7\) Another significant difference is Nevada's short limitations period, which gives creditors two years, rather than four years, to bring a claim.\(^7\) Nevertheless, all the statutes were designed to accomplish the same result: validation of the self-settled spendthrift trust.\(^7\)

III. STATE COURT CHALLENGES

A. FULL FAITH AND CREDIT CLAUSE AND JURISDICTIONAL ISSUES

One potential threat to the self-settled spendthrift trust is the possibility that a court in another state will refuse to enforce the Alaska statutory

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\(^6\) NEV. REV. STAT. § 166.025 (1999).
\(^7\) Id. § 18-9.2-4(b).
\(^7\) Id. §18-9.2-5.
\(^7\) However, Delaware's statute appears to allow mandatory distributions of income. See supra note 59 and accompanying text (describing exceptions the Delaware statute).
\(^7\) ALASKA STAT. §§ 34.40.010, .110 (Lexis 1998).
\(^7\) DEL. CODE ANN. tit. 6, §§ 1301, 1304, 1305 (1999); NEV. REV. STAT. §§ 112.180, .190 (1999); R.I. GEN. LAWS §§ 6-16-4 to -5 (1992).
\(^7\) See supra note 64-66 and accompanying text (discussing Nevada's statute).
\(^7\) For the sake of simplicity, the Article will refer primarily to the Alaska statute in discussing hypotheticals and will refer to the other state statutes only where there is a distinction.
rule\textsuperscript{76} that protects assets from creditor claims and hold that a judgment is enforceable against such a trust. Offshore trusts generally do not raise this concern.\textsuperscript{77} Returning to the hypothetical, recall that PT (Polly Taft) has obtained a judgment in a Washington state court against DD (Debra Diversified) for her injuries sustained in the accident caused by DD's intoxicated driving. Assume that instead of the Alaska trust, DD had placed her assets in a trust in Nevis, a country in the Caribbean that allows self-settled spendthrift trusts. When PT travels to the offshore jurisdiction to enforce her judgment against DD's trust, she will probably have to relitigate the issue of liability because the underlying judgment would not be entitled to full faith and credit,\textsuperscript{78} and, thus, the foreign (non-U.S.) jurisdiction may not recognize it.\textsuperscript{79} Assuming that PT obtains an enforceable judgment against DD in Nevis, PT would then have to bring an enforcement action in a Nevis court. In that action, the court would most likely apply Nevis laws, which allow the spendthrift protection,\textsuperscript{80} and refuse to enforce its own judgment against the trust. If PT instead brings the enforcement action in a U.S. court and obtains a ruling that DD's trust was vulnerable to the judgment, that ruling would not be entitled to deference in the foreign jurisdiction. In sum, since offshore trusts are beyond the reach of any U.S. court, trustors place their assets in offshore trusts because they generally avoid potential state court hostility towards self-settled spendthrift trusts.

By contrast, an Alaska court is bound by the Full Faith and Credit Clause and the Supremacy Clause of the federal Constitution.\textsuperscript{81} Therefore,

\begin{itemize}
\item \textsuperscript{76} Likewise, a court could ignore Nevada, Rhode Island, or Delaware statutory rules.
\item \textsuperscript{77} See Osborne, Asset Protection, supra note 12, ¶ 1407.10 (discussing particular concerns to clients using foreign jurisdictions).
\item \textsuperscript{78} The Washington state judgment might be recognized in some foreign jurisdictions, but one attraction of the offshore trust countries is that their courts are not bound to recognize U.S. judgments under treaties, statutes or common law principles. See INTERNATIONAL ESTATE PLANNING 91-96 (Donald D. Kozusko & Jeffry Schoenblum eds., 1991) (discussing principles governing enforceability of U.S. judgments in various offshore jurisdictions); Marty-Nelson, supra note 13, at 59 (discussing practical barriers to enforcement of U.S. judgments in offshore jurisdictions); Howard D. Rosen & Patricia A. Donley-Rosen, Domestic Asset Protection Trusts: Do They Work?, 23 TAX MGMT., EST., GIFTS AND TR. J. 211, 213 n.19 (1998) (noting that Anguilla, the Cook Islands, Nevis, St. Kitts, St. Vincent, and the Grenadines have legislation that either exempts their trusts from foreign judgments or provides that foreign judgments are unenforceable if based on law inconsistent with their trust laws or if its own law governs matters related to the judgment).
\item \textsuperscript{79} See Marty-Nelson, supra note 13, at 57 (discussing recognition of U.S. judgments in the offshore jurisdictions).
\item \textsuperscript{80} Osborne, Asset Protection, supra note 12, ¶ 1407.10(F) (noting that Nevis law allows self-settled spendthrift trusts).
\item \textsuperscript{81} See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Consti-
if PT obtains a judgment in Washington on the underlying liability, and then brings that judgment to Alaska to enforce it, she need not relitigate liability issues because the Alaska court must respect the Washington judgment. However, even though the Alaska court must acknowledge that the debtor is liable, it could nonetheless decide that the trust is inaccessible under state law. Therefore, most creditors would want a state court other than Alaska’s (such as Washington in our example) to consider the enforceability issue as well as the underlying liability issue.

Unfortunately, not every creditor will have this luxury because it is unclear whether a non-Alaska court will agree that it has jurisdiction over the enforcement issue. Presumably the trust assets will be located in Alaska, and the court will therefore not be able to claim in rem jurisdiction. The critical question will then be whether personal jurisdiction over the trustee is obtainable or necessary.

1. Personal Jurisdiction Over the Trustee

As we shall see, if the trustee of DD’s trust had limited activity linked with Washington, a Washington court will have to determine whether it can assert jurisdiction over the trustee before the court can order the trustee to release the trust funds to DD’s creditors. The seminal case of Hanson v. Denckla has been cited as an obstacle to enforcement of an out-of-state judgment against a self-settled spendthrift trust. The trust at issue in Hanson was set up in Delaware by a woman living in Pennsylvania, who then moved to Florida and later died there. She had reserved a power of appointment over the trust assets and had exercised that power in writing.
during her lifetime. The Hanson Court held that a Florida court could not rule on the validity of the trustor's exercise of the power of appointment, because Florida law provided that the trustee was an indispensable party, and that the Florida court did not have jurisdiction over the Delaware trustee. Before Florida could assert jurisdiction over the trustee, the opposing party had to show that the trustee had “minimum contacts” with the state. The “minimum contacts” had to include some act by which the trustee had purposefully availed itself of the privilege of conducting business in Florida. The Hanson trustee had not ventured into Florida, except to the extent that it continued to conduct business with the trustor after she moved to Florida. The unilateral actions of the trustor were insufficient to satisfy the Hanson test.

A corporate trustee in Alaska is likely to be more aggressive than the trustee in Hanson in pursuing out-of-state customers because the purpose of the self-settled spendthrift trust statute is to lure business into state trust departments. The national marketing of the trusts by a corporate trustee may include establishing websites, advertising, conducting interviews with national publications such as The Wall Street Journal and Forbes, placing other articles in the national press, and providing promotional material to estate planning practitioners in other states. Such activities may bring a trustee within a state's long arm statute. Returning to our hypothetical, in

property to herself, her estate or her creditors. A limited or special power of appointment limits the permissible recipients of the property to exclude the holder of the power and her creditors and estate. Reutlinger, supra note 6, at 76-78.

89. Hanson, 357 U.S. at 239-40.
90. It is important to note that the Supreme Court's holding went only to the issue of whether the Florida court had personal jurisdiction over the trustee. The Florida court held that the trustee was an indispensable party, and the Supreme Court accepted the Florida court's interpretation of Florida law. Id. at 245. The Court noted that because the Florida court had “personal jurisdiction over the executor, legatees and appointees, there is nothing in federal law to prevent Florida from adjudicating concerning the respective rights and liabilities of the parties. But Florida has chosen not to do so.” Id. at 254.
91. Id. at 253 (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).
92. Id.
93. Id.
94. See Nenno, supra note 86, at 3 (“The benefits of Delaware trust and tax law, coupled with Delaware's ongoing efforts to maintain a salubrious trust climate, continue to make that state a favored place for personal trusts.”). At the time he authored the article, Mr. Nenno was a Vice President and Trust Counsel employed by Wilmington Trust Company, Wilmington, Delaware. See Wagenfeld, supra note 15, at 857-66 (noting that Alaska sought to attract trust business with its new trust statute).
95. For an example of such a site, log onto Alaska Trust Company at <http://www.alaska-trust.com> (visited May 3, 2000).
97. Although there is some variation among state long-arm statutes, several of them either explicitly provide or have been interpreted to mean that the only limits to personal jurisdiction in the state are the constitutional limits set by the due process clause. Wright &
light of the increasingly broad scope of personal jurisdiction, it may be difficult for such a corporate trustee to claim insufficient contacts with Washington.98

Washington is one of the states that has set the reach of its personal jurisdiction at the limits of due process.99 The court in Washington would have some flexibility in asserting jurisdiction over the trustee because the due process analysis is sufficiently fluid.100 Therefore, if the court were sufficiently outraged by the defendant's attempted avoidance of liability, the court could use that flexibility to give itself jurisdiction and reach the trust. In another context, the case of Sligh v. First National Bank101 is a good ex-

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98. The Supreme Court has acknowledged the shrinking influence of lack of physical presence as a due process and fairness objection, in light of new technology. In Burger King, 471 U.S. 462, the Court stated that "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." Id. at 476. In Quill v. North Dakota, 504 U.S. 298 (1992), the Court, citing Burger King, stated that "[i]n modern commercial life it matters little that [business] solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing state." Id. at 308 (considering whether taxation by one state of an out-of-state mail-order business violated due process).


100. See supra note 97 (detailing the limits on personal jurisdiction).

101. 704 So. 2d 1020 (Miss. 1997).
ample of an outraged court taking extraordinary steps to reach assets in a spendthrift trust. In *Sligh*, the court held that it was against public policy to prevent the plaintiff, who had been paralyzed by a drunk driver, from collecting because the defendant's mother had locked his assets away in a spendthrift trust.\(^{102}\) The Mississippi court, therefore, created a judicial exception to spendthrift enforceability for tort creditors.\(^{103}\) In sum, the hypothetical court will probably be able to assert personal jurisdiction over the trustee without the actual presence of the trustee in the state. The trustee's interaction with DD and its business contacts with other Washington residents may be sufficient to support a finding of personal jurisdiction.

2. The Finality of a Finding of Personal Jurisdiction

What if the Washington court in our hypothetical improperly stretches the boundaries of personal jurisdiction? If the trustee appears in the litigation in Washington, asserts the defense of lack of jurisdiction, and loses, the trustee may then attempt to avoid enforcement of the judgment by claiming that it is not entitled to full faith and credit. Such a claim would fail, however, if the parties litigate the jurisdictional question in one court, and that court enters a final judgment, because then even an erroneous decision is entitled to full faith and credit.\(^{104}\)

The trustee could not avoid full faith and credit by claiming that the Washington judgment violates a fundamental public policy of Alaska. The U.S. Supreme Court has recently confirmed that there is no such public policy exception to full faith and credit. In *Baker v. General Motors*,\(^{105}\) a Missouri court had refused to honor a Michigan court's injunction prohibiting a party to the Michigan litigation from testifying in other court proceedings.\(^{106}\) The Supreme Court stated that Missouri could not refuse to honor

\(^{102}\) *Id.* at 1027.

\(^{103}\) *Id.* However, the Mississippi state legislature acted swiftly to overturn the court's action by passing legislation reinstating spendthrift protection against tort creditors. MISS. CODE ANN. § 91-9-503 (1998).

\(^{104}\) The Supreme Court first enunciated this principle in *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931). The Court wrote:

Public policy dictates that there be an end to litigation, that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.


\(^{106}\) *Id.* at 230. The Michigan litigation was between General Motors and a former em-
the Michigan order on the grounds that it offended Missouri public policy. The Court Stated, "[O]ur decisions support no roving 'public policy exception' to the full faith and credit due judgments." Likewise, the hypothetical trustee could not claim that the Washington judgment offends Alaska public policy as a reason to refuse to give full faith and credit to the Washington judgment.

If the Washington court in the hypothetical case asserts personal jurisdiction over DD's Alaska trustee, the trustee will then face a strategic decision. If the trustee appears and litigates the jurisdictional issue in Washington, it will be bound by the Washington judgment. On the other hand, if the trustee does not appear, it will be free to challenge the creditor's efforts to enforce the judgment in Alaska. By not appearing, however, the trustee cannot participate in the resolution of the substantive issue—whether PP and CC can, in fact, reach the trust assets. That would presumably be a small price to pay, however, since DD would be active in the litigation and would have an even stronger interest than the trustee in vigorously defending against the creditors' attack on the trust. However, the trustee's presence as a party has value to DD and to supporting enforceability of the trust. Although the trustee and DD would raise the same legal arguments, the trustee is the only party that can effectively argue for the trustee's interest in protecting the integrity of the trusts, free from outside influence, as an Alaskan entity doing business under Alaska law.

Suppose that the trustee declines to appear and protest the jurisdictional issue in Washington. Assume further that PT gets a ruling from the Washington court that DD is liable, and that the trust assets are available to satisfy the judgment. Presumably, the trustee would refuse to honor the

ployee. Id. at 227. As part of the settlement of the case, the Michigan court enjoined the former employee from testifying in product liability cases brought against General Motors. Id. at 227-28.

107. Id. at 233. The court went on to hold that the Missouri court was nevertheless not bound by the injunction because "the Michigan decree cannot determine evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court." Id. at 239. See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 ("A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its courts on the original claim."). Cf. Willis L.M. Reese & Vincent A. Johnson, The Scope of Full Faith and Credit to Judgments, 49 COLUM. L. REV. 153, 178 (1949) (discussing the possibility of a public policy exception and concluding: "[I]n the absence of case precedent, it seems impossible to do more than suggest that such an exception to the full faith and credit clause does in all probability exist. . . . Although such elaboration cannot be attempted at the present time, the exception is believed to have a firm foundation."). Because the Baker Court cited to the Reese and Johnson article, one could conclude that there may be some exception to the Full Faith and Credit Clause relating to competing state interests that the Supreme Court would recognize, albeit narrower than a "roving" public policy exception.

108. See Durfee v. Duke, 375 U.S. 106, 111 (1963) (discussing the general rule that "a judgment is entitled to full faith and credit"); St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese, 273 Cal. Rptr. 340 (Cal. App. Ct. 1990) ("Where another state has fully and fairly litigated its jurisdiction, and has finally decided the question, a second state may not reexamine the question but must give the judgment of the first state full faith and credit.").
decision and would withhold payment. PT would then register its judgment and ask an Alaska court for an order forcing the trustee to comply. The Alaska court might rule that the judgment was void for lack of jurisdiction, since the personal jurisdiction issue was not “fully litigated,” and could refuse to give full faith and credit to the Washington ruling. Such a ruling may comply with Baker v. General Motors because the Supreme Court merely held that a “final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.” Without jurisdiction over the trustee, the judgment would not be entitled to full faith and credit under that formulation.

If the Alaska court upheld the jurisdictional decision, the trustee might cite Baker as authority that “enforcement measures do not travel with the sister state judgment as preclusive effects do.” The trustee’s argument would not prevail. In Baker, the Court held that the Missouri court could not ignore the Michigan injunction on the ground of a public policy exception to full faith and credit. However, the Court ultimately permitted the Missouri court to ignore the injunction because it went to admissibility of a witness’s testimony, and each court controls its own evidentiary rulings. The type of “enforcement” measures that the Baker Court exempted from full faith and credit were “time, manner and mechanisms for enforcing judgments.” By contrast, the trustee of DD’s trust would be challenging the substantive holding that the trust’s spendthrift protections are invalid. Even assuming the argument had merit, if the trustee had been properly brought in as a party to the Washington action determining the enforceability of the spendthrift provision, then issue preclusion would most likely bind the trustee to Washington’s determination. Thus, the trustee’s best strategy in this circumstance is to refuse to participate in the Washington action, move the issue of personal jurisdiction to an Alaska court, and hope that the Alaska court would take a narrower view of Washington’s jurisdictional reach. If the Alaska courts hold that Washington’s assertion of per-

109. Arguably, an Alaska proceeding would not be necessary under that set of facts. The Washington court has asserted personal jurisdiction over the trustee; therefore, the trustee is refusing to follow an order from a court that has the same authority over it as an Alaska court would. However, the creditor could bring an enforcement action in Alaska to reach the assets under the principles of the Uniform Enforcement of Foreign Judgments Act, if the trustee refused. See ALASKA STAT. § 09.30.200 (Lexis 1998) (providing procedures for enforcement in Alaska of out-of-state judgments).


111. Id. at 235.

112. See supra notes 106-07 (describing the Court’s holding in Baker).

113. Baker, 522 U.S. at 239.

114. Id. at 235.

115. See 18 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE—JURISDICTION AND RELATED MATTERS § 4416 (1981) (giving a general definition of issue preclusion, while admitting that “[s]o many limitations have emerged in such ambiguous forms that it seems impossible to achieve any statement that is both graceful and complete”); see also Baker, 522 U.S. at 239 n.11 (discussing the role of issue preclusion in that case where the Missouri plaintiffs were not parties to the Michigan litigation).
sonal jurisdiction was unconstitutional, then it would be up to the creditor to seek the assistance of the U.S. Supreme Court. If the Washington court determines that it has jurisdiction over the Alaska trustee, that decision will be binding if the trustee litigates the issues in Washington, but the ruling may be vulnerable to attack if the trustee fails to appear and waits until the judgment is brought to Alaska.

3. The Trustee as a Necessary Party to the Litigation

Another part of the full faith and credit analysis is whether the trustee is a necessary party to the dispute. Professor Scott seems to contemplate that jurisdiction over the trustee is always necessary when considering issues of the validity of the trust and distribution of trust assets. The general rule is that the court must have jurisdiction over the trustee or the trust property in order to determine trust issues. There are, however, some instances where a court can decide trust issues without such jurisdiction.

