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ASSET PROTECTION PLANNING:

Understanding the Links and the Conflicts Between Estate Planning and Debtor/Creditor Law

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Printed September 8, 2017

I. INTRODUCTION

Lawyers and other advisors involved to any extent in estate planning are well aware of their clients' interest in mechanisms that will avoid exposing their assets unnecessarily to the claims of present and future creditors. This interest in "asset protection planning" is prompted in part by seminars and articles in the general and professional press and in part by high-profile cases where defendants in lawsuits either have or have not made themselves judgment-proof. Although it is the authors' view that the estate planner should consider asset protection planning in conjunction with virtually every estate planning engagement, an increasing number of clients will come to the estate planner with the sole or primary goal of modifying the ownership of their assets to protect them from existing or anticipated creditors. It is important that the estate planner have a general familiarity with the various techniques available to accomplish these goals, including their technical underpinning.

It is perhaps equally important to understand that asset protection laws vary widely from jurisdiction to jurisdiction. While some relevant laws are founded on federal legislation and case law (the laws providing protection for certain retirement plans, for example, and the laws giving "super creditor" status to certain federal claims), many are founded on state legislative, constitutional and case law. In some cases, these state laws are applicable to assets actually located in the jurisdiction; entireties protection of real estate is a good example. In most cases, however, state law applies to those who are domiciled in the particular jurisdiction. Due to variations in state laws, advisors should consider whether and to what extent a particular individual's choice of domicile may bear on the safety, or vulnerability, of that individual's assets.

The focus of this paper is to describe, in practical terms, the various legal structures that pertain to estate planning and the rights of creditors. As noted above, many of these structures are state specific; however, it is also important to understand the interaction with federal law, where applicable.

It must be noted that the authors are primarily Pennsylvania lawyers whose practice is focused in that jurisdiction. While reference is made to the laws of several other jurisdictions, those intending to use these guidelines must consult with attorneys in the jurisdictions where their clients reside and, in many cases, where their clients have assets. The applicable laws of the fifty states and the District of Columbia vary widely.

II. CATEGORIES OF LEGAL STRUCTURES

A. <u>In General</u>

Asset protection planning in the broadest sense is estate planning with consideration being given to the laws governing the rights of present and future creditors to a particular client's existing and future interests in property. This can be illustrated by the following example. Assume a client has existing outstanding judgments against her personally. Assume that her parents are still living and expect to make significant lifetime and post-death gifts to their debtor daughter. It is sensible asset protection planning to consider whether under the law governing the parents' estates (and/or their inter vivos planning) giving the daughter her inheritance in trust will protect those assets from her creditors in place at the time the trust is formed. This is largely a question of state law of the state where the parents are domiciled and/or the law of the situs of inter vivos trusts.

As will be seen, the laws pertaining to the rights of creditors, and the rights of debtors, vary widely from jurisdiction to jurisdiction. Those laws are not always easy to identify or interpret and they rarely "reside" in a single part of a jurisdiction's laws. Some, like Florida and Texas homestead, are based on state constitutional provisions. Some, like Pennsylvania entireties, reside solely in case law. Others, such as the rights of creditors vis-à-vis self-settled and third-party settled trusts, are part of the jurisdiction's trust and estate laws (as, for example, most states that have adopted the Uniform Trust Code). Finally, all states have statutes that collectively set forth a listing of assets that are, in most cases, exempt from the claims of creditors. This paper will highlight many of these laws in a number of major jurisdictions.

Recognizing that some jurisdictions may be better for creditors than others, clients may ask how they can avail themselves of more favorable law. As highlighted below, in order to claim some protections, a creditor must meet certain residency requirements. In contrast, under the domestic asset protection trust statutes now in effect in seventeen jurisdictions, the settlor need not reside in the jurisdiction, but must make minimal requisite contacts with the jurisdiction, which vary from jurisdiction to jurisdiction, in order to establish situs of the trust in the jurisdiction. Important to these considerations are the concepts of domicile and the constitutionally protected freedom of movement.

1. **Domicile.** Individuals may have several places of residence and may have citizenship in more than one nation, but they may only have one domicile.[1] The terms "domicile" and "residence" are often used interchangeably, but there are formal distinctions between them. Residence refers to a physical presence in a jurisdiction, with or without the intent to remain.[2] Domicile, on the other hand, requires physical presence in a jurisdiction *and* the intent to stay there or return there.[3] Lastly, citizenship is a legal relationship between an individual and a state that exists irrespective of presence.

