

<p>Article 7.Part 5. Creditors' Claims; Spendthrift and Discretionary Trusts</p>	<p>Article 7.Part 5.</p>
<p>GENERAL COMMENT</p> <p>This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the general rules. To the extent that a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, however, the creditor can reach the beneficiary's interest subject to the court's power to limit the relief. Section 503 lists the categories of creditors whose claims are not subject to a spendthrift restriction. Sections 504 through 507 address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.</p> <p>The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the</p>	<p>GENERAL COMMENT</p> <p>This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 62-7-501 and 62-7-502 state the general rules. To the extent that a trust is protected by a spendthrift provision, a beneficiary's creditor may not reach the beneficiary's interest until distribution is made by the trustee. To the extent not protected by a spendthrift provision, however, the creditor can reach the beneficiary's interest subject to the court's power to limit the relief. Section 62-7-503 lists the categories of creditors whose claims are not subject to a spendthrift restriction. Sections 62-7-504 through 62-7-507 address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 62-7-504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 62-7-505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 62-7-506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 62-7-507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.</p> <p>The provisions of this article relating to the validity and effect of a spendthrift provision</p>

<p>terms of the trust. See Section 105(b)(5). This article does not supersede state exemption statutes nor an enacting jurisdiction's Uniform Fraudulent Transfers Act which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.</p> <p>SECTION 62-7-501. Rights of beneficiary's creditor or assignee.</p> <p>(a) Except as provided in subsection (b), the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.</p> <p>(b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary to the extent a beneficiary's interest:</p> <p>(1) is protected by a spendthrift provision, or (2) is a discretionary trust interest as referred to in S.C. Code Section 62-7-504.</p> <p>COMMENT Absent a valid spendthrift provision, a creditor may reach the interest of a beneficiary the same as any other of the beneficiary's assets. This does not necessarily mean that the creditor can collect all distributions made to the beneficiary. Other creditor law of the State may limit the creditor to a specified percentage of a distribution. See, e.g., Cal. Prob. Code Section</p>	<p>and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. See Section 62-7-105(b)(5). This article does not supersede state exemption statutes nor any fraudulent transfer statutes, which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.</p> <p>SECTION 62-7-501.</p> <p>(a) Except as provided in subsection (b), the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.</p> <p>(b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary to the extent a beneficiary's interest:</p> <p>(1) is protected by a spendthrift provision, or (2) is a discretionary trust interest as referred to in S.C. Code Section 62-7-504.</p> <p>REPORTER'S COMMENT Absent a valid spendthrift provision, a creditor may reach the interest of a beneficiary the same as any other of the beneficiary's assets. This does not necessarily mean that the creditor can collect all distributions made to the beneficiary. Other creditor law of the State</p>
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15306.5. This section does not prescribe the procedures for reaching a beneficiary's interest or of priority among claimants, leaving those issues to the enacting State's laws on creditor rights. The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor periodically to return to court will be reduced.

A creditor typically will pursue a claim by serving an order on the trustee attaching the beneficiary's interest. Assuming that the validity of the order cannot be contested, the trustee will then pay to the creditor instead of to the beneficiary any payments the trustee would otherwise be required to make to the beneficiary, as well as discretionary distributions the trustee decides to make. The creditor may also, in theory, force a judicial sale of a beneficiary's interest. Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as appropriate under the circumstances. In exercising its discretion to limit relief, the court may appropriately consider the support needs of a beneficiary and the beneficiary's family. See Restatement (Third) of Trusts Section 56 cmt. e (Tentative Draft No. 2, approved 1999).

SOUTH CAROLINA COMMENT

There was no South Carolina statutory provision that correlates with this Section. Also, the case law in South Carolina is uncertain as to the effectiveness and application

may limit the creditor to a specified percentage of a distribution. This section does not prescribe the procedures for reaching a beneficiary's interest or of priority among claimants, leaving those issues to the State's law on creditor rights. The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor periodically to return to court will be reduced.