In Acheson v. Dowell (In re Morgan Guarantee Trust Co.), for example, a New York court addressed the enforceability of a California court's interpretation of a California resident's will, in which the testator had exercised a power of appointment over a New York trust. The California court's ruling modified the language of the will because, as written by the decedent, the will's disposition of the trust assets would have violated the Rule Against Perpetuities. The New York trustee was not made a party to the action, and the heirs who would have benefited from an alternative

116. Although personal jurisdiction analysis generally focuses on issues of fairness, this case includes parties with very different concerns. Usually, the court is concerned with fairness to the party over whom jurisdiction is being asserted. However, fairness to the trustee (personal jurisdiction over whom is the critical issue) may not be a paramount concern, since the trustee does not have a large personal stake in the outcome. The defendant/trustor has the most interest in the outcome and is unquestionably within Washington's jurisdictional reach, and fairness to the plaintiff would be a countervailing concern. In other words, fairness to the trustee should not be the only question, and perhaps should be an insignificant question, in the case where a defendant is attempting to move assets beyond her creditors' reach by transferring them to a person outside the jurisdictional reach of the court.

117. "Professor [Austin Wakeman] Scott, together with Professor George G. Bogert of the University of Chicago, molded the modern law of trusts in this country. Their influential treatises on the law of trusts, constantly cited by courts, are the starting point for analysis of questions of trust law." Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 558 (6th ed. 2000).

118. See 5A SCOTT, supra note 5, § 567.

119. "If . . . neither the trust property nor the trustee is subject to the judicial jurisdiction of the state, the court has no jurisdiction over the trust, even though the trust instrument attempts to give it such jurisdiction." Walter W. Land, Trusts in the Conflict of Laws 257 (1940).

120. See supra note 84 (discussing UNIF. PROBATE CODE § 2-703 as possible authority for a court to assert such jurisdiction).

121. 269 N.E.2d 571 (N.Y. 1971).

122. See supra note 88 (defining power of appointment). In this case, the California resident, through his California will, was specifying distribution of assets from a New York trust. Acheson, 269 N.E.2d at 572-73.

123. Acheson, 269 N.E.2d at 573.
ruling by the California court chose not to participate in the California proceeding. As a threshold matter, the New York court decided that the California court had jurisdiction to interpret the will of its decedent, although that court did not have jurisdiction to decide the validity of the exercise of the power of appointment as it related to the New York trust. The New York court noted that the California court had no authority to order the New York trustee to distribute trust assets, but that the California court's decision regarding interpretation of the language in decedent's will—exercising the power of appointment—was entitled to full faith and credit. The New York court ultimately gave full faith and credit to the California court's resolution of the power of appointment issue and resolved the rights of the parties on that basis. The California court was essentially able to rule on an issue that determined distribution of a New York trust, without having jurisdiction over the New York trustee.

Unlike the California court in Acheson, the Washington court in our hypothetical would face substantial resistance in claiming authority to rule on distribution of DD's trust assets. In Acheson, the California court was using California law to rule on the terms of a California resident's will, with the effect on the trust distribution flowing from that ruling. In our hypothetical, the Washington court would be ruling based on the residency of DD and her creditors and the situs of the events giving rise to the claims. However, the Washington court's legal analysis (in determining whether DD's creditors could reach the trust assets) would be an evaluation of the Alaska trust and its terms which would be based on Alaska law. The issue before the Washington court, therefore, would relate directly to the internal administration of an out-of-state trust, as opposed to the issue before the California court in Acheson, which was the interpretation of a direction to the out-of-state trustee.

The Washington court could defend this direct intrusion into Alaskan affairs by asserting that, as to its own residents, it should have the right to determine the policy issue of whether the assets of a self-settled trust are available to creditors when those creditors are Washington residents. In order to receive full faith and credit, however, that jurisdictional determination would have to receive the same favorable reception in Alaska that the California court's decision received in Acheson received when it was taken to New York. Another difficulty is that even if the Washington

124. The potential beneficiaries were the decedent's children from a prior marriage. The California court's interpretation benefited the daughter from the decedent's second marriage. See id. at 573 (noting that the California court construed the will to give effect to the testator's "obvious intent").
125. See id. at 575-76 (noting personal jurisdiction).
126. Id. The court noted that the California court did not rule on the validity of the trust or the validity of the exercise of the power of appointment. Id. It further noted that the New York trustee was not an indispensable party in the California proceeding because its role was that of a "stakeholder" whose only interest was in carrying out a properly determined distribution. Id.
127. The choice of law provisions in the Alaska, Delaware, Rhode Island, and Nevada
court rules that the creditors can reach the trust assets, and that ruling is entitled to full faith and credit, the ruling may not be binding on the Alaska trustee. In *Acheson*, the trustee was a mere stakeholder who did not object to the New York order which followed the California decision. If our hypothetical trustee objected when the Washington judgment was brought before an Alaska court, the Alaska court could rule that the Washington judgment was entitled to full faith and credit with respect to the parties before the Washington court (PT, CC, and DD), but that the judgment would not be binding on the trustee.

An interesting parallel to the dilemma of the trustee's necessary presence may be found in the state taxation area, where a state may attempt to subject a trust located in another state to its income tax. The extraterritorial enforcement problems with such an attempt are similar to our case because it is an attempt by one state to impose obligations on an out-of-state trustee. In order to prevent a trust from escaping the reach of its income tax, states often define trust residency to include trusts whose administration has moved outside of the state. For example, some states classify a trust as a resident entity of the state if the trustor was a resident at the time the trust became irrevocable, or, in the case of a testamentary trust, if the trustor was a resident at the time of his or her death. However, the Due Process Clause of the Fourteenth Amendment may require a stronger connection with a state before the trust is subject to that state's income tax. A Missouri case, *In re Swift*, set forth six factors for courts to consider in determining whether trust taxation was constitutional:

1. the domicile of the settlor,
2. the state in which the trust is created,
3. the location of trust property,
4. the domicile of the beneficiaries,
5. the domicile of the trustees, and
6. the location of the administration of the trust.

The court held that the first two factors alone were not enough to support statutes would make that reception unlikely. ALASKA STAT § 13.36.035(c) (Lexis 1998); DEL. CODE ANN. tit 12, § 3571 (Supp. 1998); NEV. REV. STAT § 166.025 (1999); R.I. GEN. LAWS § 18-9.2-2 (1999).

128. *See Acheson*, 269 N.E.2d at 575-76 (ruling that stakeholder was not an indispensible party and therefore did not have to be joined).

129. *Cf. Baker v. General Motors*, 522 U.S. 222, 240-41 (1998) (holding that even though judgment was entitled to full faith and credit, the court of one state could not rule on evidentiary issues in another state's court proceedings); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) (holding that in rem jurisdiction still required the court to find minimum contacts with persons interested in the property).

130. *See, e.g.*, MINN. STAT. ANN. § 290.01 (7)(b) (West 1999); MO. ANN. STAT. § 143.331 (West 1999); N.Y. TAX LAW § 605(3) (McKinney 1999).

131. *See In re Swift*, 727 S.W.2d 880, 882 (Mo. 1987) (holding that the trust's connections to the state to support taxation must show the trust took advantage of the protection of the state's laws).

132. *Id.*

133. *Id.* at 882.
valid taxation because those factors did not indicate that the trust had the advantage of the ongoing protection, or benefit of state law. At least one of the other four factors (3 through 6) had to be present along with the first two in order to find sufficient connection with the state to tax the trust. Therefore, under the Swift test, the underlying question should be whether the trust obtained any benefit or protection from the taxing state, so that taxing the trust would be justified.

However, in a recent D.C. Court of Appeals decision, District of Columbia v. Chase Manhattan Bank, the court held that the District of Columbia could constitutionally impose income tax on a trust whose only connection with the District of Columbia was the fact that the trustor was a D.C. resident at the time of his death. The trustee was a New York bank that administered the trust from its New York offices, and none of the trust beneficiaries were D.C. residents. The D.C. court stated that the Supreme Court had expanded the method of due process analysis of state taxation statutes in Quill Corp. v. North Dakota. Under Quill, the state may tax a taxpayer if the taxpayer has minimum contacts with the state. The Chase Manhattan court, relying on Quill, determined that the trustor's death in the District of Columbia gave the trust sufficient minimum contacts to be subject to D.C. tax. If the District of Columbia could constitutionally tax a trust based solely on the trustor's residence there, by analogy, a non-Alaska court may use similar residency connections to assert jurisdiction and rule on the validity of an Alaska trust's spendthrift provision.

It remains unclear, however, whether a state could rely on such reasoning to statutorily define certain trusts as residents for jurisdictional purposes. Some commentators argue that the Chase Manhattan court went

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134. Id.
135. Id.
137. Id. at 543.
138. Id. at 541.
139. Id. at 542 (citing Quill Corp. v. North Dakota, 504 U.S. 298 (1992)).
140. Quill, 504 U.S. at 307.
141. Chase Manhattan, 689 A.2d at 545. In so ruling, the court emphasized that a testamentary trustor's state of residence at time of death give the state in rem jurisdiction to adjudicate disputes related to the trust. Id. at 544 (citing George T. Bogert, Trusts § 177, at 686 (6th ed. 1987)).
142. This approach can be compared to the unfortunate statutory attack on same sex marriages. Some states, in order to prevent giving full faith and credit to same sex marriages which may become valid elsewhere, have passed legislation that excludes same sex marriages from the general rule of comity for valid out-of-state marriages. For an example of such a statute, see Wash. Rev. Code § 26.04.020 (1999). This exclusion is authorized by the Defense of Marriage Act, 28 U.S.C. § 1738C (Supp. 1999) [hereinafter DOMA]. Congress could similarly authorize a state to assert jurisdiction over a trust set up by its resident for the purpose of determining access by creditors. However, serious issues regarding the constitutionality of DOMA under the Full Faith and Credit Clause have been raised and left unresolved. See generally Heather Hamilton, Comment, The Defense of Marriage Act: A Critical Analysis of its Constitutionality Under the Full Faith and Credit Clause, 47 DePaul L. Rev. 943 (1998) (exploring the constitutionality of DOMA); Jennie R. Shuki-Kunze, Note, The "Defenseless" Marriage Act: The Constitutionality of the Defense of Marriage Act as an Extension of Congressional Power Under the Full
too far. State legislatures may be tempted to construct a statute mirroring the jurisdictional reach of Chase Manhattan if they want to deter their residents from placing the bulk of their assets in Alaska trusts because such conduct might enable residents to avoid paying a liability owed to another state resident. States might respond to this foreseeable problem by enacting statutes that give state courts jurisdiction to decide the vulnerability of trust assets to debts of a trustor-beneficiary, regardless of where the trust is administered, if the trustor was a resident of the state at the time she established the trust and currently maintains that residency. Although there have been decisions holding that the trustor's residency at the time the trust became irrevocable is, without more, an insufficient nexus to tax the trust, the suggested statute would add the element of current residency of the trustor. Such a statute would satisfy the Swift test because the domicile of the trustee and the beneficiaries would be in the state claiming jurisdiction over the trust. Of course, the Swift test was used in the context of establishing the constitutionality of trust taxation, but the due process test should be similar. The enforcement difficulty with this approach is that even though the statute would give a Washington court jurisdiction to decide whether the spendthrift clause is enforceable, unless the trustee was made a party to the litigation, it is likely that the trustee would not be bound by the judgment. Therefore, the Washington court may assert jurisdiction over the enforceability of the spendthrift clause without the trustee present as a party, but the court likely lacks the power to compel the

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Faith and Credit Clause, 48 Case W. Res. L. Rev. 351 (1998) (same). The full faith and credit problem would not be presented with the type of state jurisdictional statute proposed here; the constitutional issue would be whether such assertion of jurisdiction would satisfy due process standards. Of course, another obstacle to such legislation is the fact that this issue is unlikely to raise the same political fervor that same-sex marriage has raised.

143. See M. Read Moore & Amy L. Silliman, State Income Taxation of Trusts: New Case Creates Uncertainty, EST. PLAN. 200, 206-08 (1997) (stating that the D.C. court failed to make a convincing argument of minimum contacts—unlike Quill, there was no "purposeful directing" of activities to the state—and further criticizing the decision for its failure to analyze limitations on in rem jurisdiction and problems where personal jurisdiction over the trustee is not present).

144. See Roundtable Discussion, The International Trust, 32 Vand. J. Transnat'l L. 779, 793 (1999) (noting the remarks of Mr. Eric Henzy: "But the notion that three or four hundred thousand people in Alaska ought to be deciding what folks in the lower forty-eight ought to be doing about their tort systems, it's just not supportable.").

145. Note, however, that the Alaska statute purports to give its state courts jurisdiction to determine these issues when the trust has an Alaska choice of law provision. Alaska Stat. § 13.36.035(C) (Lexis 1998).

146. For example, see Blue v. Department of Treasury, 462 N.W.2d 762 (Mich. Ct. App. 1990) ("We choose to follow the cases . . . restricting the state's power to impose a tax on resident trusts where neither the trustee nor the trust property are within the state.").

147. See supra text accompanying note 133 (stating the Swift test).

148. See Moore & Silliman, supra note 143, at 207-08 (pointing out that state statutes holding trusts liable for income tax, even though constitutional, could be unenforceable if the state could not get personal jurisdiction over the trustee); see also supra note 124 and accompanying text (discussing the similar issue presented in Acheson v. Dowell, 269 N.E.2d 571 (N.Y. 1971)).
trustee to comply with its decision. The surest route to enforcement, therefore, would be a definitive holding that the Washington court had personal jurisdiction over the Alaska trustee.\textsuperscript{149}

4. Choice of Law Issues

Assuming that the Washington court does assert jurisdiction to decide the issue, it will then have to determine which state's laws apply. Presumably, the trust agreement will have a choice of law clause selecting Alaska law as applicable.\textsuperscript{150} Under general choice of law principles, Alaska would have sufficient contacts with the trust so that a Washington court would respect the contractual choice of law.\textsuperscript{151} However, there is a general public policy exception to choice of law principles.\textsuperscript{152} Washington has expressed its disapproval of self-settled spendthrift trusts in a statute that provides that: "all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the existing or subsequent creditors of such person."\textsuperscript{153} Assuming that a Washington court had jurisdiction over the issue, the court might determine that the Alaska statute is sufficiently contrary to its policies and override the trustor's choice of law clause.\textsuperscript{154}

B. FRAUDULENT CONVEYANCE CHALLENGE

There is another state court option available to DD's tort and contract creditors: PT and CC could attack the transfer to the trust as a voidable fraudulent conveyance. This claim differs from the claim that the spendthrift provision is invalid because it is irrelevant that the trustor transferred property to an Alaska trust; a defrauded creditor could make the same fraudulent transfer claim if DD had fraudulently transferred the property to her Alaskan sister-in-law. If the creditors asserted such a claim, the

\textsuperscript{149} It is conceivable that there could be enough money at stake for the parties to appeal to the U.S. Supreme Court, if it is necessary to decide the issue. In particular, if insurance companies were concerned with the result (for example, if the plaintiff's damages would otherwise be paid by other joint and severally liable defendants or by uninsured motorist protection) the insurance companies may be concerned with payments in future cases. Unfortunately, a decision that would expose the trust assets to the judgment in this context would be too fact-specific to have much relevance to future cases, since it would turn on personal jurisdiction of a particular state over a particular trustee. However, depending on the policy analysis done to determine personal jurisdiction, the decision could be a sufficient cautionary tale that would make the trusts less attractive or, at least, affect future litigation strategy.

\textsuperscript{150} The Alaska statute has a provision giving effect to Alaska choice of law provisions. ALASKASTAT. § 13.36.035(c) (Lexis 1998).

\textsuperscript{151} See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187 (1971) (stating test of validity of choice of law clause).

\textsuperscript{152} See id. § 187(b) (stating public policy exception).

\textsuperscript{153} WASH. REV. CODE § 19.36.020 (1998). This provision has remained unchanged since enacted in 1881.

\textsuperscript{154} Compare In re Brooks, 217 B.R. 98 (Bankr. D. Conn. 1998), discussed infra section IV, where the bankruptcy court engaged in that exact analysis with respect to an offshore trust.
Washington court would be faced with the question of whether Washington or Alaska law applied. The trust instrument's choice of law designation is irrelevant to this question because the issue of fraudulent conveyance is not an issue of the contract between the trustor and trustee. Further, Alaska is minimally linked to the issue of whether the transfer was, in effect, a fraud on the creditor. If the choice of law clause in the trust agreement applied to a fraudulent conveyance question, then any debtor could control the choice of law by entering into a contract with the transferee and making the contract subject to the law of a state with a more favorable fraudulent conveyance law. The location of the assets before or after the transfer, consequently, does not affect the choice of law. In James v. Powell, for example, a New York court considered whether a transfer of land in Puerto Rico was fraudulent as to the transferor's New York judgment creditor. The court held that Puerto Rican law applied to answer that question, citing the Restatement sections setting forth choice of law rules applicable to real property. However, the court commented in a footnote that:

Of course, if, in exploring the law of Puerto Rico, it were to be found that it was specifically designed to thwart the public policy of other states—for example, by denying a remedy to all judgment creditors in the plaintiff's circumstances in order to attract foreign investment in its real estate—the courts of this State would be privileged to apply the law of New York rather than that of Puerto Rico.

In our hypothetical, PT and CC would argue that Washington law should apply because Washington has the broader definition of fraudulent transfer, as adopted from the Uniform Fraudulent Transfer Act. The majority of state laws are more favorable to creditors than Alaska's, as most states have adopted a form of either the Uniform Fraudulent Transfer Act

156. See Ferrari v. Barclays Business Credit, Inc., 108 B.R. 384 (Bankr. D. Mass. 1989), where court refused to apply a choice of law clause in a security agreement that was allegedly a fraudulent conveyance.
158. Id. at 254.
159. Id. at 258.
160. Id. at 259 n.4.
161. The Uniform Fraudulent Transfer Act and the Washington statute define "fraudulent transfer," with respect to present and future creditors, to include transfers made with actual intent to defraud as well as transfers for inadequate consideration that are made at a time when the debtor was in business, in a transaction for which the debtor's remaining assets are unreasonably small, or when the debtor should have known that she would incur debts beyond her ability to pay. WASH. REV. CODE § 19.40.041 (1999). There is a broader definition of fraudulent transfer applicable to present creditors, which would include all transfers for insufficient consideration when the debtor was insolvent immediately after the transfer. WASH. REV. CODE § 19.40.051 (1999); UNIF. FRAUDULENT TRANSFER ACT §§ 4, 5, 7A U.L.A. (1999).
or the Uniform Fraudulent Conveyance Act. Alaska law requires a showing of actual intent to defraud. Washington law, however, would void the transfer if:

1. DT actually intended to hinder, delay, or defraud any creditor;
2. DT received no consideration for the transfer and was engaged in or was about to be engaged in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
3. DT received no consideration for the transfer and intended to incur, or believed or reasonably should have believed that she would incur, debts beyond his or her ability to pay as they became due.