The burden of proof for asserting domicile rests on the individual asserting it.[4] The laws of each state determine the specific criteria required to establish domicile. Some states provide a statutory list of factors to guide courts in determining whether an individual has established domicile;[5] in other states, the courts have established factors.[6] Residence may be considered *prima facie* evidence of intent to remain.[7] When an individual lacks the requisite capacity to form an intent to make a permanent home in a particular jurisdiction (domicile by choice), the individual's domicile may be determined by default, either by birth or by operation of law.[8] In addition, domicile requirements may vary within a jurisdiction depending on the purpose (e.g., for tax purposes versus for election purposes).[9]

2. **Freedom of Movement.** As early as the Articles of Confederation,[10] Congress has recognized the freedom of movement among the several states as a fundamental right of its citizens. Today, freedom of movement under United States law is governed primarily by the Privileges and Immunities Clause of the United States Constitution, which states, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[11] During the latter half of the Twentieth Century, the Supreme Court of the United States interpreted the Privileges and Immunities Clause to strike down several one-year

residency requirements imposed under state law with respect to the receipt of state-provided welfare benefits[12] and medical care,[13] voting rights in state elections[14] and receipt of civil service preferences for state veterans.[15] In contrast, one area where the Court has been comfortable in drawing a distinction between residents meeting a one-year residency requirement and newer residents is with respect to hunting and fishing licensing fees.[16] In modern times, the strong right to freedom of movement is often associated with the freedom of association and the freedom of expression.

B. State Exemptions

The availability of assets for attachment (prior to judgment) or execution (subsequent to judgment) during the owner's lifetime is generally governed by two factors, ownership and category. The concept of domicile also may be relevant in determining which state law protections a debtor may seek to assert.

1. **Ownership.** The ownership of assets is most commonly a matter of registration or title. Some registration is a matter of public record, such as title to real estate, an automobile, boat or other vehicle. Other registration is more private, such as bank accounts or securities. Certain assets, such as cash and most tangible personal property, are unregistered, which does not mean that tangible personal property is not owned by anyone but instead that proof of ownership is more complex.

2. **Category.** For purposes of availability for creditors, it is important to define a particular asset's category because certain categories of assets enjoy a special status *vis-a-vis* attachment or execution.

C. Personally-owned Assets

1. **In General.** The class of assets most readily available for attachment or execution is that owned by an individual in his or her own name and not in a special category. If in a community property state, the class would include many forms of community ownership as well. These are the assets that an estate planner will think of as probate assets. They are titled and registered in the individual's own name and they would pass under the individual's will or according to the intestacy laws. Bank accounts, certificates of deposit, brokerage accounts, registered or bearer securities, real estate, vehicles, tangible personal property and the like are all potentially attachable if registered or titled in the debtor's sole name and otherwise unencumbered. In virtually every new estate planning engagement, the client's personal financial statement will reflect sole ownership of unencumbered assets. This is also true of most married couples; either or both of the spouses typically owns assets in his or her sole name (e.g., gifts from family members, interests in closely-held businesses, assets brought into the marriage, etc.). In most community property jurisdictions, it is understood that, except for special exempt categories such as homestead, 100% of community property is attachable by most categories of creditors of either spouse.

2. **Exempt Categories.** The laws of every state and the District of Columbia identify certain specific assets that are exempt from attachment or execution by a judgment creditor.[17] As an initial matter, under the Bankruptcy Code, a debtor must reside in a jurisdiction for at least 730 days (approximately two years) to take advantage of any state law bankruptcy exemption available there. If the debtor has moved from one state to another state within the 730-day look back period, then the debtor's domicile for purposes of available state

exemptions will be based on the 180-day period (or longer portion thereof) immediately preceding the 730-day look back period.[18]

Alternatively, the debtor can elect to apply the federal exemptions under the Bankruptcy Code.[19] However, a state's legislature may "opt out" of the federal bankruptcy exemptions and substitute the state's own exemptions, so that there is no choice in the matter by the debtor.[20]

In the case of Pennsylvania, a fairly typical jurisdiction, the state exemptions are set forth in title 42, sections 8121 through 8127 of the Pennsylvania Consolidated Statutes.[21] Section 8122 prohibits a debtor from waiving the statutory exemptions from attachment by express or implied contract.[22] The specific exemptions are:

a. Property of the judgment debtor up to the value of $300.[23]

b. Certain personal property, including wearing apparel, bibles, school books, sewing machines and uniforms.[24]

c. Certain specified state retirement and pension plans.[25]

d. Any pension or annuity paid to a retired employee under a plan or contract that prohibits assignment.[26]

e. Any self-employed person's retirement or annuity fund to the extent the contributions were deductible and were made while solvent.[27]

f. Most retirement or annuity funds described in Sections 401, 403, 409 and 530 of the Internal Revenue Code[28] (such as IRAs, qualified pension and profit sharing plans and the like[29]), including appreciation and income earned in the fund, provided, however, that (a) amounts contributed by the debtor during the year preceding filing bankruptcy; (b) amounts in excess of $15,000 contributed to an IRA within any one-year period (other than by rollover); and (c) amounts deemed to be fraudulent transfers are not exempt.[30] A number of bankruptcy courts have determined, in applying the IRA laws of several states (not including Pennsylvania) that inherited IRAs are not protected by those states' statutes in bankruptcy.[31]

The Pennsylvania statutory exemption of certain IRAs is incorporated, together with other exemption provisions, into the bankruptcy proceeding of a Pennsylvania bankrupt who elects state law exemptions as opposed to the list of federal exemptions contained in the Bankruptcy Act. The bankrupt in *In re Davis*[32] had an IRA and elected federal, not Pennsylvania, exemptions. He attempted to exempt his IRA under a federal exemption pertaining to pension plans and the Bankruptcy Court, *sua sponte*, decided that the IRA was exempt under a wholly separate provision exempting spendthrift trusts (the District Court subsequently affirmed this decision). The Third Circuit's opinion is an interesting analysis of whether or not an IRA is a trust (one condition to the application of the spendthrift trust exemption).[33] Its most important lesson has to do with the sensible choice of federal versus state law exemptions.

