

TRUSTS AND DIVORCE - GOOD, BAD & UGLY:*

New Rules for the Treatment of a Spouse's Discretionary Trust Interests and Powers of Appointment in Divorce Under UTC Article 5 and Goodlander

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I. INTRODUCTION

The high incidence of divorce and the popularity of trusts for asset protection, wealth transfer tax shelter and inheritance management have combined to foster considerable ferment in state domestic relations and trust laws regarding marital rights and trust interests and powers. Estate planning clients often express to their attorneys an especially keen interest in trust ownership to protect to the greatest possible extent their descendants' inheritances from diversion to non-beneficiary spouses and child support orders in the event of a divorce. The third party discretionary trust has historically been the vehicle of choice to bullet-proof trust assets from these kinds of risks. Drafting attorneys were able to give the settlor's descendants extensive powers over and interests in their discretionary trusts without jeopardizing the settlor's protective purposes. This gave the beneficiaries virtually all the benefits of outright ownership without exposing the trust property to the risks of diversion to non-beneficiaries.

Provisions of our "designer version" of the Uniform Trust Code (the "UTC") and the New Hampshire Supreme Court's decision in *Goodlander*¹ seemed to confirm the immunity of third party discretionary trust interests from risks associated with property settlements between a beneficiary and non-beneficiary spouse. However, a *recent* order, not citable as precedent, issued by a "3JX" panel of the Court in *Nerbonne*² has cast some doubt on what was thought to have been settled.

* Apologies to Sergio Leone, and Clint Eastwood (good), Lee Van Cleef (bad) and Eli Wallach (ugly), who directed and acted in the 1969 Spaghetti Western from which part of the title is borrowed. The authors thank Todd Mayo of Perspecta Trust Company, for his review of an early manuscript and thoughtful suggestions that enhanced the final product.

Further, the role and powers of the family and probate divisions of our Circuit Courts in considering a divorcing spouse's trust interests under the UTC and family law statutes in fashioning alimony and child support awards have created uncertainties that did not exist under prior law. This new legal landscape ignores long-standing New Hampshire traditions respecting freedom of disposition, creates unnecessary confusion, and requires a wasteful, inefficient circuitry of action between the family and probate divisions. It undermines our state's efforts to maintain a competitive position in the interjurisdictional trust situs wars as other progressive trust law jurisdictions offer greater protections against domestic relations risks to non-resident settlors and their advisors.

This article will survey this complex intersection of principles of trust, property and domestic relations laws. Topics addressed include: (i) the classification and proper treatment in structuring property settlement, alimony and child support awards of discretionary trust interests and beneficiary-held powers of appointment under our prior and current law; (ii) the limited subject matter jurisdictions and the relative roles of the separate Probate and Family Divisions of the ten New Hampshire Circuit Courts under applicable provisions of UTC Article 5 relating to the new vulnerability of trust interests and powers, and (iii) the preservation of the privacy rights and respect for the duties and intentions of third party trustees and settlors under the new regime. We will call for remedial amendments to Article 5 and some other UTC provisions intended to strike a policy balance favoring the free alienability of property over the interests of non-beneficiaries that is more in line with New Hampshire's strong settlor intent-serving bias and the legislature's ongoing commitment to maintain our competitive position among progressive domestic trust jurisdictions.

II. THE ROLE OF THE UNIFORM TRUST CODE.

RSA Chapter 564-B contains our nuanced version of the UTC. It was initially enacted in 2004, substantially rewritten in 2005 and 2006,³ and amended several times since then to make our laws more user-

friendly and accessible to non-resident settlors. This article will often refer to pertinent provisions of RSA 564-B by “UTC” section numbers without the “RSA 564-B” prefix (e.g., “UTC §1-101”). References to the uniform state law from which many of the provisions of our UTC are drawn will be to the “Model Act.”⁴

III. BASIC TRUST LAW PRINCIPLES AND TERMINOLOGY.

A. The Parties to a Private Trust Relationship and Their Rights, Responsibilities, Liabilities and Powers.

Each private trust involves the participation of at least three parties: the trust’s *settlor*, the *trustee* and one or more *beneficiaries*. The same person can occupy one, two or even all three of these categories simultaneously. The relative rights, responsibilities, powers and liabilities of the settlor, trustee, beneficiaries and certain third parties, including creditors of beneficiaries, their spouses and former spouses, and their dependent children, are defined generally first in the trust agreement,⁵ and secondarily in the pertinent default statutory and common law rules of the state whose laws govern the trust and its administration. A trust is *self-settled* when the settlor retains a beneficial interest in the trust. This is to be contrasted with a *third-party trust* created for beneficiaries other than the settlor him or herself.

Any given trust may have one or more trustees and other non-trustee participants. The non-trustee participants may serve the trust by performing certain trust-related administrative and substantive functions in fiduciary or non-fiduciary capacities as trust advisors, protectors and agents.⁶ One or more trustees may be the trust’s settlor, a third party or one or more of the trust’s beneficiaries.

Legal title to the trust’s assets is vested in the trustee. The *equitable interests* held by the beneficiaries and the trustee’s fiduciary duties to protect and serve those interests are enforced by the remedies available to the beneficiaries for a trustee’s breach of trust. Those remedies include petitioning a court of competent jurisdiction to compel the trustee to make a required distribution to the beneficiaries under the terms of the governing instrument. The rights and remedies available to third parties to reach a beneficiary’s trust interest to satisfy claims against the beneficiary are largely dependent on the terms of the trust agreement and the law that governs the trust’s validity, construction and administration.

B. The Treatment of Third Party Discretionary Trust Interests and Beneficiary-Held Powers of Appointment Under Traditional Common Law Principles.

1. Discretionary Trusts: Support, Extended Discretion and Hybrid Trusts. A *discretionary interest* in a third party trust is created by provisions in a trust agreement that grant the trustee some level of discretion over the payment or accumulation of either income or principal or both to one or more current *discretionary beneficiaries*. A *sprinkle trust* or *spray trust* is one that allows

a trustee to make distributions of the trust’s net income, principal or both among multiple concurrent discretionary beneficiaries.

A trustee’s discretion over distributions may be limited by an *objective* or *ascertainable standard*, such as “amounts as are necessary to provide for the health, education, maintenance and support of the children of the settlor.” Trusts creating these interests are often referred to as *support trusts*.

Alternatively, the trustee may be given *unlimited* or *extended discretion* over distributions. One common example: “the trustee *may* in its sole, uncontrolled and absolute discretion distribute so much of the trust’s net income and principal, or both, whether the whole or a lesser amount, to or for the benefit of such one or more persons as such trustee may, in its sole and absolute discretion, select among a class of persons consisting of the settlor’s descendants who are living from time to time.”⁷ These are sometimes referred to as *extended discretion trusts*. Trustees often petition for instructions or a beneficiary may challenge a trustee’s distributions or refusal to make distributions. In resolving these issues, probate judges are often faced with difficult legal questions in construing the trust agreement language to ascertain the intended scope of the trustee’s discretion⁸.

A *discretionary support trust* or *hybrid trust* combines an expression of broad discretion with a support language such as “such amounts as the trustee shall, in the trustee’s sole and uncontrolled discretion, determine is necessary to support the settlor’s children in the style of living to which they are accustomed.”⁹ The question: did the settlor intend some or all of the above-italicized language to be *precatory* or *mandatory* in nature?¹⁰ As discussed later in Section VI.A. *infra*, such inartful drafting can present issues concerning the content and enforcement of alimony and child support awards under our current UTC Article 5 that may not be within the jurisdiction of a family division judge to resolve.

Modern trust drafting practices tend to favor the greater flexibility and creditor-safety of extended discretion trusts. Trust agreements creating *mandatory interests*, such as a current beneficiary’s right to receive distributions of a trust’s net income, are less popular and infrequently used unless required to achieve tax-related objectives.¹¹ Discretionary trusts offer greater distributional flexibility by allowing the trustee to adapt distribution patterns to unforeseen circumstances. The availability and increasing popularity of perpetual trusts, often designed as *generation-skipping trusts*,¹² make such flexibility even more desirable.

Beneficiaries may challenge as improper a trustee’s exercise or refusal to exercise discretion to distribute trust property to a current beneficiary. The reviewing court may compel a recalcitrant trustee of a support trust to make a distribution if the complaining beneficiary establishes that the distribution is necessary for his or her support. When examining a beneficiary’s challenge to the discretionary distribution decisions of a trustee of an extended discretion trust, courts will not substitute their judgment for that of the trustee.¹³ This deferential standard of review is sometimes called an *abuse of discretion* standard. Courts would generally not find an abuse of discretion unless a complaining beneficiary proved that the trustee acted arbitrarily,

in bad faith or with improper motives.¹⁴ Beneficiaries of extended discretion trusts could rarely carry this burden of proof. They were therefore said to have no power to compel distributions, and none of their creditors claiming through them could reach their interests regardless of whether the trust agreement included an enforceable *spendthrift provision*¹⁵ purporting to prevent creditors from doing so.

Any discretionary distribution made to a beneficiary without sufficient assets of his or her own to satisfy debts and judgments or who was a party to a pending divorce action or bankruptcy proceeding as debtor might be diverted to a judgment creditor, included in a divisible marital estate or made part of the beneficiary's bankruptcy estate. Trustees of discretionary trusts facing these risks will feel compelled by their fiduciary duties to find "work-arounds" to prevent the diversion of distributions to non-beneficiaries. One way to deny benefits to both the distressed beneficiary and his or her creditors would be to refrain from making any discretionary distributions that might otherwise be diverted. A trustee who desires simultaneously to avoid diversion and allow some benefit to the beneficiary could do so in three ways: (i) loan trust assets to the beneficiary¹⁶; (ii) allow the beneficiary the rent-free use of trust assets, and (iii) where the trust agreement allowed for distributions "to or for the benefit of" the beneficiary, pay the beneficiary's expenses directly to vendors on the beneficiary's behalf.¹⁷ These benefits would not be subject to diversion because they were never actually received by the beneficiary.