CC would rely on the second ground for voiding DD’s transfer. PT could claim that, in light of DD’s history of driving drunk and her lack of adequate insurance, the third prong should be applicable. Although PT is a sympathetic plaintiff, the success of her argument will turn on whether DD should have foreseen creating a large tort liability as a result of her behavior.

Another reason that a creditor might prefer another state’s fraudulent conveyance law, is because Alaska’s provision eliminates the benefit of the statute of limitations discovery rule for creditors whose claims arose after

162. 5 DEBTOR-CREDITOR LAW § 22.03 (Theodore Eisenberg ed., 1999). The law of fraudulent conveyances is believed to have originated with the Statute of Elizabeth, an English statute enacted in 1570. The Statute of Elizabeth voided transfers made with intent to delay, hinder, or defraud creditors; a finding of actual intent was a necessary element of the action. A few states (including Alaska) still use a version of the Statute of Elizabeth. The Uniform Fraudulent Conveyance Act (UFCA) was promulgated in 1917 and introduced the concept of constructive fraud, where certain objective facts could establish a fraudulent conveyance without proving actual intent to defraud. The UFCA was replaced in 1984 with the Uniform Fraudulent Transfer Act (UFTA), and most states followed suit and adopted the UFTA in place of the UFCA, but several states have retained the UFCA. A major impetus for the UFTA was to coordinate the statute’s terms with the Bankruptcy Reform Act of 1978, but there is a great deal of overlap (including the provisions for constructive fraud) between the two uniform acts. See also Marty-Nelson, supra note 13, at 51-56 (discussing trusts and fraudulent conveyance law).

163. ALASKA STAT. § 34.40.010 (Lexis 1998).

164. WASH. REV. CODE § 19.40.041(a) (1999). Delaware, Nevada, and Rhode Island all have enacted the UFTA, so constructive fraud would be an available claim to a creditor. See supra note 73 (listing the Delaware, Nevada, and Rhode Island statutes). Each state has shortened the limitations period, however. Nevada’s in particular is abbreviated, allowing only two years after the trust is established, or six months after discovery by an existing creditor. See supra note 65 and accompanying text (describing Nevada’s statute).

165. See Gebbia-Pinetti, supra note 155, at 233:

For example, if a neurosurgeon cancels his malpractice insurance, transfers assets into trust, then slips with the laser a week later and is sued for malpractice, it would be reasonable for him to believe that, if there was a claim, he would not be able to pay. Voidability may turn on whether it was reasonable for him to believe there would be a claim.

Id.
the trustor established the trust.\textsuperscript{166} Under the Uniform Fraudulent Transfer Act, such a creditor would have a year to act from the time the creditor should reasonably have discovered the trust, if longer than the four-year general limitations period.\textsuperscript{167}

If the Washington court (considering PT’s and CC’s claims of fraudulent conveyance) applies Washington law and holds that the transfer to the trust was fraudulent and therefore voidable, PT and CC may still have difficulties. The trustee may refuse to comply with the court’s order, claiming lack of personal jurisdiction or impossibility. The trustee’s claim of impossibility would be based on the spendthrift clause as a bar to the trustee complying with the order. That claim should be as ineffective as a claim by an outright transferee that the transfer of property to that transferee was complete and irrevocable and thus not subject to voidability because the purpose and effect of fraudulent conveyance statutes is to void otherwise complete transfers if done in fraud of creditors.\textsuperscript{168} The trustee’s lack-of-personal-jurisdiction argument would present similar issues to those discussed above regarding attempts to get the trustee before the court to determine the trust’s validity.\textsuperscript{169} Generally, the transferee is a necessary party to the action to determine whether the transfer was fraudulent because the transferee may be able to assert good faith defenses.\textsuperscript{170} The Washington court may interpret the trustee’s contacts with Washington in a different light, however, because the claim is that the trustee accepted a fraudulent transfer from a Washington resident—rather than the more benign act of accepting the role of trustee.

Therefore, if CC and PT can establish that the transfer to the trustee was fraudulent under Washington’s fraudulent conveyance statute, and the

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\item \textsuperscript{166} ALASKA STAT. § 34.40.110(d)(2) (Lexis 1998).
\item \textsuperscript{167} UNIF. FRAUDULENT TRANSFER ACT § 9, 7A U.L.A. 359 (1999). Note also that even though Delaware, Rhode Island, and Nevada include the discovery rule in their general fraudulent conveyance statutes, the discovery rule is eliminated with respect to creditors claiming against a self-settled spendthrift trust, if their claims arose after the trust was established. DEL. CODE ANN. tit. 12, § 3572 (Supp. 1998); 1999 Nev. Stat. 299, § 1; R.I. GEN. LWS § 18-9.2-4(b) (1999).
\item \textsuperscript{168} The remedy in a fraudulent conveyance action is to set aside the conveyance to the transferee or, in the alternative, disregard the conveyance and attach or levy against the property in the hands of the transferee. \textit{See generally} UNIF. FRAUDULENT TRANSFER ACT § 7 7A U.L.A. (1999); UNIF. FRAUDULENT CONVEYANCE ACT §§ 9(1)(a), (b); PETER A. ALCES, THE LAW OF FRAUDULENT TRANSACTIONS ¶ 5.05[3] (1989 & Supp. 1999). \textit{See also In re Morris, 151 B.R.} 900 (C.D. Ill. 1993) (finding that the transfer of the proceeds of a life estate into a spendthrift trust for the benefit of the debtor was ineffective and therefore should be set aside because the life estate was subject to creditor claims).
\item \textsuperscript{169} \textit{See supra} Part III(B) (1)-(2) (discussing potential personal jurisdiction problems in a suit against a trustee).
\end{itemize}
Washington court can assert jurisdiction over the trustee, then CC and PT could access the trust funds without resort to the Alaska courts. However, if the Washington court cannot obtain personal jurisdiction over the Alaska trustee, CC and PT could, alternatively, assert their fraudulent conveyance claims in an Alaska court and could argue that Washington law should apply.

C. CONTEMPT

A court-imposed charge of civil (or criminal) contempt is the final remedy available to assist the creditors in collecting if the trustor refuses to retrieve the required funds from the trust. In a recent case, Federal Trade Commission v. Affordable Media, L.L.C, the court was faced with the issue of whether to uphold a civil contempt finding against the defendants, Mr. and Mrs. Anderson. In spite of an injunction, the defendants had failed to repatriate funds that had been transferred to a Cook Islands trust. The Andersons argued impossibility, claiming that they had written to the Cook Islands trustee to return the funds, but the trustee, based on the terms of the trust, had refused. The Ninth Circuit, nevertheless, affirmed the finding of contempt, concluding that the defendants did not prove that they in fact lacked the power to repatriate the assets, because they remained in the role as trust "protectors." The court looked askance at the defendants' claim that they could not access the funds and explained: "While it is possible that a rational person would send millions of dollars overseas and retain absolutely no control over the assets, we share the district court's skepticism." Because the court found that the defendants retained control, it left "for another day" a more difficult question: whether impossibility could be a defense when a defendant in fact had not retained control, but the lack of control resulted from the defendants' deliberate acts

171. 179 F.3d 1228 (9th Cir. 1999).
172. Id. at 1231.
173. The facts of this case make it a lightning rod for offshore trust outrage—the defendants were attempting to hide the profits from a pyramid scheme (where earlier investors are paid off with money put up by later investors). The defendants purportedly sold interests in shares of infomercials selling "such modern marvels as talking pet tags and water-filled barbells." Id. at 1231-32. Investors were supposedly promised a 50% return in 60 days. Id. See David C. Lee, Note, Offshore Asset Protection Trusts: Testing the Limits of Judicial Tolerance in Estate Planning, 15 BANKR. DEV. J. 451, 509-15 (1999) (giving the description of the trial court proceedings in Affordable Media).
174. Affordable Media, 179 F.3d at 1239. The defendants were co-trustees of the trust, together with the Cook Islands bank, but the trust agreement provided that upon occurrence of an event of duress (such as the injunction to repatriate the funds) the defendants would cease to be co-trustees. Id. at 1240 n.9.
175. Id. at 1240. A trust protector is a role often retained by the trustor of an offshore trust. The trust protector's powers can include the power to oversee the trustees, veto trustee actions, and replace trustees. Gideon Rothschild, Establishing and Drafting Offshore Asset Protection Trusts, 23 EST. PLAN. 65, 70 (1996).
176. Affordable Media, 179 F.3d at 1241. The fact that the defendants had been able to pull more than $1 million from the trust to pay taxes was a tangible indication that they retained control. Id. at 1242.
in designing and setting up the trust.\textsuperscript{177}

Contempt can be a very effective tool for a court that cannot assert jurisdiction over a trustee. In our hypothetical, the creditors could argue that DD in fact retained sufficient control so that she could obtain the assets if she desired. In the alternative, CC and PT could argue that the "impossibility" claimed by DD was an intentional part of the design of the trust, and, therefore, impossibility should not be an available defense.

Perhaps DD would respond to the self-created impossibility argument by asserting that she acted in good faith—in other words, she created the trust prior to incurring the liability and before the court order was foreseeable. She would argue that there is an insufficient connection between her actions and her inability to comply with the court order.\textsuperscript{178} Whether the passage of time between transfer and a claim would bolster an impossibility defense to contempt is unclear in this context. It is particularly uncertain where the trustor deliberately created the impossibility for the purpose of protecting the assets from exactly such a court order (even though DD could not predict with precision the circumstances of the specific order). DD could claim that her intent was to create estate tax advantages rather than creditor protection,\textsuperscript{179} but that argument is somewhat circular since tax advantages depend in large part on the availability of the creditor protection.\textsuperscript{180} The threat of a contempt order from the Washington court might be sufficient pressure on DD to comply with the Washington order, or at least sufficient pressure to encourage a settlement.

\textbf{D. Summary}

The potential success of PT and CC in accessing DD's trust assets through state courts is unpredictable. Offshore trust proponents claim that onshore trusts will be vulnerable because of full faith and credit principles,\textsuperscript{181} and the onshore trust proponents claim that personal jurisdiction issues will protect trustors from other state judgments.\textsuperscript{182} Both claims are too simplistic. There are certainly avenues available to PT and

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\item \textsuperscript{177} See id. at 1240 ("Recognizing this risk [of contempt], asset protection trusts typically are designed so that a defendant can assert that compliance with a court's order to repatriate the trust assets is impossible . . . ").
\item \textsuperscript{178} See United States v. Bryan, 339 U.S. 323, 332 (1950) (stating that a witness must show good faith in responding to a subpoena); Lee, supra note 173, at 474 (describing United States v. Bryan).
\item \textsuperscript{179} See infra notes 296-99 and accompanying text (describing the estate tax advantages presented by the self-settled spendthrift trust).
\item \textsuperscript{180} See infra notes 300-02 and accompanying text (summarizing the weaknesses in the estate tax benefits). Another possible strategy available to DD would be to prove impossibility by enduring a jail sentence. Depending on how long DD would have to sit in jail to convince the judge that accessing the assets was in fact impossible, and depending on the amount of the liability and the assets in the trust, it may be a worthwhile trade-off. See Lee, supra note 173, at 514 (discussing the possible strategy of the Andersons, who, in fact, were jailed for six months and would be subject to future jail time until the assets were repatriated).
\item \textsuperscript{181} See Giordani & Osborne, supra note 16 (noting the disadvantages of onshore trusts).
\item \textsuperscript{182} See Nenno, supra note 86, at 11 (citing the benefits of onshore trusts).
\end{itemize}
\end{footnotesize}
that are not available to creditors attacking an offshore trust, but the jurisdictional problems may be significant. The magnitude of the disparity between Washington’s public policy prohibiting self-settled spendthrift trusts and Alaska’s departure from that traditional position, the defendant’s own behavior, and the uncertainty of personal jurisdiction standards could lead a non-Alaska court to hold that creditors may reach the trust assets. In the course of actual litigation, stranger things have happened.\[183\]

IV. BANKRUPTCY

The creditors’ best route around the personal jurisdictional dilemma is to set the issue before a bankruptcy court. Bankruptcy courts have national jurisdiction.\[184\] Thus, a bankruptcy court in Washington would have jurisdiction over our hypothetical Alaska trustee.\[185\] PT and CC would have another advantage if a bankruptcy court determined the validity of the spendthrift clause. The bankruptcy code specifically provides that if a spendthrift trust is valid under applicable state law, then it is excluded from the bankruptcy estate.\[186\] Even if the bankruptcy court were located in Washington, it would be subject to choice of law rules. Therefore, if the trust agreement provided that Alaska laws were applicable, the bankruptcy court could validate the spendthrift protection. A federal court must, however, apply the choice of law rules of the forum state in which it sits.\[187\] Even though local law in most states will follow the Restatement and respect a choice of law applicable to a trust (as long as there is a sufficient nexus),\[188\] the local law will probably contain a general public policy exception to choice of law provisions.\[189\]

For example, in In re Brooks,\[190\] the debtor transferred property to his wife, who then transferred it to two offshore trusts in Jersey (Channel Islands) and Bermuda.\[191\] Each trust provided that the local law of the coun-

\[183\] See In re Strittmater, 53 A.2d 205, 206 (N.J. 1947) (holding that a testatrix who left her estate to a women’s rights organization lacked testamentary capacity because of “insane delusions about the male”).

\[184\] FED. R. BANKR. P. § 7004(d).

\[185\] The bankruptcy court could also determine the issue without the trustee’s participation because the court has in rem jurisdiction over all property of the bankruptcy estate and has jurisdiction to determine whether property is included in the bankruptcy estate. Henzy, supra note 14, at 746.


\[188\] See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 187, 273 (1971) (providing that the choice of law is respected as long as the trust has a sufficient nexus to the state whose law is selected).

\[189\] See id. § 187(b) (providing that the court can disregard the choice of law if the chosen state’s law is contrary to public policy of the state where the court is deciding the issue); see also supra notes 152-54 and accompanying text (discussing the application of the public policy exception to enforcement of self-settled spendthrift trusts).


\[191\] Id. at 101.
try where the trust was administered would apply to the trust. The debtor in *Brooks* was the sole income beneficiary of the trusts, and the trustee had discretion to distribute as much of the principal as the trustee deemed "necessary, advisable or appropriate" for the debtor's health, comfort, and support as well as for needs associated with any business enterprise of the debtor. The court treated the debtor, rather than his wife, as the settlor of the trusts. The court also held that the law of Connecticut—the debtor's residence and the forum state—applied, instead of the law of Bermuda and Jersey, because Connecticut would not enforce the law of another jurisdiction which contravened Connecticut public policy. The court went on to hold that, under Connecticut law, a settlor's interest in a trust is available to the settlor's creditors without regard to a spendthrift provision. Since the trusts' spendthrift provisions were not enforceable under Connecticut law, the bankruptcy code provision recognizing spendthrift trusts did not apply. The court, therefore, deemed the trusts to be part of the bankruptcy estate.

Similarly, in *Marine Midland Bank v. Portnoy (In re Portnoy)*, the creditor urged the court to refuse to give the debtor a discharge in bankruptcy because the debtor failed to disclose his interest in an offshore trust. In considering the debtor's summary judgment motion, the court determined whether New York law (the forum state) or Jersey, Channel Islands, law (the situs of the trust) should apply. It noted the general rule that a court will respect the grantor's choice of law, unless it violates the public policy of the forum state. The public policy exception would apply only if the chosen law would "violate some fundamental principle of justice, some prevalent concept of good morals, or some deep-rooted tradition of the common weal." It was absolutely clear to the court that New York's policy forbidding debtors from putting their assets beyond the reach of creditors while retaining use of the property was strong enough to trigger the public policy exception. The court also noted that Jersey's public

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192. Id.
194. Id. at 103.
195. *See Brooks*, 217 B.R. at 101 (citing Dick v. Dick, 355 A.2d 110 (Conn. 1974)). The court also held that Connecticut law applied because the legality of a trust of personality is determined by the law of the settlor's domicile and cited that rule as an exception to the rule that a choice of law provision in a trust will be respected. Id. at 104.
196. Id. at 103-04.
197. Id. Of course, the enforceability of that ruling would be in doubt, since the courts of Jersey and Bermuda do not have to recognize the ruling of a U.S. bankruptcy court. Osborne, *Asset Protection*, supra note 12, ¶¶ 1407.3(F), 1407.8(F).
199. Id. at 688.
200. Id. at 696.
201. *See id.* at 698 (citing *RESTATEMENT (SECOND) OF CONFLICTS OF LAWS* § 270).
202. *Id.* at 700.
203. *Portnoy*, 201 B.R. at 700. It appears that most states would decide as the New York bankruptcy court did and would have strong countervailing public policy against the use of
policy in support of self-settled spendthrift trusts seemed limited to business promotion. The court therefore concluded that the trust property was property of the bankruptcy estate and denied the debtor's summary judgment motion.

Therefore, if PT and CC attempted to access the trust assets through a bankruptcy proceeding in Washington, the bankruptcy court could obtain jurisdiction over the trustee and—following the reasoning of the court in Brooks and Portnoy—rule that Washington law applied to the validity of the spendthrift provision. The bankruptcy court could then include the trust assets in the bankruptcy estate and subject them to the creditor's claim.

Bankruptcy of the judgment debtor thus would appear to be the optimum route for the creditor. However, CC and PT may face some obstacles in getting the issue before a bankruptcy court in Washington. DD may attempt to avoid the Brooks and Portnoy result by filing for bankruptcy in a state that would not have a countervailing public policy against self-settled spendthrift trusts (e.g., Alaska), or she could refrain from filing for bankruptcy. If DD chose to refrain, use of an involuntary petition would be necessary.

An involuntary petition is only available under certain circumstances. If the debtor has twelve or more eligible creditors, at least three must file the petition. If the debtor has fewer than twelve eligible creditors, then a single creditor can file. Furthermore, the claims of the petitioning creditors cannot be contingent as to liability or subject to a bona fide dispute. If the creditor filing the petition is the debtor's only creditor, courts differ on whether to allow an involuntary petition because the single creditor may have difficulties satisfying section 303(h), which requires a showing that the debtor is generally not paying his debts as they become due. Some courts have eased the test for single creditor petitions when the creditor has no other adequate remedy or when there is a showing of fraud, self-settled spendthrift trusts. However, that argument may be more difficult in Florida and Texas because both states allow unlimited homestead exemptions, thereby allowing debtors to convert assets into a residence to protect them from creditors. FLA. CONSTIT. art. X, § 4(a); TEX. PROP. CODE § 41.002 (Supp. 2000).

