Third Party Trusts in Divorce

Is a Beneficiary's Interest Marital Property?

Before undertaking this study of how equitable distribution (property settlement) in divorce interacts with the law that governs spendthrift trusts, it is worth noting that some benefactors are fond of a beneficiary's spouse (some more so than they are of the beneficiary). Yet few estate plans benefit the in-law spouse of a beneficiary (the forgotten beneficiary), even if the marriage ends at the beneficiary's death rather than in divorce. Planners have the tools to provide for the "Jackie Kennedy Onassis" issue, but few plans do. So, in presuming for discussion purposes that trust settlors do not want the ex in-law spouse of a beneficiary to take their property, this material just reflects this reality. This discussion makes no assumptions regarding the merits, ethics, or political correctness of planning to minimize the rights of predatory *or* deserving in-laws. The goal is just to present the facts.

As you will discover, just summarizing the law is daunting – because this is an uncertain and changing arena. It also is distressing – because a student of trust law with an awareness of the spendthrift trust battles, particularly regarding exception creditors (current or former spouses, and children) may be unaware that beneficial interests in trust have been subjected to an entirely different inroad. You could confirm this notion by searching in vain for reports of major cases cited herein in mainstream trust law (or estate planning) treatises – these authorities are off the radar of trust law specialists. As a result, some planners may be unaware of drafting recommendations that may be appropriate for a client who wishes to preclude a beneficiary's divorce from having an impact on the client's estate plan. Turn to page 18 to review those drafting recommendations.

The Law Today

To minimize confusion, let's define the scope of this inquiry and summarize the rules as they are today, as opposed to what many of us remember about the law of spendthrift trusts:

1. Self-settled trusts present a separate category of issues, which are not the focus of this discussion. For the same reason, whether domestic asset protection trusts work also is not our subject. See, e.g., Berlinger v. Casselberry, 2013 WL 6212023 (Fla. Dist. Ct. App. 2013), for one state's treatment of facts involving both third-party and self-settled trusts. Our exclusive concern is third-party trusts.
    a. Current law tends to regard inherited wealth as subject to equitable distribution, the same as any other. That notion is addressed in the context of third-party trusts, below.
    b. The result usually is the same as if a self-settled trust did not exist, which means that trust corpus received by gift, devise, bequest, or inheritance and that would not be subject to equitable distribution under state law does not lose its character just because the recipient placed it in a self-settled trust. As we're going to learn, however, in many states that property is subject to equitable distribution.
2. The ability to reach a self-settled trust in calculating a surviving spouse's elective share at death poses issues that, again, are not our focus here. But the equities that apply in the context of dissolution inter vivos and at death are similar. For a full exegesis on the topic of planning to minimize the elective share consult Cline,

Pennell, & Turnipseed, Spouse's Elective Share, 841 Estates, Gifts, and Trusts Portfolio (Tax Mgmt. 2012), which reveals easy methods to minimize the rights of a surviving spouse, even in the most efficient augmented probate estate system.

a. Note that the most recent version of the Uniform Probate Code (UPC) augmented probate estate concept would calculate the elective share of a decedent's surviving spouse by considering assets held in any trust over which the decedent had a general power of appointment – even if the power was not exercised. Thus, if insulation of family wealth from the claim of an in-law spouse of a beneficiary is important, then the plan should provide less entitlement than the grant of a general power of appointment. For basis improvement purposes, some planners give trust beneficiaries formula general powers to appoint assets to the extent that the power will not cause the beneficiary's estate to exceed the beneficiary's applicable exclusion amount. This may inadvertently expose the wealth to claims of that beneficiary's spouse (or other predators).

b. It *ought* to be just as easy to protect wealth from the claims of the in-law spouse of a beneficiary as it is to protect your own wealth from your own spouse, either in divorce or at death. Yet property divisions in divorce and at death differ. It is more difficult to insulate wealth in divorce than it is at death, because the property division in divorce rules virtually everywhere in the United States operate very much like the community property rules. See Raymond C. O'Brien, Integrating Marital Property into a Spouse's Elective Share, 59 Cath. U.L. Rev. 617 (2010). Many observers conclude that the community property system is more fair, and more efficient, and that the rules applicable to marital dissolution are preferable to the rules that apply at death. But they don't adequately address the issue confronted here. And they don't uniformly protect separate (nonmarital) property.

3. The principle issue for consideration here is like the creation of a third-party special needs trust (SNT) – and whether a predator (Medicaid in the SNT context, or a spouse or former spouse in this situation) may reach the assets of a trust that was created for a beneficiary by a third party. For these purposes, imagine that Parent (P) created the trust for an adult, married child (C) and wishes to preclude C's spouse (S) from ever reaching any of the trust assets in the event that C and S divorce.

a. The traditional rule in the majority of states was that property acquired during a marriage by gift, devise, bequest, or inheritance is not marital property. That rule *ought* to mean that S is not entitled to any portion of a trust created by P for C. But this notion is undergoing change as state laws chip away at that traditional principle.

b. Even if the traditional rule still applies, in many dissolution cases an expectancy or inheritance may be *considered* when a court divides or distributes marital property. The beneficial interest is not itself regarded as marital property, but it is regarded as an economic circumstance that the court may consider when determining an equitable distribution of the marital property. This concept is widespread, and is one step shy of counting that beneficial interest as marital property. See the discussion of this concept beginning at page 12.

c. Trust monies distributed to a beneficiary may become marital property. Either via commingling or as an addition to the spouses' marital property. Those

distributed amounts are not our concern. Instead, the assumption in this discussion is that the trust corpus remains inside the trust.

d. Trust income may be a different story, however. The standard rule is that income from nonmarital property remains nonmarital property. But some states regard income from nonmarital property to be marital property, which may come as a surprise. W. Michael Wiist, Trust Income: Separate or Community Property?, 51 Baylor L. Rev. 1149, 1153 (1999), addresses this from a community property perspective, suggesting that: "Texas law is unsettled as to the marital property character of income from trusts. Texas authority exists that supports the characterization of trust income as separate property. Texas authority also exists that supports the characterization of trust income as community property. "

e. The law in other states is no more certain. In some states (e.g., Texas and Missouri) the income from separate/nonmarital property (including trust income) is community/marital property. In some cases an important distinction is whether the beneficiary only has an income interest, as opposed to a present or future interest in the trust property (the income from which is marital property).

f. Shari Motro, Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property, 102 Nw. U.L. Rev. 1623 (2008) (hereafter Motro), argues that income from nonmarital property should be marital property because it is perverse that a spouse who inherits wealth can keep unearned income apart, but the spouse must share earned income. This ignores the question whether the donor's intent to insulate family wealth should prevail, and is similar to the traditional debate about spendthrift trust protection of inherited wealth while self-generated monies are subject to creditor claims.

g. The developing trend is for courts to simply ignore the marital/nonmarital distinction and determine an equitable distribution in dissolution of marriage with all of each spouse's wealth in mind, including inherited wealth, interests in a trust, and income from a trust interest. A series of planning responses are listed beginning at page 18 below, as ways to minimize a court's ability to capture trust value in an equitable distribution.