2. Powers of Appointment. Non-fiduciary powers to direct the disposition of trust property are referred to as *powers of appointment*.¹⁸ Such powers are traditionally, but not always, given to trust beneficiaries. A power of appointment can enable a beneficiary either during life in a signed writing (a *lifetime power of appointment*) or upon death under the terms of the powerholder's will (a *testamentary power of appointment*) to direct the trustee to distribute all or a defined portion of a trust's property (the *appointive property*) among a defined class of permissible *objects* of the exercise of the power. Most modern, well-drafted trust agreements include beneficiary-held powers of appointment. They enable the beneficiaries to deal flexibly with changing circumstances such as births, deaths and marriages in the beneficiary's family, the inability of remainder beneficiaries to manage property, and changes in the legal, economic or investment environments without the fiduciary constraints placed on trustees' distribution decisions. Lifetime general powers of appointment can take the form of a beneficiary-held *power to withdraw* trust assets. Some common examples include *Crummey* and *five or five*¹⁹ withdrawal powers, and a beneficiary's right to withdraw a defined dollar amount or a percentage of a trust's principal in stages when the beneficiary reaches designated ages, at a certain time or after a defined event. Powers of appointment can be either *general* or *non-general* (also known as *special*). *Currently exercisable* lifetime general powers can be exercised to benefit the powerholder himself or herself or the powerholder's creditors.²⁰

Pre-Model Act common law principles generally forbade creditors of a powerholder from securing court orders compelling the debtor/powerholder to exercise a general power of appointment based on the rationale that the power is personal to the beneficiary and it is

not exercisable in any fiduciary capacity, and the appointive property remains in the trust and subject to the trustee's fiduciary duties owing to all beneficiaries (not only the powerholder him or herself) until the power is voluntarily exercised.²¹

3. "Beneficiary-Controlled" Trusts. While not a part of the traditional lexicon of trust and estate practitioners, the concept of a *beneficiary-controlled trust* has lately gained some currency among estate planning professionals.²² Such trusts are often multi-beneficiary sprinkle arrangements that designate a single *primary beneficiary* who is typically a child or spouse of the trust's settlor. That primary beneficiary, often together with his or her descendants, is an eligible recipient of discretionary distributions. The governing trust agreement often grants to the primary beneficiary an array of controls and interests that give the primary beneficiary significant powers over the trust's administration without having that beneficiary treated as possessing a general power of appointment for federal wealth transfer tax purposes. These interests and powers typically include one or more of the following: (i) serving as the trust's sole or co-trustee, often referred to as an *interested trustee*, possessed of all trustee powers except for tax and creditor-sensitive powers such as the ability to make distributions of net income or principal: (a) to him or herself other than for his or her health, education, maintenance and support, and (b) in a manner that would discharge a legal obligation that the powerholder has to support a trust beneficiary; and (ii) possessing: (a) an annually-lapsing, non-cumulative five or five withdrawal power over the trust's principal, and (b) powers to appoint, remove and replace the third party disinterested co-trustee.²³ The third party disinterested co-trustee will possess any wealth transfer tax-sensitive distribution powers.²⁴ Depending on technical wealth transfer tax considerations, the primary beneficiary is also given control over the ultimate distribution of the assets of his or her trust remaining at the time of the beneficiary's death through a testamentary general or the broadest possible non-general power of appointment. As will be seen later in this article, several provisions of our UTC expose certain of a beneficiary's interests in and powers over these trusts to domestic relations risks.

IV. PROPERTY SETTLEMENTS.

A. Discretionary Trust Interests and Powers of Appointment as Divisible "Property".

1. RSA §564:16-a Establishes an "All Property" Equitable Division Regime.²⁵ RSA §458:16-a incorporates our property settlement statute. Section II provides that "[w]hen a dissolution of a marriage is decreed, the court may order an equitable division of *property* between the parties" (emphasis added).²⁶ Section I of that statute defines property to include "... all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties."

2. The Chamberlin Framework for Determining the Divisibility of a Spouse's Trust Interest or Trust Assets Subject to a Spouse's Power of Appointment. *In re Chamberlin*²⁷ requires the family division to undertake a two-step inquiry

for determining the proper treatment of a trust beneficiary's interest for property settlement purposes. The court first must determine, "as a matter of law", whether the interest is "marital property" under RSA §458:16-a, I, "and thus subject to equitable division." Only after crossing that threshold does the court have discretion to value the trust interest and apply the 15 "division factors" of RSA §458:16-a, II(a)-(o) in equitably allocating between the spouses the trust interest and all other divisible assets.²⁸

3. Application of Chamberlin Framework to Powers of Appointment and Withdrawal and Discretionary Trust Interests.

a. Powers of Appointment.

i. Currently Exercisable General Powers Treated as Functionally Equivalent to Ownership. The holder of a presently-exercisable lifetime general power of appointment may withdraw or apply such property without restriction for his or her personal benefit. Before the enactment of the UTC, our courts followed the majority rule that a creditor of a beneficiary of a New Hampshire trust was not able to attach trust property subject to the beneficiary's unexercised general power or to compel the power-holding beneficiary's exercise of the power in the creditor's favor.²⁹ The drafters of the Model Act discerned a common law trend in a minority of jurisdictions to treat such powers as the equivalent of outright ownership over the appointive property.³⁰ The Model Act reflects that view, treating general powers as the equivalent to ownership of the appointive property.³¹

Our UTC follows the Model Act's lead in UTC §§5-505(b) and 6-603(b). As in the Model Act, our UTC §5-505(b) provides that during the period a power to withdraw property from a trust may be exercised, the withdrawal powerholder is treated the same as a settlor of a revocable trust. Under UTC §6-603(b), holders of executory powers of withdrawal have the rights of a settlor of a revocable trust over the property subject to the power. It is because the settlor's power of revocation is considered outright ownership that the assets of the settlor's revocable trust are subject to claims of the settlor's creditors under UTC §5-505(a)(1). It follows that the assets subject to these powers are divisible for as long as the power is exercisable. This includes outstanding *Crummey* powers and *five or five* withdrawal powers exercisable both within and exceeding the lapse protection amounts of the provisions of the federal gift tax law.³² This treatment is supported by a more sound policy rationale than the common law rule that denied creditors access to the appointive property.

ii. Non-General Powers. A divorcing spouse holding a presently exercisable non-general power of appointment over third party trust assets that are not otherwise includable in the marital estate has no ability to exercise that power for his or her personal benefit. Therefore, at common law the mere existence of that divorcing spouse's power did not confer on him or her a divisible property interest in the appointive property.³³ Our UTC does not disturb the common law rule.

b. Discretionary Trust Interests.

i. Discretionary Interests in Irrevocable Self-Settled Trusts.

(A) Domestic and Offshore Asset Protection Trusts. On July 11, 2008, Governor Lynch signed into law RSA

Chapter 564-D, the "Qualified Dispositions in Trust Act" (the "QDTA"), effective September 9, 2008. The divisibility of the divorcing spouse's retained interest in a self-settled "asset protection trust" ("APT") created under the QDTA will turn on whether the settlor spouse funded the trust before or after the marriage. Assets of an APT meeting the QDTA's requirements for "qualified dispositions" and funded prior to the settlor's marriage will not be subject to property settlement claims despite the settlor's retention of his or her beneficial interest unless the non-settlor spouse can prove that any transfers made to the APT were fraudulent under the provisions of QDTA §§ 9, 12 and 15.I.(a), and applicable provisions of the Uniform Fraudulent Transfer Act, RSA §545-A.³⁴ QDTA §15 I.(a) makes divisible assets held in a New Hampshire APT to the extent that the APT was funded during the marriage, with no requirement that the non-beneficiary spouse prove that the APT's funding was fraudulent. The assets of an APT funded during the marriage under the laws of another, more pro-debtor, APT state and being administered exclusively by a trustee residing in that state may not be divisible in a New Hampshire divorce, except perhaps under one of three circumstances: under the common law dissipation doctrine;³⁵ upon a finding that the funding was fraudulent under the other state's APT statute; or a finding that the application of the other state's laws violate a strong public policy reflected in the marital partnership theory underpinning our property settlement statute.³⁶

(B) Common Law Self-Settled Trusts. UTC

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§5-505(a)(2) codifies the common law self-settled trust doctrine. It confirms the long-standing common law principle allowing creditors to reach the assets of irrevocable self-settled trusts that are not protected under the QDTA or the laws of another APT jurisdiction. Assets held in these trusts are divisible to the extent that discretionary distributions can be made to the settlor, irrespective of where or when the trust was created and funded.³⁷

ii. Interests in Third Party Trusts.

(A) Uncertainty Under Prior Law. Our Supreme Court had no occasion to provide guidance in a property settlement context concerning the proper treatment of discretionary trust interests before the enactment of our UTC. The two divorce cases involving a spouse's discretionary trust interests, *Eaton v. Eaton*,³⁸ decided in 1924, in *Athorne v. Athorne*,³⁹ from 1957, provided some clues to the Court's treatment of discretionary trust interests by rejecting attempts of non-beneficiary spouses to reach the other spouse's discretionary trust interests to satisfy alimony awards. There were, moreover, cases decided under general debtor-creditor principles that upheld the protective features of third party discretionary trusts.

Relying on the maxim that the settlor's intent is of paramount importance rather than the nature of the interest itself, the Court in *Duncan v. Elkins*⁴⁰ held that what it characterized as a fully discretionary "protective" trust would be protected against a beneficiary's creditors because "[t]o hold otherwise would defeat the intention of the testatrix to 'protect' the fund during [the beneficiary's] life."⁴¹ *Brahmey v. Rollins*⁴² recognized that creditor protection of discretionary trust interests inheres in the contingent nature of the beneficiary's interest.⁴³ The trust language in *Hanford v. Clancy*⁴⁴ and *Carlton v. Henderson*⁴⁵ required the trustee to exercise discretion as to the time, manner, and purposes for which the beneficiary should receive distributions. The beneficiary was determined to have no direct legal or equitable title to the trust funds for that reason.⁴⁶ In each of these cases, the interposition of a third party trustee's discretion between the trust's assets and the beneficiary was sufficient to protect the beneficiary's interest from creditors.

(B) Apparent Certainty Under the UTC and Goodlander.