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trick, artifice, or sham. If a creditor of an Alaska trust grantor was the only creditor, it is likely that the court would allow the involuntary petition because that case would fit within one of these exceptions.

Therefore, if PT and CC want to enforce their claims against DD's trust assets, an involuntary bankruptcy petition in Washington may be preferable to attempting an enforcement action in Washington state courts. The bankruptcy court would have jurisdiction over the trustee, and a bankruptcy court sitting in Washington could find that Washington law governs.

V. CONTRACT CLAUSE CHALLENGE

A contract creditor, like CC, might seek to invalidate the Alaska trust statute by raising a claim that the statute violates the Contract Clause of the U.S. Constitution, which states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." The original purpose of the clause is somewhat unclear, but a prevalent theory is that it was passed in reaction to state laws relieving farmers of their mortgage debts owed to East Coast banks. The Contract Clause has had an interesting evolution: it enjoyed a lengthy heyday of almost a century, beginning in 1810, and continued to flourish as a means of striking down state regulation for the next eighty years. Upon the passage of the Fourteenth Amendment, however, the Due Process Clause, which was broader than the Contract Clause in scope both substantively and jurisdictionally, became a more popular tool for challenging state action. The Supreme Court began a trend of refusing Contract Clause challenges and upholding state laws as valid exercises of police power. Nevertheless, the Contract Clause survives as a limitation on states' powers to legislatively change the terms of existing contracts.

211. See In re 7H Land & Cattle Co., 6 B.R. 29, 34 (Bankr. D. Nev. 1980) (following this rule and citing COLLIER, supra note 206, § 303.04(5)).
212. U.S. CONST. art. I, § 10, cl.1. Note that this challenge would be unavailable to PT, a tort creditor.
215. See Fletcher v. Peck, 10 U.S. (1 Cranch) 87 (1810) (using the Contract Clause to strike down a Georgia law).
216. U.S. CONST. amend. XIV.
217. The Due Process Clause, found in both the Fifth and Fourteenth Amendments, is binding on federal as well as state authority. The Due Process Clause reaches a broader range of rights than the Contract Clause, which refers only to contractual interests. Also, due process rulings in federal legislation would be available support in challenges to state legislation. See Veron, supra note 213, at 142 (explaining this reasoning).
218. See id. at 141-49 (discussing this period of Contract Clause jurisprudence).
219. See, e.g., Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) ("None-
The elements of a Contract Clause challenge are as follows. First, by the express terms of the Clause, there must be a contractual obligation present.\textsuperscript{220} Second, a plaintiff must show that the legislation at issue substantially impairs the existing contractual obligation.\textsuperscript{221} This second element requires that there be more than minimal interference,\textsuperscript{222} and the impairment must be an impairment of the contract rather than just an impairment of remedies available upon breach.\textsuperscript{223} Finally, if the court determines that the state law is a substantial impairment of the existing contract right, it then questions whether the state has a justifiable purpose for passing the law and whether the legislature narrowly drafted the statute to achieve that purpose.\textsuperscript{224}

\textbf{A. WHETHER THE ALASKA LEGISLATION IS A SUBSTANTIAL IMPAIRMENT OF EXISTING CONTRACTS}

CC can easily meet the first prong of a Contract Clause challenge because he had a contract with DD. However, the second element—substantial impairment—immediately presents two obstacles to the contract creditor. First, does the Alaska statute sufficiently impair existing contracts? Second, is the statute merely a limitation on an unpaid creditor's remedy, rather than an impairment of the underlying contractual promise to pay?

\textbf{1. Effect on Existing Contracts}

As to the first question, DD may argue that the Alaska statute's fraudulent conveyance provision\textsuperscript{225} sufficiently protects existing contracts. However, the statute bars an existing creditor from collecting against the trust assets, unless the trustor had actual intent to defraud.\textsuperscript{226} The creditor must also bring the action within four years of the establishment of the trust or within one year of its discovery of the transfer.\textsuperscript{227} Contrary to the current statute, the prior Alaska law did not permit the debtor to transfer assets and retain an interest in them.\textsuperscript{228} Previously, Alaska's fraudulent conveyance

\textsuperscript{220.} U.S. CONST. art. I, § 10, cl. 1.
\textsuperscript{221.} \textit{Id. at 245.}
\textsuperscript{223.} United States Trust Co. v. New Jersey, 431 U.S. 1, 16 (1977) (upholding the use of the Contract Clause as a limit on state power); \textit{Whirlpool Corp. v. Ritter}, 929 F.2d 1318, 1322 (8th Cir. 1991) (same); Bailey v. State, 500 S.E.2d 54 (N.C. 1998) (same); \textit{see also Ronald D. Rotunda, The Impairments of Contracts Clause and the Corporation: A Comment on Professors Butler's and Ribstein's Thesis, 55 Brook. L. Rev. 809, 811 (1998)} (stating that the Contract Clause has a real but limited role in restraining state regulatory power).
\textsuperscript{224.} \textit{Id. § 34.40.110(a).}
\textsuperscript{225.} \textit{Id. §§ 34.40.110(b).}
\textsuperscript{226.} \textit{Id. § 34.40.110(a).}
\textsuperscript{227.} \textit{Id. § 34.40.110(a).}
\textsuperscript{228.} Former section 110 read as follows: "A deed of gift, a conveyance or a transfer or assignment, oral or written, of goods and chattels or things in action made in trust for the
statute only voided transfers to third persons on a showing of actual intent. Therefore, the effect of the amendment is to allow a self-settled trust that same protection. That change would have a substantial impact on the creditor's situation. The debtor, prior to the amendment, could only protect assets by transferring them to third parties and retaining no interest (assuming the debtor could avoid the actual intent to defraud test). Upon passage of the amendment to the statute, the debtor has the option of protecting assets and retaining them for his own use, losing only a modicum of control.

Another change from prior law is the reachback period; prior Alaska law did not specifically limit the time in which a party could make a challenge. The 1997 legislation limits all challenges to four years after the trust has been established, or one year after discovery, if later, for creditors existing at the time of the trust's inception.

One possible response to claims of substantial impairment (although not attractive to the debtor) would be to challenge the assumption that Alaska law would apply to the transfer. If the transaction arose in another state, and Alaska's only contact with the debtor was the debtor's establishment of a trust, then the creditor could argue that the law of the state that had the most contacts with the transaction at issue should apply in deciding whether the transfer was fraudulent. If successful, the creditor would retain the same protections that it had under law prior to passage of section 110. Of course, Alaska may be the state with the most contacts, or the applicable law may be similar to Alaska's. However, if the existing creditor could assert another forum's fraudulent conveyance protection, the creditor would enjoy the same protection that existed prior to the passage of the statute and is arguably unaffected by the legislation. Under this argument, the most that a creditor could hope to void under the Contract Clause would be the statutory provisions requiring the application of Alaska law to the transfer.}

person making the deed, conveyance, transfer, or assignment is void as against the creditors, existing or subsequent, of the person.” ALASKA STAT. § 34.40.110 (Michie 1949) (repealed 1997).

229. See ALASKA STAT. § 34.40.110 (Lexis 1998) (providing that Alaska's general fraudulent conveyance section, which does not have a statute of limitations, is now inapplicable to self-settled trusts); see also Gebbia-Pinetti, supra note 155, at 235 (describing the reachback period under ALASKA STAT. § 34.40.110).

230. ALASKA STAT. § 34.40.110(d) (Lexis 1998).

231. See supra text accompanying notes 150-54 (discussing choice of law decisions).

232. See id (discussing the effect of rejecting Alaska choice of law).

233. If Alaska is the state with the most contacts, then there are no alternate state's laws and policies to fall back on, and the Contract Clause claim is probably the best avenue for that creditor. If the state with the most contacts is one of the eight other states that, like Alaska, has a fraudulent conveyance statute modeled after the Statute of Elizabeth, which does not include constructively fraudulent transfers, then arguably the legislation did not strip the creditor of much protection. See supra note 162 (describing fraudulent conveyance statutes). Of course, the state may have a longer statute of limitations than that permitted under the Alaska statute. See Gebbia-Pinetti, supra note 155, at 235. The creditor from that state would have the same arguments of impairment as discussed supra text accompanying notes 229-30.
law. That would limit the reach of the fraudulent conveyance protection. However, the effect of voiding those provisions may be substantial. Reinstating the home state's fraudulent conveyance protection could give an existing creditor a longer time frame, and broader grounds, to void the transfer.

Therefore, the creditor with the best Contract Clause argument is the Alaska creditor whose claim existed at the time the legislature passed the statute. If CC made the Contract Clause claim, DD may counter that the Washington fraudulent conveyance remedy, still available to him, is sufficient protection. CC could reply that the transfer does not meet the requirements, even the broader requirements under Washington's state law, of a fraudulent conveyance and, therefore, is no protection at all. Alaska's statute has created an unfairness that the drafters of the fraudulent conveyance statutes did not contemplate. At the time the contract was made, the creditor was able to rely on the debtor's current financial situation. In evaluating a debtor's risk, a creditor presumably considers the possibility of financial setbacks for the debtor, assuming that the debtor would take steps to prevent such setbacks out of personal interest. The creditor could also consider the possibility that the debtor may give assets away, thus increasing the creditor's risk of not getting paid. However, prior to the adoption of section 110, the debtor's self-interest in retaining both assets and the fraudulent conveyance laws both protected the creditor against that risk.

The change introduced by the statute, even for an out-of-state creditor with Uniform Fraudulent Transfer Act (UFTA) protection, is that the debtor could now set up a "rainy-day fund," retaining access to the money as a personal hedge against future setbacks while leaving the creditor without such a lifeboat. The debtor is now able to shift the lion's share of risk of future financial setbacks onto the creditor, thereby perhaps increasing the debtor's risk tolerance. While prior to Alaska's statutory amendment, the debtor's own self-interest, and cognizance that she would go down with the ship, provided the creditor with some protection from such a setback, the passage of the statute created a shift in loyalty, a factor the creditor was depending on when the debt was created.

The first response to a plaintiff who claims substantial impairment is that the impairment of contracts was simply incidental to the much broader

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234. ALASKA STAT. § 13.36.035(a), (c)-(e) (Lexis 1998).
235. See supra note 167 and accompanying text (describing the discovery rule available to claims under a state that has enacted UFTA).
236. See supra notes 155-70 and accompanying text (discussing requirements for proving a fraudulent conveyance). CC could, as noted above, assert that the second ground for a finding of fraudulent conveyance, involvement in a business that makes the debtor's remaining assets after the transfer unreasonably small, makes the trust transfer fraudulent. However, CC would not be relying on the Contract Clause argument if he had been successful in arguing fraudulent conveyance.
underlying purpose of the statute. In Exxon Corp. v. Eagleton, for example, an Alabama statute prohibited oil and gas producers from passing a tax increase on to purchasers. Prior to enactment, producers had entered into contracts that required the purchasers to pay any increase in tax. Those producers sued, claiming a violation of the Contract Clause. The Eagleton Court held that there was no violation of the Contract Clause because the statute was a "generally applicable rule of conduct" that incidentally affected the contracts at issue. The Court distinguished the statute at issue in Allied Structural Steel v. Spannaus. That Minnesota statute set vesting requirements for pension interests in certain existing retirement plans. The Spannaus Court viewed that statute as directly aimed at the private contract between employer and employee, rather than a generally applicable rule of conduct.

A debtor-trustor like DD could correspondingly argue that the legislature intended for the Alaska statute to protect trust assets from all forms of creditors, not just contract creditors, and that the effect it has on existing contract rights is merely incidental. Although a debtor may use the statute to avoid contractual obligations, the reach of the statute is much broader, and the focus is not on contractual relations. Also, the statutory protection of trust assets does not automatically affect obligations. The debtor's assets outside of the trust would still be subject to the debt, and the debtor would have to take the rather dramatic action of moving substantially all of his or her assets into such a trust before affecting his contractual obligation.

This argument was supported by the facts in Eagleton, but the argument cannot be made to support the Alaska statute. In Eagleton, there was a strong public purpose in utilities rate setting. In addition, the subject matter of the contract was traditionally subject to heavy regulation, and, therefore, statutory changes were foreseeable to the parties. Neither factor is present here. In fact, particularly for out-of-state debtors and creditors, the subsequent legislation that allowed debtors to place assets outside the reach of the contractual debt were most certainly an unforeseeable event, since the statutes were a dramatic departure from the tradition of spendthrift trusts and established law.

2. Impairment of Contract or Remedy

DD could also answer the Contract Clause challenge to Alaska's statute

239. Id. at 179.
240. Id. at 179-80.
241. Id. at 179-80.
242. Id. at 191-92.
244. Id. at 238-39.
245. Id. at 244, 248-49.
246. The Court cited several Supreme Court decisions allowing states to set utilities rates even though such rates displaced previous contract terms. Eagleton, 462 U.S. at 192-93.
247. Id. at 194 n.14.
by claiming that only the contract remedy is impaired, rather than the contract itself. Early cases made the distinction between contract right and a remedy for contract breach in this context and held that mere impairments of remedy did not violate the Clause, but that distinction was quickly eroded, and courts have not discussed it in recent cases. Even in the earlier cases that made the distinction, if the impairment of the remedy was so extreme that it essentially relieved a party of its obligations under the contract, then the remedy impairment was a violation of the Contract Clause. As the Supreme Court stated in McCracken v. Hayward, “any law which in its operations amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

An early example of a constitutional change in remedy was the abolition of laws allowing a creditor to imprison the debtor, leaving the creditor with “his remedy against property alone.” However, courts refused to enforce homestead laws and similar property exemption provisions against creditors who were collecting on debts incurred before the exemption laws’ enactment. These provisions were held unconstitutional because the impairment of the remedy essentially excused the debtors’ contractual obligation. As Justice Cardozo stated:

[In the books there is much talk about distinctions between changes of the substance of the contract and changes of the remedy. . . . The dividing line is at times obscure. . . . Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression.]

But as we have seen, courts always limited and qualified the right-

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250. McCracken v. Hayward, 43 U.S. (2 How.) 608, 612 (1844). See 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 585-86 (Walter Carrington, ed., 8th ed. 1927): Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract, and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made.

Id. (footnotes omitted).

251. 1 COOLEY, supra note 250, at 588-89; see Hale, supra note 248, at 535-36 (providing further discussion of this example).


253. 1 COOLEY, supra note 250, at 593.

remedy distinction rather than determining constitutionality of a law by automatically characterizing it as affecting either a right or remedy. Arguably, the distinction was an alternative way of stating the substantiality requirement, or perhaps a subset of that requirement, and it fell out of favor and was eventually deemed unnecessary. It seems particularly superfluous since it was apparently never used to bless a legislative enactment that, although on its face applied to remedy, was in fact a substantial impairment.

The right-remedy distinction may also be another way of stating the role of expectation in Contract Clause analysis. A contracting party cannot reasonably assume that there will be no future changes in state law determining contractual remedy. For example, in *El Paso v. Simmons*, a law shortening the time to reinstate a defaulted land claim was not a Contract Clause violation because the claimant could not reasonably expect the law regarding that issue to remain unchanged.

In sum, CC can argue that the Alaska statute substantially impaired his contract with DD because it allowed DD to place her assets beyond CC's reach without sacrificing her own access to those funds. At the time CC contracted with DD, he relied on her net worth as an indication of a relatively low risk in relying on her promises, but the statute allowed her to avoid those promises. Even if the impairment was characterized as affecting only the remedy, the impairment leaves CC with no remedy, essentially voiding DD's contractual obligations, and, therefore, it satisfies the substantial impairment test of a Contract Clause challenge.

### B. Determining Whether a Substantial Impairment is Nevertheless Justifiable

Once a court determines that the challenged law substantially affects existing contract rights, it does not necessarily follow that the law violates the Contract Clause. The statutory restriction may nevertheless be constitutional if it imposes reasonable conditions and if it is appropriately tailored to address the problem. In *Allied Structural Steel v. Spannaus*, the Court held that the Minnesota statute, which affected pension vesting rights, violated the Contract Clause for the following reasons: there was no public emergency, the statute addressed no broad social issue, the focus of the legislation was too narrow, and, at the time the law was passed, Congress was about to pass the Employee Retirement Income Security Act of 1974 (ERISA), which would have made the statute's effect extremely

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255. *See* 1 *COOLEY*, *supra* note 250, at 598 (giving examples of statutes substantially impairing remedies that were struck down); Hale, *supra* note 248, at 535-57 (taking an in-depth look at remedy distinctions).


258. The statute only affected employers with over 100 employees and only applied when the employer closed its Minnesota office or terminated its pension plan. *Id.* at 248.

temporary.  

Of course, in some circumstances the fact that a statute is narrowly drawn and temporary may support a finding that it is appropriately tailored to the situation. For example, in *Home Building & Loan Association v. Blaisdell*, the Court upheld a mortgage moratorium law enacted to provide relief to homeowners facing foreclosure during the Depression. The validity of the legislation was supported by the fact that the legislation was of temporary duration and that the legislature carefully tailored the statute to address the particular emergency, without being overbroad. Conversely, in *Spannaus*, the Court held that the narrow scope of the statute was unreasonable because it failed to effectively address the state's claim that it was protecting its citizens' retirement benefits. The *Spannaus* Court also pointed out that this was not an area that the state had previously subjected to regulation, so the parties might not have foreseen a change in the law.

The requirement that the legislative scheme be a reasonable restriction in order to override the Contract Clause prohibition does not mandate that a statute be flawless. In *Southeast Arkansas Landfill, Inc. v. Arkansas*, a waste facility that had filed for bankruptcy protection under Chapter 11 brought a Contract Clause challenge against a state statute restricting importation of out-of-state solid waste. The court noted that, similar to *Blaisdell's* mortgage moratorium law, this legislation addressed a public environmental emergency, the per diem capacity restrictions were reasonable, and the restrictions were of limited duration. The court held that complaints about the implementation of the legislative scheme, such as problems at other landfills, were irrelevant: "Arkansas need not enact the most reasonable scheme, it need only enact a reasonable scheme." Therefore, the Alaska trust statute need only be reasonable.