4. A related issue is the authority of a divorce court to subpoena the estate plan and financial statement of a living potential benefactor (e.g. P), the natural object of whose bounty (e.g. C) is being divorced. These courts seek to consider wealth that C someday *might* inherit. This informs P considering the same planning that would suffice in item 3 – after P is deceased – to preclude S (C's spouse or former spouse) from ever reaching that wealth.

   a. Silent trust issues (e.g., under Uniform Trust Code (UTC) §813) are relevant in these cases, because C may not know that a trust even exists for C's benefit. And S may be on a fishing expedition to obtain information that C otherwise is not entitled to know – for example, about the existence or size of a trust for C's benefit, or about P's wealth in general.

   b. In this context it is useful to distinguish a will from a trust – the notion being that no one is heir to the living and that a will cannot be relied upon as an expectancy, but a trust (especially if it is irrevocable) may be more certain for computation or reliance purposes.

c. Courts making equitable distributions consider each spouse's potential inheritances as additional resources in determining how to divide marital property. The hardest issue appears to be statements like the following: "there is generally no error where a court considers a future or anticipated inheritance when distributing property. The [state marital dissolution act] itself requires a court to consider nonmarital property, even where such property will not be received until some future point, in assessing . . . the 'relevant economic circumstances of each [spouse],' their relative 'age, health, station, occupation, amount and sources of income,' and 'the reasonable opportunity of each spouse for future acquisition of capital assets and income'." In re Marriage of Benz, 518 N.E.2d 1316, 1324 (Ill. App. Ct. 1988). This "consideration" is the issue to which we now direct deeper attention.

Tannen

One aspect of this topic is illustrated by the treatment of a married beneficiary's equitable trust interest in Tannen v. Tannen, 3 A.3d 1229 (N.J. Sup. Ct. 2010), aff'd per curium, 31 A.3d 621 (N.J. 2011). *Tannen* surprised trust lawyers who were not familiar with the developing law regarding the treatment of a trust beneficiary's equitable interest as part of a divorce action. Yet *Tannen* is not unique, or even path breaking. Indeed, it is a good example of this "one-factor-to-consider" concept. In this respect, only the following facts are significant:

- *Tannen* is a divorce *alimony* case (not an equitable distribution of assets). As such the beneficiary's interest in the trust was never regarded as marital property, nor was it addressed in an equitable distribution of assets.
- The trust authorized discretionary distributions of income and corpus for the beneficiary's "health, support, maintenance, education, and general welfare," making it a "discretionary support trust" (see Restatement (Third) of Trusts §60 and UTC §504). Only the beneficiary's income interest was at issue, and only for purposes of determining the amount of alimony that the court would order the beneficiary's ex-husband to pay.
- The trial court ordered the trust to make certain distributions to the beneficiary, which it then treated as imputed income to her. On appeal the court reversed, holding instead that the lower court should only "consider the historical record of payments made by the [trust] on [her] behalf . . . [i]n determining the 'actual need[s]' . . . for which she was entitled to support . . . ."

The availability of trust distributions was just one "economic circumstance" — a factor to consider — in measuring the beneficiary's needs for purposes of imposing an alimony obligation. This is a common state court inquiry.

Several other facts in *Tannen* are interesting because the courts did not properly evaluate several spendthrift trust aspects of the case.

- The case involved an irrevocable inter vivos trust created by the beneficiary's parents for her sole benefit, of which she and her parents were cotrustees.
- The trust was partly self-settled, because the beneficiary transferred a dwelling into the trust (which her father originally gave to her). She and her two children continued to reside in that house rent free, and the trust (as the owner) paid the real estate taxes, half of a housekeeper's salary, and made improvements to the property.

- The trust's spendthrift restriction only precluded the beneficiary from acting "without first procuring the written consent of the Trustees." Thus, it was not a full-fledged spendthrift restriction.

As the discussion below reveals, the final result in *Tannen* was not dramatic, especially considering these additional facts. But it is indicative of changes that are occurring in the context of third-party trust interests and a beneficiary's divorce.

The New Jersey Bar Association participated as amicus curiae in *Tannen* at the New Jersey Supreme Court level, but that court wrote no opinion and the Bar's involvement did not rectify several errors regarding trust law made by the lower courts, including:

- The appellate court's synopsis of the case stated that the "wife's beneficial interest in discretionary support trust was not an asset held by her, so it was improper to impute income from the trust to her in determining husband's alimony obligation." Trust lawyers know that a beneficiary's equitable trust interest *is* an asset – a property interest – that the beneficiary may enforce.
- A more accurate statement in the appellate court's full opinion is that "it is not appropriate to consider a party's beneficial interest in a discretionary trust as an asset for purposes of alimony or child support because the spouse has no current right to the fund." The court apparently meant only that it was error for the lower court to order trust distributions that the beneficiary herself could not have demanded from this discretionary trust, and that fixing a specific distribution amount in making the alimony determination was improper. If that is an accurate summary of what the court meant, then it would be consistent with traditional spendthrift trust principles – which preclude acceleration of a beneficial interest.
- The appellate court did not distinguish between creditor rights in a self-settled trust vis-à-vis the beneficiary's own contribution and her income interest in trust corpus that her parents contributed to the trust. Citing Restatement (Second) of Trusts §155, the court held that the "limited nature of the beneficiary's rights serves to limit the rights of any 'transferee or creditor' of the beneficiary who similarly '[could] not compel the trustee to pay anything to him'." This is error in a self-settled trust, as to which creditors may reach the full amount that the trustees *could* distribute, even if they chose not to pay any amounts to the settlor. The court also did not consider the fact that the daughter was one of the trustees, or that the trust's spendthrift provision was abnormal.
- As a result of this self-settled trust error, it also was wrong for the appellate court to opine that the lower court "erred in ordering the trust to . . . continue to pay for taxes and expenses on the [dwelling]." The dwelling was a trust-owned asset, as to which the lower court was right to hold that the trust should pay carrying charges.

Despite these missteps, *Tannen* is informative for several reasons.

The first was many observers' concern that the lower court's decision might mean that third-party-trust assets might be treated as marital property in an equitable distribution case. *Tannen* did not create a legitimate fear in this respect because it did not involve equitable distribution. But it also would not have been the first such case to treat beneficial interests in a third-party-trust as marital property in an equitable distribution. Indeed, such cases have been decided for many years, in a variety of ways that are explained further below.

A second concern was that the lower court improperly ordered the trustees to make certain mandatory distributions to the beneficiary, which it then considered in setting the

alimony award. This raised doubts about the ability to insulate family wealth from a divorce court's consideration. Reversal of that order was favorable to those who wish to protect trust property from dissipation in divorce. But the issue is larger than revealed in *Tannen*, because (also as revealed below) courts in other states already have made the feared inroad on the ability to protect family wealth from an in-law's claims in divorce.

Finally, of broad interest is the appellate court's rejection of a change made in Restatement (Third) of Trusts §60 and UTC §504, which the court correctly quoted as "eliminat[ing] the distinction between discretionary and support trust[s], treating the latter as a discretionary trust with a standard" and then saying that "[t]hese changes reflect recognition that a beneficiary of a discretionary trust has an enforceable interest in the benefits of the trust, even if the trustees are accorded the broadest discretion." This is a correct statement, but it does not mean what the courts in *Tannen* assumed.