(1) UTC Article 5. Most of the provisions of both the Model Act and our UTC relating to the rights and remedies of the creditors of trust beneficiaries are contained in Article 5, UTC §§5-501-510. Model Act Article 5 contains controversial provisions that have been debated by commentators and in many respects substantially modified or rejected by adopting states.⁴⁷ Among other innovations that have been characterized as departures from the common law is the UTC's elimination of any distinction between purely discretionary and support trusts for creditors' rights purposes.⁴⁸ Instead, the Model Act draws a significant distinction between mandatory and discretionary interests. Under Model Act §506(a), a "... 'mandatory distribution' means a distribution of income or principal which the trustee is required to make to a beneficiary under the terms of the trust. ...". Mandatory trust interests "[do] not include a distribution subject to the exercise of the trustee's discretion even if: (i) expressed

in the form of a standard of distribution, or (ii) the terms of the trust authorizing a distribution couple language of discretion with language of direction."⁴⁹ Mandatory interests not protected by spendthrift restrictions can be reached by creditors without restriction. Discretionary interests may not be attached except by defined classes of "exception creditors", including, as discussed in Section V.C.2.a. and b., *infra*, non-beneficiary payees under alimony and child support orders.

Article 5 of our UTC as enacted in 2004 and substantially rewritten in 2005, 2006 and 2008 follows the Model Act's basic distinction between discretionary and mandatory interests. The legislature amended UTC §8-814 in 2008 to address concerns that some of the Model Act's provisions could be interpreted to expose third party discretionary trust interests to property settlements.⁵⁰ UTC §8-814(b) now expressly provides that a discretionary interest is a "mere expectancy" and not a "property interest" or "enforceable right," irrespective of whether the trustee's discretion over distributions is extended or limited.

(2) The Goodlander Decision.

Goodlander presented the Supreme Court with its first opportunity to interpret and apply these UTC provisions in a divorce context. The husband appealed certain aspects of the lower court's property settlement order that the husband alleged improperly favored his former wife, Elizabeth M. Tamposi. The appeal challenged the lower court's treatment of the wife's interests in two trusts (collectively referred to as the "EMT Trust"⁵¹) that were administered under provisions of a trust agreement created by her deceased father.⁵² The trustee had the discretion to distribute among the wife and her descendants "such amounts from the net income and principal of the [EMT Trust] and in such proportions among them as the trustee considers necessary for [their] education and maintenance in health and reasonable comfort."⁵³ In each year prior to the divorce the trustee made substantial discretionary distributions to the wife. The trustee for the most part discontinued those distributions after the filing of the divorce action.

Goodlander affirms the trial court's application of UTC §8-814(b) to exclude the wife's discretionary interests from the marital estate.⁵⁴ There was no need to construe the trust language to determine whether the wife's interest was a support trust or extended discretion trust interest; the statute is clear that neither grants a property interest. Neither the retroactive application of our UTC, which was enacted after the EMT Trust was created but before the commencement of the divorce action, nor the enactment of UTC §8-814(b) during the pendency of the case violated the New Hampshire Constitution's prohibition on retrospective laws that negate vested rights.⁵⁵

(C) Not So Fast: The Uncertain Reach of Nerbonne. The EMT Trust design was not a "beneficiary-controlled" trust similar to that described in Section III, B.3., *supra*. The three justice 3JX panel specifically mentioned several restrictions on the wife's interests in and powers over the EMT Trust. She could not serve as a trustee and therefore had no role in the trust's administration or distribution decisions. Two of the wife's brothers served as the trust's "investment directors." In that capacity the brothers controlled all real estate interests owned by the trust and the flow of cash to the trustee.

Their decisions to withhold or distribute cash to the trust were subject to the forgiving “business judgment standard”, making them virtually immune from attack by the trust’s trustee or the wife as beneficiary.⁵⁶ Neither the wife nor the trustee had the power to remove the investment directors.⁵⁷

The Court’s *dicta* discussing these limitations might be interpreted to imply that the result in *Goodlander* would have been different if the wife had one or more of the broad array of interests and powers typical of the modern beneficiary-controlled trust despite the language of UTC §8-814(b) that creates no exception to the “no property interest” general rule. In *Nerbonne*,⁵⁸ decided in October of 2014, the unanimous 3JX panel cited this *dicta* in distinguishing *Goodlander* and holding divisible the assets of a discretionary beneficiary-controlled trust.⁵⁹

The issue was presented by Mr. Nerbonne’s appeal of the trial court’s determination that *Goodlander* and UTC §8-814(b) dictated that the assets of the trust were indivisible.⁶⁰ Mr. Nerbonne had irrevocably created and funded the trust several years before the parties’ divorce out of assets that would have been considered marital property had the parties divorced at that time. Mrs. Nerbonne was both the trustee and, together with the parties’ descendants, a discretionary beneficiary as to both net income and principal. In reversing the trial court’s exclusion of the trust’s assets from the marital estate, the panel held that as a “matter of law” the entire trust principal was subject to division based on the “extensive rights and powers retained by the parties to control the trust and the trust funds.”⁶¹ Mrs. Nerbonne’s rights and powers included the following: (i) as trustee she could distribute trust assets to herself for her health, maintenance, education or support, (ii) she could appoint a “special trustee” to distribute additional funds to herself as beneficiary, and (iii) she, as trustee, could amend or terminate the trust for any reason.⁶² The panel also noted Mr. Nerbonne’s power to remove Mrs. Nerbonne as trustee.⁶³

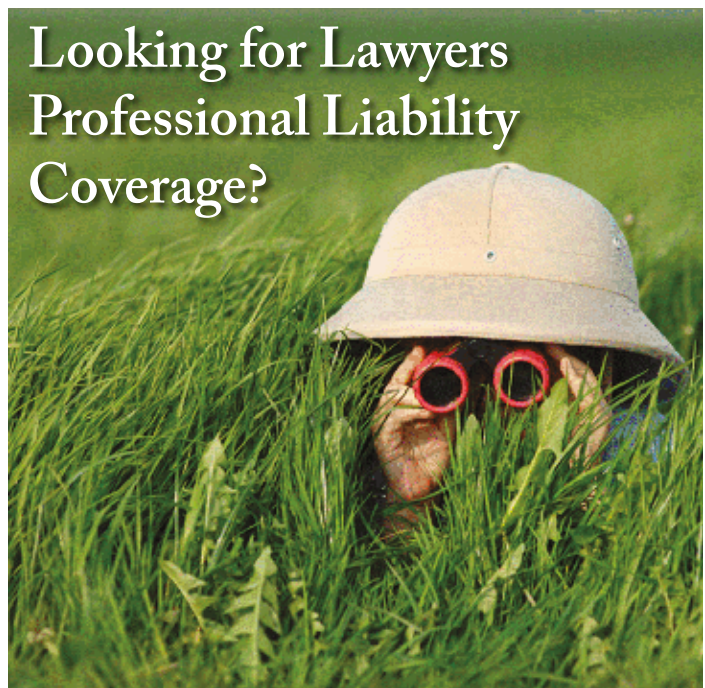
Where does *Nerbonne* leave us? Would the result have been different if the opinion was issued by the full Court? Would any one or more of the factors cited by the panel to distinguish *Goodlander* be sufficient alone or in combination to support the panel’s determination? Would the result have been different if Mr. and Mrs. Nerbonne had the same powers and interests over the trust and its administration, but the trust was funded by a third party out of assets that were not previously part of the marital estate? The authors submit that none of the factors cited in *Nerbonne* to distinguish it from *Goodlander* justify ignoring the clear mandate of UTC §8-814(b). Each party to a marriage is generally free to dispose of his or her assets during the marriage without the risk of them being recalled and made part of a divorce property settlement unless the court applies the dissipation doctrine to do so.⁶⁴ Moreover, the nature and extent of Mr. and Mrs. Nerbonne’s interests in and powers over the trust and its assets should not have been sufficient to take the trust assets out of the protective ambit of UTC §8-814(b) unless those interests and powers rose to the level of general powers of appointment. Because Mrs. Nerbonne’s discretionary power as trustee to make distributions to herself was limited by an ascertainable standard, she held only a non-general power. The exercise of those powers were subject to fiduciary standards owed to *all*

trust beneficiaries.

UTC §§5-506(a) and 8-814(b) make abundantly clear the legislature’s intent to take all discretionary third-party trust interests out of the category of property interests irrespective of whether the trustee’s discretion over distributions is absolute or subject to a standard, without any exceptions. Our Supreme Court has traditionally enforced the letter of a clearly-worded statute. It has consistently refused to usurp legislative prerogatives by adding common law exceptions where the legislature has not seen fit to include them.⁶⁵ *Nerbonne* represents a troubling departure from this well-settled pattern of judicial deference, and leaves us all wondering concerning its implications for future cases.

B. The Consideration of Indivisible Discretionary Trust Interests Under the Pertinent Division Factors of RSA §564:16-a, II.

After the property interest characterization analysis is complete, the family division must consider the 15 factors enumerated in RSA §458:16-a, II(a)-(o) in determining an equitable division of the marital estate. An equal division is presumed to be equitable unless the court determines that an equal division would not be appropriate after considering one or more of the division factors. Those listed in subsections (a)-(o) that may be most important in cases involving a spouse’s indivisible discretionary trust interests include, without



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limitation: “[t]he duration of the marriage”, subsection (a); “[t]he opportunity of each party for future acquisition of capital assets and income”, subsection (c); “[t]he value of any property acquired prior to the marriage. . .”, subsection (m); “[t]he value of any property acquired by gift, devise or descent”, subsection (n), and the “catch-all” category of subsection (o) - - “[a]ny other factor that the court deems relevant.”