Assuming CC can show that his contract right has been substantially impaired, it is probable that the Alaska statute would not survive the rea-

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261. 290 U.S. 398 (1934).
262. Id. at 447.
263. Id. at 444-47.
265. Id. at 250. The *Eagleton* Court upheld the statute in part because of the fact that the industry affected was traditionally subject to heavy regulation and therefore the parties' expectations had to allow for future changes in the law. Exxon Corp. v. Eagleton, 462 U.S. 176, 194 n.14 (1983). See also Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark, 310 U.S. 32, 38 (1940) (making an issue of the fact that regulations were in place at the time the shares were purchased in the corporation); Energy Reserves Group v. Kansas Power & Light Co. 103 S. Ct. 697, 706-09 (1983) (noting that the potential for extensive regulation was recognized in the contract).
267. Id. at 738.
268. Id. at 745.
269. Id.
270. See supra notes 225-38 and accompanying text (discussing the showing of substantial impairment).
reasonable review test set out in Blaisdell and Spannaus.\textsuperscript{271} DD would have to show that the Alaska statute is properly tailored to address a social issue, and that the contractual limitations are reasonable. This will be difficult for DD because it is hard to imagine what public purpose self-settled spendthrift trusts serve. The arguments in favor of such trusts usually focus on the litigation explosion and the risk of unusually high jury awards.\textsuperscript{272} Also, the justification that the grantor should be able to place restrictions on a gift to a third person\textsuperscript{273} does not apply to the self-settled spendthrift trust. The apparent purpose of increasing the trust business in state banks\textsuperscript{274} is also not a policy that courts would likely give deferential treatment.

The Contract Clause cases where the courts analyze statutes revoking beneficiary designations on divorce provide some guidance about how a court might view the public purpose and reasonableness of the self-settled spendthrift trust legislation. The beneficiary revocation statutes generally provide that upon dissolution of a marriage, any designation of the now ex-spouse as beneficiary of life insurance proceeds, pension assets, joint tenancy accounts, and the like are automatically revoked.\textsuperscript{275} Plaintiffs have challenged these statutes, with respect to beneficiary designations in existence at the time of passage of the legislation, as violating the Contract Clause.\textsuperscript{276}

In \textit{Parsonese v. Midland National Insurance Co.},\textsuperscript{277} the court held that a Pennsylvania statute revoking beneficiary designation upon divorce vio-

\textsuperscript{271} See supra notes 258-65 and accompanying text (describing the Blaisdell-Spannaus test).

\textsuperscript{272} Mr. Barry Engel notes:

I mean, you talk about the impact on society. You have obstetricians who are no longer practicing. You have people who are hesitant to go into business in certain areas—I mean, there is a huge cost to what has gone on in the last ten to twenty years as a result of what some would call, and not necessarily myself, believe it or not, but what some would call a legal system run amuck.

Roundtable discussion, supra note 144, at 794. See also infra Part VII (discussing arguments against self-settled spendthrift trusts based on tort reform).

\textsuperscript{273} See GRISWOLD, supra note 24, § 552 (noting that the maxim \textit{cuius est dare eius est disponere}—whoever it is to give, has the power to dispose as he pleases—was often given as the reasoning supporting spendthrift trusts).

\textsuperscript{274} See Wagenfeld, supra note 15, at 857-66 (noting state's economic incentives to establish self-settled spendthrift trusts).

\textsuperscript{275} For an example of such a statute, see WASH. REV. CODE CH. § 11.07 (1998).

\textsuperscript{276} See, e.g., Whirlpool Corp. v. Ritter, 929 F.2d 1318, 1322 (8th Cir. 1991) (holding statute violated Contract Clause); \textit{In re Estate of Dobert}, 963 P.2d 327, 333, 333 n.4 (Ariz. Ct. App. 1998) (holding that ex-spouse and insurance company did not have standing to bring Contract Clause challenge); \textit{Parsonese v. Midland Nat'l Ins. Co.}, 706 A.2d 814, 819 (Pa. 1998) (holding statute violated Contract Clause). An interesting aspect of both \textit{Ritter} and \textit{Dobert} is that the deceased ex-spouse had apparently been killed by the surviving ex-spouse who was arguing against application of the beneficiary revocation statute. The possible application of a slayer statute was not raised in \textit{Dobert}, but the court in \textit{Ritter} remanded on the issue of whether the state's common law rule prohibiting slayers from inheritance would prevent the ex-spouse from taking the insurance, since the beneficiary revocation statute had been held invalid. \textit{Whirlpool}, 929 F.2d at 1324 (citing State Mut. Life Assurance Co. v. Hampton, 696 P.2d 1027 (Ok. 1985)).

\textsuperscript{277} 706 A.2d 814 (Pa. 1998).
lated the Contract Clause with respect to beneficiary designations in place at the time the legislation was passed.\textsuperscript{278} The court reached this conclusion because it was unimpressed with the emergency nature of the statute.\textsuperscript{279} The legislature designed the statute to protect “only divorced owners of life insurance policies . . . who inadvertently neglect to revoke pre-divorce designations of their spouses as beneficiaries.”\textsuperscript{280} However, the statute’s broad coverage was protecting a special group “without any suggestion that their ‘lives, health, morals, comfort and general welfare’ need special protection under the police power of the state.”\textsuperscript{281} The court was also concerned with the statute’s unlimited duration.\textsuperscript{282}

Similarly, the recent Alaska legislation addresses no emergency, is unlimited in duration, and offers protection to one class of persons, (debtors) at the expense of another class (creditors), without adequately showing a need for such protection. If the statute was designed to address excessive jury awards, it is not tailored to that public policy concern because it allows debtors to avoid paying just debts as well as unjust judgments. The weakness of the public policy supporting the statute, as well as its failure to focus the remedy on the stated concern, would most likely prove fatal to a defense that the statute was a reasonable impairment.

C. Effect of a Successful Contract Clause Claim

Even if a Contract Clause violation were found, the self-settled spendthrift trust statutes would not be struck down in their entirety. Presumably, creditors with contractual rights that arose before enactment would be able to reach the trust assets, but the statute’s protection would apply and would bar the claims of tort creditors and subsequent contract creditors.\textsuperscript{283}

The limited effect of a successful Contract Clause challenge is illustrated by Bailey v. State.\textsuperscript{284} In Bailey, the challenged statute put a $4000 cap on the state income tax exemption for distributions from state and local government pensions, where previously the exemption was unlimited.\textsuperscript{285} The legislature passed the law in response to a U.S. Supreme Court decision\textsuperscript{286} that required state tax treatment of federal employees to be equivalent to the tax treatment of state and local government employees.\textsuperscript{287} The legislature had set the $4000 cap to recoup the lost taxes when extending

\textsuperscript{278} Id. at 819.
\textsuperscript{279} See id. at 818 (noting that the statute contained “no emergency basis whatever”).
\textsuperscript{280} Id.
\textsuperscript{281} Id. at 819.
\textsuperscript{282} Parsons, 705 A.2d at 819.
\textsuperscript{283} The Contract Clause prohibits laws that affect existing contract rights; presumably tort creditors and contract creditors whose claims arose after passage of a law would not be protected by the Contract Clause.
\textsuperscript{284} 500 S.E.2d 54 (N.C. 1998).
\textsuperscript{285} Id. at 59.
\textsuperscript{287} Bailey, 500 S.E.2d at 59.
the tax break to federal employees.\textsuperscript{288} The court struck down the statute as violating the Contract Clause, but restricted its holding to apply only "with regard to employees whose benefits had vested when [the legislation] was passed.\textsuperscript{289} The court stated that the legislature could have made the cap prospective only, and its holding, in essence, made the cap prospective.\textsuperscript{290}

Also, in \textit{Parsonese v. Midland National Insurance Co.},\textsuperscript{291} the court held that a statute revoking a beneficiary designation on divorce was unconstitutional when applied retroactively, and it therefore refused to apply the statute retroactively.\textsuperscript{292} The court, however, left the prospective application of the statute intact.\textsuperscript{293}

Therefore, even if an existing contract creditor brought a successful Contract Clause claim, that holding is likely to leave untouched the spendthrift protection against subsequent contract creditors and tort creditors. However, the possibility of existing creditors reaching the assets may affect whether the estate and gift tax benefits claimed for these trusts\textsuperscript{294} will be available, at least in the near future.\textsuperscript{295}

\textbf{D. SUMMARY}

A contract creditor whose claim against the debtor existed before promulgation of the Alaska legislation could challenge a transfer of the debtor's assets into an Alaska self-settled spendthrift trust on the grounds that the legislation violated the Contract Clause. The creditor would have to show that the legislation was a substantial impairment of the creditor's contract with the debtor, and that the impairment was more than a mere restriction on a remedy available to the creditor upon breach by the debtor. The debtor may counter with the argument that the remaining remedies under fraudulent conveyance statutes are still available to the creditor. However, a fraudulent conveyance claim is difficult for a plaintiff to establish, and, if the transfer falls short of the definition of fraudulent conveyance, the legislation has harmed the creditor by giving the debtor a relatively painless way to put assets beyond the reach of the creditor.

The defense that the impairment only applies to a contractual remedy is a weak one that will fail if the impairment of the remedy essentially nullifies the debtor's obligations under the contract. Assuming the contract creditor can prove substantial impairment, it will be difficult for the debtor to claim that the legislation is nevertheless constitutional under the reason-

\begin{flushleft}
\textsuperscript{288} \textit{Id.} at 67.  \\
\textsuperscript{289} \textit{Id.}  \\
\textsuperscript{290} \textit{Id.}  \\
\textsuperscript{291} 706 A.2d 814 (Pa. 1998).  \\
\textsuperscript{292} \textit{Id.} at 819.  \\
\textsuperscript{293} \textit{Id.} The court's approach was consistent with a Pennsylvania statute allowing severability of statutory provisions when necessary to salvage the remaining provisions. \textit{Id.} at 814 (citing 1 \textit{Pa. CONS. STAT.} § 1925).  \\
\textsuperscript{294} \textit{See infra} notes 296-99 and accompanying text (describing the estate tax benefit).  \\
\textsuperscript{295} At some point in the future, however, the threat of creditors existing at the time the legislation passed will no longer be realistic.
\end{flushleft}
ablleness test of Spannaus and Blaisdell. The policy addressed by the legislation, presumably excessive tort judgments, is of limited concern, and the remedy presented by the legislation is overbroad and of endless duration. However, even if a contract creditor succeeds with a Contract Clause challenge, the statute would still be constitutional with respect to tort claimants and contract creditors whose debts arose after enactment.

VI. ESTATE AND GIFT TAX ISSUES

One of the selling points of the Alaska trust is that, because of the creditor protection, it will operate as an estate freeze device, thus "freezing" the value of assets for estate tax purposes at their value at a time prior to the taxpayer's death.\textsuperscript{296} The position that the trust provides an estate freeze follows this reasoning: when a grantor places assets into an Alaska self-settled spendthrift trust (which is irrevocable by definition) the transfer could be treated as a completed gift for gift tax purposes because the grantor has relinquished sufficient control over the trust assets.\textsuperscript{297} The value of the transfer for gift tax purposes will presumably be the entire value of the trust corpus at the time of the gift.\textsuperscript{298} The grantor continues to have use of the property, subject to the trustee's discretion. When the grantor dies, and the assets pass to her heirs, the assets would not be included in the grantor's estate because they had previously been gifted and because the grantor had not retained sufficient power over the assets to warrant inclusion under sections 2036 or 2038 of the Internal Revenue Code ("I.R.C.").\textsuperscript{299} Thus, all of the elements of a classic freeze are present:

\textsuperscript{296} The concept of an estate freeze is as follows: the taxpayer wants to retain the benefits of property but somehow freeze the value of the property so that future appreciation will not be included in his taxable estate upon death. A classic freeze was the technique of retaining preferred stock in a closely held company while transferring the common stock to the younger generation. The estate freeze was severely limited by former section 2036(c) of the Internal Revenue Code, which was repealed retroactively and replaced with chapter 14 of the Internal Revenue Code, which contains a different set of limits on estate freezes. See generally JOHN R. PRICE, CONTEMPORARY ESTATE PLANNING § 2.44 (1992 & Supp. 1999).


\textsuperscript{298} See Priv. Ltr. Rul. 98-37-007 (June 10, 1998) (disallowing deduction for grantor's interest because it was impossible to value.) Also, depending on the identity of the other trust beneficiaries, I.R.C. § 2702 may value the grantor's interest at zero. That section sets the transferor's retained interest at zero value for gift tax purposes where the recipient of the transferred interest is the transferor's spouse, the transferor's lineal descendants, the lineal descendants of the transferor's spouse, and spouses of any such lineal descendants. I.R.C. § 2701(e)(1) (West Supp. 1999).

\textsuperscript{299} Generally, under section 2036, if a taxpayer gratuitously transfers property and retains a life estate or the power to determine who will receive the income, the entire value of the property will be included in the taxpayer's taxable estate, even though it is not owned by the taxpayer at death. RICHARD B. STEPHENS ET AL., FEDERAL ESTATE AND GIFT TAXATION ¶ 4.08, at 4-145 to 4-146 (7th ed. 1996) [hereinafter STEPHENS]. Property is includable in a taxpayer's estate under section 2038, even if transferred by the taxpayer before death, if the taxpayer retained the right to revoke the transfer or alter who has the right to enjoy the property. Id. ¶ 4.10, at 4-197 to 4-200. Because there is a great deal of overlap in the property
an early transfer of the assets with a gift tax cost of value at that time, continued use of the assets, and ultimate transfer of the assets to the heirs with no tax on the post-gift appreciation.

Whether the grantor would be able to obtain this freeze is still unclear. The IRS has issued a letter ruling concluding that the establishment of an Alaska trust is a completed gift, but two important conditions on that ruling leave unanswered questions. The first is that the IRS based the ruling on the assumption that creditors cannot reach the trust assets. But as the previous discussion illustrates, that assumption is not guaranteed. Presumably the only grantor that can be confident of the enforceability of the spendthrift provisions is an Alaska grantor. Thus, the assertion that the creditor protection written into the Alaskan statute obtains the tax benefits begs the underlying question of whether the creditor protection will in fact hold.

Second, the ruling expressly reserved the question of whether the trust assets would be included in the trustor's estate when she died, even though the transfer was a completed gift at the time of establishment of the trust. The fact that the transfer was previously taxed as a completed gift does not take it out of reach of the estate inclusion provisions, sections 2036 and 2038. The success of the spendthrift trust in tax planning depends on a separate analysis under those sections because they apply different tests than does section 2511, which determines whether the donor has relinquished sufficient control and interest to constitute a completed gift.

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301. Creditor protection is relevant to the tax issue because if the grantor's creditors can reach an asset transferred by the grantor, then the grantor has de facto ownership because he could borrow money and then allow creditors to reach the transferred money to satisfy his debt. Paxton v. Commissioner, 96 T.C. 785, 814 (1986).
302. See supra Parts III-V (discussing a possible creditor attack on Alaska trusts).
304. For example, if a grantor established a trust with income payable to grantor for life, remainder payable to niece on grantor's death, the transfer to the trust would be a completed gift by grantor to niece of the remainder, and a gift tax return would be required. However, when grantor died, the trust assets would be brought into grantor's estate under section 2036 because of the retained life interest. I.R.C. §§ 2511, 2036 (West Supp. 1999); see Stephens, supra note 299, ¶ 10.01[3][b], 4.08 (explaining that a remainder causes assets to revert to the grantor's estate).
305. Professor Pennell stated:
   Even the statement of that result [a completed gift of the property will keep it out of donor's estate] suggests that it is the wrong conclusion under current law, and case law looking to the rights of creditors may be unreliable because the creditor test is merely a surrogate for a more precise articulation of the degree of enjoyment that must be retained before section 2036(a)(1) is triggered. Pennell, supra note 16, § 4.2. See also Herzog v. Commissioner, 116 F.2d 591 (2d Cir. 1941), which is cited in a tax analysis article at the Alaska Trust Company website for support that the trust tax planning will work. Alaska Trust Company's Gift & Estate Tax Analysis of Alaska Self-settled
Section 2036(a) requires inclusion of assets in a person's estate if the person transferred the assets during life but retained "the possession or enjoyment of, or the right to the income from, the property, or . . . the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom." The second clause is not applicable, assuming that the trust was properly drafted so that only the trustee has the power to designate who shall enjoy the property. The issue is whether the grantor's status as a discretionary beneficiary, with spendthrift protection, is equivalent to retention of the enjoyment of the property.

There are two tests under which the grantor's beneficiary status would be treated as enjoyment of the property and, therefore, cause the trust assets to be included in the grantor's estate. First, case law and IRS rulings hold that where the grantor's creditors can reach the trust assets, then the grantor has retained enjoyment of the property within the meaning of I.R.C. § 2036(a). Second, the regulations issued under section 2036 state that where a grantor has transferred assets to an independent trustee, and the trustee has the discretionary power but no obligation to make distributions to the grantor, the grantor's interest will cause the trust to be included in his estate if there is an express or implied understanding with the trustee that the grantor can have access to the funds in the trust.

Before the Alaska and Delaware statutes were passed, the estate freeze was not considered available for trusts in which the grantor retained a discretionary interest. That was so because the grantor's creditors could most likely reach the assets under state law, and, therefore, the IRS would hold the assets includable in the taxable estate under the first theory. Analysis of the applicability of section 2036(a) to an Alaska trust would start with application of the creditor accessibility test. As noted above, some avenues for certain creditors to reach the trust assets exist, in spite of the

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And while one theory underlying the creditor reach standard for applying section 2036(a)(1) was that a settlor could indirectly enjoy trust assets by running up credit that would be satisfied from the trust, the more precise articulation of the rationale for inclusion is that this ability to relegate creditors to trust assets is a section 2038(a)(1) power to indirectly revoke the trust.

Pennell, supra note 16, § 4.2. See generally supra note 299 (describing the effects of sections 2036 and 2038).

309. See Rev. Rul. 76-103, 1976-1 C.B. 293 (holding that a grantor's trust assets are included in his gross estate when the trust is discretionary); Priv. Ltr. Rul. 80-37-116 (June 23, 1980) (holding that the grantor's trust assets are includable when the grantor has retained the right to designate beneficiaries); Pennell, supra note 16, § 4.2 (describing creditor access rule).
310. See supra Parts III-V (discussing possible creditor attacks on Alaska trusts).
statutory protection. However, whether this would be sufficient to support a holding that such limited creditor access was tantamount to retaining enjoyment of the assets is unclear.