In 2005, the United States Supreme Court resolved a conflict among three Circuits regarding the exemption of IRAs from a bankrupt's estate where the individual elected the federal, as opposed to state, exemptions in *Rousey v. Jacoway*.[34] While not normally applicable to Pennsylvania situations, *Rousey* addressed the matter of whether an IRA is exempt, for those claiming federal exemptions, under a provision exempting payments "under a stock bonus, pension, profit sharing, annuity or similar plan or contract on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of the debtor."[35]

In April 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (the "2005 Bankruptcy Act")[36] adopted significant modifications to bankruptcy law. The 2005 Bankruptcy Act includes special rules for the treatment of IRAs in bankruptcy; the rules apply whether the bankrupt elects federal or state exemptions. The exemption is generally limited to $1 million in an IRA exclusive of rollover contributions (which continue to be wholly exempt), unless the Bankruptcy Court increases the limit "in the interests of justice."[37]

In 2014, the United States Supreme Court clarified in *Clark v. Rameker*,[38] that inherited IRAs, in contrast to IRAs established and held by the owner who originally deposited the funds, are not "retirement funds" for purposes of the federal exemptions under the Bankruptcy Act.[39] The Court looked at several legal characteristics of inherited IRAs, including: (1) that the holder of an inherited IRA cannot invest additional money in the account, (2) that the holder of an inherited IRA is required to withdraw money from the account without regard to retirement age and (3) that the holder of an inherited IRA may withdraw the entire balance of the account at any time – and use it for any purpose – without penalty.[40] The Court noted that the Bankruptcy Code's exemption provisions strike a careful balance between

> the creditor's interest in recovering assets and a debtor's interest in protecting essential needs. Allowing debtors to protect funds in an IRA ensures that a debtor will be able to meet his or her basic needs during retirement. By contrast, nothing about an inherited IRA prevents or discourages a debtor from using the entire balance immediately after bankruptcy for purposes of current consumption.[41]

It is important to note that *Clark* was decided based on the federal exemptions. Debtors who are domiciled in states like Florida, Ohio, Missouri, Alaska and Texas, which have statutory creditor protection for inherited IRAs,[42] will not be impacted by the decision in *Clark* if they qualify to file bankruptcy in their state of domicile (by having been domiciled there for 730 days before filing a bankruptcy petition) and they elect out into the state law exemptions. Debtors who live in states that do not have statutes that protect inherited IRAs, or debtors who are domiciled in states that do have such statutes but have not lived there for 730 days and must file bankruptcy based upon a previous state of domicile, will not be able to exempt inherited IRAs as qualified "retirement funds" as a result of *Clark*.

g. The Pennsylvania statute governing the creation and operation of Section 529 College Savings Accounts, provides specific protection of Pennsylvania plans from the creditors of the account owner and the beneficiary of the plan.[43] Other statutes reach similar results.[44]

h. Certain insurance benefits, including workers' compensation, small annuities, group life insurance, annuity, and life insurance payments to spouses, children and dependent relatives, accident, or disability insurance and life insurance cash values.[45]

i. Tangible personal property exhibited at international exhibitions.[46]

j. Tangible personal property in the custody of common carriers.[47]

k. Wages salaries and commissions of individuals while in the hands of the employer.[48]

3. **Exemptions in Other Jurisdictions.** Every American jurisdiction has similar statutory exemptions serving similar purposes. Some of these are reflected in the footnotes: California,[49] Connecticut,[50] Delaware,[51] Florida,[52] Georgia,[53] Idaho,[54] Illinois,[55] New Hampshire,[56] New Jersey,[57] New York,[58] North Carolina,[59] Ohio,[60] Oregon,[61] South Carolina,[62] Tennessee,[63] Texas,[64] Virginia,[65] Washington,[66] and West Virginia.[67]

4. **Homestead Exemptions.** Although it does not apply for asset protection in Pennsylvania, the homestead exemption is the starting point for protection for creditors in some jurisdictions.

The homestead exemptions in the states that offer them are diverse in kind and extent, but they were all curtailed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Under the Bankruptcy Abuse Prevention and Consumer Protection Act, a 1,215 day (3 years and 4 months) rule applies to qualify a non-fraudulent transfer of real property for homestead protection in bankruptcy. If the debtor acquired the property within 1,215 days of the date on which he or she files a petition for bankruptcy, the Act provides that the applicable state law homestead exemption can shield only an aggregate amount of $125,000, indexed for inflation ($160,375[68] as of 2016).[69] This limitation only applies in bankruptcy, so homestead exemptions may be useful for a shorter-term protection of assets from other creditors. If the debtor satisfies both the 730 day residency rule and the 1,215 acquisition rule, then the maximum homestead exemption is the maximum available under state law (assuming that the debtor is using state law exemptions).