The lower court in *Tannen* determined that the trust terms "support and maintenance and the language of the trust" meant that the trustee must distribute amounts needed to maintain the beneficiary's lifestyle, and then that "benefits from the trust must be first considered before an alimony obligation is determined." It further held that any failure to make such distributions would constitute "an abuse of discretion," such that the court could order the trustees to make distributions. Notwithstanding that the trust expressly stated that "the beneficiary shall not be permitted, under any circumstances, to compel distributions of income and/or principal," and notwithstanding the following Comment to UTC §504, which said about its elimination of the distinction between discretionary and support trusts that:

> the rights of a creditor are the same whether the distribution standard is discretionary, subject to a standard, or both. Other than a claim by a child, spouse or former spouse, a beneficiary's creditor may not reach the beneficiary's interest. Eliminating this distinction affects only the rights of creditors. The [e]ffect of this change is limited to the rights of creditors. It does not affect the rights of a beneficiary to compel a distribution.

Restatement (Third) of Trusts §60 Comment *a* is to the same effect. Meaning that the discretionary support trust change actually had no relevance in *Tannen*. But it led the appellate court to decline to embrace the Restatement Third, and the whole story fuels fears about the reach of a divorce court's jurisdiction involving spendthrift trusts for married beneficiaries. That is the larger subject of the discussion below. But first, a short digression into equitable distribution in divorce.

A Divorce Primer

Chicago-based estate planning expert Tom Abendroth wrote materials for a February 2013 ALI CLE program that are immensely useful in corralling the changing law that is summarized here. Another extensively footnoted resource for this developing topic is Chorney, Interests in Trust in Divorce: What the Settlor Giveth the Divorce Court May Taketh Away, 40 Heckerling Inst. Est. Plan. Ch. 16 (2006) (hereafter Chorney). Even more useful (but generally not as easily accessed) is Chorney, TRUSTS IN Divorce PROPERTY DIVISIONS (CLE in Colorado 2d ed. 2014). Both authors provide excellent resources for further study, or to mine authority that may be useful in briefing a case.

Contrary to the alimony or support sorts of issues showcased in *Tannen*, the following concepts from Chorney (the Heckerling version) may help estate planners to understand what divorce courts are doing in equitable distributions. For example, he states in

¶1600.1 that "enabling statutes" give courts authority to transfer property in making equitable distribution, which is the law in all noncommunity property states. These come in two flavors under Uniform Marriage and Divorce Act §307: (1) an "all property" approach allows a divorce court to include all property owned by either spouse, including property acquired before the marriage and property acquired while married by gift, devise, bequest, or inheritance, and (2) categories of marital and nonmarital (community and separate) property, with local variations in terms of rights to income and appreciation during the course of the marriage.

Motro describes Chorney's "all property" approach as the "kitchen sink" option, in which the divorce court considers all the property and property interests of both spouses in making an equitable distribution in divorce. It is with respect to trust interests that these equitable distribution changes are most relevant to estate planners. Chorney at ¶1601 states that

> some courts have held that an interest in trust is not considered property until the interest becomes possessory (the beneficiary has received or has a present right to withdraw the trust property). Other courts have determined that certain remainder interests constitute property in situations where the trust instrument requires an outright distribution to a beneficiary during the beneficiary's life. Yet other decisions treat interests in trusts as divisible, regardless of whether the interest is vested, unvested, or contingent.

Chorney's third category creates the greatest angst among planners. In those states, holding property in a dynasty trust will not protect it from an in-law spouse of a beneficiary.

Also disturbing is what Chorney further notes in ¶1601.2, that courts and litigants mess up future interest law in a severe manner, thinking (for example) that there is a substantive difference between an interest that is vested subject to complete defeasance and a contingent remainder. Chorney cites one case in which the court concluded that the husband had a "vested interest in the trust . . . [a]lthough contingent in nature." Whatever the court thought that means, it is consistent with the reality that the divorce bar and the family law courts are not facile with future interests in trust.

Although it is risky to make generalizations about the use of lingo in this arena, in the context of marital dissolution and equitable distribution of property "vested" often seems to mean the antithesis of a mere expectancy – the donor of which is still living – or a trust interest that is revocable or subject to a power of appointment. See B. Turner, Equit. Distrib. Prop. §6:91 (3d ed. 2013) (hereafter Turner), which states that "the mere possibility of a future inheritance or gift does not constitute divisible *property* . . . as the expecting spouse has no legally enforceable right to receive property" (emphasis in original). On the other hand, a disposition that cannot be changed might be regarded as "vested," even though it is contingent on an event or condition (such as survivorship of a prior interest holder) or subject to divestment. Meanwhile, a mere expectancy may be considered under state laws that regard the likelihood of acquiring future assets as a factor to weigh in making an evaluation of each spouse's overall financial resources. See, e.g., the discussion beginning at page 13 of state laws that refer to the "opportunity for future acquisition of capital assets and income."

These examples will reveal that estate and trust drafters cannot assume that the fine distinctions and tight or precise definitions known to property transfer specialists will be recognized or respected in equitable distribution cases. According to Turner at §6:94:

"There is no reason why the law of equitable distribution should be burdened with the accumulated baggage of years of case law under the law of future interests. Property division upon divorce is a uniquely equitable setting, and it places little importance upon rules of law (most significantly legal title) which are controlling in other contexts." Oh!

The decision that may have gotten Denver based estate planner Chorney exercised about this topic was *In re* Marriage of Balanson, 25 P.3d 28 (Colo. 2001), in which the Colorado Supreme Court considered whether a wife's remainder in a joint trust that her parents created (and which became irrevocable when the first parent – her mother – died) was marital property even though her father – as the surviving settlor and life tenant – could receive corpus distributions for the balance of his overlife. The courts miscast the wife's interest as a vested remainder even though she had to survive her father in order to take. The court referenced a prior case in which it classified a similar interest, saying: "a present fixed right to future enjoyment gives rise to a vested interest in property, even if that interest is subject to complete divestment or defeasance." Really?

These statements are *so* wrong, and yet this is the reality in the equitable distribution arena. To a future interest maven, these statements confirm that these cases must address definitional and communication issues. To further illustrate that these courts don't speak the same future interests language, here is the *Balanson* court's full quote regarding a prior case:

> By way of comparison, we held . . . that a beneficiary's interest in a discretionary trust was not property, but merely an expectancy. The issue there was whether the wife's interest in a testamentary trust created by the will of the wife's mother constituted marital property. In that case, the trustees had uncontrolled discretion to distribute income and principal from the trust to the wife's father, the wife, or her descendants, for expenses deemed necessary for their health, welfare, comfort, support, maintenance and education. Upon the father's death, the trust proceeds were to be distributed to the wife's descendants, if any, or otherwise to the mother's heirs. After reviewing the relevant case law in Colorado discussing the issue as to whether an interest constitutes "property," we concluded that one's enforceable contractual right gives rise to a property interest, while an unenforceable interest constitutes a mere expectancy. Because we found that the trust in that case was completely discretionary, we determined that the wife had no contractual or enforceable right to income or principal from the trust. Therefore, we concluded that the wife's interest in the discretionary trust was not property, and that the income received by the wife from the trust was more properly characterized as a "gift" under the Act.
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> In the present case, Wife has a future, vested interest not within the discretion of the trustee to withhold. Such interests are distinguishable from interests in discretionary trusts because although the value of such interests may be uncertain at the time of the dissolution of marriage, they nonetheless constitute property because they are certain, fixed interests subject only to the condition of survivorship.