If, upon the death of the grantor, a court determines that creditor access was sufficiently limited so that the first test of creditor access under section 2036 does not cause the trust assets to be included in the estate, the court could then turn to the second test: whether an implied understanding of grantor access nevertheless existed. A retained interest can trigger I.R.C. § 2036 inclusion, even if it is not legally enforceable, if the understanding that the grantor retains enjoyment of the property can be inferred from the circumstances. Cases finding an implied understanding illustrate the flexibility courts will have in determining whether an Alaska trust should be included in the grantor’s estate.

In *Estate of Paxton v. Commissioner*, for example, the grantor had placed virtually all of his assets, including his household furnishings, into a trust, naming his son as primary trustee and his other children as back-up trustees. He withheld from the trust, however, certain patent royalty payments that provided significant income at the time, but would cease less than ten years after he established the trust. The trust instrument gave the trustee full discretion over distributions of principal and income. The court found that the following circumstances established the existence of an understanding that the grantor in fact retained enjoyment of the property:

1. when the trust was set up, the grantor did not file a gift tax return, instead taking the position that his retained interest in the trust was consideration for the transfer of property into the trust, and, thus, it was not a gift;
2. the grantor had transferred everything he owned into the trust, other than the royalty payments, which were due to expire when grantor would have been 64 years old, and it was unlikely that the grantor would have left himself destitute at that point in his life;
3. the grantor made no provision for his wife other than the trust and would not have left her destitute on his death;
4. distributions from the trust to grantor’s wife after grantor’s death increased dramatically;
5. the interests in the trust that the grantor retained passed to his children—who were the natural objects of his bounty—on his death, and distributions to the children increased after the grantor’s death.

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312. It is useful to review the factual circumstances of such cases because the finding of an implied understanding is always based on the particular facts.
313. 86 T.C. 785 (1986).
314. *Id.* at 810.
315. *Id.*
316. *Id.*
Because of the implied understanding that the taxpayer would continue to have use of trust assets, the court held that the trust assets were includable in his taxable estate at his death.

_Estate of McCabe v. United States_ 318 is another example of factual circumstances indicating an implied understanding that the grantor could continue to rely on the trust funds for support. In _McCabe_, the grantor set up a trust in 1940 which provided that the grantor's wife was to receive the trust income for life, with the remainder going to his children upon his wife's death. 319 The trustee had the discretion to invade the trust principal for the benefit of the grantor's wife if she had medical needs or other emergencies. 320 The trustee made no distributions until the grantor retired. 321 During the five years between the grantor's retirement and his death, the trustee distributed trust principal to the grantor four times, each time following receipt of letters from the grantor's wife requesting that principal be distributed. 322 The trustee was also the grantor's longtime friend. 323 The Court of Claims held that these circumstances indicated an understanding that the trustee would invade the principal for the benefit of the grantor when the grantor's cash needs arose upon retirement. 324 That understanding was sufficient to include the trust assets in the estate of the grantor under I.R.C. § 2036(a). 325

Likewise, in _Estate of Green v. Commissioner_, 326 the taxpayer transferred more than $700,000, the bulk of her assets, to an irrevocable trust, naming a bank as trustee. 327 The trustee had discretion to distribute so much of the income and corpus, up to $25,000 a year, as the trustee deemed necessary for the trustor's "health, welfare and happiness." 328 When the trustor established the trust, her son-in-law made the arrangements with the bank, and the son-in-law and the bank personnel agreed that the trustor would receive quarterly distributions of $6000. 329 The trust further provided that, upon the trustor's death, the trust assets would be distributed to her descendents. 330 The court held that the trust assets were to be included in her

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318. 475 F.2d 1142 (Ct. Cl. 1973).
319. _Id._ at 1144.
320. _Id._ at 1144-45 n.1.
321. _Id._ at 1147.
322. _Id._
323. _McCabe_, 475 F.2d at 1146.
324. _Id._ at 1147.
325. _Id._ at 1148.
326. 64 T.C. 1049 (1975).
327. _Id._ at 1050.
328. _Id._ at 1059.
329. _Id._ at 1052.
330. _Id._ at 1051.
estate under section 2036.\textsuperscript{331} The fact that she placed the majority of her assets in the trust made it "highly unlikely that she would have done so without some understanding that she would receive . . . [regular distributions]."\textsuperscript{332} Also supporting the inference of an implied understanding was the fact that the trustor received all of the income from the trust until her death.\textsuperscript{333}

Finally, Estate of Skinner v. United States\textsuperscript{334} illustrates how little is required to find an implied arrangement. The trustor in that case set up an irrevocable trust, providing for discretionary payments of income to trustor and other family members.\textsuperscript{335} The trustor also had the power to appoint successors to the individual and corporate trustees if there was a vacancy.\textsuperscript{336} From the time the trustor established the trust until trustor's death, she received all the income from the trust.\textsuperscript{337} The court held that the actual receipt of all the income, coupled with the fact that the trustor filed a gift tax return when she set up the trust, showing a deduction for the value of her life estate,\textsuperscript{338} was sufficient evidence of a prearrangement. The court acknowledged that this holding set up a stringent test for a settlor of a discretionary trust to exclude the trust assets from his estate if he has in fact received all of the income.\textsuperscript{339} The court went on to state, however, that "every case of this sort must stand on its own facts and that the practice of assuming that a trustee, corporate or otherwise, is necessarily independent of the cestui whom he represents, need not be followed invariably but may be rebutted by circumstances."\textsuperscript{340}

Thus, Skinner, as well as Paxton, McCabe, and Green, demonstrates that courts find implied understandings by examining how much of the trustor's property is placed in the trust, the extent and regularity of distributions to the trustor after the trust is established, the relationship between the trustor

\textsuperscript{331} Green, 64 T.C. at 1063-64.
\textsuperscript{332} Id. at 1062.
\textsuperscript{333} Id. The court also found another ground for inclusion: The words used to limit the trustee's discretion, i.e., that he was to make distributions as it deemed necessary for her happiness, was tantamount to the trustor retaining a right to the income because the trustor was the only one who could say what was needed for her happiness. To refuse a request for funds from the trustor would have therefore been a breach of trust. The trust assets were therefore includible under the first clause of section 2036(a)(1), including assets in which the decedent retained "the right to income." Id. at 1059.
\textsuperscript{334} 316 F.2d 517 (3d Cir.1963).
\textsuperscript{335} Id. at 519.
\textsuperscript{336} Id.
\textsuperscript{337} Id.
\textsuperscript{338} Id. Ironically, the deduction for the life estate was successfully challenged by the government when the gift tax return was audited. Id. Therefore, the trustor was subjected to gift tax for the entire amount at the time the trust was established. The value of the trust as of date of death was also later brought into her estate for estate tax purposes. The government’s position regarding the gift tax return, that the life estate was worthless because of the trustee’s discretionary power over distributions, was considered "of but little weight" by the court when later considering estate inclusion. Id. at 520.
\textsuperscript{339} Skinner, 316 F.2d at 520.
\textsuperscript{340} Id.
and trustee, and statements or other actions implying the trustor's continued reliance on support from the trust.

However, some taxpayers have had success in excluding self-settled trusts from their estate. In Estate of Uhl v. Commissioner, the taxpayer's estate conceded that the portion of a trust set up by the taxpayer would be included in his estate because the trust mandated a $100 monthly payment to the taxpayer. However, the estate argued that the trust principal in excess of the amount needed to support the required monthly payment should be excluded from the taxable estate, even though the trustee had discretion to distribute more than the required $100 per month. The IRS countered that the entire trust corpus was includible under section 2036(a)(1) because, under state law, the taxpayer's creditors were able to reach the entire trust corpus. The Seventh Circuit interpreted Indiana state law and held that it was unclear whether creditors could reach the entire corpus, and that the IRS's argument was therefore insufficient to trigger section 2036(a)(1). The court did not discuss, and apparently the government did not argue, the second test—whether there was an understanding that more than the monthly $100 would be available to the taxpayer. Even though Uhl is an example of the trust being excluded from the estate, it is not helpful in defending against an implied understanding theory of estate inclusion.

Estate of German v. United States was another estate inclusion case, where the court refused to bring the trust assets back into the taxpayer's estate under section 2036. In that case, the trustor set up six separate trusts, naming her two sons as cotrustees. Three of the trusts were for the benefit of one son, and the other three were for the benefit of the other son. Each trust agreement provided that the assets were to accumulate during the lifetime of the trustor, and, after her death, each agreement allowed discretionary distributions to the son who was the beneficiary of the trust. On the death of a son, the assets remaining in the trusts were to be payable to family members appointed by that son. Under each trust agreement, the trustees had authority to make distributions from the trust to the trustor, provided that the son who was the beneficiary of the trust

341. 241 F.2d 867 (7th Cir. 1957).
342. Id. at 868.
343. Id.
344. Id. at 870.
345. Id. at 870-71.
346. It should also be noted that the Skinner court did not find Uhl supportive of the taxpayer's argument because, in Uhl, the trustor only received discretionary distributions in two of the eight years that the trust existed before trustor's death. By contrast, in Skinner, the trustor received all the income every year until her death. Skinner, 316 F.2d at 519, 520 n.3.
347. 7 Cl. Ct. 641 (1985).
348. Id. at 645.
349. Id. at 642.
350. Id.
351. Id.
352. German, 7 Cl. Ct. at 643.
gave prior written consent to the distribution. As in Uhl, the government argued that under Maryland law, the trustor's creditors could reach the trust, and, therefore, the trust assets should be includable in her estate under section 2036. Based on the government's position, the court stated: "[t]hus, the narrow issue to be decided herein is as to the extent of decedent's creditors' rights with respect to the trust income and assets under Maryland law." After finding that the case at hand was distinguishable from Maryland case law allowing creditors access to trust assets, the court held that the government did not establish that creditors could have reached the trust assets. Similar to Uhl, the court did not discuss, and apparently the government did not argue, the alternative ground for inclusion: whether there was an implied understanding that the trustor would receive assets under the discretionary power held by her trustees and subject to the consent of the ultimate beneficiaries. Even though Uhl and German were taxpayer victories with trusts similar to the Alaska trusts, the incomplete analysis in those cases undercuts their use as authority for supporting the tax freeze benefits of the Alaska trust.

Estate of Wells v. Commissioner, however, is a case where the court relied on the facts to find there was no implied understanding. The government argued that there was an agreement with the trustee that the trustor would have access to the trust funds. The Tax Court held that there was no evidence of such an implied agreement. First, the trustor had approached her accountant about making gifts to her grandchildren, but she expressed concern about the effect on her cash flow if she made the gifts. The accountant prepared a cash flow analysis which showed that even if she made the gifts, her income would remain at an acceptable level because of the recent sale of some property. The accountant advised her to put the funds in trust for her minor grandchildren, but also encouraged her to name her son as trustee, and allow him to make discretionary distributions to her in the event of some "medical tragedy." The son in fact made regular distributions to the trustor because he wanted to encourage his mother to travel. These facts indicated to the court that the trustor's intention was to make gifts to grandchildren, and that she had no expectation that she would continue to receive benefits from the assets transferred

353. Id.
354. Id. at 643.
355. Id.
356. Id. at 645.
357. German, 7 Cl. Ct. at 645.
359. Id. at 1310.
360. Id. at 1305.
361. Id. at 1310.
362. Id. at 1305.
363. Wells, 42 T.C.M. (CCH) at 1306.
364. Id. at 1306.
365. Id.
into the trust. Therefore, a showing of adequate resources retained outside the trust, the intention of the grantor not to rely on the trust assets, and modes of distribution from the trust defeated the argument of an implied agreement.

Conversely, facts indicating that a primary purpose of the trust was to protect the assets from creditors may be read as evidence of agreement. In Estate of Hendry v. Commissioner, the taxpayer had transferred a farm to his wife, but continued to operate the farming business and commingled the proceeds of that business with his personal assets until his death. In support of its holding that there was an implied understanding that the decedent would retain benefits from the farm, and that the farm was therefore includible in his estate under section 2036, the court noted that the decedent’s wife testified that he had made the transfer because he “was in a high-risk business, and, therefore . . . he wanted to insure that his wife and children would have some security.” Contrast this with the expressed intention of the decedent in Estate of Wells v. Commissioner to make gifts to her grandchildren. Intent of the trustor is therefore a factor indicative of whether there was an understanding.

While a trustor of an Alaska trust would be well advised to make a record of intent that appears more consistent with Wells than Hendry, the size of the transfer relative to the trustor’s other assets, the trustor’s occupation, and the trustor’s concern about creditors may contradict expressed intentions for making gifts to the other trust beneficiaries. Also, even if a factors analysis is inconclusive in finding an implied understanding, a court could still find an understanding based on evidence that the trustee would be likely to respond to trustor’s requests or needs. In Estate of Kerdolff v. Commissioner, the taxpayer had transferred her home to her children but continued to live there. Even though there were some circumstances refuting an understanding that the mother could continue to have use of the home, the daughter admitted in testimony that “[w]e weren’t going to kick her out.” That admission, coupled with the court’s conclusion that it would be difficult to actually move the mother out of the family home because it would be a “drastic emotional and personal change,” was sufficient to find an understanding and include the residence in the mother’s estate.

366. Id. at 1310.
368. Id. at 864.
369. Id. at 875. Another notable aspect of Hendry is that the court put the burden on the taxpayer of proving that an implied understanding did not exist because the facts of the case implied a prearrangement.
371. For example, if the trustor was a high net-worth individual, she may have concerns about being a target for litigation.
372. 57 T.C. 643 (1972).
373. Id. at 645-46.
374. Id. at 649.
375. Id. at 650.
estate under section 2036.\textsuperscript{376} Similarly, although the personal and emotional dynamics connected with a home, and with a mother and her children, would not be present with an Alaska trust, a court may consider the natural inclination of the corporate trustee to provide for the grantor when requested to do so. Quite simply, if the trustee was restrictive in responding to requests for funds for the grantor, that may then discourage future grantors.

Two letter rulings indicate that the IRS accepts, to some extent, the general proposition that section 2036 should not bring a trust back into the grantor's estate where the grantor retains an interest as a discretionary beneficiary. In Private Letter Ruling 80-37-116, the IRS ruled that a trust set up by a nonresident alien, in which the trustee had discretion to distribute principal and income to the nonresident alien grantor and other family members who were beneficiaries, was not includible in the assets subject to U.S. estate tax on the grantor's death.\textsuperscript{377} Section 2104(b) includes any assets transferred by a nonresident alien that would fall within sections 2035 through 2038, if the assets were situated in the United States at time of transfer.\textsuperscript{378} The IRS found that the trust did not come within section 2036, because \textit{Herzog v. Commissioner},\textsuperscript{379} which was decided by the court in the same circuit as the location of the trust at issue, held that discretionary beneficiary status was "a hope or passive expectancy rather than a right" to enjoyment of the property.\textsuperscript{380} \textit{Herzog} was a gift tax case, however, and the private letter ruling made no mention of the creditor access issue or the implied understanding issue.\textsuperscript{381} Also, the ruling noted that the trustee had made no distributions from the trust to the grantor.\textsuperscript{382}

Similarly, in Private Letter Ruling 93-32-006,\textsuperscript{383} two siblings had established offshore trusts. They requested a ruling on whether the transfers to the trusts were completed gifts and whether the trust assets would be includable in their estates under sections 2036 or 2038.\textsuperscript{384} The IRS ruled that the siblings had relinquished sufficient control to make completed gifts.\textsuperscript{385} Furthermore, the IRS stated that the trust property would not be included in either settlor's estate under sections 2036, 2037, or 2038 because "under the facts presented, the Trustee's discretion to make distribu-

\begin{itemize}
\item \textsuperscript{376} \textit{Id.}
\item \textsuperscript{377} \textit{Id.}
\item \textsuperscript{378} Nonresident aliens are subject to U.S. estate tax to the extent that their assets are situated in the United States as of the time of death. \textit{I.R.C. § 2101} (West Supp. 1999).
\item \textsuperscript{379} 116 F.2d 591 (2d Cir. 1941).
\item \textsuperscript{380} Priv. Ltr. Rul. 80-37-116 (June 23, 1980). Also, the Service held that the interest as a discretionary beneficiary would not be considered a reversionary interest that would trigger section 2037. \textit{Id.}
\item \textsuperscript{381} \textit{Id.}
\item \textsuperscript{382} \textit{Id.}
\item \textsuperscript{384} \textit{Id.}
\item \textsuperscript{385} \textit{Id.} The Service also cited Rev. Rul. 76-103, which concluded that if a gift was incomplete because of the extent of retained rights in the property, the transferred property would be includible in the taxable estate under section 2038. Rev. Rul. 76-103, 1976-1 C.B. 295, 294.
\end{itemize}
tions to a Settlor is not a retained interest or power for purposes of those sections.\footnote{386} It is surprising that the IRS would be willing to make a prospective ruling on the estate inclusion issue without analysis of actual distributions to the settlors prior to their deaths.\footnote{387} There was the usual disclaimer at the end of the ruling, however, that "no opinion is expressed about the tax treatment of . . . any conditions existing at the time of, or effects resulting from, the proposed transaction that are not specifically covered by the above rulings."\footnote{388}

In summary, the estate freeze advantage of the self-settled spendthrift trust is not guaranteed. Although the IRS has recognized that establishing such a trust can be a completed gift for gift tax purposes, it may still claim that the trust assets should be included in the trustor's estate at the date-of-death value. The trust assets could be included under a theory that, despite Alaska law, the assets were still subject to the trustor's creditors under the various means of attack described in Parts III through V of this Article. In the alternative, the assets could be included if a court finds that there was an implied understanding that the trustor would continue to enjoy the benefits of the trust assets. Facts supporting the finding of such an understanding could be showings of intent at the time the trust was set up, the extent of the trustor's assets placed in the trust, and the history of distributions to the trustor after the trust was established. Since the existence of an understanding that the trustor has access to the trust is determined on a case-by-case basis, there is certainly the undesirable prospect of engaging in litigation against the IRS. Whether the taxpayer will be successful in that litigation will depend in part on the facts of the case as well as the possibility that the court would conclude that this type of trust necessarily includes an understanding that the trustor retains enjoyment of the property.