The decided cases reflect a strong bias in favor of an equal division of the divisible assets for marriages of long duration,⁶⁶ and may influence an exercise of discretion in a non-beneficiary spouse’s favor in cases involving indivisible discretionary interests in large trusts, particularly where significant distributions were made during the marriage that directly or indirectly benefited both spouses. The “received by gift or inheritance” and “acquired before the marriage” factors may rebut the “equal as equitable” presumption in many beneficiary spouses’ favor.⁶⁷ The “opportunity for future acquisitions” consideration should more often than not support a division favoring the non-beneficiary spouse if discretionary distributions can reasonably be expected to be made to the beneficiary spouse after the divorce.⁶⁸ The catch-all factor is intensely case-specific and can cut either way in any case depending on the experience-informed instincts of the fact-finder concerning what might be equitable, all things considered.⁶⁹

V. DISCRETIONARY TRUST INTERESTS AND ALIMONY AND CHILD SUPPORT AWARDS.

A. The Primarily Rehabilitative Role of Alimony.

Since the adoption of the equitable division statute in 1978, property settlements are the primary means by which the marital partnership theory of marital property rights has been implemented, the contributions of a non-title holding spouse recognized, and his or her future needs met. Alimony awards have been relegated to a secondary role of rehabilitating a formerly supported spouse to provide continued support and perhaps lifestyle maintenance while he or she receives training sufficient to find work and achieve economic independence. To the extent that alimony is ordered, it is rarely awarded in a lump sum, but is rather payable by the obligor spouse over a defined number of months or years necessary to achieve the rehabilitative purposes based on the obligor’s ability to pay.⁷⁰

B. The Alimony Statute.

The alimony statute, RSA §458:19, gives family division judges broad discretion to make equitable alimony awards. RSA §458:19, I.(a)-(c) list three factors to guide the exercise of this discretion. The judge is encouraged to give particular consideration to: (i) the lifestyle the parties enjoyed during the marriage; (ii) the payor spouse’s ability to pay based on his or her statutorily defined “income” relative to the payee spouse’s needs after considering his or her available income and other resources, if any, and (iii) where minor children are involved, the effect of custody and child support orders on the spouses’ abilities to seek or continue employment and/or a payor spouse’s ability to earn income sufficient to fund both child support and alimony obligations.⁷¹

C. Prior Common Law, UTC Article 5 and the QDTA Relating to the Enforcement of Alimony and Child Support Awards Against Indivisible Discretionary Trust Interests.

1. Prior Law. The *Atborne* and *Eaton* cases cited in nn. 39 and 38, *supra*, and discussed in each note’s accompanying text, confirm that before the enactment of our UTC alimony awards could not be enforced against a spouse’s discretionary trust interests. *Atborne*, the more recent of these two cases and therefore the better indicator of the Court’s application of modern marital partnership theories and broad equitable discretion in divorce cases, denied any attachment remedy to the non-beneficiary spouse but confirmed the divorce court’s discretion to consider the existence of the interest in determining the amount of alimony awarded.⁷² This was consistent with the general common law rule in virtually all equitable division states.⁷³ There are no reported New Hampshire cases allowing a divorce court to order that child support payments ordered must be made out of a parent’s discretionary trust interests.⁷⁴ The majority common law rule prevailing in other jurisdictions was that they could not be ordered to do so.⁷⁵

2. UTC Article 5. The creditors’ rights provisions of both the Model Act and our UTC ignore these common law limitations and their underlying rationale. They substantially expand the powers of family division judges to burden a beneficiary spouse’s discretionary trust interests with alimony obligations with no apparent consideration to whether creating these new remedies represents a better balancing of the competing policy interests than that implicit in the prior law. They also allow an alimony order to reach discretionary distributions made “for the benefit of”, and not directly to, an alimony payor spouse, disabling trustees from using indirect distributions to simultaneously benefit the beneficiary and avoid diversions that are discussed in Section III. B.1. above.

a. Alimony. UTC §5-504 addresses the extent to which an alimony award can be satisfied out of a beneficiary spouse’s interest in a third party discretionary trust. The *Goodlander* Court applied that provision in considering the husband’s appeal of his alimony award.

UTC §5-504(b) disables the creditor of a beneficiary from compelling any distribution subject to the trustee’s discretion, irrespective of whether the discretion is extended or limited or whether the trustee has abused the discretion or failed to comply with a distribution standard. UTC §5-504(c)(1) allows “the court” [*sic*] to order the trustee of a discretionary trust to make a distribution “. . . to satisfy a judgment or court order against the beneficiary. . . for alimony for the beneficiary’s spouse, or former spouse” under certain limited circumstances. Subsection (c)(2) limits the amount of any such distribution to “. . . 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.” It further limits the scope of the forced distributions “. . . to the extent that the judgment or court order expressly specifies the alimony amount attributable to the most basic food, shelter, and medical needs of the spouse or former spouse.”

These provisions are intended to create a limited exception creditor status for a payee spouse or former spouse. The “most basic needs”, “but not more than” and “equitable under the circumstances” limitations establish the outer limits on the family division judge’s power to order a discretionary distribution to satisfy an alimony award.⁷⁶ None of these considerations will be relevant, however, in the absence of a prior finding by a court of competent jurisdiction that the trustee has not complied with a distribution standard or abused its extended discretion. No guidance is given concerning how these layered and confusing limitations and conditions are to be reconciled with the powers granted under the general alimony statute or whether the family division has any power to make findings and enter orders beyond determining the amount that might be equitable under the circumstances and required for the non-beneficiary spouse’s most basic needs.

The superior court judge in *Goodlander* had obvious difficulty parsing UTC §5-504(c), particularly understanding its interrelationship with the alimony statute and the court’s inability under prior law to issue orders diverting discretionary trust interests. The Supreme Court vacated the judge’s alimony order: (i) limiting the husband’s award to his most basic needs under UTC §504(c)(2) rather than in accordance with the standards and factors enumerated in RSA §458:19; and (ii) conditioning the satisfaction of the award on the wife’s receipt of trust distributions sufficient to satisfy those most basic needs.⁷⁷ On remand, the Court ordered the judge first to apply the factors in the alimony statute to redetermine the alimony award and then issue an order directing that the trustee make future distributions to the husband from the EMT Trust to the extent necessary to satisfy the husband’s most basic needs.⁷⁸

The Supreme Court was undoubtedly correct to vacate and remand the alimony order based on the lower court’s understandable misreading of UTC §504(c). However, the Court provided no analysis or commentary other than merely citing the threshold requirement in UTC §504(c)(b)(2) of a finding that the trustee failed to comply with a distribution standard or abused its extended discretion. The Court’s cryptic analysis and remand order left many unanswered questions concerning the lower court’s powers to make such a determination and to enforce any order that it might issue. Section VI below provides a detailed description of the proper roles of the family and probate divisions in considering a beneficiary spouse’s discretionary trust interest in the context of an alimony award to the non-beneficiary spouse under UTC §504(c) and satisfying any such award out of future discretionary distributions made by the trustee.

b. Child Support. All of the *Goodlander* parties’ children were adults at the time of the divorce action. The Court therefore had no occasion to address the vulnerability of discretionary interests to child support orders under UTC §504(c). That section allows the enforcement of child support orders out of discretionary trust interests only after a trustee has been found to have failed to comply with a distribution standard or abused its extended discretion, but without the “most basic needs” limitation applicable to alimony awards. Accordingly, a family division judge may both consider a parent’s discretionary trust interest in determining the amount of a

child support order, and, if equitable under the circumstances, issue an order directing distributions to satisfy the order in an amount not to exceed the amount distributable to the beneficiary-parent had the trustee satisfied the distribution standard or not abused its extended discretion, with same unanswered questions concerning enforcement that apply to alimony orders.

3. The QDTA. QDTA §15.I.(a) extends exception creditor status without limitation to minor children of the settlor spouse even if the settlor non-fraudulently created and funded the APT prior to the marriage such that its assets are not divisible in a property settlement. The language of that section purporting to extend exception creditor status to a “spouse” and “former spouse” must be read in conjunction with the definitions of those terms in QDTA §1 VII. as including “only persons to whom the [settlor] was married at, or before, the time the qualified disposition is made.”

Does this mean that exception creditor status is available to alimony awards to spouses and former spouses of APT settlors only to the extent that the APT was funded on or after the date of the marriage (although in most cases that will be irrelevant because those assets will be included in the marital estate and the non-settlor spouse will likely have his or her economic needs met through the property settlement)? If the answer is “yes”, the family division would have no power under the QDTA to enforce alimony awards against the assets of New Hampshire APTs but be given most basic needs enforcement



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powers against the assets of third party discretionary trusts under UTC §504(c)(2). This creates a curious asymmetry, probably unintended, between the alimony exception creditor provisions of the UTC and the QDTA. The law has traditionally accorded more creditor protection to third party discretionary trust interests than retained interests in self-settled trusts. This bias is based on the policy that it would ignore settlor intent to allow access to interests under third party trusts but be unfair to creditors to allow settlors to exempt their own assets from claims while still retaining the opportunity to benefit from them.⁷⁹ Eliminating the limited exception creditor status for non-beneficiary alimony payee spouses under the UTC will eliminate this anomaly as recommended in Section VII, *infra*.

VI. SUBJECT MATTER JURISDICTION; PRIVACY OF THIRD PARTIES.

A. Jurisdiction. The statutes defining the limited jurisdictions of the probate and family divisions do not overlap in any respect. Each is accorded limited jurisdiction and neither has concurrent jurisdiction to resolve legal issues within the other's purview.

1. The Family Division's Limited Subject Matter Jurisdiction. RSA §490-D:2, I confers on the family division *exclusive* jurisdiction over "petitions for divorce, nullity of marriage, alimony, custody of children, support, and to establish paternity." RSA §§458:16-a and 19 allow the family division to divide marital property and enter alimony orders in divorce cases, but they infer no power to determine or disturb the property interests or rights held by third parties.

The Supreme Court clarified the family division's limited jurisdictional reach *In re Muller*.⁸⁰ In that case, the husband claimed that funds received from his parents were loaned to him. He presented evidence in the form of a promissory note and mortgage deed. The wife maintained that the funds were gifted and were therefore divisible. She challenged the legitimacy of the note and mortgage, claiming that they were contrived after the fact to support husband's allegedly specious claim. The family division ruled in the wife's favor on the basis that the note and mortgage were not enforceable. On appeal, the Supreme Court vacated the family division's order because only a superior court judge can determine the legitimacy of loan documents and a debt allegedly owed by third parties to the divorce litigation.⁸¹

2. The Exclusivity of the Probate Division's Jurisdiction Over Trust Matters. RSA §547:3, I and UTC §2-203 confer on the probate division exclusive jurisdiction over the interpretation, construction, modification and termination of trusts, the administration of trusts and the appointment, removal and surcharge of trustees of such trusts. In a case commenced before the creation of the circuit court system, the Supreme Court discussed the probate courts' subject matter jurisdiction in *DiGaetano v. DiGaetano*.⁸²

In that case, the parties' deceased mother was the surviving settlor of a joint trust agreement. The plaintiffs appealed a probate court determination that their mother's amendment to the trust agreement after the death of her joint settlor husband was valid and enforceable. That amendment eliminated the plaintiffs' beneficial interests and

made the defendant the sole trust beneficiary. The plaintiffs filed their appeal under a since-amended statute that allowed appeals in the superior court where a right to a jury trial is guaranteed by the constitution or a statute. They asked the superior court to exercise its equitable powers to reform the trust in light of evidence of an alleged separate, oral contract preventing the parties' mother from amending the joint trust's terms.