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The case law in South Carolina was uncertain as to the effectiveness and application of the spendthrift provision but appears to indicate that a spendthrift provision

of the spendthrift provision but appears to indicate that a spendthrift provision operates against only income interests but not principal interests. See S. Alan Medlin, *The Law of Wills and Trusts, Vol. I, Estate Planning in South Carolina, Section 508.2(a)*, p. 5-19 (2002). Older cases seem to allow a cesser clause to prevent the voluntary or involuntary alienation of the beneficiary's interest. See S. Alan Medlin, *supra*. This Section avoids the confusion regarding the effectiveness and application of the spendthrift provision and also clarifies and broadens the laws in South Carolina so that a spendthrift provision operates as a restraint against both income and principal interests, except as otherwise provided in the following sections of the SCTC.

Section 62-7-501 provides additional protection not only for spendthrift interests, but also for interests in discretionary trusts as referred to in S.C. Code Section 62-7-504. Discretionary trusts do not have to rely on spendthrift language for a beneficiary's present or future interest in the trust to be exempt from creditor attachment.

For a definition of discretionary trust, resort should be made to the South Carolina common law. See generally *Heath v. Bishop*, 25 S.C. Eq. (4 Rich. Eq.) 446 (S.C. 1851); *Collins v. Collins*, 219 S.C. 1, 63 S.E.2d 811 (S.C. 1951); see also *Sarlin v. Sarlin*, 312 S.C. 27, 430 S.E.2d 530 (S.C. App. 1993); *Page v. Page*, 243 S.C. 312, 133 S.E.2d 829 (S.C. 1963).

SECTION 62-7-502. Spendthrift provision.

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

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SECTION 62-7-502.

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a ‘spendthrift trust’, or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary’s interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

COMMENT

Under this section, a settlor has the power to restrain the transfer of a beneficiary’s interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Third) of Trusts Section 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Sections 152-153 (1959). For the definition of spendthrift provision, see Section 103(15).

For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary’s interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary’s creditor from collecting, and vice versa. See Restatement (Third) of Trusts Section 58 cmt. b (Tentative Draft No. 2, approved 1999). See also Restatement (Second) of Trusts Section 152(2) (1959). A

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(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

REPORTER’S COMMENT

Under this section, a settlor has the power to restrain the transfer of a beneficiary’s interest, regardless of whether the beneficiary has an interest in income, in principal, or in both. Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Third) of Trusts Section 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Sections 152-153 (1959). For the definition of spendthrift provision, see Section 62-7-103(15).

For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary’s interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary’s creditor from collecting, and vice versa. See Restatement (Third) of Trusts Section 58 cmt. b (Tentative Draft No. 2, approved 1999). See also Restatement

<p>spendthrift provision valid under this Code will also be recognized as valid in a federal bankruptcy proceeding. See 11 U.S.C. Section 541(c)(2).</p> <p>Subsection (b), which is derived from Texas Property Code Section 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a “spendthrift trust” or words of similar effect.</p> <p>A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. See, e.g., Unif. Probate Code Section 2-801(a). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. See Restatement (Third) of Trusts Section 58 cmt. c (Tentative Draft No. 2, approved 1999).</p> <p>A spendthrift provision is ineffective against a beneficial interest retained by the settlor. See Restatement (Third) of Trusts Section 58(2) (Tentative Draft No. 2, approved 1999). This is a necessary corollary to Section 505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor’s benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.</p> <p>A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary’s purported assignment. The trustee may recommence distributions to the beneficiary at anytime. The beneficiary, not</p>	<p>(Second) of Trusts Section 152(2) (1959). A spendthrift provision valid under this Code will also be recognized as valid in a federal bankruptcy proceeding. See 11 U.S.C. Section 541(c)(2).</p> <p>Subsection (b), which is derived from Texas Property Code Section 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a “spendthrift trust” or words of similar effect.</p> <p>A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. See, e.g., Unif. Probate Code Section 2-801(a) and SCPC Section 62-2-801(c)(6). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. See Restatement (Third) of Trusts Section 58 cmt. c (Tentative Draft No. 2, approved 1999).</p> <p>A spendthrift provision is ineffective against a beneficial interest retained by the settlor. See Restatement (Third) of Trusts Section 58(2) (Tentative Draft No. 2, approved 1999). This is a necessary corollary to Section 62-7-505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor’s benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.</p> <p>A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to</p>
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having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. See Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 152 cmt. i (1959).