VII. POLICY DISCUSSION

The question remains whether courts should ever allow the self-settled spendthrift trust. The supporters of these trusts offer a number of justifications, including protection from excessive tort judgments and equity for self-made millionaires who have no wealthy relatives to set up a spendthrift trust for them. However, the validity of these trusts should be denied for several reasons. First, there are the moral concerns: a person should be held to her promises, should be required to repay just debts, and should not be able to avoid paying debts while still enjoying the use of her assets.\footnote{389} Next, there is the practical concern of the effect this device may have on the

\begin{itemize}
\item \footnote{387} The Service was not so generous in its recent ruling on the taxability of an Alaska trust. See Priv. Ltr. Rul. 98-37-003 (June 10, 1998) (withholding a ruling on whether the trust assets would be included in the grantor's estate).
\item \footnote{389} While there are many ways that our legal system allows just that, such as exemptions for retirement assets, those exemptions are in place for other, countervailing reasons. On the other hand, the system also extends liability to assets that the debtor has passed beyond her control, as in the case of fraudulent transfers and bankruptcy preferences.
\end{itemize}
integrity of our legal and economic system. Finally, the arguments favoring the self-settled spendthrift trust are merely justifications for its existence and do not offer compelling reasons to override the policy concerns on the other side of the debate. For example, the primary argument offered in defense of self-settled spendthrift trusts is the overactive tort system. That argument seems pretextual, however, because excesses should be addressed within the tort system itself, rather than providing an escape route from the entire system.

A. ARGUMENTS SUPPORTING SELF-SETTLED SPENDTHRIFT TRUSTS

The position that self-settled spendthrift trusts are a desirable extension of trust law draws both from the traditional arguments supporting third-party spendthrift trusts generally, as well as from arguments focused on the benefits of the self-settled creditor protection. As for the traditional arguments, the argument often given as the primary support for spendthrift trusts does not aid the self-settled trust. This argument was based on general property rights and the notion that donors should be able to restrict a gift in whatever way they saw fit, including a restriction on access to the beneficiary's interest by her creditors and assignees. That argument obviously offers no support for the extension of protection to the self-settled spendthrift trust because the protection from the grantor's creditors resulting from a self-settled trust involves no gift to a third person. Additionally, the grantor's rights in her own property would not normally include the power to set that property beyond the reach of creditors.

Another one of the original arguments, used by Justice Miller in his now-famous dicta in Nichols v. Eaton, is more helpful to the cause of self-settled spendthrift trusts. This argument states that that spendthrift trusts are no different than creditor protection provided by exemption laws such as homestead. Professor Hirsch notes that an individual can already protect himself from creditors by putting assets into exempt form, such as ERISA-governed retirement accounts, life insurance, and residences.

390. See GRISWOLD, supra note 24, § 552 (stating that a person who owns property may give as he pleases); George P. Costigan, Jr., Those Protective Trusts Which are Miscalled "Spendthrift Trusts" Reexamined, 22 CAL. L. REV. 471, 483 (1932) (same). Dean Griswold argued that this justification is insufficient because property ownership does not carry an unqualified right to dispose of it in any way. GRISWOLD, supra note 24, § 554. "If such trusts are valid it is not because the owner of property may dispose of it as he sees fit, but because the particular restriction in question is not contrary to public policy." Costigan, supra, at 467. Professor Costigan called the reliance on this argument "unfortunate" because it allowed for an unlimited spendthrift protection. Id. at 483.

391. 91 U.S. 716 (1875).

392. See id. at 726 (stating that in some jurisdictions the homestead, inter alia, is exempted).

393. 26 U.S.C.A. § 401(a)(13) (West Supp. 1999); 26 C.F.R. 1.401(a)-13(b)(1) (1999). Cf. Patterson v. Schumate, 504 U.S. 753, 758 (1992) (noting that ERISA protection qualifies as "applicable nonbankruptcy law" extending spendthrift protection under 11.U.S.C. § 541(c)(2) so that assets subject to that spendthrift protection were excluded from the bankruptcy estate). In some states, retirement assets not governed by ERISA, such as individual retirement acc-
protected by homestead laws. Professor Hirsch therefore questions whether there is a substantive difference in allowing a person to protect assets by placing them in trust.

Professor Costigan supported the third-party spendthrift trust on the ground that objections focus on protecting the hapless creditor, while, in his opinion, "[t]he hard-hearted creditor, it is quite safe to assert, has been more ubiquitous and more pernicious than the unscrupulous debtor." It is hard to argue with that statement, but, particularly if used to justify self-settled spendthrift trusts, it seems excessive to give all debtors, both unscrupulous and well-meaning, a means by which to thwart the "hard-hearted" creditor in pursuit of that well-meaning debtor.

Professor Hirsch identified several functions served by spendthrift trusts. These include the protective (or paternal) function and the socializing function, which can be summarized as follows. The spendthrift trust gives parents a way to protect their children and help overspending children without either giving them more than their fair share of the family wealth or overly restricting their fair share. In addition, restraints on involuntary alienation serve a security function, protecting the beneficiary from future financial reversals, and a value maintenance function, because the restrictions on the assets cause them to be undervalued by third parties looking for reimbursement. The protective and socializing functions do not support self-settled spendthrift trusts, but the security and value maintenance functions are presumably the primary reasons grantors would choose such a trust. A good example is the well-meaning grantor who is setting up a self-settled spendthrift trust with a reasonable percentage (rather than all) of her assets in order to have a "rainy day fund" if she is ever sued in her professional or personal capacity. This is the most justifiable use of the self-settled spendthrift trust: the grantor who retains assets outside of the trust, continues to maintain liability insurance, and does not intend to defraud her creditors, but seeks only to have some funds to live on. The problem with this justification for the self-settled spendthrift trust is that the statutes do not, and cannot, distinguish between the responsible

counts, are also exempt from creditor claims. For an example, see WASH. REV. CODE § 6.15.020 (1998).


395. See FLA. CONST. art. X, § 4(a) (providing unlimited homestead exemption).


397. Costigan, supra note 390, at 476-77.


399. Id.

400. See id. at 57 ("By squirrelling away this nest egg, benefactors give beneficiaries a measure of protection against future financial embarrassment . . . .").

401. See id. at 58-59 (explaining how restraints on alienation guard against disadvantageous judicial sales of property).

402. Another potential motivation would be to achieve the tax savings discussed supra Part VI.
and the unscrupulous grantor; they extend protection to both.

In addition to the arguments supporting spendthrift trusts in general, there are independent arguments supporting the extension of the spendthrift protection to self-settled trusts. In Professor Costigan's reply to Professor Gray's objections to the spendthrift trust, he provided an argument in favor of allowing at least a limited use of self-settled spendthrift trusts:

And that brings us, at last, to the problem of the man who realizes that he is a spendthrift and who tries to protect himself from ultimately becoming dependent on charity or on the public for support by creating for himself a spendthrift trust. If there is anything in the argument that the beneficiary's need should affect the attitude of the court, then such a beneficiary's need should be met, provided there is no fraud on his existing creditors, that is, provided that he keeps out of the trust assets sufficient to discharge his existing debts. No doubt there is, on the one hand, a danger of defrauding future creditors that must be guarded against; but that is wholly a problem of intent, which may be ascertained, and we are assuming an intent that is legitimate. On the other hand, after the recent experiences of the United States with so-called high powered salesmanship, there seems clearly to be a grave need that society shall protect those persons who are unable to guard themselves against objectionable importunity and against being thrown to the wolves that infest our society. Nevertheless, since they themselves provide the property to be used for their own reasonable support, free from the claims of the future creditors, and since their protection against such creditors is to be justified only to the extent that sound public policy dictates, it would seem only fair to make each trustor-beneficiary demonstrate his peculiar need for protection—his actual and not merely possible inability to fend off the human vultures seeking to gorge upon his substance. In addition it may be proper to require him, through recorded notices of the trust and through information supplied to commercial agencies and other bodies which furnish credit reports to business people, to spread the news of his self established spendthrift trust so as to put reasonable cautious future creditors on their guard.403

There is also the issue of the inequity of the bar against self-settled spendthrift trusts when third-party spendthrift trusts are allowed. A person with wealthy relatives can enjoy a spendthrift trust fund that can never be depleted by her debts, but a person who accumulates her wealth by her own efforts is unable to create such an exempt fund with her own assets. Dean

403. Costigan, supra note 390, at 491-92. Similar arguments have been made in support of the federal bankruptcy statutes, referring to unscrupulous credit card companies that extend credit to persons for whom repayment will clearly be a hardship, if not impossible. See Hon. Leif M. Clark, Calling Credit Card Lenders to Account, 1998 AM. BANKR. L. J. 181.
Griswold was troubled by this: "Why should a person be allowed to live debt free on the bounty of others while property which he has accumulated by his own effort is denied the same immunity?"\textsuperscript{404} The inequity becomes even more troubling when one considers that Alaska and Delaware, as well as several other states,\textsuperscript{405} have abolished the Rule Against Perpetuities, thus allowing many future generations to take advantage of creditor-exempt wealth.

A more contemporary commentator has stated that the bar on self-settled trusts "makes no sense."\textsuperscript{406} Professor Hirsch analogizes the self-settled spendthrift trust to a transfer to a third person.\textsuperscript{407} He argues that the creditor's concern with the possibility of the debtor transferring assets to a self-settled spendthrift trust is essentially the same as the risk that the debtor will transfer to a third party.\textsuperscript{408} Therefore, the introduction of self-settled spendthrift trusts has not increased the creditors' burden and should be addressed in the same manner as third-party transfers—with fraudulent conveyance statutes and contract provisions.\textsuperscript{409} He further argues that the benefits of self-settled spendthrift trusts—which serve the self-paternalism function, value maintenance function, and security function—support their acceptance.\textsuperscript{410}

Scholars have also argued that self-settled trusts do not harm creditors since the transfer could be unwound if done to defraud existing creditors,\textsuperscript{411} and future contract creditors would then have notice of the trust and the limitations on the grantor's assets available to satisfy the debt.\textsuperscript{412} Notice of the spendthrift trust would forewarn the creditor to protect itself by obtaining additional security, limit the credit extended, or include protective contract terms.

Finally, the argument advanced in support of the new wave of domestic asset protection trusts is the threat of litigation. The legislation's supporters claim that the self-settled spendthrift trust is a response to the problem of a runaway tort system.\textsuperscript{413} They argue that society as a whole benefits from their availability because without such trusts, there are "ob-

\textsuperscript{404} GRISWOLD, supra note 24, § 557, at 475. But Griswold also thought that any such spendthrift protection for the settlor should be limited in amount. Id. at 476.

\textsuperscript{405} See DUKMINIER & JOHANSON, supra note 117, at 854 (listing states that have abolished the Rule Against Perpetuities).

\textsuperscript{406} Hirsch, supra note 396, at 83.

\textsuperscript{407} Id.

\textsuperscript{408} Id.

\textsuperscript{409} Id. at 84-86.

\textsuperscript{410} Id. at 89-90; see also supra notes 398-402 and accompanying text (describing Professor Hirsch's definitions of these functions).

\textsuperscript{411} See supra notes 36-70 and accompanying text (describing Alaska's and other states' fraudulent conveyance exceptions to self-settled spendthrift trust protection).

\textsuperscript{412} See Nichols v. Eaton, 91 U.S. 716, 726 (1875) (noting that trust instruments are available for public inspection); Hirsch, supra note 396, at 64-65 (arguing that the criticism of spendthrift trusts that they harm creditors is a "red herring").

\textsuperscript{413} See Roundtable Discussion, supra note 144, at 794 (noting the comments of Mr. Barry Engel).
stetricians who are no longer practicing . . . [] people who are hesitant to go into business in certain areas,” and, as a result, there is a “huge cost” to all of us.414

In sum, the self-settled spendthrift trust can be viewed as a necessary protection against the threat of unjustified and excessive tort judgments and the actions of other predatory creditors. It can also be viewed as an equalizing measure to allow the self-made millionaire the same protection from creditors that the beneficiary of inherited wealth can enjoy.

B. RESPONSES TO THE ARGUMENTS FAVORING SELF-SETTLED SPENDTHRIFT TRUSTS

The argument that self-settled trusts are akin to other creditor protection provisions, such as homestead laws and exemption of retirement assets, fails to address the significant risk-shifting available with a self-settled trust. While it is true that there are significant opportunities to protect assets through use of pension accounts, life insurance, and expensive homes, there are certain limitations on those forms of assets that normally prevent individuals from easily converting all of their assets into those forms.415 Moreover, even with a bankruptcy discharge, the effect on an individual’s future creditworthiness is a significant deterrent.

With a self-settled trust, however, there are almost no limitations. Although the trustor must turn irrevocable control over to the independent trustee and pay a fee for such services, there are no legal limitations on the amount the trustee can distribute for the benefit of the grantor. Presumably, the corporate trustee will want to accommodate its customer, the settlor, in order to encourage future business. Also, the assets in the trust can remain liquid, and therefore readily available, at the trustee’s discretion. Investment decisions regarding the trust assets are relatively unrestricted. An existing creditor is therefore deprived of the benefit of relying on the debtor’s self-interest to maintain his own assets. Although it is true that if the transfer falls within the applicable definition of fraudulent transfer, then the creditor will be able to access the trust assets, Alaska defines “fraudulent transfer” very narrowly. Furthermore, even with the broader definition from other states, a disadvantaged creditor may still fall outside the statutory protection. In other words, the self-settled trust offers such little risk to the grantor, and allows him to retain so much control, that it removes ordinary disincentives to asset protection that existing law has presumed. As noted by Professor Dobris, “who would not want to spendthrift his own assets? If it works, then, among settlors who fear their credi-

414. Id.
415. For example, the annual contributions to qualified retirement accounts and IRAs are limited. I.R.C. § 415 (West. Supp. 1999). The purpose of those limitations is to limit the income tax breaks on retirement savings, rather than to reign in creditor protection, however. With respect to the unlimited homestead exemption as a method of sheltering assets, it requires the debtor to invest solely in one parcel of real estate, losing the advantages of liquidity and diversification.
tors, the only people who will choose not to spendthrift their own assets, are those who are afraid no one will do business with them or loan them money ever again.  

Another commentator answers the exempt property analogy by pointing out that the purpose of the exemption statutes is to protect the debtor and the debtor’s family from absolute poverty, while still allowing some relief for creditors. This echoes the concerns of Dean Griswold and Professor Costigan, that even third-party spendthrift trust protection should be limited to reasonable support. As further recognition of the policy that there should be limits on exempt property, Congress has proposed amending the federal bankruptcy law to cap the amount of allowable homestead exemption, overriding the state law on the question.

With respect to the need for protection from the ruthless creditor, the remedy of the self-settled spendthrift trust is both overbroad and underinclusive. The self-settled spendthrift trust is unlikely to be used by working class people who develop financial difficulties as a result of easy credit offered by overly aggressive lenders. It is equally likely to be used by the more sophisticated debtor to avoid just, as well as unjust, debts.

The argument that prohibition of the self-settled spendthrift trust is unfair to the person who earned his own wealth is a valid point. However, inherited wealth carries with it many advantages, of which permissible spendthrift protection is only one. To extend spendthrift protection to one’s own earnings violates the same principle as if creditor exemption of life insurance and retirement accounts were extended to any asset. If the legal system makes it too easy to avoid liability, then the civil enforcement system, which supposedly is an incentive to obey the rules, would be in jeopardy.

The argument that the creditor is not harmed by a self-settled spend-

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417. See Willard M. Bushman, The (In)validity of Spendthrift Trusts, 47 OR. L. REV. 304, 312 (1968) (stating that exemption laws strengthen the integrity of the debtor).
418. GRISWOLD, supra note 24, § 565; Costigan, supra note 390, at 492.
419. See GAO Finds Some Florida and Texas Debtors Have Expensive Homes, CONSUMER BANKR. NEWS, Aug. 12, 1999, at 1, 6 (noting that Senators Kohl and Sessions planned to offer an amendment to S. 625, the Bankruptcy Reform Bill of 1999, capping the homestead exemption at $100,000); Protecting Rich Bankrupts, N.Y. TIMES, Aug. 13, 1999, at A-20 (discussing bankruptcy protection in Texas and Florida).
420. For example, a person contemplating bankruptcy may be able to disclaim an inheritance the day before filing (assuming the disclaimer is otherwise within the state-prescribed time limits), and that disclaimer would be recognized. However, if the same person gave away assets she currently owned on that same day, those assets would be brought back into the bankruptcy estate. See In re Atchison, 925 F.2d 209 (7th Cir.), cert. denied, 502 U.S. 860 (1991) (holding pre-bankruptcy filing disclaimer not a “transfer” and, therefore, not reachable by bankruptcy trustee); but see In re Dinsdale, 1993 Bankr. LEXIS 2279 (N.D. Iowa 1993) (holding that pre-filing disclaimer was a “transfer” and, therefore, reachable by bankruptcy trustee).
421. See Lynn M. LoPucki, The Death of Liability, 106 Yale L.J. 1, 4-7 (1996) (describing judgement-proofing strategies available to debtors and the decline of obstacles to the use of those strategies).
thrift trust, because the creditor can take protective action in advance, overlooks the tort creditor, who cannot choose her tortfeasor. In light of the limited fraudulent conveyance actions and short statutes of limitations included in the self-settled spendthrift trust statutes, existing contract creditors also may not be sufficiently protected. For example, a creditor existing at the time a debtor sets up an Alaska trust has to prove actual intent to defraud, even if the creditor brings the action within the time frame allowed. Note also that with existing creditor-debtor relationships, the papers have already been signed, and the creditor may not have the opportunity to include a provision protecting itself from the debtor's establishment of a self-settled spendthrift trust. Presumably contract creditors, at least those who consult an attorney, will now include contract language to protect against self-settled trusts, such as a call on the debt, making it due in full upon the debtor's establishing a creditor-protected trust. However, it is unclear whether any contract provisions would sufficiently protect the creditor, since the creditor would still have to prove actual fraud once the trust was established in order to collect from the trust assets. Thus, even though the contract may have prohibited establishment of the trust, if the debtor breaches and sets up the trust, he has improved his bargaining position (unless his assets outside of the trust are sufficient to satisfy the debt).

Also, self-settled trusts present additional, substantial problems for creditors because there is an enormous difference, from the debtor's point of view, in transferring assets to a self-settled trust rather than a third party. The debtor would clearly prefer the self-settled trust because he retains the use of the assets. That fact, in turn, affects the creditor because the creditor can no longer rely on the debtor's self-interest in retaining use of his money to restrict the debtor's willingness to make such a transfer. Also, as discussed above, the fraudulent conveyance provisions of the onshore trust statutes give very thin protection to existing creditors.