The superior court judge denied the defendant's motion to dismiss the appeal holding that the superior court had subject matter jurisdiction to grant the plaintiffs the relief they requested. The Supreme Court reversed the lower court's denial of the defendant's motion to dismiss on the basis that the plaintiffs' appeal involved the interpretation of the meaning and validity of the trust. Only a probate judge may construe the trust language and determine whether a trustee has breached a duty or issue orders compelling a trust distribution.

3. Jurisdictional Limits on Family Division's Enforcement of an Alimony Order against a Spouse's Discretionary Trust Interest. The language of UTC §504(c)(1), allowing "the court" to enforce alimony awards out of discretionary trust interests, must be construed in light of *DiGaetano*, *Muller* and the statutes conferring jurisdiction on the probate and family divisions. The alimony portions of *Goodlander* vacating and remanding the superior court judge's alimony award do not acknowledge the absence of any subject matter jurisdiction that would allow the judge on remand to construe the language of the trust agreement governing the EMT Trust as required in UTC §504(c) concerning the extent of the trustee's discretion (absolute or limited), and whether the trustee's refusal to make a distribution to the wife would have breached a duty owed to her.

It appears that the superior court judge's vacated alimony order recognized the limits of the judge's powers by ordering the wife to share with her husband only the basic needs portion of any future distributions that the trustee might exercise its discretion to make to the wife. However, the instructions given for the judge's reconsideration provide no indication of how the judge was to resolve the jurisdictional issues that apparently troubled her when she issued the vacated order. In the absence of such guidance, a fair reading of all applicable statutes compels the conclusion that UTC §504(c) required the courts and the parties to follow a circuitous judicial protocol to secure the necessary orders from the probate and family divisions, a procedural gauntlet unprecedented under prior law that made no provision for orders allowing non-beneficiaries access to discretionary trust interests.

It is also unclear from the Court's discussion of the alimony issue whether it views UTC §504(c) as: (i) giving the husband, a non-beneficiary, standing to enforce the family court judge's order in the probate court, (ii) requiring the wife, as beneficiary, to do so, or (iii) compelling the trustee against whom the order is issued to petition the probate division for instructions. In any event, if the presiding probate judge finds settlor intent to confer extended discretion, it can enforce the family division's order only to the extent that the judge finds that by refusing to make a distribution the trustee was not acting "... in good faith and in accordance with the terms and purposes of the trust

and the interests of the beneficiaries” as required in UTC §8-814(a). In the probate division proceeding, any trustee of an extended discretion trust refusing to make a distribution that would be diverted to the non-beneficiary spouse will easily satisfy the “good faith” and “interests of the beneficiaries” standard based on the settlor’s intent not to benefit the non-beneficiary spouse and the trustee’s duty under UTC §8-811 to protect the trust’s assets.⁸³ This will neutralize any prior determinations made by the family division judge concerning the non-beneficiary spouse’s most basic needs and what might be equitable under the circumstances.

In the end, a family division judge’s attempt to issue and enforce the presumably modest basic needs alimony orders issued under UTC §504(c) will in most cases only waste judicial resources and prove to be an expensive exercise in futility for all parties involved. The same can be said for that portion of child support orders issued under that provision, except that the absence of a basic needs limitation on the amount of those orders may make them worthwhile for a custodial non-beneficiary spouse to pursue on behalf of the minor children, particularly if they are very young.

B. Privacy, Confidentiality and Trustees’ Fiduciary Dilemmas.

1. Disclosing Trust Interests in Financial Affidavit. In most cases a parent or other ancestor will be the settlor of the trust under which a divorcing spouse has a beneficial interest. Obtaining a copy of the governing trust agreement may be necessary to determine the beneficiary’s disclosure obligations and the proper treatment of the beneficiary’s trust interests and powers in the divorce action. The family division’s initial self-disclosure requirements of Rule 1.25-A(B)1, effective on December 1, 2011, are intended to make discovery of such information simpler and encourage communication and the free sharing of information between the parties early on in the process. Rule 1.25-A(B)1 requires that each party file a financial affidavit.⁸⁴ It is filed under seal with the court and is not available to non-parties.⁸⁵ The Rules require full disclosure under oath of all income and assets having any substantial value. Rule 1.25-A(B)(1)(h) requires the provision of bank statements held in the name of another person for the benefit of either party, which may be interpreted to create a duty of inquiry on each party to ascertain and gather relevant information from third parties. If assets are omitted from the financial affidavit and discovered after the entry of property settlement and alimony orders, the case may be reopened. In *In re Spenard*,⁸⁶ the Supreme Court recently vacated a family division judge’s property settlement order where the husband’s affidavit failed to disclose promissory notes payable to him. A beneficiary or potential beneficiary spouse who fails to make all reasonable efforts to discover and disclose existing or prospective trust interests does so at his or her peril.

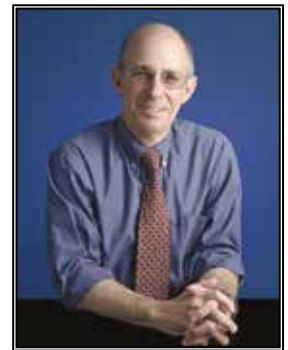
2. Compelled Production of Copies of Trust Agreements and Assets. Amendments made to our UTC in 2006 reject the Model Act’s suggestion that the beneficiary reporting, information and disclosure requirements of UTC §8-813 be made mandatory and not

default rules.⁸⁷ This makes it possible for settlors to provide in their trust agreements that beneficiaries are not entitled to request and receive copies of the governing agreements themselves or any information concerning their beneficial interests or the assets that the trust holds. Some settlors will take advantage of this opportunity to create “quiet trusts” out of a concern that a beneficiary or a creditor or dissident spouse of a beneficiary will use trust information to undermine the trust’s purposes or divert trust assets to third parties or other purposes in a manner inconsistent with the settlor’s intentions.

In cases involving such quiet trusts, it may be impossible for the beneficiary to comply with the family division’s mandatory self-disclosure rules concerning his or her trust interests. Counsel for the non-beneficiary spouse may be forced to attempt to secure the information through the discovery process. The mandatory self-disclosure rules are not intended to limit the scope of discovery.⁸⁸ Requests for production, interrogatories, depositions and the issuance of a subpoena *duces tecum* remain available as well.⁸⁹ Failing to respond to discovery requests or to comply with discovery orders or subpoenas could prevent the scope of certain testimony or evidence or prevent a party from proceeding with certain claims or result in the assessment of costs and perhaps attorney’s fees incurred by the other parties.⁹⁰ A party willfully refusing or failing to comply with a discovery order or subpoena is subject to civil contempt sanctions.⁹¹ The impossibility of performance defense may provide some shelter against contempt

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sanctions and give the beneficiary of a quiet trust grounds for a motion to quash a subpoena.⁹² However, the cure may be worse than the illness if the presiding judge perceives that the beneficiary is being obstructive, willfully neglecting the duty to inquire of third parties, or attempting to subvert the purposes of discovery by hiding behind the impossibility defense.⁹³ Rule 1.25-A(C) requires that when a document or information is unavailable, a party must describe in writing under oath the efforts made to obtain the documents.

3. Settlor Privacy Concerns and Third Party Trustees' Fiduciary Duties.

a. Confidentiality of Trust Records and Settlor's Financial Information. If counsel for a divorcing non-beneficiary spouse cannot access trust records from the beneficiary spouse, discovery might be sought directly from third parties such as the trustee or a living settlor.⁹⁴ New Hampshire statutes and court rules allow discovery in such cases upon a good faith showing that the information sought from the third party will assist the spouses and the court in assessing the parties' financial situations and entering equitable property settlement and divorce orders.

The trustee of a quiet trust may be confronted with express disclosure and personal jurisdiction submission prohibitions in the governing instrument. A subpoena *duces tecum* may be sufficient to convince a reluctant settlor or trustee to provide information if the subpoenaed party insists that only redacted disclosures be made or affidavits given and that any such information provided be subject to a confidentiality agreement among the parties and their experts.⁹⁵

Confidentiality agreements are commonly used to protect from public inspection any sensitive information disclosed voluntarily or through the discovery process. A confidentiality agreement may, for example, restrict who has access to the confidential information and the purposes for which it may be used and provide for its later destruction. In cases where the parties cannot reach a consensus on confidentiality the party seeking it may request a protective order under Rule 1.25-A(B)(4). The party seeking the protective order must submit the materials to the court for an *in camera* review by the court. All materials are then sealed and disclosed only to the parties' attorneys, staff, experts in court and as otherwise necessary.⁹⁶

b. Trustees' Fiduciary Duties to Defend Trusts and Their Purposes. UTC §8-811 imposes upon trustees the duty to take "reasonable steps" to defend claims against the trust.⁹⁷ Any governing discretionary trust agreement may make clear the settlor's intention that only the beneficiary spouse is eligible to receive discretionary distributions. The effect of a family division's alimony and child support orders entered under UTC §504(c) in favor of the non-beneficiary spouse and minor children is to effectively rewrite the trust agreement by adding new discretionary beneficiaries. In those cases where trustees are not joined as parties to the divorce action, the primary means of enforcing attachment orders to satisfy judgments against third parties holding the property of a judgment debtor is for the court to issue a writ of trustee process under RSA Chapter 512.⁹⁸ RSA §512:32 provides that a third party refusing to file with the court required disclosure forms or deliver property subject to the writ is

entitled to an evidentiary hearing on the basis for the objection. RSA §512:39 provides that any third party not proving a satisfactory basis for noncompliance may only be discharged as a party to the underlying action by paying into court the amounts subject to attachment.

A third party trustee may assert two bases for refusing to comply with a trustee process order issued under the authority of UTC §504(c). First, where the order is unsupported by any required separate orders from a probate division judge as described above, the trustee cannot comply until that judicial process is complete. Second, if there were unsuccessful efforts made to secure the required probate court orders, the trustee should be excused from compliance with a trustee process order unless a future refusal by the trustee to exercise the distribution discretion is successfully challenged in the probate division by the beneficiary or non-beneficiary spouse. Absent such circumstances, the trustee's refusal to perform its obligations under Chapter 512 subjects it to the possibility of contempt sanctions.