a. Florida, which has among the most comprehensive homestead protection in any jurisdiction, provides that, in general, a debtor's homestead is exempt "from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty . . . ."[70] To take advantage of this exemption, a debtor "must establish that he intended to make this property his family's permanent residence," and must reside in the state for at least 180 days before declaring bankruptcy.[71] The amount of the protection is unlimited in value provided that the property cannot exceed ½ acre in a municipality or 160 contiguous acres outside of a municipality.[72] Further, the federal Bankruptcy Code provides that no protection is available to the extent that the property is attributable to property that the debtor disposed of within ten years of a bankruptcy proceeding with the intent to hinder, delay or defraud a creditor.[73]

b. Texas has a similarly broad homestead exception, codified in chapter 41 of the Texas Property Code. Like Florida, Texas distinguishes between urban and rural homes. Urban homesteads can consist of up to 10 acres of land on contiguous lots and the improvements thereon.[74] A rural homestead can consist of up to 200 acres for a family, or 100 acres for a single adult, and the improvements thereon.[75] Texas defines "urban" as being located within a municipality and served by police and fire protection as well as certain utilities provided by or under contract to a municipality.[76] Like in Florida, the value of the exemption is unlimited. To establish a Texas homestead, a debtor need only show a "combination of both overt acts of homestead usage and the intention on the part of the owner to claim the land as a homestead."[77] Actual occupancy of the property is not required, but "[i]nvestigation of intention need not be made when the land is actually put to homestead uses. Such actual use of the land is the most satisfactory and convincing evidence of intention."[78]

c. Other states' homestead exemptions are far less beneficial and often apply to real or personal property up to a certain limit: $75,000 in California;[79] $75,000 (or $125,000 if the debt arises from "services provided at a hospital") in Connecticut,[80] $15,000 in Illinois;[81] $100,000 in New Hampshire;[82] $35,000 in North Carolina (or $60,000 for unmarried debtors over 65 who once owned the exempt property as tenancy by the entireties or as joint tenancy with a right of survivorship with someone who is currently deceased);[83] $125,000 in Ohio;[84] $50,000 in South Carolina;[85] $5,000 (or $10,000 for debtors 65 and over) plus $500 per dependent in Virginia;[86] $5,000 in West Virginia;[87] and $40,000 in Washington.[88] Note that the limits may be different depending on whether or not the debtor is in bankruptcy, whether the debtor is single or married, and the age of the debtor.

5. **Exception to Exemptions.** These exemptions may not apply to certain types of creditors whose claims are given special statutory protection. For example, wages, salaries and commissions may not be exempt from attachment for support judgments and restitution to crime victims.

6. **Impact on Estate Planning.** When clients consider adjusting their asset allocation, practitioners should make clear to clients that by removing assets from exempt categories, such as making withdrawals from retirement accounts and surrendering insurance policies, a debtor could expose funds to creditors that otherwise would be protected by the statutory exemptions.

7. **Disclaimed Interests.** In some jurisdictions, a debtor who becomes the beneficiary of an interest that would otherwise be seized by a creditor may protect the interest from the claims of creditors by executing an effective disclaimer.[89]

a. The Uniform Disclaimer of Property Interests Act (UDPIA), promulgated in 2002, replaced the Uniform Disclaimer of Property Interests Act, Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act and the Uniform Disclaimer of Transfers under Nontestamentary Instruments Act, all promulgated in 1978. The UDPIA is designed to allow all sorts of disclaimers, including those for tax planning purposes and does not include a specific time limit on the making of any disclaimer.[90] The UDPIA has been adopted by nineteen jurisdictions.[91] According to Section 6 of the UDPIA, a disclaimer of an interest in property has the following effect:

> (2) The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.
>
> (3) If the instrument does not contain a provision described in paragraph (2), the following rules apply:
>
> > (A) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist.
> >
> > (B) If the disclaimant is an individual, except as otherwise provided in subparagraphs (C) and (D), the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.

(C) If by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(D) If the disclaimed interest would pass to the disclaimant's estate had the disclaimant died before the time of distribution, the disclaimed interest instead passes by representation to the descendants of the disclaimant who survive the time of distribution. If no descendant of the disclaimant survives the time of distribution, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died at the time of distribution. However, if the transferor's surviving spouse is living but is remarried at the time of distribution, the transferor is deemed to have died unmarried at the time of distribution.[92]

The UDIPA specifies that "[a] disclaimer made under this [Act] is not a transfer, assignment, or release."[93] Although the majority of jurisdictions have not adopted the UDPIA, some jurisdictions have concluded, even without the UDPIA, that a disclaimed interest that results in a person or entity other than the original beneficiary owning funds or an asset does not constitute a transfer because an effective disclaimer causes the disclaimed interest to pass as if the disclaimant had died immediately before the date of transfer of the interest (e.g., the death of the testator who made a bequest in his or her will to the disclaimant). Because the disclaimer