The primary justification for self-settled spendthrift trusts is that they are a response to the threat of excessive tort judgments. It seems a curious response to the problem, however: Instead of responding directly to the abuses and excesses of the tort system, the asset protection trust undercuts the entire system of liability. As discussed below, the potential damage

422. See Emanuel, supra note 3, at 197-98 (discussing the difference between tort and contract creditors).
423. Supra notes 155-70 and accompanying text (discussing the fraudulent conveyance remedies in this context).
424. ALASKA STAT. § 34.40.110 (Lexis 1998).
425. Note that the other three states allowing onshore trusts recognize constructive fraud as a ground of voiding a transfer, so the existing contract creditor would have a somewhat easier time collecting in those states, as compared to Alaska. See supra note 164 and accompanying text (describing those state fraudulent conveyance provisions).
426. See supra notes 155-70 and accompanying text (comparing fraudulent conveyance provisions applicable to onshore trusts to general fraudulent conveyance provisions in other states).
427. This approach resembles the family business arguments made in favor of repeal of the estate tax. The argument is that the estate tax prevents families from passing the family
to the liability system outweighs the benefit of relief from threat of abusive use of the system.

C. The Policy Arguments Against Self-Settled Spendthrift Trusts

The policy arguments against self-settled spendthrift trusts essentially fall into two categories: moral and economic. The moral argument is simple and intuitive: You should keep your promises and pay your debts because it is the right thing to do. According to this argument, there is something disturbing about a country that would allow debtors to leave their debts unpaid and still enjoy an extravagant lifestyle. Professor Gray's and Professor Scott's objections seemed to fall on this moral plane, and even Professor Costigan and Dean Griswold believed that the spendthrift protection should be limited to reasonable support because amounts beyond that are inequitable. These limits indicate policy decisions that spendthrift protection is untenable in some circumstances. For example, certain creditors—such as child support claimants—are generally exempted from the effects of spendthrift clauses. Recognizing that spendthrift protection should be limited to reasonable support needs of the beneficiary, some proposals and statutes set dollar limits on the amount subject to spendthrift protection. For example, Dean Griswold proposed authorizing spendthrift trusts, but allowing creditors to reach income in excess of $5000 per year. Some states place statutory limits on the dollar amount the trustor may place in such a trust and on annual income

business down to the next generation. See Representative Christopher Cox's (R-Cal.) website materials regarding repeal of the estate tax at <http:llcox.house.gov/deathtax/index.htm> (visited May 4, 2000). This issue, even if you accept this problem as one that must be remedied, is not a complete justification for repeal of the entire tax, however, because the tax system could be adjusted to facilitate such transfers without eliminating the entire tax. See I.R.C. §§ 2032A, 2057, 6166 (West Supp. 1999) (providing provisions that give tax relief for closely-held businesses and farms). One therefore suspects that the family business is just a poster child for estate tax repeal.

428. See infra notes 442-49 and accompanying text (discussing the economic effects of the self-settled spendthrift trust).
429. See GRAY, supra note 1, at iii (referring to the duty to pay one's debts); SCOTT, supra note 5, § 156 (same).
430. GRISWOLD, supra note 24, § 565; Costigan, supra note 390, at 492.
431. See RESTATEMENT (SECOND) OF TRUSTS § 157 (1959) (identifying four classes of claimants that can reach spendthrifted assets: child support and alimony claimants, providers of necessary services, providers of services that protected the beneficiary's interest in the trust, and the United States). At least 30 states have statutes that allow child support claimants to reach assets in spendthrift trusts. William S. Huff, Spendthrift Clauses: Legality and Effect on Post-Transfer Estate Planning, 1984 U. MIAMI PHILIP E. HECKERLING INST. ON EST. PLAN. 1206.3.
432. See Costigan, supra note 390, at 483-84 (noting that creditors have a legitimate grievance when trusts provide beneficiaries with wealth and leave creditors unpaid).
433. See infra notes 436-38 and accompanying text (referring to the statutes).
434. GRISWOLD, supra note 24, § 565, at 648. His proposal also expressly excluded self-settled spendthrift trusts and allowed a court to order payment of claims for alimony, child support, provision of necessaries, or injury in tort from assets otherwise protected by a spendthrift provision. Id.
435. See CAL. PROB. CODE § 15306.5 (West 1991) (allowing up to 25% of payments to or
tied to protection. Two states statutorily allow tort claimants to access spendthrift trusts. Trust ceilings and exceptions for certain creditors indicate that the policy arguments supporting spendthrift trusts can yield to deserving, competing interests and also indicate that those policy arguments have natural limits. Most negative reactions to the concept of self-settled spendthrift trusts are probably due to an instinctive reaction that they are somehow unfair. Most of us have been played the role of both debtor and creditor and can look at this somewhat objectively. My guess is that most of us would have the same feeling as to the morally "right" side of this issue. However, Professor Costigan questions why we should favor creditor rights over debtor rights. While, overall, the fair and just solution is to hold debtors responsible for their debts, there are certainly abuses by unscrupulous creditors.

The second category of arguments against self-settled spendthrift trusts turns on an economic analysis of their impact. Professor Hirsch argues that morality should not enter the debate, in part because extending credit is a business, and both parties have to be aware of the underlying legal structure defining the relationship. He also argues that the efficacy of spendthrift trusts is not an issue that stirs us like racial discrimination. When the issue is more technical, and does not have the urgency of "fundamental ideals of human dignity," then Hirsch believes economic analysis is the more appropriate evaluating tool.

Evaluating the economic impact of self-settled spendthrift trusts would be a daunting and very speculative task that is beyond the scope of this Article. However, there is one economic impact that is perhaps the most significant objection to the self-settled spendthrift trust. Professor Lynn LoPucki has warned that the increasing ability to avoid liability threatens the system of civil enforcement of obligations, both tort and contract. Professor LoPucki analogizes to a poker game where the players no longer have to ante up any chips. While the broader concerns about undermining liability go to the asset protection methods available to large business enti-

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for the benefit of a beneficiary to be subject to creditor claims in spite of spendthrift protection); Va. Code Ann. § 55-19(B) (Lexis Supp. 1999) (limiting amount sheltered in spendthrift trusts to $1 million).
438. Costigan, supra note 390, at 492.
439. Such abuses have, to some extent, been addressed legislatively, with consumer credit legislation and the bankruptcy laws.
440. See Hirsch, supra note 397, at 60-61 (acknowledging that the rights of involuntary creditors "take on a moral tone").
441. Hirsch, supra note 397, at 94.
442. Id.
443. See LoPucki, supra note 421, at 3-4.
444. Id. at 3.
ties, extending asset-protection to individuals seriously increases the risk of undermining the only way, other than criminal liability, that our system of civil liability enforces its rules of individual responsibility.

Whether the impact of self-settled trusts on the tort system is desirable, therefore, depends on the view of the efficiency of the tort system. In broad terms, commentators usually identify the primary purposes of the tort system as deterrence, compensation, resource allocation, and fairness, but they have also argued that the tort system should be replaced because its costs outweigh its benefits. However, even those who would eliminate the tort system would address the problem directly by system-wide abolition and acknowledge that the deterrence and compensation functions would have to be replaced by other methods. Assuming one agrees with the tort system's detractors, the self-settled spendthrift trust seems an inappropriate response, since it does not replace the functions of the tort system in cases where the tortfeasor has used the self-settled trust to avoid liability, and because it provides relief only to tortfeasors who have the means and the sophistication to avail themselves of trust protection.

After one weighs all of the policy concerns on both sides of the argument, two competing concerns must be balanced. While many of these concerns, such as treating the self-made millionaire on a par with the trust fund baby, are primarily only interesting in academic debate, the two issues of major concern that do actually capture the attention of the public at large are the threat of inflated tort judgments versus the unfairness of allowing some people (who are sufficiently well-off to hire lawyers and set up asset-protection trusts) to enjoy a prosperous lifestyle without having to pay their bills. On the second issue, the policymakers should be concerned not just with public outrage over the unfairness of allowing some debtors to avoid their debts, but with the overall effect these trusts may have on civil liability as an enforcement system. It seems an odd legislative choice to cure the first concern, not by directly reforming that system, but by giving a free pass to debtors from all debts, justified or not.

VIII. CONCLUSION

The success of the self-settled trust is currently quite uncertain. For some trustors, it will be enough of a deterrent to creditors to ensure quick settlements of any disputes. With the right sympathetic creditor and an egregious set of facts, a creditor may gain access. The question of whether the tax advantages will be realized will probably depend on how popular the device becomes. If the trust is infrequently used, the IRS may allow taxpayers to claim the estate freeze benefits without challenge. If it becomes a

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446. See Sugarman, supra note 445, at 661-64 (proposing alternatives).

popular freeze device, then history indicates that it will likely become a target of the IRS, and there are several avenues for the government to use in attacking it, from individual audits and litigation to legislation directly eliminating the tax benefit. The more troubling question is why state legislators view this device as reflecting a policy that is sufficiently justifiable to be the law. Why would the government approve an open-ended permission to leave bills unpaid? In doing so, state governments show that they are willing to help their banks provide the latest version of the free toaster, even though the benefit to local banks will lessen as more states, closer to home, enact similar legislation. If these trusts stay within the realm of the very rich, with only the occasional shocking tale of injustice, then they may be more easily tolerated. On the other hand, they may be yet another sign that paying one's bills is becoming a "moth-eaten virtue."

APPENDIX—PERTINENT ALASKA STATUTES GOVERNING SELF-SETTLED SPENDTHRIFT TRUSTS

AS § 13.12.205. Decedent's nonprobate transfers to others

The value of the augmented estate includes the value of the decedent's nonprobate transfers to others, not included under AS 13.12.204, of any of the following types, in the amount provided respectively for each type of transfer:

1. property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death; property included under this category consists of:
   A. property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment; the amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, default, or otherwise, to or for the benefit of a person other than the decedent's estate or surviving spouse;
   B. the decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship; the amount included is the value of the decedent's fractional interest, to the extent that the fractional interest passed by right of survivorship at the de-

448. For example, when the classic freeze technique (with a closely held company, parents gave common stock—representing future appreciation—to children and retained preferred stock, thus giving them an income stream) became too popular, Congress responded by enacting section 2036(c) (now repealed) that eliminated the advantages of such techniques. E. James Gamble, Section 2036(c)—A Statutory Analysis, 23 U. OF MIAMI PHILLIP E. HECKERLING INST. ON EST. PLAN. 13-1, 13-3-4 (1989).

cedent's death to a surviving joint tenant other than the
decedent's surviving spouse;
(C) the decedent's ownership interest in property or
accounts held in pay on death, transfer on death, or co-
ownership registration with the right of survivorship;
the amount included is the value of the decedent's own-
ownership interest, to the extent the decedent's ownership
interest passed at the decedent's death to or for the
benefit of a person other than the decedent's estate or
surviving spouse;
(D) proceeds of insurance, including accidental death
benefits, on the life of the decedent, if the decedent
owned the insurance policy immediately before death or
if and to the extent the decedent alone and immediately
before death held a presently exercisable general power
of appointment over the policy or its proceeds; the
amount included is the value of the proceeds, to the
extent the proceeds were payable at the decedent's
death to or for the benefit of a person other than the
decedent's estate or surviving spouse;
(2) property transferred in any of the following forms by the de-
cedent during marriage:
(A) an irrevocable transfer, including an irrevocable
transfer in trust with a transfer restriction under AS
34.40.110(a), in which the decedent retained the right
to the possession or enjoyment of, or to the income
from, the property, if and to the extent the decedent's
right terminated at or continued beyond the decedent's
death; the amount included is the value of the fraction
of the property to which the decedent's right related, to
the extent the fraction of the property passed outside
probate to or for the benefit of a person other than the
decedent's estate or surviving spouse;
(B) a transfer in which the decedent created a power
over the income or property, exercisable by the dece-
dent alone or in conjunction with another person, or
exercisable by a nonadverse party, to or for the benefit
of the decedent, the decedent's creditors, the decedent's
estate, or creditors of the decedent's estate; the amount
included with respect to a power over property is the
value of the property subject to the power, and the
amount included with respect to a power over income is
the value of the property that produces or produced the
income, to the extent the power in either case was exer-
cisable at the decedent's death to or for the benefit of a
person other than the decedent’s surviving spouse or to the extent the property passed at the decedent’s death, by exercise, release, lapse, default, or otherwise, to or for the benefit of a person other than the decedent’s estate or surviving spouse; if the power is a power over both income and property and the preceding provision defining the amount included produces different amounts, the amount included is the greater amount; and

(3) property that passed during marriage and during the two-year period next preceding the decedent’s death as a result of a transfer by the decedent if the transfer was of any of the following types:

(A) property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under (1)(A), (B), or (C) or (2) of this section, if the right, interest, or power had not terminated until the decedent’s death; the amount included is the value of the property that would have been included under (1)(A), (B), or (C) or (2) of this section, if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of a person other than the decedent or the decedent’s estate, spouse, or surviving spouse; as used in this subparagraph, termination, with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in (1)(A) of this section, termination occurs when the power terminated by exercise or release, but not otherwise;
(B) a transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under (1)(D) of this section had the transfer not occurred; the amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent’s death to or for the benefit of a person other than the decedent’s estate or surviving spouse;
(C) a transfer of property, to the extent not otherwise
included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse; the amount included is the value of the property transferred to a person to the extent that the aggregate transfers to that person in either of the two years exceeded $10,000.

AS § 13.36.035. Court jurisdiction; choice of law

(a) The court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts, including trusts covered by (c) of this section. Except as provided in (c) and (d) of this section, proceedings that may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries of trusts. These include proceedings to

(1) appoint or remove a trustee;
(2) review trustees' fees and to review and settle interim or final accounts;
(3) ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, instruct trustees, and determine the existence or non-existence of any immunity, power, privilege, duty, or right; and
(4) release registration of a trust.

(b) Neither registration of a trust nor a proceeding under this section results in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistently with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the court as invoked by interested parties or as otherwise exercised as provided by law.

(c) A provision that the laws of this state govern the validity, construction, and administration of the trust and that the trust is subject to the jurisdiction of this state is valid, effective, and conclusive for the trust if

(1) some or all of the trust assets are deposited in this state and are being administered by a qualified person; in this paragraph, "deposited in this state" includes being held in a checking account, time deposit, certificate
of deposit, brokerage account, trust company fiduciary account, or other similar account or deposit that is located in this state;

(2) a trustee is a qualified person who is designated as a trustee under the governing instrument or by a court having jurisdiction over the trust;

(3) the powers of the trustee identified under (2) of this subsection include or are limited to
   (A) maintaining records for the trust on an exclusive basis or a nonexclusive basis; and
   (B) preparing or arranging for the preparation of, on an exclusive basis or a nonexclusive basis, an income tax return that must be filed by the trust; and

(4) part or all of the administration occurs in this state, including physically maintaining trust records in this state.

(d) The validity, construction, and administration of a trust with a state jurisdiction provision are determined by the laws of this state, including the
   (1) capacity of the settlor;
   (2) powers, obligations, liabilities, and rights of the trustees and the appointment and removal of the trustees; and
   (3) existence and extent of powers, conferred or retained, including a trustee's discretionary powers, the powers retained by a beneficiary of the trust, and the validity of the exercise of a power.

AS § 13.36.390. Definitions

In this chapter,

(1) "qualified person" means
   (A) an individual who, except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause shown, resides in this state, whose true and permanent home is in this state, who does not have a present intention of moving from this state, and who has the intention of returning to this state when away;
   (B) a trust company that is organized under AS 06.25 and that has its principal place of business in this state; or
   (C) a bank that is organized under AS 06.05, or a national banking association that is organized under 12
U.S.C. 21—216d, if the bank or national banking association possesses and exercises trust powers and has its principal place of business in this state;

(2) "settlor" means a person who transfers property in trust and includes a person who furnishes the property transferred to a trust even if the trust is created by another person.

(3) "state jurisdiction provision" means a provision that the laws of this state govern the validity, construction, and administration of a trust and that the trust is subject to the jurisdiction of this state.

AS § 34.40.010. Invalidity generally

Except as provided in AS 34.40.110, a conveyance or assignment, in writing or otherwise, of an estate or interest in land, or in goods, or things in action, or of rents or profits issuing from them or a charge upon land, goods, or things in action, or upon the rents or profits from them, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, or a bond or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded is void.

AS § 34.40.110. Restricting transfers of trust interests

(a) A person who in writing transfers property in trust may provide that the interest of a beneficiary of the trust may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee. In this subsection,

(1) "property" includes real property, personal property, and interests in real or personal property;

(2) "transfer" means any form of transfer, including deed, conveyance, or assignment.

(b) If a trust contains a transfer restriction allowed under (a) of this section, the transfer restriction prevents a creditor existing when the trust is created, a person who subsequently becomes a creditor, or another person from satisfying a claim out of the beneficiary's interest in the trust, unless the

(1) transfer was intended in whole or in part to hinder, delay, or defraud creditors or other persons under AS 34.40.010;

(2) trust provides that the settlor may revoke or terminate all or part of the trust without the consent of a person who has a substantial beneficial interest in the trust.
and the interest would be adversely affected by the exercise of the power held by the settlor to revoke or terminate all or part of the trust; in this paragraph, "revoke or terminate" does not include a power to veto a distribution from the trust, a testamentary special power of appointment or similar power, or the right to receive a distribution of income, corpus, or both in the discretion of a person, including a trustee, other than the settlor;

(3) trust requires that all or a part of the trust's income or principal, or both, must be distributed to the settlor; or

(4) at the time of the transfer, the settlor is in default by 30 or more days of making a payment due under a child support judgment or order.

(c) The satisfaction of a claim under (b)(1)—(4) of this section is limited to that part of the trust to which (b)(1)—(4) of this section applies.

(d) A cause of action or claim for relief with respect to a fraudulent transfer under (b)(1) of this section, or under other law, is extinguished unless the action is brought as to a person who

(1) is a creditor when the trust is created, within the later of

(A) four years after the transfer is made; or

(B) one year after the transfer is or reasonably could have been discovered by the person;

or

(2) becomes a creditor subsequent to the transfer into trust, within four years after the transfer is made.

(e) If a trust contains a transfer restriction allowed under (a) of this section, the transfer restriction prevents a creditor existing when the trust is created, a person who subsequently becomes a creditor, or another person from asserting any cause of action or claim for relief against a trustee of the trust or against others involved in the preparation or funding of the trust for conspiracy to commit fraudulent conveyance, aiding and abetting a fraudulent conveyance, or participation in the trust transaction. The creditor and other person prevented from asserting a cause of action or claim for relief is limited to recourse against the trust assets and the settlor to the extent allowed under AS 34.40.010.

(f) In this section, "settlor" means a person who transfers real property, personal property, or an interest in real or personal property, in trust.