VII. CONCLUSIONS AND CALL FOR REMEDIAL LEGISLATION.

The good: UTC §8-814(b) and *Goodlander* appeared at first blush to remove any doubt concerning the indivisibility of *all* third-party discretionary trust interests, and, by logical extension, any retained discretionary interest in APTs non-fraudulently created and funded under the QDTA before the marriage in the context of property settlements. UTC §§5-505(b) and 6-603(b) confirm the status of assets subject to general powers of appointment as the equivalent of ownership and eliminate the unfair treatment under prior law that disabled creditors (including beneficiaries of domestic relations orders) access to the appointive property.

The bad: *Nerbonne* erroneously distinguishes *Goodlander* and ignores the flush language of our UTC, creating uncertainty about the extent to which a divorcing spouse's interests in and powers over third party discretionary trusts as trustee and otherwise will subject the trust assets to property settlement risks. Moreover, the new remedies contained in UTC Article 5 purporting to empower family division judges to order that a portion of alimony and child support awards be satisfied out of the payor spouse's third party discretionary trust interests give family division judges an unprecedented ability to rewrite the terms of discretionary trust agreements to include new beneficiaries (particularly former spouses-in-law who are not part of a settlor's blood line) in a manner that disregards settlor intent. They also create dilemmas for trustees attempting to reconcile their fiduciary duties and legal obligations to comply with orders issued under the new rules, and encourage them to avoid the effect of UTC §504(c) orders by indirection, *i.e.*, employing the beneficiary loan and rent-free use strategies described in Section III. B.1., *infra*.

The ugly: Statutory limits on the family and probate divisions' subject matter jurisdiction, and the vague reference to "the court" in UTC §504(c)(1), will require the involvement of both divisions' judges to determine and enforce alimony and child support orders made against third party discretionary trust interests. This will result in needless expense to the parties and the unnecessary expenditure of

limited and already strained judicial resources.

In the authors' opinions, these reasons are alone sufficient to justify the retroactive enactment of remedial legislation. Taking such action will also reverse perhaps the greatest casualty resulting from these new rules: New Hampshire's standing among the other progressive trust law jurisdictions in the eyes of wealthy situs-seeking settlors and their advisors seeking iron-clad assurances that their descendants' discretionary trust assets will not be subject to domestic relations risks. Those assurances are available to one degree or another under the laws of all of the other states that are competing with ours in the national trust services marketplace. Indeed, even jurisdictions that have enacted their own versions of the Model Act and are not considered among the domestic trust havens, notably Massachusetts and Maine, have omitted or modified the offending provisions of Article 5 to eliminate the problems inherent in the flawed Model Act approach.

Following their lead would be as simple as eliminating UTC §504(c), making a few simple changes to any other provisions that cross-reference it, and adding some language to §8-814(b) negating the broad implications of *Nerbonne*. The authors submit that doing so would honor our state's long-standing traditions that elevate settlor intent and principles of free alienability over paternalistic motives to protect the interests of non-stakeholders whom trust settlors have consciously chosen not to benefit.

ENDNOTES

1 In re Goodlander and Tamposi, 161 N.H. 490 (2011).

2 In re Lori Nerbonne and Robert Nerbonne, Case Nos. 2013-0281 and 2014-0003 (Oct. 24, 2014). 3JX panel orders are unpublished. Supreme Court Rule 12-D(3) states that they "...shall have no precedential value and shall not be cited in any pleadings or rulings in any court in this state; provided, however, that such order[s] may be cited and shall be controlling with respect to issues of claim preclusion, law of the case and similar issues involving the parties or facts of the case in which the order was issued."

3 N.H. Rev. Stat. Ann. §564-B:1-101-12-1206 (2004) (as amended 2005, 2006, 2008, 2011 and 2014). The UTC has been amended multiple times since its enactment in 2004. These changes, including the changes made to protect third party discretionary trust interests from property settlements, are part of the continuing effort to enhance the statutes as a preferred jurisdiction for trust situs commencing with the enactment of the Trust Modernization and Competitiveness Act of 2006. See generally Arruda and Ardinger, *The Policy and Provisions of the Trust Modernization and Competitiveness Act of 2006*, 47 N.H. BAR JOUR. 6 (Fall 2006).

4 UNIFORM TRUST CODE (National Conference of Commissioners on Uniform State Laws 2000) (amended 2001, 2003, 2004 and 2005) (the "Model Act").

5 Although the UTC is generally a default law, N.H. Rev. Stat. Ann. §564-B:1-105(b) lists seventeen rules that are mandatory and cannot be altered by the terms of a trust agreement.

6 See generally McDonald, *Open Architecture Trust Designs Under New Hampshire Provide Flexibility and Opportunities*, 49 N.H. BAR JOUR. 34 (Autumn 2008).

7 A typical sprinkle trust with multiple concurrent beneficiaries will also provide that "the trustee's exercise of this discretion shall be final and binding on all persons interested in the trust estate."

8 A current discretionary beneficiary might, for example, challenge a trustee's refusal to make requested distributions to or for the benefit of him or herself. A remainder beneficiary may question the propriety of distributions made to the current beneficiary on the basis that the distribution effectively shifted trust property from the remainder beneficiary to the current income beneficiary in a manner inconsistent with the settlor's intent reflected in the terms of the document determining the scope of the trustee's discretion and in violation

of the trustee's duty of impartiality between consecutive classes of beneficiaries.

9 See Evelyn Ginsberg Abravanel, *Discretionary Support Trusts*, 68 IOWA L. REV. 273 (1983).

10 A "precatory" expression in a will or trust expresses a testator's or settlor's wish or desire to have his or her property disposed of in a certain way or to have some other task undertaken in a certain manner but does not necessarily impose a mandatory obligation upon an executor or trustee to carry out the desire. Precatory language usually includes such terms as a settlor's "request," "hope" or "desire" not direction. See J. DUKEMINIER, R. SITKOFF and J. LINDGREN, *WILLS, TRUSTS, and ESTATES*, at 562 (Eighth ed., 2009).

11 For example, "marital Q-TIP" and "general power of appointment" trusts that qualify for the estate and gift tax marital deductions require that net income be distributed to the surviving spouse for his or her lifetime for the funding of the trust to qualify for the gift or estate tax marital deduction under §§2056(b)(7) and (5), respectively, of the Internal Revenue Code of 1986, as amended (hereinafter the "Code").

12 A generation-skipping trust is designed to avoid its assets being subject to federal estate taxation on the death of the trust's primary beneficiary, often a child or further descendant of the trust's settlor. An extended discussion of generation-skipping trusts and federal generation-skipping transfer taxes is beyond the scope of this article.

13 M. ASCHER, A. SCOTT and W. FRATCHER, *SCOTT AND ASCHER ON TRUSTS*, §187, at 14 (5th ed. 2006) [hereinafter SCOTT ON TRUSTS].

14 RESTATEMENT (SECOND) OF TRUSTS §187, comment e (1959).

15 A spendthrift provision expressly prohibits voluntary and involuntary alienation of beneficial interests in anticipation of their receipt. See RESTATEMENT (THIRD) OF TRUSTS §58, comment a (2003). UTC §5-502 provides that spendthrift restrictions in New Hampshire trusts are enforceable. See also Scheffel v. Krueger, 146 N.H. 669 (2001) (upholding a spendthrift trust provision based on the predecessor spendthrift trust statute enacted in 1997 despite a sympathetic plaintiff's urging that the court recognize a common law exception for victims of intentional torts).

16 The beneficiary's legally-binding obligation to repay those loans would be evidenced by the beneficiary's promissory note carrying a market-based rate of interest. The principal amount of the note would equal the amount of the distribution, thereby avoiding any increase in the beneficiary's creditor-vulnerable net worth. After the threat of diversion has passed the trustee could exercise its discretion over distributions by forgiving the note or distributing the note to the beneficiary, thereby merging and extinguishing the beneficiary's obligation.

17 See Newman, *Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code*, 40 REAL. PROP. PROB. TR. J. 567, 568, note 2 (Fall 2005).

18 See RESTATEMENT (THIRD) OF PROPERTY (Wills and Other Donative Transfers) §17.1 (2006).

19 A "Crummey" power gives a trust beneficiary the unrestricted right to withdraw all, or if it is otherwise limited, a portion of, annual contributions to a trust. The purpose of the Crummey withdrawal right is to allow a gift to the trust to qualify for the annual exclusion from gift tax because a beneficiary has a present interest in the trust property transferred during the period that the right remains executory. A "five or five" power gives the beneficiary the annually lapsing, non-cumulative right to withdraw the greater of \$5,000 or 5% of the trust principal – the "lapse protection amounts" defined as a safe harbor for treatment as a general

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power of appointment in Code §2514(e).

20 A general power of appointment is a power to appoint trust property in favor of the powerholder, the powerholder's estate, the powerholder's creditors or the creditors of the powerholder's estate. A non-general or special power of appointment is a power to appoint trust property in favor of anyone other than the powerholder, the powerholder's estate, the powerholder's creditors or the creditors of the powerholder's estate. See Code §2041; see also RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §11.4 (1986).

21 See *Quinn v. Tuttle*, 104 N.H. 1 (1962) (appointment powerholder's creditors cannot reach appointive property subject to unexercised power). See also *Fiske v. Warner*, 99 N.H. 236 (1954) (son's pretermitted heir claim against deceased mother's estate did not include the assets of a trust created by the mother's deceased husband over which the mother had an unexercised testamentary power of appointment).

22 See, e.g., Harris and Klooster, *Beneficiary-Controlled Trusts Can Lose Asset Protection*, TRUSTS & ESTATES (December 2006).

23 "Disinterested" refers to the third party trustee's status as a non-beneficiary.

24 Such powers include those that would otherwise be treated as a general power of appointment under Code §2041 if held by the primary beneficiary/interested trustee.

25 An "all property equitable distribution" marital estate includes "...all property owned by the spouses (including property acquired before the marriage, and property acquired by gift, inheritance, devise and descent)." See Uniform Marriage and Divorce Act §307 (National Conference of Commissioners on Uniform State Laws 1974). Most community property states characterize gifts, inheritances and the assets held in third party trusts as indivisible "separate property."