In re Marriage of Beadle, 968 P.2d 698 (Mont. 1998), held that one beneficiary "was sure to inherit so long as he did not predecease his mother or she did not deplete the trust corpus. Therefore, we labeled [his] interest in the testamentary trust a vested remainder subject to divestment." The same court, however, regarded a remainder that was subject to a power of appointment as contingent – not vested subject to divestment by exercise of the power. Causing Chorney, at ¶1601.3[C][2], to raise the question whether any power

of appointment should suffice to regard a beneficiary's interest as subject to total divestment. Although the answer is clear to any trust lawyer, apparently it is debatable within the divorce bar.

Labels aside, valuation of an interest in trust is crucial, and matrimonial lawyers and divorce courts lack experience in the valuation of temporal interests. Among the factors that might be considered, Chorney ¶1603.1 lists

- any appropriate discount rate (reflecting interest or yield assumptions),
- the proper life expectancy for any beneficiary of a present interest and the likelihood that a remainder beneficiary may survive termination of that prior interest,
- any power in the trustee to make discretionary distributions to the present interest holder (and potentially the identity of the trustee), that beneficiary's needs, and the standard involved,
- the existence of any five-or-five power in that present interest beneficiary,
- fiduciary fees, and
- income or wealth transfer tax exposure.

Tinkering with various of these factors could cause the value of a trust interest to be de minimis in a beneficiary's future divorce.

In that respect, Abendroth states that most estate plans do not anticipate divorce, and he opines that "the possibility of divorce" should not be the tail that wags the estate or financial planning dog. Despite that sage advice, the discussion beginning at page 18 considers whether easy, traditional, and acceptable planning techniques should be routine when crafting trusts that will be held for descendants whose marital failures cannot easily be predicted. Which may mean in *any* trust that may continue for several generations.

Abendroth also correctly cautions that the applicable rules are state-specific, and that generalized legal concepts fail in some cases. This particularly is true because the law is fluid, undergoing changes that make it difficult to predict what the rules may be when a beneficiary's divorce occurs, perhaps decades in the future. It also is a challenge because of the conflict of laws issue, which is highlighted beginning at page 13 with an illustration of several state laws that are very "progressive" in this equitable distribution context. So the challenge today is to formulate suggested approaches that are most likely to protect family wealth from diversion to the in-law spouse of a beneficiary when that beneficiary goes through a divorce, all without too significant an impact on the planning that a client otherwise would prefer.

Spousal Rights

Another element that is disturbing to traditional estate planners is that historical notions regarding the rights of predators (such as a former spouse) have changed, in terms of dealing with divorce-related obligations – such as support, maintenance, alimony, and child support – and property interests that are subject to distribution in a marital dissolution. For example, marital and parental obligations may be informed by the relative wealth of spouses (rather than merely need), and by a collapse of the traditional distinction between marital and nonmarital property.

The most important traditional concept that some courts ignore today is that property is nonmarital if it was acquired prior to a marriage or if it was received by one spouse during the marriage via gift, devise, bequest, or inheritance. By tradition neither was subject to division in dissolution of the marriage. Nevertheless, in some states today the

nonmarital property of one spouse may be subject to distribution to the owner's spouse in the division of their aggregate properties in divorce. In substance, this resembles the augmented probate estate concept, which can apply in the context of calculating and then satisfying the elective share of a surviving spouse, when a marriage terminates at death in a noncommunity property jurisdiction.

In various ways, state law has confused traditional distinctions between marital and nonmarital property, such that "commingling" or transmutation may occur even if traditional constructs are honored. In some cases this tainting of the character of property occurs by inadvertence, such as when a spouse mingles marital and nonmarital property in a way that makes tracing impossible. For example, commingling might occur because property or income from property (including income from a beneficial interest in trust) is contributed to the marriage or is used for marital purposes (such as to support the spouses or their children).

In other cases this melding of concepts occurs because state law holds that income from nonmarital property is marital property, or that any increase in the value of nonmarital property is marital property to the extent it reflects contributions or efforts attributable to the owner's spouse. Those contributions may entitle the owner's spouse to reimbursement, or they may create an ownership interest, depending on state law. These nearly unpredictable results may flow from particular facts and circumstances, and they may reflect a judge's view of the equities of a given situation. Remember: property division in divorce is labeled "equitable" distribution for good reason.

Additional confusion of the law and lack of predictability of result is attributable to the fact that some states today regard nonmarital property as subject to equitable distribution, without more. Others states purport to respect the nonmarital property of one spouse but, in consideration of it, award the other spouse a larger share of the couple's marital property. In essence, this merely allows one spouse to retain title to nonmarital property, but the ultimate distribution of their aggregate wealth constitutes a division of both marital and nonmarital property, as if all of the wealth was commingled.

A further reality is that either or both of two things may occur at the same time in a divorce context. Carolyn J. Frantz & Hanoch Dagan, Properties of Marriage, 104 COLUM. L. REV. 75, 99-100 (2004), describe

> [p]roperty division [as] backward-looking . . . while alimony reflects the law's concern with the post-divorce financial situation of the parties, their future needs, and their prospective abilities. Concerns about future financial disparity (substantive alimony) may be reflected by formal property division – for instance, through granting complete ownership of the family home to the spouse with lower earning potential.

Thus, drafters must think about state law in two ways, because it may regard a trust interest as "property" for dissolution/division or as a factor to consider in setting future obligations (alimony). It also helps to explain the two different approaches we see in cases in which a property interest in a trust may generate problems in either of those two contexts – equitable distribution and alimony. And drafting solutions may not work the same in each context

A further but much less common complication is that some state laws impose obligations on a spouse who owns significant nonmarital property if the other spouse is less wealthy or if income from nonmarital property financed the couple's lifestyle while married. The policy in these states is that each spouse is entitled to continue to enjoy the

same standard of living following the divorce as they enjoyed while they were married, as financed by their aggregate resources. So, having married wealth, and having learned to live the life that it supports, may entitle a former in-law spouse of a trust beneficiary to continue to enjoy the life style they enjoyed while married, as supported by the trust, even after they divorce. Curiously, the same is not true after a death, as the Jackie Kennedy Onassis phenomenon attests.

In each of these circumstances the nonmarital property of one spouse may affect the equitable distribution of property as between the spouses, and it may influence an award of alimony or support.

For purposes of this discussion the significant question is how a court that is reallocating property will treat a beneficiary's equitable interest in a third-party trust, including a contingent future interest that may never vest in possession. In some cases it is apparent that the court either does not understand trust law or future interests, or it failed to apply generally accepted principles for the valuation of a beneficial interest.

Spendthrift Trust Principles

Court opinions confirm that a traditional assumption is failing. Estate planners are accustomed to the notion that property left to a beneficiary outright may not be protected, but holding the same property in a third-party spendthrift trust for that beneficiary will insulate the property. The following discussion of spendthrift trust principles reveals that the historic treatment of spendthrift trusts has eroded to the point that simply creating a trust with a spendthrift provision is no guarantee that the property will be insulated from spousal or child support claims in or following a divorce. And it may not protect the wealth in an equitable distribution either.