> relates back to the time of the decedent's death and the beneficiary does not acquire any interest in the devised estate. Because nothing passes to a beneficiary who disclaims any interest in a testamentary gift, the beneficiary has no estate that could be made the subject of a voluntary conveyance. Accordingly, we [hold] that a disclaimer is not a voluntary conveyance or transfer of the disclaimed estate within the meaning of the fraudulent conveyance statute.[94]

b. Sections 6201 through 6207 of the Pennsylvania Probate, Estates, and Fiduciaries Code (the "PEF Code") set forth the law governing Pennsylvania disclaimers.[95]

c. Creditors (and bankruptcy trustees) may attempt to recover disclaimed assets as fraudulent transfers.[96] The law of most jurisdictions provides that an effective disclaimer causes the disclaimed interest to pass as if the disclaimant had died immediately before the date of transfer of the interest (e.g., the death of the testator who made a gift to the disclaimant in his will). Because the disclaimer "relates back" to the date of the original transfer (date of death), it seems logical to suggest that the disclaimant is deemed never to have received the interest and therefore has not made a transfer.

d. Other jurisdictions may differ. A Pennsylvania Superior Court decision makes it clear that in Pennsylvania, a disclaimer is a transfer for fraudulent transfer purpose.[97]

e. Other disclaimer statutes are noted in the accompanying footnote.[98]

D. Tenancy by the Entireties

1. **In General.** Property held by joint tenants or by tenants in common is liable to attachment and levy by creditors in whole or in part, depending on applicable local law. Assets owned by a husband and wife as tenants by the entireties, however, are to a greater or lesser extent protected from the separate creditors of either spouse in a number of jurisdictions. Not all jurisdictions recognize ownership by tenancy by the entireties, and there are variations of application among those jurisdictions that do.

Tenancy by the entireties is a form of ownership available only between spouses. A creature of the common law, it assumes a notional entity, the marital union, owns the property. As a member of the union, each spouse owns an undivided half interest in the whole, possessing a present right to use the property and a survivorship right in the property. The entireties tenancy can terminate in the following ways: (1) Either spouse can convey his or her interest to the other spouse, making the recipient the sole owner; (2) both spouses can agree to terminate the entireties estate, dividing the property as they agree; (3) upon the death of the first spouse, the survivor becomes the sole owner; and (4) upon divorce, a tenancy by the entireties is commonly converted into a tenancy in common by operation of law, with each spouse owning a one-half interest. Significantly, however, in many cases creditors of one spouse may not force sale and/or partition of entireties property. Joint creditors of both spouses, however, can enforce payment out of assets held as entireties property.

The early English common law concept of tenancy by the entireties evolved as a means of protecting a wife's interest in property over which her husband had dominion and control. In the late Nineteenth Century, near universal enactment of Married Women's Property legislation protected wives' interests in property from their husbands' power to alienate the whole. Subsequently, England and many United States jurisdictions abolished (or declined ever to recognize) tenancies by the entirety (e.g., Georgia, Ohio,[99] South Carolina[100] and West Virginia[101]).

Currently, twenty-four states and the District of Columbia recognize property held as tenancies by the entireties.[102] In some jurisdictions, such as Pennsylvania,[103] Delaware,[104] North Carolina,[105] Virginia[106] and Florida,[107] entireties assets are wholly safe from the claims of creditors and the creditors may literally do nothing to impose on the assets. Some of those jurisdictions, however, permit liens against a debtor spouse's interest in the property, which is subject to the non-debtor spouse's survivorship interest. Moreover, a creditor who can establish that his debtor transferred assets to a tenancy by the entireties with intent to defraud, may void the transaction and/or levy upon such assets.[108] In New York, property held by joint tenants or by tenants in common is liable to attachment by creditors in New York, but assets owned by husband and wife as tenants by the entireties are not reachable by the creditors of either.[109]

Nine states (including North Carolina[110] and Oregon[111]) limit the tenancy to real property (although in some cases, e.g., Indiana, traceable proceeds of sale of such property also enjoy the protection[112]). New York only permits real property and, in some cases, shares of stock of a cooperative apartment corporation, to be held in tenancy by the entireties.[113] In a few cases (e.g., Illinois[114] and Massachusetts[115]), the protection from creditors is further restricted to the couple's principal residence, i.e., it amounts to little more than an extension of the homestead exemption.

Some states (e.g., New Jersey[116]) also permit creditors to obtain liens against the debtor spouse's usufruct (use and enjoyment) and survivorship interests. Because such a creditor can at most obtain the same interest as the debtor spouse, those liens remain subject to the non-debtor spouse's survivorship interest, which means that the non-debtor spouse may retain possession of the property, and, if the debtor spouse dies first, the liens may be extinguished.[117] However, "it is within the equitable discretion of the court to deny partition to a purchaser of the [debtor spouse's] interest, leaving the creditor to resort to some other remedy."[118]

In most (but not all) jurisdictions with broader protection (e.g., Alaska,[119] Delaware,[120] District of Columbia,[121] Florida,[122] Maryland,[123] Missouri,[124] Pennsylvania,[125] and Tennessee[126] (but not Virginia[127])), real **and** personal property titled in the couple's joint names may be **presumed** to be held as a tenancy by the entireties. This presumption also exists in certain jurisdictions that limit tenancy by the entireties to real property (e.g. North Carolina[128]).