26 N.H. Rev. Stat. Ann. §458:16-a, II.

27 *In re Chamberlin and Chamberlin*, 155 N.H. 13 (2007).

28 *Goodlander*, 161 N.H. at 495 (citing *Chamberlin*, 155 N.H. at 16).

29 See *Quinn v. Tuttle*, 104 N.H. 1 (1962). See also *Fiske v. Warner*, 99 N.H. 236 (1954).

30 RESTATEMENT (THIRD) OF TRUSTS, §56 comment b.

31 The Model Act treats a general power of appointment as the equivalent of a power of revocation because the two powers are functionally identical. See Model Act §§505 and 603, comments. UNIFORM POWERS OF APPOINTMENT ACT (National Conference of Commissioners on Uniform State Laws 2013) §§102, 502 and Official Comments.

32 Many Crummey powers lapse within a short period of time following the date they are granted. They are often limited to an amount that does not exceed the lesser of the annual exclusion amount or the greater of the lapse protection amounts defined in Code §2514. In most cases the existence of a currently exercisable Crummey power will not, therefore, expose much of a trust's principal to property settlement risks where the principal is fully discretionary. "Hanging" Crummey powers, however, may remain outstanding for a significant amount of time and could cumulate to expose more trust assets to property settlement risks. A hanging power provision gives the beneficiary the power to withdraw a trust contribution up to the maximum available annual exclusion amount. That portion of the withdrawal right that equals the greater of \$5,000 and 5% of the trust principal will lapse within the short term described in the Crummey provision in the trust agreement or specified in the withdrawal notice. Any withdrawal right exceeding those lapse protection amounts will remain outstanding ("hang") indefinitely until future years. The hanging portion will lapse in subsequent years to the extent that all hanging powers held by that beneficiary, plus the amount of any current contributions in that year subject to withdrawal by that beneficiary, can lapse within the five or five limitations. Hanging Crummey powers are often used to avoid the adverse transfer tax consequences that would otherwise result to the Crummey powerholder who allows his or her withdrawal powers to lapse in amounts greater than the lapse protection amounts. Accumulated, executory hanging powers can have substantial cumulative value for trusts that have been funded over a number of years and whose principal has not increased in value to the level required to lapse both current year contributions and accumulated hanging powers within the five percent prong of the five or five formula.

33 But what if the terms of the document granting the power enables the spouse to appoint trust property to or for the benefit of the powerholder's spouse but provides that the power is not exercisable to discharge the powerholder's legal obligation to support the spouse? This is a common restriction designed to avoid giving the beneficiary spouse a general power of appointment for wealth transfer tax purposes. Can the family division judge presiding over the divorce action exercise its equitable powers to compel the powerholding spouse to exercise that power in the other spouse's favor? An alimony order imposes on the obligor spouse a support obligation. Nothing in our UTC can be interpreted to support the compelled exercise of a non-general power. While they are broad, the scope of the judge's equitable powers should not include issuing orders that effectively rewrite the language of a trust agreement. The cases cited in n. 21, supra, preclude compelled exercises of powers of appointment. While the enactment of the provisions in the UTC discussed in the text of this article overrule the aspects of those cases that prevent creditors from reaching assets subject to a general

power of appointment, they did not affect the precedential value of those decisions precluding compelled exercises of any non-general powers that are not held in a fiduciary capacity. UTC §1-106 provides that the common law supplements all of the provisions of the UTC. Under the common law of trusts, a beneficiary-held power of appointment is a power held personally by the beneficiary, and no creditor of the beneficiary can compel its exercise for the creditor's benefit. See RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) §13.2 (1986).

34 N.H. Rev. Stat. Ann. §564-D:15.

35 In *Abrams v. Abrams*, 131 N.H. 522 (1989), the Supreme Court upheld the lower court's treatment as marital property funds that the husband had transferred in anticipation of his divorce to a third party trustee of preexisting, third party irrevocable trusts created for their children by the husband's parents, reflecting its willingness to apply the common law dissipation doctrine is based on equitable fraudulent transfer principles. Dissipation of assets by a spouse prior to divorce proceedings that would have otherwise been available for property division may be taken into account in dividing the property. See generally Oldham, *Romance Without Finance Ain't Got No Chance: Development of the Doctrine of Dissipation in Equitable Distribution States*, 21 J. AM. ACAD. MATRIMONIAL LAW. 201 (2008).

36 See *Matter of Daniel Kloiber Dynasty Trust*, 2014 WL 3924309 (Del. Chan., Unpublished, Aug. 6, 2014). The full opinion is at <http://goo.gl/UFFor8>. Here the presiding Chancellor held that despite a provision in the trust agreement stating that the situs and administration of the trust is in Delaware, Delaware did not have exclusive jurisdiction over the trust to the exclusion of all other state courts. To rule otherwise would deny federal courts diversity jurisdiction and violate the Full Faith and Credit Clause of the federal Constitution. See also *Dahl v. Dahl*, 345 P.3d 566 (Utah 2015) (Utah Supreme Court applied Utah law in the appeal of a property settlement decree, reversing the lower court's exclusion of Nevada trust's assets in marital estate, despite a Nevada governing law provision and a Nevada resident trustee). The Dahl court refused to enforce the choice-of-law provision in the trust agreement because Utah has a "strong policy of equitable distribution of marital assets," and application of Nevada law to the trust "would deny the district court the ability to achieve an equitable division of the marital estate."

37 N.H. Rev. Stat. Ann. §564-B:5-505(a)(2).

38 *Eaton v. Eaton*, 81 N.H. 275 (1924).

39 *Athorne v. Athorne*, 100 N.H. 413 (1957).

40 *Duncan v. Elkins*, 94 N.H. 13 (1946).

41 *Duncan*, 94 N.H. at 17-18.

42 *Brahmey v. Rollins*, 87 N.H. 290 (1935).

43 *Brahmey*, 87 N.H. at 299.

44 *Hanford v. Clancy*, 87 N.H. 458 (1936).

45 *Carlton v. Henderson*, 79 N.H. 416 (1920).

46 *Id.*

47 Critics of Article 5 suggest that the UTC dramatically reduces the traditional protection available to discretionary trusts by giving exception creditors greater rights than they had under the common law. See, e.g., Merric & Oshins, *How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?*, 31 EST. PLAN. 478, 484 (2004) (hereinafter cited as "Merric and Oshins"). Defenders maintain that the critic's arguments misinterpret Article 5 and misrepresent the common law. See, e.g., Millard, *Rights of a Trust Beneficiary's Creditors Under the Uniform Trust Code*, 34 ACTEC JOURNAL 58 (Fall 2008) (hereinafter cited as "Millard").

48 At common law, the vulnerability of a third party discretionary trust interest to the beneficiary's creditors depended upon the extent of the trustee's discretion. Protection was greatest where a trustee had extended discretion. Less protection was afforded to support trusts. See Millard, n. 47, supra, at 69; see also RESTATEMENT (SECOND) OF TRUSTS §157. The UTC decouples the beneficiary's power to reach the trust assets from a creditor's reach of a beneficiary's interest. Although a beneficiary may be able to compel a distribution for failure to comply with a standard or an abuse of discretion, a creditor (other than an exception creditor in certain circumstances) cannot compel a distribution. A non-exception creditor of a beneficiary cannot compel a distribution that is subject to a trustee's discretion regardless of whether or not discretion is expressed in the form of a standard and regardless of whether a trustee has failed to comply with a standard or abused its discretion. See Model Act §504(b); UTC §5-504(b).

49 Model Act §506(a). The Model Act's elimination of the distinction between extended discretion and support trusts reflects the notion that in most cases where the trustee's discretion over distributions is subject to a support standard, the trustee is granted discretion whether explicit or implicit. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 CARDOZO L. REV. 2551, 2596 (2006).

50 Some commentators speculated that the Model Act's good faith standard opened the

door to the characterization of discretionary trust interests as divisible marital property. See *Merric & Oshins*, n. 47, *supra*, at 481.

51 These two trusts, the “GST Exempt” and the “GST Non-Exempt” trusts, conferred on the wife beneficial interests and powers that were sufficiently similar to allow the Court to consider them together in determining whether alone or in combination they gave the wife any divisible property interests.

52 *Goodlander*, 161 N.H. at 492, 493.

53 *Id.* at 493.

54 *Goodlander*, 161 N.H. at 497-498.

55 *Id.* at 499-501.

56 *Id.* at 496-501.

57 This governance structure created two layers of discretion between the wife and distributions of the cash generated by the real estate activities: the business judgment rule discretion possessed by the investment directors, and the trustee’s discretion governed by trust fiduciary standards. The wife and all other beneficiaries were disempowered and disconnected from the Trust and its administration to a degree far exceeding the very modest restrictions on the rights and powers of primary beneficiaries of beneficiary-controlled trusts.

58 As indicated in n. 2, *supra*, *Nerbonne* was decided by a unanimous three-judge panel appeal process known as a “3JX panel.” Under Supreme Court Rule 12-D(3), a 3JX panel has no precedential value. Nonetheless, *Nerbonne* sheds considerable light on the Court’s likely treatment in a regular, published opinion of a discretionary, beneficiary-controlled trust as marital property divisible in divorce.

59 *Nerbonne*, Case Nos. 2013-0281 and 2014-0003 (Oct. 24, 2014).

60 *Id.*

61 *Id.*

62 *Id.* Co-author Joseph F. McDonald, III served as an expert in this case. Although not specifically mentioned in the opinion, the trust agreement also gave Mrs. *Nerbonne* non-tax sensitive powers to: (i) distribute income and principal to Mr. *Nerbonne*’s descendants, and (ii) appoint a special trustee who is not related or subordinate to Mrs. *Nerbonne*. Mrs. *Nerbonne*’s powers to amend and terminate the trust were exercisable in her fiduciary capacity as trustee. This is an unusual power given to a trustee who is also a beneficiary. It is impossible to conclude whether the absence of this provision would have influenced the Court to reach a different conclusion.