SOUTH CAROLINA COMMENT

For discussion of the treatment of spendthrift provisions in South Carolina, see the South Carolina Comment to SCTC Section 62-7-501.

SECTION 62-7-503. Exceptions to spendthrift provision.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Even if a trust contains a spendthrift provision, a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.

(c) The exception in subsection (b) is unenforceable against a special needs trust, supplemental needs trust, or similar trust established for a disabled person if the applicability of such a provision could invalidate such a trust's exemption from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if the applicability of such a provision has the effect or potential effect of rendering such disabled person ineligible for

honor the beneficiary's purported assignment. The trustee may recommence distributions to the beneficiary at anytime. The beneficiary, not having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. See Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 152 cmt. i (1959).

For discussion of the treatment of spendthrift provisions in South Carolina, see Comment to SCTC Section 62-7-501.

SECTION 62-7-503.

(a) In this section, 'child' includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Even if a trust contains a spendthrift provision, a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.

(c) The exception in subsection (b) is unenforceable against a special needs trust, supplemental needs trust, or similar trust established for a disabled person if the applicability of such a provision could invalidate such a trust's exemption from consideration as a countable resource for Medicaid or Supplemental Security Income (SSI) purposes or if the applicability of such a provision has the effect or potential effect of rendering such disabled person ineligible for any program of public benefit, including, but

<p>any program of public benefit, including, but not limited to, Medicaid and SSI.</p> <p>COMMENT</p> <p>This section exempts the claims of certain categories of creditors from the effects of a spendthrift restriction.</p> <p>The exception in subsection (b) for judgments or orders to support a beneficiary’s child or current or former spouse is in accord with Restatement (Third) of Trusts Section 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts Section 157(a) (1959), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. Subsection (b), unlike Section 504, does not authorize the spousal or child claimant to compel a distribution from the trust. Section 504 authorizes a spouse or child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for distribution.</p> <p>Subsection (b) refers both to “support” and “maintenance” in order to accommodate differences among the States in terminology employed. No difference in meaning between the two terms is intended.</p> <p>The definition of “child” in subsection (a) accommodates the differing approaches States</p>	<p>not limited to, Medicaid and SSI.</p> <p>REPORTER’S COMMENT</p> <p>This section exempts the claims of certain categories of creditors from the effects of a spendthrift restriction.</p> <p>The exception in subsection (b) for judgments or orders to support a beneficiary’s child is in accord with Restatement (Third) of Trusts Section 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts Section 157(a) (1959), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. South Carolina Trust Code Section 62-7-503(b), however, eliminates the exceptions contained in Uniform Trust Code Section 503 for a beneficiary’s spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance as well as a judgment creditor who has provided services for the protection of a beneficiary’s interest in a spendthrift trust. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. Subsection (b), unlike Section 62-7-504, does not authorize the child claimant to compel a distribution from the trust. Section 62-7-504 authorizes a child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to</p>
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take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the State making the award chooses to define “child” will be recognized under this Code, whether the order sought to be enforced was entered in the same or different State.