To put this in perspective, here is what Abendroth states about the *historical* protection of spendthrift trusts:

> Absent extraordinary circumstances, [spendthrift] protection will prevent a divorcing spouse from claiming trust assets to satisfy divorce obligations. Moreover, the trust property cannot be subject to division with the spouse, since the beneficiary spouse does not own it and, if it is a spendthrift trust, cannot transfer it. The trust interest is even better protected than separate property of the spouse.
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> For a wealthy family, long-term trusts for the children can provide much of the protection that otherwise would need to be accomplished through a prenuptial agreement. It is protection that a child cannot provide for himself or herself, except possibly through careful use of offshore trusts or trusts set up in domestic asset protection jurisdictions . . . .

This assessment reflects traditional common law principles that Abendroth admits "the development of the law in some states has significantly weakened . . . ." If anything, that is an understatement, and the future trend is to diminish or abandon entirely such spendthrift protections.

The ability created by the spendthrift provision in §503 of the UTC to reach a beneficial interest is not a major concern because it typically does not allow acceleration or commutation – these claimants simply garnish whatever the beneficiary is entitled to receive, as the beneficiary is entitled to receive distributions. In a discretionary trust these claimants' only recourse is to complain that the trustee is not properly exercising its discretion. Under §504(c) a child, spouse, or former spouse may seek a court ordered

distribution if the trustee "has not complied with a standard of distribution or has abused a discretion," in which case the court "shall direct the trustee to pay . . . such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion." Meaning that there can be no acceleration – only an order to turn on the flow of that which should have been distributed in the proper exercise of the trustee's discretion.

Courts in non-UTC states also typically do not invalidate spendthrift trusts, or accelerate distribution of trust assets to a beneficiary spouse (that then can be reached by the in-law spouse of that beneficiary). But courts in many states *will* count trust property as belonging to the beneficiary spouse and order distribution of an *equalizing* amount of the spouses' marital property to the in-law spouse of that beneficiary. These courts respect the spendthrift provision in theory, but the effect is nearly to the contrary.

Note that a court also may impose an obligation on the beneficiary spouse to make a distribution to that beneficiary's spouse if or when trust assets are received by the beneficiary in the future. This always was possible, because spendthrift provisions only delay when a beneficiary's creditors may reach trust assets in satisfaction of creditor claims. The law always has provided that trust assets may be reached once they are distributed out of a trust, and garnishment orders may require the trustee to distribute directly to the creditor once a distribution is required.

Ordering a deferred distribution in this way is preferable to a court attempting to value a beneficiary's contingent future interest and then, based on that value, currently award assets to the in-law spouse of that beneficiary. Basing a current award on what may prove to be a wrong estimate of future value is more problematic than a delayed distribution award. This especially is true if a contingency (such as survivorship) means that the beneficiary spouse may never receive a trust distribution. See, e.g., Trowbridge v. Trowbridge, 114 N.W.2d 129 (Wis. 1962). Or if the rights of a preceding beneficiary to principal distributions may reduce or eliminate the expected value of the trust. See, e.g. Zuger v. Zuger, 563 N.W.2d 804 (N.D. 1997).

Similarly, a trust interest may be subject to divestment by exercise of a power of appointment held by another trust beneficiary. Such was the case in S.L. v. R.L. 774 N.E.2d 1179 (Mass. Ct. App. 2002), in which a spouse's remainder interest in a marital deduction trust was subject to a general power of appointment held by the spouse's mother. And, in D.L. v. G.L. 811 N.E.2d 1013 (Mass. Ct. App. 2004), one trust granted the spouse's father a nongeneral power of appointment, with the same consequence. Nevertheless, as discussed next below, each trust was counted as an opportunity for future acquisition of capital or income, and thus was a factor considered in the equitable distribution determination.

In addition, the *S.L.* court made an "if and when received" distribution of the spouse's trust interest, notwithstanding the court stating that such a disposition generally is disfavored, holding that it "is appropriate where warranted by the circumstances, such as where there are insufficient assets available at the time of divorce to divide the present value of the future interest without causing undue hardship to either spouse." As such, the deferred distribution may be preferable to the trust beneficiary, but still it is an inroad that clients may wish to preclude.

State Law Illustrations

The following illustrations confirm that the law at this intersection between equitable distribution and estate planning is a mess, which makes planning to protect a client's property especially challenging. The law also is fluid, and the current direction is not favorable to clients who wish to preserve family wealth.

In re Marriage of Jannsen, 2013 Ill. App. Unpub. LEXIS 786, characterized the issue regarding a beneficiary's expectancy this way:

> "Potential inheritances are not property which can be valued and awarded to a spouse, although they can be given some consideration in determining property distribution." . . . In other words, the potential inheritance is not a present asset with value but may be considered in examining a party's overall financial resources.

This is a relatively benign approach, compared to that in Massachusetts, which is at the forefront of a trend that may make the following extended summary useful (in terms of what to expect in other states in the future). Similar to the Illinois law in *Jannsen*, Massachusetts G.L. c. 208, §34 requires a court to consider any "opportunity for future acquisition of capital assets and income" when dividing the wealth of divorcing spouses – and not just when determining what alimony to award. This is a critical distinction – considering a potential inheritance to determine ongoing support or alimony entitlements is one thing, allowed in many jurisdictions, but Illinois and Massachusetts courts are not limited in this respect. Massachusetts goes farther, however. Here is what their statute provides:

> Upon divorce . . . the court . . . may make a judgment for either of the parties to pay alimony to the other . . . . In addition . . . the court may assign to either husband or wife all or any part of the estate of the other . . . . In fixing the nature and value of the property, if any, to be so assigned, the court . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony, if any, awarded . . . . The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates . . . .

Here is how this provision is explained by the Massachusetts Divorce Law Practice Manual:

> §8.3.1: G.L. c. 208, §34 states that "[u]pon divorce . . . the court may assign to either husband or wife all or any part of the estate of the other." The . . . court may assign property to either party, regardless of whose name is on the title [and] property subject to negotiation and division is not limited to property acquired during the marriage, but includes all property, "whenever and however acquired."
>
> . . .
>
> §8.3.6: Gifted assets acquired during the marriage by one spouse can be ordered transferred to the other spouse upon divorce. Vested inheritances may be assigned upon divorce.
>
> A mere expectancy under a revocable trust or will is not a property interest subject to division upon divorce. [But] . . . the court may consider such expected