Note that under conflict of laws principles, title to movable property is established as of the time of the conveyance. Thus, moveable property (i.e., chattels, intangibles) acquired by a couple when they are domiciled in a state that favors tenancies by the entirety in personal property may continue to enjoy protection against the separate creditors of one spouse even if the couple subsequently moves to a state that does not recognize tenancy by the entireties.[129]

2. **Bankruptcy Issues.** Tenancy by the entireties property may be exempted from an individual debtor's estate in bankruptcy if the debtor elects the state exemptions under 11 U.S.C. § 522. Upon commencement of a case under Title 11, a bankruptcy estate is created, which is comprised of all of the debtor's legal and equitable interests in property "wherever located and by whomever held."[130] Consequently, a spouse's interest in the property held in tenancy by the entireties is included in the bankruptcy estate. If, however, he elects to exempt property listed in 11 U.S.C. § 522(b)(2) (i.e., the state exemptions), an individual debtor may exempt from property of the estate (A) any property that is exempt under Federal non-bankruptcy law or state or local law of the debtor's domicile and (B) "any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable non-bankruptcy law."[131] Note that movable property acquired in a jurisdiction that favors tenancy by the entireties in personal property and real estate located in such a jurisdiction may be exempt even if the debtor's domicile as of the commencement of his or her bankruptcy does not recognize tenancies by the entirety.[132] If a debtor has elected the state exemptions, the bankruptcy trustee can, at most, administer only the debtor's right to survivorship (on the theory that the survivorship interest is separable and not exempted as an entireties interest).[133] On the other hand, if the husband and wife are both debtors in bankruptcy, their entireties property will not be exempt.[134] Moreover, even when an individual debtor in bankruptcy has exempted entireties property from the bankruptcy estate, a joint creditor of both spouses "may, prior to the discharge of the bankrupt spouse from the debt of such creditor and upon the lifting of the stay, proceed to obtain judgment, execute or foreclose upon property owned by both the bankrupt and the nonbankrupt spouse as tenants by the entireties."[135] Finally, if an individual debtor elects the federal exemptions, his interest in the entireties property is not exempted from the bankruptcy estate. Consequently, the bankruptcy court may grant a judicial lien against the debtor's interest in the entireties property. There is debate as to whether 11 U.S.C. § 363(h) permits the bankruptcy trustee to sell the debtor's

entireties property when the debtor's spouse is not in bankruptcy and the debtor has elected the federal exemptions.

3. **Possible Breakdown of Entireties Protection.** Despite the centuries-old rules outlined above, the protection of entireties property from the creditors of one spouse was challenged in a 2002 federal tax case. The United States Supreme Court's holding in *United States v. Craft*[136] initially appeared to some commentators to have signaled the beginning of the end for entireties protections. Despite Michigan's longstanding and unambiguous law protecting entireties property from the claims of one spouse's creditors, the *Craft* Court held that the Internal Revenue Service was able to place a lien against the debtor spouse's interest in entireties property, thus preventing its ready alienation, sale or other disposition. Justice O'Connor, writing for the majority, used language familiar to tax lawyers--noting that although state law governs the determination of a taxpayer's "property rights," "[w]hether the interests of [taxpayer] in the property he held as a tenant by the entirety constitutes 'property and the rights to property' for the purposes of the federal tax lien statute is ultimately a question of federal law."[137] *Craft* was widely perceived to bring into question the usefulness of entireties protections in the asset protection context.[138] On the other hand, some suggested that *Craft* could be readily limited to the federal tax context and may not impact creditor rights and the protection afforded entireties property under state law and bankruptcy law.

4. **Application of *Craft* in Subsequent Cases.** *Craft* was applied in a number of cases involving federal tax claims, which should be the proper limit of its applicability. A good example is the successful claim by the IRS against fifty percent of the proceeds of sale of entireties property at issue in *Popky v. United States*.[139] In effect, *Popky* extended the result in *Craft*, where a lien is permitted to be filed, to the application of the proceeds of sale of the entireties asset. A number of courts have considered *Craft's* impact on situations other than those involving IRS claims. There are a number of bankruptcy cases, for example, that represent some of the more interesting attempted applications of *Craft*.

As noted above, in virtually every personal bankruptcy case, the debtor is entitled to elect certain exemptions under federal bankruptcy law or under state law that enable the debtor to retain certain classes of assets; this includes the exemption in 11 U.S.C. § 522(b)(3)(B), exempting "any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety . . . to the extent that such interest . . . is exempt from process under applicable nonbankruptcy law." In *Schlossberg v. Barney*,[140] the trustee in bankruptcy asked the Fourth Circuit to hold that entireties assets owned in part by the bankrupt, whose spouse was not included in the proceeding, were available to the estate (and thus to the creditors). The trustee cited *Craft* for the proposition that, since the IRS could make a claim against entireties assets, the trustee should have the same power to "strong-arm" entireties assets into the estate.[141] The court, in rejecting the trustee's claim, determined that *Craft* was limited to the federal tax lien situation and could not be used to give the trustee in bankruptcy the extraordinary power to step into the shoes of the IRS and strong-arm entireties assets into the estate. In *dicta*, the court, in this August, 2004 decision, noted that "every court to have addressed the applicability of *Craft* to trustees in bankruptcy under the Bankruptcy Code has rejected [trustee's] argument."[142]