The exception in subsection (b) for a judgment creditor who has provided services for the protection of a beneficiary’s interest in the trust is in accord with Restatement (Third) of Trusts Section 59(b) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(c) (1959). This exception allows a beneficiary of modest means to overcome an obstacle preventing the beneficiary’s obtaining services essential to the protection or enforcement of the beneficiary’s rights under the trust. See Restatement (Third) of Trusts Section 59 cmt. d (Tentative Draft No. 2, approved 1999).

Subsection (c), which is similar to Restatement (Third) of Trusts Section 59 cmt. a (Tentative Draft No. 2, approved 1999), exempts certain governmental claims from a spendthrift restriction. Federal preemption guarantees that certain federal claims, such as claims by the Internal Revenue Service, may bypass a spendthrift provision no matter what this Code might say. The case law and relevant Internal Revenue Code provisions on the exception for federal tax claims are collected in George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Section 157.4 (4th ed. 1987). Regarding claims by state governments, this subsection recognizes that States take a variety

comply with a standard for distribution.

Subsection (b) refers both to “support” and “maintenance” in order to accommodate differences among the states in terminology employed. No difference in meaning between the two terms is intended.

The definition of “child” in subsection (a) accommodates the differing approaches states take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the state making the award chooses to define “child” will be recognized under this Code, whether the order sought to be enforced was entered in the same or different state.

South Carolina has eliminated the exceptions found in UTC Section 503 (b) and (c) certain judgment creditors and for a claim made by the State of South Carolina or the United States to the extent a state or federal law provides for any such claim. Thus, under the SCTC, the only exception to a spendthrift trust will be for a beneficiary’s child who has a judgment or court order against the beneficiary for support or maintenance. South Carolina also adds a new subsection (c), not found in the UTC, which makes clear that the exception in subsection (b) for child support shall be unenforceable against a special or supplemental needs trusts under the circumstances described in subsection (c). Unlike Restatement (Third) of Trusts Section 59(2) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(b) (1959), this Code does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to the beneficiary. There

of approaches with respect to collection, depending on whether the claim is for unpaid taxes, for care provided at an institution, or for other charges. Acknowledging this diversity, subsection (c) does not prescribe a rule, but refers to other statutes of the State on whether particular claims are subject to or exempted from spendthrift provisions.

Unlike Restatement (Third) of Trusts Section 59(2) (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 157(b) (1959), this Code does not create an exception to the spendthrift restriction for creditors who have furnished necessary services or supplies to the beneficiary. Most of these cases involve claims by governmental entities, which the drafters concluded are better handled by the enactment of special legislation as authorized by subsection (c). The drafters also declined to create an exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts Section 59 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 157-157.5 (4th ed. 1987).

SOUTH CAROLINA COMMENT

South Carolina Trust Code Section 62-7-503(b) eliminates the exceptions contained in Uniform Trust Code Section 503 for a beneficiary's spouse or former spouse who has a judgment or court order against the beneficiary for support

is also no exception for tort claimants. For a discussion of the exception for tort claims, which has not generally been recognized, see Restatement (Third) of Trusts Section 59 Reporter's Notes to cmt. a (Tentative Draft No. 2, approved 1999). For a discussion of other exceptions to a spendthrift restriction, recognized in some States, see George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* Section 224 (Rev. 2d ed. 1992); and 2A Austin W. Scott & William F. Fratcher, *The Law of Trusts* Sections 157-157.5 (4th ed. 1987).

or maintenance as well as a judgment creditor who has provided services for the protection of a beneficiary's interest in a spendthrift trust. South Carolina has also eliminated the exception found in UTC Section 503(c) for a claim made by the State of South Carolina or the United States to the extent a state or federal law provides for any such claim. Thus, under the SCTC, the only exception to a spendthrift trust will be for a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance. South Carolina also adds a new subsection (c), not found in the UTC, which makes clear that the exception in subsection (b) for child support shall be unenforceable against a special or supplemental needs trusts under the circumstances described in subsection (c).

SECTION 62-7-504. Discretionary trusts; effect of standard.