> inheritance under §34 as an opportunity for future acquisition of capital assets and income in determining what disposition to make of the property that is subject to division. . . .
>
> . . .
>
> §29.10.3: Although trust assets which are not subject to general powers of appointment in a beneficiary are not reachable by the creditors of a beneficiary . . . it may still be part of the marital estate subject to equitable division under G.L. c. 208, §34.
>
> In Lauricella v. Lauricella, 565 N.E.2d 436 (Mass. 1991), the Supreme Judicial Court analyzed the interest of a husband in a trust in real estate established by his father which (1) gave the beneficiaries no power to require partition or distribution of trust assets; and (2) contained a spendthrift clause that purported to prohibit alienation or anticipation of a beneficiary's interest in the trust. The probate judge had reasoned that the father's trust was not a marital asset because this trust had nothing to do with the marriage: the husband was neither settlor nor the trustee, and the trust could be amended to eliminate the husband's beneficial interest. But the Supreme Judicial Court disagreed, concluding that the husband's interest in the trust was includable in the marital estate subject to equitable division under G.L. c. 208, §34. Although the husband's interest was subject to divestment and contingent upon his surviving until the termination of the trust, the *Lauricella* court noted that the husband had a present, enforceable, equitable right to the use of the trust property for his benefit, as well as a vested right to receive his share of the trust property upon termination of the trust according to its terms.
>
> *Lauricella* held that: "The husband's interest is unlike a mere expectancy of the type that this court has held to be outside of the divisible estate under §34." Moreover, "[t]he fact that valuation of the interest may be difficult does not alter its character as a divisible asset, . . . nor does its inalienability change its character as divisible."
>
> Trust property is thus vulnerable to equitable division under G.L. c. 208, §34 even if it is not subject to a spouse's general power of appointment and even if a child or spouse of a trust beneficiary is ultimately not an exception creditor able to pierce a spendthrift trust under Massachusetts law. "When the future acquisition of assets is fairly certain, and current valuation possible, the assets may be considered for assignment under §34." Although the . . . court requires . . . that current valuation be possible, such valuation need not be easy. It need not be "susceptible of precise calculation" to be divisible under §34.
>
> Thus, trust property is includible in the marital estate subject to equitable division under G.L. c. 208, §34 if the beneficiary's likelihood of receiving his interest in the trust is not "too remote or speculative for inclusion within the estate."
>
> Note too that, even if a beneficiary's interest in the trust is too remote or speculative for inclusion within the marital estate of the beneficiary in divorce, it is nevertheless appropriate to consider his or her beneficial interest "under the §34 criterion of 'opportunity of each [spouse] for future acquisition of capital assets and income' in dividing the marital property."

This Massachusetts jurisprudence is expansive, and the state of the law there (as elsewhere) is confused. For example, the rule in Massachusetts is that a court should make "reasonable assumptions" about expectancy interests, but use caution when taking

any expectancies into account. See Vaughan v. Vaughan, Mass. SJC Single Justice No. 91-485 (1991), citing Frederick v. Frederick, 560 N.E.2d 151 (Mass. Ct. App. 1990), Bak v. Bak, 511 N.E.2d 625 (Mass. Ct. App. 1987), Davidson v. Davidson, 474 N.E.2d 1137 (Mass. Ct. App. 1985), and Rice v. Rice, 361 N.E.2d 1305 (Mass. 1977).

Zeh v. Zeh, 618 N.E.2d 1376 (Mass. Ct. App. 1993), added the following:

> While an expectancy of an inheritance does not qualify as property subject to division under G.L. c. 208, §34, it may be considered by the judge under the "criterion of 'opportunity of each for future acquisition of capital assets and income' in determining what disposition to make of the property which *is* subject to division." An inheritance in possession clearly stands on different footing and constitutes part of the estate of the recipient subject to division under §34.
>
> In the circumstances of this case, the husband's inheritance from his father falls well within the category of assets subject to division. As a noncontingent legacy, it vested as of the date of the father's death. A fair estimation of the size of the legacy appears to have been available at the time of the divorce hearing . . . . In the absence of evidence of claims against the estate or other unusual circumstances, there is no reason to treat the legacy other than as part of the "estate" of the husband and subject to equitable division under §34. . . . Our courts' expansive view of the marital estate of a party to a divorce includes a beneficial interest in a trust, notwithstanding that distribution of that interest has not occurred and may be conditioned on factors outside of the spouse's control. Moreover, the fact that the value of a vested, but not yet distributed, interest may not be susceptible of precise calculation "does not alter its character as a divisible asset."

Notice the absence of any consideration of spendthrift trust protections, or notions of inherited wealth as being nonmarital property that is not subject to equitable distribution in dissolution. This is the trend that courts in divorce are reflecting, and not just in Massachusetts.

From an earlier case, Davidson v. Davidson, 474 N.E.2d 1137 (Mass. Ct. App. 1985), comes a better understanding of this trend:

> Under the terms of the testamentary trust of Henry's father, Henry's remainder interest would be distributed free of trust when his mother died and when he reached age 35. Henry was about 33 years old and his mother was alive. The trustees were empowered "in their uncontrolled discretion" to invade principal for the benefit of Henry's mother. The value of the remainder interest was, therefore, uncertain and actuarial calculations would be to no avail. In addition, the remainder was subject to a valid spendthrift clause and could not have then been reached by Ann in satisfaction of any judgment or claim. Under Henry's mother's will . . . Henry would receive certain tangible personal property and he would have a life estate under a trust.
>
> While "[p]roperty concepts have not become immaterial," implicit in our appellate decisions is the rejection of the notion that the content of the estates of divorcing parties ought to be determined by the wooden application of technical rules of the law of property. We think an expansive approach, within the limits of the marital partnership concept, is appropriate. The purpose of §34 is to "empower[] the courts to deal broadly with property and its equitable division incident to a divorce proceeding. Such broad discretion is necessary in order that the courts can handle the myriad of different fact situations which surround

> divorces and arrive at a fair financial settlement in each case."
>
> We conclude that Henry's remainder interest under his father's testamentary trust, while it may have been at the outer limits, constituted a sufficient property interest to make it a part of his estate for consideration in connection with a property division under §34. Henry's right to the remainder was fixed at the time of the divorce . . . , subject only to the conditions of survivorship. We do not think that either the uncertainty of value or the inalienability of the interest, in themselves, are sufficient to preclude consideration of the interest as subject to division
>
> Henry's expectancy at the time of the divorce under the will of his mother stands on a different footing. The mother was alive . . . and could have changed her will. There are practical reasons for a rule that generally excludes such expectancies from the definition of property subject to division under §34. An attempt at some determination of the usual speculative quantum of an expectancy might well involve the lengthy trial of issues . . . : the validity of a will, current and future testamentary capacity, valuation of the estates of others, familial relationships, and so forth. . . . In any event, the expectancy might be considered by the judge, having been mindful of the evidentiary constraints which should deflect secondary considerations, under the §34 criterion of "opportunity of each for future acquisition of capital assets and income" in determining what disposition to make of the property which *is* subject to division.

From Chorney ¶1601.7[A] comes the point that a beneficial interest in a revocable trust is no different than an interest in a living testator's will, but courts like *Davidson* have not consistently so held. For planning purposes Chorney states that "exercising a power of appointment . . . is no different than if a settlor of a revocable trust amended or revoked . . . the trust . . . . Similarly, a trustee's or trust protector's power also might be considered substantial enough to render the beneficial interest amendable or revocable." This, too, does not find universal recognition, however.