The Eleventh Circuit reached the same conclusion in *Musulino v. Sinnreich (In re Sinnreich)*.[143] Without needing to apply the strong arm provisions of the Bankruptcy Code, the court distinguished *Craft* by finding that "[t]he *Craft* Court gave no indication that its holding could be extended beyond a tax collection context, which is evidenced by its careful and thorough analysis of the powers of the IRS to attach a lien on all 'property and rights to property' of any taxpayer who failed to pay federal taxes."[144] Several other courts have reached the same conclusion, in each case limiting *Craft* to its federal tax lien birthplace.[145]

A disturbing rejection of entireties protection, based in part on *Craft*, was the decision of United States District Judge Joyner of the Eastern District in *United States v. Sheehan*.[146] In that case, Mr. Sheehan pleaded guilty to mail fraud and was required to make certain restitutions under his plea agreement. Prior to the fraud which gave rise to the plea, he and his wife owned a home as tenants by the entireties. After the plea agreement but before he made full restitution, Mr. Sheehan transferred his entire interest in the house to his wife (who had been diagnosed with a serious illness); she subsequently died and willed the house to children and others. The United States brought an action to set aside the transfer as a fraudulent transfer. The court found that the transfer violated the federal and Pennsylvania fraudulent transfer laws and the entireties ownership was therefore not effectively severed. Citing *Craft*, Judge Joyner concluded that the claim of the United States applied to attach Mr. Sheehan's entire interest, representing, since his wife has predeceased him, one hundred percent of the value of the house. Not even *Craft* went that far.

While *Craft* continues to exist as a disturbing precedent invoking federal statutory law to grant rights over entireties property and *Sheehan* suggests that a common planning technique for couples with entireties property may be subject to challenge (i.e., the transfer of assets to the non-debtor spouse), the well-reasoned distinction of *Craft* by circuit, district and bankruptcy courts, at least in the bankruptcy context, should reassure estate planners that *Craft* will for now be limited to federal tax lien situations. Although *Popky* and other cases suggest that the lien can be converted into a claim for the sale proceeds of entireties assets, as Judge Sigmund shows in *Basher*,[147] it is not clear exactly what the IRS can do with its lien.[148]

5. **Entireties Protection of Joint Trusts**. Several states, including Delaware,[149] Hawaii,[150] Illinois,[151] Indiana,[152] Maryland,[153] Missouri,[154] Virginia[155] and Wyoming[156] have recently passed laws allowing married couples to create a statutory tenancy by the entireties trust ("STET").[157] While Illinois and Hawaii limit the property that can be held in a STET to real property, Delaware also allows personal property to be held in a STET. Delaware law provides that property held in a STET must be treated as though it were tenancy by the entireties property.[158] Delaware law also allows assets held in a STET transferred by a husband and wife to a Delaware asset protection trust (discussed below) to continue to be treated as though they are tenancy by the entireties property.[159]

6. **Entireties Protection and Same-Sex Marriage.** On June 26, 2015, the Supreme Court of the United States held in *Obergefell v. Hodges*,[160] in a 5-4 decision, that the fundamental right to marry is guaranteed to same-sex couples under both the Due Process Clause the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. As a result of *Obergefell*, all states are required to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other jurisdictions.

Because federal law often looks to state law definitions to characterize property rights, there is no longer a discrepancy between same-sex married couples living in states that previously recognized same-sex marriage and those states that did not. If a state provides entireties protection to married couples, then all married couples – whether a same-sex married couple or a heterosexual married couple – will be afforded such protection.

Prior to *Obergefell*, thirty-six states and the District of Columbia already issued marriage licenses to same-sex couples or offered civil unions or domestic partnerships. The *Obergefell* opinion came on the second anniversary of *United States v. Windsor*,[161] in which the Supreme Court held that the federal Defense of Marriage Act (DOMA) was an unconstitutional deprivation of the equal liberties of persons that is protected by the Fifth Amendment. As a result of *Windsor*, the federal government was no longer permitted to distinguish between same-sex married couples and heterosexual married couples.

7. **Impact on Estate Planning.**

a. **In General.** In many cases, couples come to the estate planner with many if not all of their assets (other than life insurance and qualified plans) registered between them as tenants by the entireties or joint tenants with rights of survivorship. The estate planner will rightly point out that assets owned in either fashion pass outright at the first spouse's death to the surviving spouse generally free of death taxes. Prior to the advent of portability, planners would customarily note, however, that joint ownership by spouses made it more difficult to achieve the primary goal of utilizing both estate and gift tax exemptions.[162] Thus, to utilize these exemptions, planners would commonly recommend that some assets be divided and titled in separate names, thereby stripping such assets of protection from creditor claims.

The concept of portability, introduced by the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010,[163] and made permanent by the American Taxpayer Relief Act of 2012,[164] permits a surviving spouse in certain circumstances to use the predeceased spouse's unused federal estate and gift tax exemptions. Portability may alleviate the need to do this sort of planning. However, this planning still makes sense for a variety of reasons, including the desire to use both spouses' generation-skipping transfer tax exemptions and the possible appreciation in assets between the spouses' deaths, etc.

b. **Disclaimer Planning.** If a surviving spouse can make an effective disclaimer of entireties property that will satisfy the requirements of the Internal Revenue Code of 1986, as amended (the "Internal Revenue Code"), the estate planner may recommend that clients retain assets in entireties ownership and use disclaimers to take advantage of the unified credit and GST exemption in the estate of the first spouse to die.