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) Except as otherwise provided in subsection (c), a creditor of a beneficiary may not compel a distribution from a trust in which the beneficiary has a discretionary trust interest, even if:

(1) the discretion is expressed in the form of a standard of distribution; or

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the

SECTION 62-7-504.

(a) In this section, 'child' includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) Except as otherwise provided in subsection (c), a creditor of a beneficiary may not compel a distribution from a trust in which the beneficiary has a discretionary trust interest, even if:

(1) the discretion is expressed in the form of a standard of distribution; or

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or

<p>beneficiary's child; and</p> <p>(2) the court shall direct the trustee to pay to the child 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.</p> <p>(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution; provided, however, this right may not be exercised by a creditor of the beneficiary.</p> <p>(e) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution from insurance proceeds payable to the trustee as beneficiary to the extent state law exempts such insurance proceeds from creditors' claims.</p> <p>(f) A creditor of a beneficiary who is also a trustee or cotrustee may not reach the trustee's beneficial interest or otherwise compel a distribution if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.</p> <p>COMMENT</p> <p>This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. See Restatement (Third) of Trusts Section 60 Reporter's Notes to cmt. a</p>	<p>maintenance of the beneficiary's child; and</p> <p>(2) the court shall direct the trustee to pay to the child 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.</p> <p>(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution; provided, however, this right may not be exercised by a creditor of the beneficiary.</p> <p>(e) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution from insurance proceeds payable to the trustee as beneficiary to the extent state law exempts such insurance proceeds from creditors' claims.</p> <p>(f) A creditor of a beneficiary who is also a trustee or cotrustee may not reach the trustee's beneficial interest or otherwise compel a distribution if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard.</p> <p>REPORTER'S COMMENT</p> <p>South Carolina Trust Code Section 62-7-504 eliminates the exceptions allowed under Uniform Trust Code Section 504 for judgments or court orders in favor of a beneficiary's spouse or former spouse. As with SCTC Section 62-7-503, the only exception will be for a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance.</p>
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<p>(Tentative Draft No. 2, approved 1999).</p> <p>This section will have limited application. Pursuant to Section 502, the effect of a valid spendthrift provision, where applicable, is to prohibit a creditor from collecting on a distribution prior to its receipt by the beneficiary. Only if the trust is not protected by a spendthrift provision, or if the creditor falls within one of the exceptions to spendthrift enforcement created by Section 503, does this section become relevant.</p> <p>For a discussion of the definition of “child” in subsection (a), see Section 503 Comment.</p> <p>Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under Section 814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.</p> <p>Subsection (c) creates an exception for support claims of a child, spouse, or former spouse who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary’s child, spouse, or former spouse enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child, spouse or former spouse such amount as is equitable under the circumstances but not in excess of the</p>	<p>However, a child’s claim against a discretionary trust interest will be limited to those cases where a trustee has not complied with a standard of distribution or has abused a discretion.</p> <p>This section addresses the ability of a beneficiary’s creditor to reach the beneficiary’s discretionary trust interest, whether or not the exercise of the trustee’s discretion is subject to a standard. This section, similar to the Restatement, eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories. See Restatement (Third) of Trusts Section 60 Reporter’s Notes to cmt. a (Tentative Draft No. 2, approved 1999).</p> <p>This section could have limited application. Pursuant to Section 62-7-502, the effect of a valid spendthrift provision, where applicable, is to prohibit a creditor from collecting on a distribution prior to its receipt by the beneficiary. Only if the trust is not protected by a spendthrift provision, or if the creditor falls within one of the exceptions to spendthrift enforcement created by Section 62-7-503, does this section become relevant.</p> <p>For a discussion of the definition of “child” in subsection (a), see Section 62-7-503 Comment.</p> <p>Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. Under</p>
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amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The Uniform Trust Code does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