Adding further meaning – and showing that other states have expanded the spread of the Massachusetts trend, see Billings v. Billings, 35 A.3d 1030, 1035, 1036 (Vt. 2011), holding that "any interest [husband] has as beneficiary under a will or revocable trust is not marital property if the testator or settlor is still alive. We agree, however, . . . that such a beneficial interest can be considered in allocating marital property between the parties if it creates an opportunity . . . for future acquisition of capital assets and income." But then the court elaborated on the inconsistency in treatment, saying: "Although we have not addressed the issue, the near unanimous holdings around the country are that a beneficiary's interest under a will is not property before the death of the testator, but instead is only an expectancy that is not subject to the jurisdiction of the family court. . . ." It is very hard to view such an expectancy as different from a contingent remainder in a trust, or even a vested remainder subject to divestment to the extent a power of appointment could be exercised to appoint the property away from the beneficiary. But the equitable distribution process regards these as very different.

Showing that the Massachusetts trend is not universal, however, *In re* Marriage of Githens, 204 P.3d 835, 835-843 (Or. Ct. App. 2009) (trust beneficial interest was too speculative to be divided as "property" in a dissolution case), held that

> mere expectancies are not "property" in the ordinary meaning of the term, and we find in the wording of the statute no intention to depart from that general rule. Because the beneficial interest in a revocable trust is, necessarily, a mere expectancy.

> [T]he [trial] court found that Husband's interest in the revocable trust "is more real than speculative." The court then decided to divide the interest as follows:
>
> > . . . the best, and fairest way to deal with Husband's interest in this asset, however it may be defined or valued, is to award Wife a non-interest bearing judgment for one-half of the value of Husband's portion of the trust, valued as of dissolution but payable as of the date of distribution, whenever made to Husband.
>
> Thereafter the trial court reversed course: "[t]his Court must conclude that the Trust at issue is revocable and that Husband's interest therein is speculative and one not subject to division as a marital asset."
>
> . . .
>
> [I]t is fairly well settled that the interest created by a revocable trust is an "expectancy." By definition, it is an interest that is extinguishable at the whim of the settlor. Given the fact that an interest in a revocable trust amounts to a mere (or bare) expectancy, and given further that Oregon law at the time that ORS 107.105(1)(f) was enacted regarded expectancies as something other than "property," it would seem necessarily to follow that—in the absence of some indication to the contrary in the text, context, or history of the enactment—the legislature likely understood that the statute would not apply to beneficial interests in revocable trusts.

The court then distinguished between an expectancy and a contingent interest in an irrevocable trust:

> [There is] a critical distinction between a contingent interest in a trust and a beneficial interest in a revocable trust. In the former case, the settlor has divested himself or herself of an actual interest in the property, subject only to a condition that is beyond the settlor's control. In the latter case, the settlor has divested himself or herself of absolutely nothing, leaving the beneficiary with only an expectancy, not a present property interest. From the beneficiary's perspective, that may seem like a distinction without a difference . . . . But from the settlor's perspective, it is a distinction with a significant difference. And the Oregon Supreme Court has held that it is the settlor's perspective that counts.
>
> . . .
>
> We note in passing that our conclusion that a beneficial interest in a revocable trust is not "property" subject to division in a dissolution case is consistent with the conclusions of every other court that has addressed the matter, save one. And the one exception was an acknowledged departure from prior law that was promptly overruled by the state legislature. [Citations omitted]

Unfortunately, the *Githens* court's summation was not accurate. For example, it miscited Massachusetts cases that are reflected in the foregoing summary.

Speaking about the developing law in Montana, *In re* Funk, 270 P.3d 39 (Mont. 2012), illustrates one further difficulty in this arena:

> . . . [B]oth counsel pointed out that our jurisprudence . . . is confusing for practitioners and has led to conflicting results. . . .
>
> Based upon an exhaustive review of the many cases interpreting [Montana law] (hereinafter referred to as § 202(1)), we conclude that our jurisprudence in this area

> has indeed been confusing and inconsistent. Therefore, for the edification of the courts and litigants, we seek now to clarify the manner in which the statute should be applied when apportioning property in a dissolution proceeding.
>
> Section 202(1) is . . . part of the Uniform Marriage and Divorce Act (UMDA). . . . Since its adoption, we have recognized that . . . everything owned jointly or by either party must be equitably apportioned by the district court in a dissolution proceeding regardless of when or how it was acquired. . . .
>
> . . . [S]ince the adoption of this statute we have applied these inheritance and gift provisions on scores of occasions, with varying and at times conflicting results. . . . Additionally, in some cases we state that pre-acquired, gifted or inherited property is included in the marital estate, while in others we expressly exclude such property from the marital assets for distribution purposes. . . .
>
> . . . The overarching premise of the statute is this: "In a proceeding for dissolution of marriage . . . the court . . . shall . . . finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or wife or both." Taken literally, this language means the court has the ultimate authority to distribute all property of both spouses; it is not required to subtract premarital assets or inheritances from the marital estate before dividing it, nor is it limited in its authority to determine how such assets are to be divided. . . .

Funk is a clear articulation, yet Halbersma v. Halbersma, 738 N.W.2d 545 (S.D. 2007), applying a similar statute to the UMDA, stated that although "inherited property 'is not ipso facto excluded from consideration in the overall division of property' . . . [o]nly where one spouse has made no or de minimis contributions to the acquisition or maintenance of an item of property and has no need for support, should a court set it aside as 'non-marital' property." It thus ought to be clear that the treatment of inherited property – including an interest in trust – is both unclear and a moving target. And the notion that drafting today can insulate that wealth in a predictably successful manner is unrealistic. Instead, a drafter needs to consider other alternatives to provide a level of protection. Several of these are suggested next below.

Planning Responses

It is nearly impossible to anticipate the law that will apply to a trust when a future interest beneficiary is divorced. So the following thoughts on planning for the possibility of a trust being reflected in an equitable distribution may be only an academic exercise:

1. First, the law governing these questions probably will be that of the beneficiary spouse's domicile and not any law specified in the trust or the law that otherwise applies to trust administration. See, e.g., Tremaine v. Tremaine, 63 A.2d 387, 395 n.16 (Conn. 1995). As a result, it may behoove trustees to be sufficiently well informed or prescient about the marital harmony of trust beneficiaries to meaningfully "encourage" a beneficiary to engage in forum shopping in anticipation of an impending divorce, hoping to select the law that will apply when the inevitable property division ultimately occurs. It also may not hurt to include a governing law provision in a trust – provided that the state whose law is chosen is a state with some valid connection to the trust – but this alone likely will not suffice. And this designation may only create a collision between asset protection trust planning and

equitable distribution, with no guarantee regarding the outcome of the quintessential conflict of laws issue.