63 *Id.*

64 For example, the court applied this doctrine in *Abrams*, cited and described in n. 35, *supra*, on the basis that husband transferred marital assets to an irrevocable trust created by his parents immediately prior to the filing of the divorce action with the purpose of removing it from the marital estate and diminishing the wife’s marital property rights. By contrast, in *Chamberlin*, cited in n.27, *supra*, and discussed in the accompanying text, the court found that the principal of a trust that was funded during the marriage out of the marital estate was not divisible property upon the parties later divorce where there was no evidence of any intent to improperly diminish the marital estate.

65 See *Scheffel v. Krueger*, 146 N.H. 669 (2001) (upholding a spendthrift trust provision based on the predecessor spendthrift trust statute enacted in 1997 despite a sympathetic plaintiff’s urging that the court recognize a common law exception for victims of intentional torts). See also *Farmington Teachers Association, NEA-New Hampshire*, 158 N.H. 453 at 456 (2009) (Court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include). It is also noteworthy that the Court in *Goodlander* found no significance in the parties’ apparent reliance on significant distributions made from the EMT Trust to the wife to fund a high standard of living and pay household expenses during their marriage. Courts in other equitable division jurisdictions that are not constrained by clear statutory language similar to that of UTC §8-814(b) have under similar circumstances upheld a lower court’s exercise of discretion to find divisible a discretionary trust interest. See, e.g., *Lauricella v. Lauricella*, 409 Mass. 211 (1991). They have done so in the exercise of their broad equitable division powers based on determinations that trust distributions became a part of the “fabric of the marriage” that would be unfair to the non-beneficiary spouse to ignore this in fashioning a property settlement.

66 See *In re Hampers*, 154 N.H. 275, 285-286 (2006) (awarding the husband most of the marital property where there the marriage was of short duration the husband brought substantial assets to the marriage). But see *Goodlander*, 161 N.H. at 504-505 (awarding a roughly equal division of the marital property and not taking into consideration potential future distributions from an extended discretion trust where the marriage was of long duration and noting that whether or not the source of the majority of the non-trust marital assets were gifts or inheritances did not warrant an uneven split); *Rahn v. Rahn*, 123 N.H. 222, 225 (1983).

67 See *Gordon & Gordon*, 147 N.H. 693, 697-698 (2002).

68 See *Buckner v. Buckner*, 120 N.H. 420 (1980) (awarding sizable property to the husband after noting that the husband had a limited education and no assets at the time of the marriage and that the wife had a sizeable estate and income). See also *Perron v. Perron*, 122 N.H. 855, 856 (1982) (approving the trial court’s award of the bulk of the marital property to the wife taking into account that the wife was seven years older than the husband and would be retiring in five years with reduced income).

69 For example, a discretionary trust interest or a remainder interest with a remote or speculative chance of vesting may not be divisible. However, a judge may cite the pertinent division factors to support the allocation of a disproportionate share (or maybe even all) of all the divisible property to the non-beneficiary spouse if the beneficiary spouse has or is expected to receive substantial future distributions from the trust, or a future inheritance that might be received outright or in trust, particularly if he or she is a member of a wealthy family. A family division property settlement order that recites the application of one or more division factors that are relevant in any given case is likely to be sustained upon any appeal by either spouse based on the deferential standards for reviewing a family division’s findings of fact and exercises of discretion.

70 See *In re Harvey & Harvey*, 153 N.H. 425 (2006) (alimony is not intended to perpetuate dependency but to “encourage the recipient to establish an independent source of income”); see also *In re Sutton & Sutton*, 148 N.H. 676 (2002) (alimony is not intended to provide a “lifetime profit-sharing plan.”)

71 N.H. Rev. Stat. Ann. § 458:19. See also *In re Gordon & Gordon*, 147 N.H. 693 (2002); *In re Levreault & Levreault*, 147 N.H. 656 (2002); *In re Fowler & Fowler*, 145 N.H. 516 (2000); *Calderwood v. Calderwood*, 114 N.H. 651 (1974).

72 *Athorne*, 100 N.H. at 417, 418.

73 See *Trust Income or Assets as Subject to Claim Against Beneficiary for Alimony, Maintenance, or Child Support*, 91 A.L.R.2d 262.

74 However, New Hampshire cases have construed support trusts for a beneficiary-spouse as also supporting the beneficiary’s dependents, allowing a trustee to make distributions to a beneficiary’s dependents after a divorce but not to the beneficiary’s former spouse. See *Athorne*, 100 N.H. at 416-417 (the “needs of a married man also included the ‘needs of his family.’ The wife was entitled to support [under the discretionary trust] until the date of the divorce but not thereafter since she is no longer considered a member of the family.”)

75 See *Merric, Stevens and Freeman, The Uniform Trust Code: A Divorce Attorney’s Dream, Estate Planning* 41 at note 6 (Oct.-Nov. 2004) (citing *BOGERT & BOGERT* §224, 465 (2d rev. ed. 1992)).

76 The 2005 changes to UTC §504(c)(2) substituting the “most basic needs” language for the unlimited discretion given by the Model Act narrowed the potential scope of the family division’s orders. See Act of July 22, 2005, ch. 270, 2005 N.H. Laws. It did not, however, restore the blanket prohibition on attachment that existed under the common law.

77 *Goodlander*, 161 N.H. at 504.

78 *Id.*

79 The elimination of alimony charging order against third party discretionary trust interests will bring into parity the treatment of retained self-settled discretionary trust interests and third party trust interests. A court might avoid this anomalous result by construing the provisions of the QDTA and UTC §504(c)(2) together, finding an intent on the part of the legislature that to the extent that they are not directly inconsistent, the provisions of the UTC overlay the provisions of the QDTA. This would be a basis for finding that the non-beneficiary spouse has the same exception creditor status related to alimony awards as are available with respect to their spouses’ third party discretionary trust interests under UTC §504(c).

80 *In re Muller*, 164 N.H. 512 (2013).

81 *Id.* at 515.

82 *DiGaetano v. DiGaetano*, 163 N.H. 588 (2012).

83 The UTC standard of good faith is highly deferential to the trustee refusing to exercise an uncontrolled discretion to make a distribution. Such standard does not impose an obligation that a trustee’s decision be within the bounds of reasonable judgment. Model Act §814, comment. The court will not interfere with the trustee’s exercise of discretion if the trustee “acts in good faith and does not act capriciously “but the [court] will interfere if the trustee acts dishonestly or [not] in good faith, or where he acts from an improper motive.” Model Act §814, comment (citing *Austin W. Scott & William F. Fratcher, The Law of Trusts* Section 187.2 (4th ed. 1988)).

84 N.H. FAM. DIV. R. 2.16.

85 N.H. FAM. DIV. R. 2.16(C).

86 *In re Spenard*, 104 A.3d 192 (2014).

87 See N.H. Rev. Stat. Ann. §564-B:1-105(b); see also Act of June 20, 2006, ch. 320.

88 N.H. FAM. DIV. R. 1.25-A(E).

89 See Levitt, *The Intersection of the Mandatory Initial Self Disclosure Rule with Disclosure of Interests in Trusts and/or Inheritances*, 53 NH BAR JOUR. 48 at 51 (Summer 2012) (hereinafter cited as "Levitt").

90 See N.H. Fam. Div. R. 1.25(L). See also N.H. Fam. Div. R. 2.24(D).

91 M. Alfano, G. Apicelli, K. Borgstrom, W. Brennan, D. Connor, R. DePuy, J. Fairclough, C. Feeney, J. Ferro, B. Fowler, C. Garvey, J. Garvey, C. Greenhalgh, H. Honorow, E. Kelly, M. Kerouac, R. Maloney, C. McKay, M. McNamara, K. Murphy, J. Papelian, D. Phillips, J. Rich, C. Stevens, C. Temple and S. Tober, *A Practical Guide to Divorce in New Hampshire*, §5.5.8 (1st ed. 2009).

92 See generally Douglas and Buck, *Civil and Criminal Contempt in New Hampshire*, 48 NH BAR JOUR. 72 (Autumn 2007); *State v. Wallace*, 136 N.H. 267, 271 (1992) (holding that the "inability to comply with the court's order, whether in civil or criminal contempt proceedings, is a defense...")

93 Some courts are not inclined to extend the impossibility defense to situations where the impossibility was self-created. See, e.g., *Federal Trade Commission v. Affordable Media, LLC*, 179 F.3d 1228 (9th Cir. 1999).

94 By accepting the trusteeship of any trust governed by New Hampshire law, the trustee voluntarily submits to the jurisdiction of the New Hampshire courts, irrespective of whether that trustee is a resident or a non-resident of this state. UTC §2-202(a). The same is true of any trust advisor, trust protector or agent serving a New Hampshire trust. UTC §12-1203. If the fiduciary from whom records are sought is a New Hampshire resident, an easier way for the non-beneficiary spouse to secure information is to join the fiduciary as a party to the divorce action, as was the case in *Athorne*. It will be more difficult to obtain information from or make a party to the divorce action a non-resident fiduciary serving a trust governed by the law of another state.

95 See *In re Marriage of Williamson*, 226 Cal. App. 4th 1303 (2014) (in divorce action, appellate court upholds lower court's refusal to compel disclosure of anything other than a heavily redacted trust agreement relating to beneficiary spouse's interests, and trust asset information redacted to exclude assets held in trusts under the same agreement for other beneficiaries).

96 Massachusetts has taken a different approach to protecting confidentiality of information disclosed by third parties in divorce actions through a Vaughn affidavit. In *Vaughn v. Vaughn*, No. 91-485 (Mass. 1991), the wife sought information relating to husband's interests in certain trusts created by his parents. She filed a motion to compel production and served husband's parents with a subpoena to no avail. The probate court held that the parents could either produce the documents or provide an affidavit stating their net worth, a general description of their estate plan and the dates of any amendments. On appeal, the Supreme

Judicial Court upheld the probate court's careful balancing of the parent's right to privacy and confidentiality against the wife's right to discover her husband's future likelihood of acquiring capital assets. See generally discussion of Vaughn affidavits in Levitt, *supra*, note 88 at 52.

97 See Scheffel, 146 N.H. at 671, citing *Brahmey v. Rollins*, 87 N.H. 290, 299 (1935) (trustee vigorously defended a spendthrift trust provision based on the predecessor spendthrift trust statute enacted in 1997 despite a sympathetic plaintiff's urging that the court recognize a common law exception for victims of intentional torts).

98 N.H. Rev. Stat. Ann. §512:5

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