SOUTH CAROLINA COMMENT

South Carolina Trust Code Section 62-7-504 eliminates the exceptions allowed under Uniform Trust Code Section 504 for judgments or court orders in favor of a beneficiary's spouse or former spouse. As with SCTC Section 62-7-503, the only exception will be for a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance. However, a child's claim against a discretionary trust interest will be limited to those cases where a trustee has not complied with a standard of distribution or has abused a discretion. South Carolina's version of subsection (e), not found in the UTC, ensures that even if there is no spendthrift provision, insurance proceeds remain exempt from creditors' claims pursuant to S.C. Code Section 38-63-40 et seq. and other relevant state laws. The South Carolina Trust Code adds to the UTC version the proviso at the end of subsection (d), which prevents a beneficiary's creditor from enforcing on behalf of the beneficiary the beneficiary's right, to the extent it exists, to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard of

Section 62-7-814(a), a trustee must always exercise a discretionary power in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.

Subsection (c) creates an exception for support claims of a child who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The SCTC does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

The South Carolina Trust Code adds to the UTC version the proviso at the end of subsection (d), which prevents a beneficiary's creditor from enforcing on behalf of the beneficiary the beneficiary's right, to the extent it exists, to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard of distribution.

South Carolina's version of subsection (e), not found in the UTC, ensures that even if

<p>distribution.</p> <p>SECTION 62-7-505. Creditors' claims against settlor.</p> <p>(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:</p> <p>(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.</p> <p>(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.</p> <p>(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, and except to the extent state or federal law exempts any property of the trust from claims, costs, expenses, or allowances, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances, unless barred by Section 62-3-801 et seq.</p> <p>(b) For purposes of this section, a beneficiary who is a trustee of a trust, but who is not the</p>	<p>there is no spendthrift provision, insurance proceeds remain exempt from creditors' claims pursuant to S. C. Code Section 38-63-40 et seq. and other relevant state laws.</p> <p>SECTION 62-7-505.</p> <p>(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:</p> <p>(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.</p> <p>(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.</p> <p>(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, and except to the extent state or federal law exempts any property of the trust from claims, costs, expenses, or allowances, the property of a held in a revocable trust that was revocable at <u>the time of the settlor's death</u> is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances,</p>
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settlor of the trust, cannot be treated in the same manner as the settlor of a revocable trust if the beneficiary-trustee's power to make distributions to the beneficiary-trustee is limited by an ascertainable standard related to the beneficiary-trustee's health, education, maintenance, or support.

COMMENT

Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. See Restatement (Third) of Trusts Section 25 cmt. a (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. See Restatement (Second) of Trusts Section 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. See Restatement (Second) of Trusts Section 156(2) (1959).

Subsection (a)(2), which is based on Restatement (Third) of Trusts Section 58(2) and cmt. e (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. The drafters of the Uniform Trust Code concluded that traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims. See Henry J. Lischer, Jr., Domestic Asset Protection Trusts: Pallbearers to Liability, 35 Real Prop. Prob. & Tr. J. 479

unless barred by Section 62-3-801 et seq.

(b) For purposes of this section:

(1) a beneficiary who is a trustee of a trust, but who is not the settlor of the trust, cannot be treated in the same manner as the settlor of a revocable trust if the beneficiary-trustee's power to make distributions to the beneficiary-trustee is limited by an ascertainable standard related to the beneficiary-trustee's health, education, maintenance, ~~or~~ and support;

(2) the assets in a trust that are attributable to a contribution to an inter vivos marital deduction trust described in either Section 2523(e) or (f) of the Internal Revenue Code of 1986, after the death of the spouse of the settlor of the inter vivos marital deduction trust are deemed to have been contributed by the settlor's spouse and not by the settlor.

REPORTER'S COMMENT

Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. See Restatement (Third) of Trusts Section 25 cmt. a (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. See Restatement (Second) of Trusts Section 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. See Restatement (Second) of Trusts Section 156(2) (1959).