2. The family law literature reveals that concepts of marriage and equality infuse much of the current thinking about property divisions. It is predictable that, as the pendulum swings, further changes in the notions that surround this topic will occur over time. Thus, modern trusts that are intended to continue for multiple generations should be crafted to be sufficiently flexible to adapt to future developments in the laws regarding dissolution and equitable distribution. It is not beyond imagination that current trends may reverse or morph further, such that a trust that is designed with current concepts in mind may be inappropriate in the future. So, like most trust drafting today, having the flexibility to make changes in the future is critical – provided that the power to make changes itself does not create any further problems – such as if the holder of the power is deemed to have an interest that is subject to a divorce court's jurisdiction. Grant powers of appointment that may be exercised to alter or divest a beneficiary's interest. At least in some states this alone will preclude a court from counting an interest in default of exercise of that power as property of the default beneficiary. Similarly, grant a trust protector or the trustee the power to alter a beneficiary's interest, including to extend it in trust, rather than to make distribution or allow withdrawal at a previously specified age, event, or date.
3. In the same manner that some drafters of durable powers of attorney direct the powerholder to sue any third party that refuses to honor the durable power, direct the trustee to engage in certain tactics if a divorce action threatens to alter the terms or beneficiaries of the trust. Chorney at ¶1607 raises the question whether a trustee is an appropriate party to, and ought to participate in, any equitable distribution, to protect trust interests. His notion is that the trust might direct the trustee to play an aggressive role, funded by the trust itself, designed to oppose any effort by the in-law spouse of a beneficiary to acquire trust property. Meanwhile, in private correspondence, Chorney actually opines that "the best advice to a trustee is to not participate in the proceedings." Perhaps an aggressive opposition by others, funded by the trust, is an appropriate middle ground. For example, the trustee could have discretion to finance the beneficiary's legal costs in a property settlement battle that entails or imperils the trust. But note In re Marriage of Earlywine, 2013 IL 114779 (Ill.), in which state law, 750 ILCS 5/501(c-1) (a "level-the-playing-field" provision), required a wealthy spouse's attorney to remit half the fees received to the other spouse's attorney to establish "substantial parity between the parties" in allocating litigation resources.
4. In the context of these state laws, UTC §503(a)(1) (which describes exception creditors to the spendthrift trust rules, to provide for judgments or court orders for the support or maintenance of a child, spouse, or former spouse) is almost quaint in how little it means to this overall dispute over property interests held in trust. Thus, instead of using a traditional form of spendthrift provision, consider using a cesser form of spendthrift provision – the British form that causes forfeiture of an interest if attached or, here, counted in the equitable distribution in any way. This is a severe, drop-dead form of protection of family wealth, which may work in the same way that a colleague explained a client's response to the request for discovery by the in-law spouse of the client's child. The client simply responded to the discovery request, which sought information about the client's wealth and estate plan, that the client would disinherit the child (and all descendants of the child, and the spouse who sought that information). The threat was perceived as credible and caused the spouse to desist.

5. Consider whether to insulate property inside an entity such as an FLP or LLC that denies or restricts rights of any transferee from family member owners. The question is whether entity restrictions on transferability will be any more effective than spendthrift restrictions in a trust. And whether they will impact valuation in an affirmative manner more effectively than they have for wealth transfer tax purposes.
6. In lieu of trust distribution provisions that create interests that can be valued and then allocated in an equitable distribution, instead permit the trustee to invest in personal use assets (such as a dwelling) that a beneficiary-spouse may occupy but never own (and, thus, may not be marital property or property subject to the equitable distribution), or make improvements to assets already held by that beneficiary.
7. Create totally discretionary spray trusts rather than trusts with more easily valued interests. Better yet, create totally discretionary spray *group* trusts, in which no beneficiary has an exclusive right to receive anything at any time. See, e.g., In re Marriage of Eddy, 569 N.E.2d 174 (Ill. App. Ct. 1991), which involved a wife who had no income from gainful employment but she had income from "investments, gifts, and trusts" – including as one of several beneficiaries of trusts created by a grandparent that granted the trustee discretion to distribute income and principal to her, her parents, and other unnamed individuals under a standard (best interests and welfare). Although the court conceded that the lower court could *consider* her present interest in the trust, it held that the lower court improperly treated her interest because she was not the exclusive beneficiary. Contra, however (in Massachusetts at least), is Pfannenstiehl v. Pfannenstiehl, 2014 WL 10295323 (Mass. Ct. App. 2015). A group trust was held for 3 children and 8 grandchildren when one child was divorced. The court made an award to that child's spouse because the trust distribution provision used a standard (comfortable support, health, maintenance, welfare, and education) that the court regarded as "ascertainable" (not in the §2041 sense, welfare being impermissible), and therefore as enforceable by the beneficiary. According to the court, a different result would have applied if the trustee's authority was "wholly discretionary . . . with no distribution standards." The court was influenced by the trust having consistently made equal distributions to the settlor's three children until just before the one child's divorce action began, at which time all distributions to that child ceased entirely. Those distributions had supported the life style to which the child's family had become accustomed, and the court concluded that the trustee was obliged to continue to make distributions, that the cut-off was a "manipulation," and that "the spendthrift provision is being invoked as a subterfuge to mask the [child's] income stream and thwart the division of the marital estate in the divorce." These damaging facts (and wrongful "scorched earth" tactics in the divorce action itself) influenced the court's final determination, including an award of attorney fees to the child's former spouse.
8. As noted in item e at page 3, giving a beneficiary only an income interest may be preferable to giving the income from a trust that ultimately may be distributed in whole or in part and become the beneficiary's property. This is because the current income from a trust might be treated as marital property, in the way that income from separate property becomes community property in some states. But if all that the beneficiary owns is an income interest for life, then perhaps the income interest will be treated as the nonmarital property itself, and not as an interest that is subject to this "income from property" concept.

9. Consider how special needs trusts hold Medicaid at bay. Would similar planning be similarly effective in divorce? It would be an odd notion that an in-law spouse of a beneficiary is more worthy and has better protection or powers under the law than the government that provides entitlement benefits. Although the special needs trust rules are a statutory safe-harbor, quaere whether they may inform a dissolution safe harbor by judicial analogy.
10. A counterintuitive strategy might be for a trust to make both spouses beneficiaries. That is, to *deal* with the forgotten beneficiary issue and specifically provide for what happens in the event of divorce. Would that alter the equation, by allowing the trust to define what *each* spouse is entitled to receive from the benefactor and preclude a vision that the trust is property owned by just one of them and therefore is subject to equitable distribution by the court? If it had that effect, then a small discretionary interest in the former in-law spouse of the beneficiary might be a small price to pay to avoid a much more costly equitable distribution of trust corpus to that in-law spouse. An interesting question is whether estate planners have not traditionally dealt with the in-law spouse of a beneficiary – the forgotten beneficiary – because of concerns about turning family wealth into marital property. In a perverse way, perhaps the current trend in equitable distribution (making all wealth, even that held in trust, into marital property) means that the plan should address rather than seek to avoid the divorce issue. And, in a positive light, this might minimize the historical disinclination to plan for the forgotten beneficiary.
11. Premarital agreements become more significant – but they only work if the spouses engaged in that planning before they married. The benefactor likely has little control over this. On the other hand, postnuptial agreements may work if there is consideration to support them. For example a benefactor might press a potential beneficiary to acquire an agreement from that beneficiary's spouse, in exchange for the benefactor providing for the beneficiary *and* the spouse while they remain married. To protect against the *next* (as yet unidentified) spouse of a beneficiary, quaere whether a condition precedent to becoming or to continuing as a trust beneficiary on first obtaining a pre- or postnuptial agreement would violate public policy.
12. Also quaere whether a beneficiary could make a binding release or disclaimer of any anticipated inheritance if that beneficiary fails to obtain an effective pre- or postnuptial agreement that forecloses the beneficiary's spouse from ever touching the family wealth. Would such a release be enforceable in the future against the beneficiary, or the beneficiary's spouse?