Subsection (a)(2), which is based on Restatement (Third) of Trusts Section 58(2) and cmt. e (Tentative Draft No. 2, approved

(2000) ; John E. Sullivan, III, Gutting the Rule Against Self-Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts, 23 Del. J. Corp. L. 423 (1998). Under the Code, whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settler-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of " settlor," see Section 103(14).

This section does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the State's law on fraudulent transfers. A transfer to the trust by an insolvent settlor might also constitute a voidable preference under federal bankruptcy law.

Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Nor does this section address the priority of creditor claims or liability of the decedent's other nonprobate assets for the decedent's debts and other

1999), and Restatement (Second) of Trusts Section 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. The drafters of the Uniform Trust Code concluded that traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims. See Henry J. Lischer, Jr., Domestic Asset Protection Trusts: Pallbearers to Liability, 35 Real Prop. Prob. & Tr. J. 479 (2000); John E. Sullivan, III, Gutting the Rule Against Self-Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts, 23 Del. J. Corp. L. 423 (1998). The SCTC confirms this policy. Under the Code, whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settler-beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of "settlor," see Section 62-7-103(14).

This section does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the State's law on fraudulent transfers. A transfer to the trust by an insolvent settlor might also constitute a voidable preference under federal bankruptcy law.

Subsection (a)(3) recognizes that a

charges. Subsection (a) (3), however, does ratify the typical poulover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code in 1998.

Subsection (b)(1) treats a power of withdrawal as the equivalent of a power of revocation because the two powers are functionally identical. This is also the approach taken in Restatement (Third) of Trusts Section 56 cmt. b (Tentative Draft No. 2, approved 1999). If the power is unlimited, the property subject to the power will be fully subject to the claims of the power holder's creditors, the same as the power holder's other assets. If the power holder retains the power until death, the property subject to the power may be liable for claims and statutory allowances to the extent the power holder's probate estate is insufficient to satisfy those claims and allowances. For powers limited either in time or amount, such as a right to withdraw a \$10,000 annual exclusion contribution within 30 days, this subsection would limit the creditor to the \$10,000 contribution and require the creditor to take action prior to the expiration of the 30-day period.

Upon the lapse, release, or waiver of a power of withdrawal, the property formerly subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection

revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges.

However, under SCTC 62-7-505(a)(3), only assets held in a revocable trust at the time of the settlor's death will be subject to creditor's claims. Assets transferred to a revocable trust following the settlor's death will not become subject to creditor's claims as a result of the transfer. For example, life insurance proceeds and cash surrender values that would be exempt under the terms of the trust pursuant to §38-63-40 or §38-65-90 would maintain the exempt status if payable to the trust. Also, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Nor does this section address the priority of creditor claims or liability of the decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (a)(3), however, does ratify the typical poulover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6-102 of the Uniform Probate Code, which was added to that Code in 1998.

Upon the lapse, release, or waiver of a power of withdrawal, the property formerly

(a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. However, following the lead of Arizona Revised Statutes Section 14-7705(g) and Texas Property Code Section 112.035(e), subsection (b)(2) creates an exception for trust property which was subject to a Crummey or five and five power. Upon the lapse, release, or waiver of a power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property subject to the power at the time of the lapse, release, or waiver exceeded the greater of the amounts specified in IRC Sections 2041(b)(2) or 2514(e) [greater of 5% or \$5,000], or IRC Section 2503(b) [\$10,000 in 2001].

The Uniform Trust Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers Sections 13.1 --3.7 (1986).

SOUTH CAROLINA COMMENT

The South Carolina Trust Code does not include the UTC version of subsections (b)(1) and (b)(2), and the UTC Comment should be adjusted accordingly.

South Carolina adds subsection (b)(1), which is not the UTC version of subsection 505(b)(1). The UTC version of Subsection (b)(1) is not included in the SCTC. The UTC and the Restatement (Third) of Trusts Section 60 cmt. g (Tentative Draft No. 2, approved 1999) appear to take the position that a creditor may attach a beneficiary's interest merely because the

subject to the power will normally be subject to the claims of the power holder's creditors and assignees the same as if the power holder were the settlor of a now irrevocable trust. Pursuant to subsection (a)(2), a creditor or assignee of the power holder generally may reach the power holder's entire beneficial interest in the trust, whether or not distribution is subject to the trustee's discretion. The Uniform Trust Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers Sections 13.1 -- 3.7 (1986).

beneficiary is the sole trustee or cotrustee, even if the trustee/beneficiary (or cotrustee/beneficiary) is limited by an ascertainable standard. SCTC Section 62-5-505(b)(1) provides that neither a sole trustee/beneficiary nor a cotrustee/beneficiary will be treated in the same manner as the settlor of a revocable trust so long as the trustee/beneficiary or cotrustee/beneficiary's interest is subject to the ascertainable standard described in that subsection.

SECTION 62-7-506. Overdue distribution.

Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date. For purposes of this section, a mandatory distribution is a distribution where the trustee has no discretion in determining whether the distribution shall be made or the amount or timing of such distribution.

COMMENT

The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest until a distribution is made and received by the beneficiary. See Section 502. But this section, along with several other sections in this article, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the

SECTION 62-7-506.

Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date. For purposes of this section, a mandatory distribution is a distribution where the trustee has no discretion in determining whether the distribution shall be made or the amount or timing of such distribution.

REPORTER'S COMMENT

The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest until a distribution is made and received by the beneficiary. See Section 62-7-502. But this section, along with several other sections in this article, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to

other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets.

This section is similar to Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999).

2001 Amendment. By amendment in 2001, "designated distribution date" was substituted for "required distribution date". The amendment conforms the language of this section to terminology used elsewhere in the Code.

SOUTH CAROLINA COMMENT

South Carolina Trust Code Section 62-7-506 adds to the Uniform Trust Code version of Section 506 a definition of "mandatory distribution" to prevent the South Carolina section from being interpreted to require distributions from discretionary trusts as referred to in SCTC Section 62-7-504. Common examples of mandatory distributions are found in qualified terminable interest property trusts, charitable remainder trusts, and grantor retained trusts, when the trustee is required to make a distribution annually of a sum certain.

make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets.

South Carolina Trust Code Section 62-7-506 adds to the Uniform Trust Code version of Section 506 a definition of "mandatory distribution" to prevent the South Carolina section from being interpreted to require distributions from discretionary trusts as referred to in SCTC Section 62-7-504. Common examples of mandatory distributions are found in qualified terminable interest property trusts, charitable remainder trusts, and grantor retained trusts, when the trustee is required to make a distribution annually of a sum certain.

This section is similar to Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999).

SECTION 62-7-507. Personal obligations of trustee.

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

COMMENT

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. See Restatement (Third) Section 5 cmt. k (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. See Restatement (Second) of Trusts Section 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. Section 541(d).

The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo-American trust law by comparison with the devices available in civil law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo-American trust with respect to transactions in civil law countries. See Hague Convention art. 11. See also Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A*

SECTION 62-7-507.

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

REPORTER'S COMMENTS

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. See Restatement (Third) Section 5 cmt. k (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. See Restatement (Second) of Trusts Section 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. Section 541(d).

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<p>Comparative Legal and Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, <i>The Secret Life of the Trust: The Trust as an Instrument of Commerce</i>, 107 Yale L.J. 165, 179-80 (1997).</p> <p>SOUTH CAROLINA COMMENT</p> <p>Prior South Carolina law had no counterpart to this Section.</p>	<p><i>Trust Law: A Comparative Legal and Economic Analysis</i>, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, <i>The Secret Life of the Trust: The Trust as an Instrument of Commerce</i>, 107 Yale L.J. 165, 179-80 (1997).</p>
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