1. Disclaimers are governed by state law. In Pennsylvania, disclaimers are described in Sections 6201 through 6207 of the PEF Code.[165] Section 6201 of the PEF Code specifically permits a surviving joint tenant to disclaim a survivorship interest[166] (some commentators question whether entireties property may be disclaimed as it is not mentioned in the statute).

2. Under the Internal Revenue Code and accompanying regulations, a surviving spouse may generally disclaim one-half of the value of property held with the decedent as entireties property. Under Pennsylvania law, the disclaimed value passes under the decedent's will and will be a transfer from the decedent to the beneficiaries of the estate.

a. In general, under section 2511 of the Internal Revenue Code, "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax."[167] Thus, for federal gift tax purposes, a disclaimer is a gratuitous transfer and will be treated as a taxable gift. Section 2518 of the Internal Revenue Code provides that a "qualified" disclaimer is not a transfer for gift tax purposes, thereby establishing an exception to the general rule.[168]

b. Section 25.2518-2(c)(4)(i) of the Treasury Regulations[169] provides the general rule that if the surviving tenant of a joint tenancy with right of survivorship or tenancy by the entireties makes a qualified disclaimer of the survivorship interest then the disclaimed amount will be deemed to be a one-half interest in the property "regardless of the portion of the property attributable to consideration furnished by the disclaimant and regardless of the portion of the property that is included in the decedent's gross estate."[170]

c. This rule does not apply, however, to joint bank, brokerage and investment accounts where the transferor could unilaterally regain his own contributions to the account without the consent of the other co-tenant. Because such transfers are not completed gifts during life, a co-tenant's contribution to the account is not transferred until that co-tenant's death. Consequently, the surviving co-tenant can only disclaim up to the amount of the deceased co-tenant's contribution. If the surviving co-tenant contributed all of the funds in the account then he cannot disclaim anything.[171]

d. Disclaimer planning has two limitations. First, if the decedent is the debtor then the fact that disclaimed assets pass through the debtor's estate makes them available for creditors, thus rendering the disclaimer useless. Second, if the surviving spouse is the debtor then the fraudulent transfer rules may result in the disclaimed assets being recovered by that spouse's creditors under the fraudulent transfer rules.[172]

e. Other states' disclaimer statutes are discussed in the accompanying footnote.[173]

E. Community Property.

1. **In General.** Community property states, such as Washington and Idaho,[174] do not recognize tenancy by the entireties and instead treat each spouse as owning an undivided one half interest in each item of community property.[175] Depending on the circumstances of the debt, creditors may be able to reach community property. For example, if the debt arises during marriage, creditors can normally reach the entire community property for tort-related debts.[176] If the tort occurred and the creditor obtained a judgment prior to the marriage, he or she may reach community property if the tortfeasor's individual property is insufficient to fulfill the debt.[177] If the tort was committed before the marriage but the judgment is obtained after the marriage, the tortfeasor may not recover any of the community property.[178] In addition, for debts incurred before the marriage, creditors may reach community assets to satisfy claims for child support and alimony.[179]

2. **Washington.** Additionally, in Washington, a husband and wife may enter into an agreement regarding the disposition of their community property.[180] However, the statute provides that this agreement "shall not derogate from the right of creditors; nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party… ."

3. **Idaho.** In Idaho, neither spouse is liable for the debts of the other spouse incurred prior to the marriage. Likewise, individual debts incurred during the marriage are the liability of the spouse who incurred those debts. Community debts may be satisfied out of the community property and out of the separate property of the spouse who was involved in the transaction that benefitted or harmed the community.[181]

4. **California.** In California, the community estate is liable for the debts of both spouses incurred before or during marriage.[182] The earnings of one spouse are not liable for the debt of the other spouse incurred before the marriage, so long as those earnings are kept separate.[183] The separate property of one spouse is not liable for debts of the other spouse incurred before or during marriage,[184] but one spouse is liable for debts incurred by the other spouse for necessaries of the life of that spouse.[185]

5. **Texas.** Texas law treats community property differently depending on whether it is subject to one spouse's sole management, control, or disposition or to joint management, control, and disposition.[186] Sole management community property is subject to the managing spouse's premarital liabilities, that spouse's liabilities incurred during marriage and any joint liabilities incurred during the marriage, as well as the nonmanaging spouse's tortious liability incurred during marriage, the nonmanaging spouse's federal taxes, and the nonmanaging spouse's necessities.[187] A spouse's separate property is not subject to the other spouse's liabilities.[188]

F. <u>Trusts and Similar Interests</u>.

1. **In General.** In Pennsylvania and elsewhere it is quite common for an individual to transfer his or her assets to himself or another as trustee, with the direction that the trustee hold the assets in a fiduciary capacity and distribute the income and principal in accordance with the terms of the trust. This is often done for estate planning reasons (i.e., the avoidance of probate or to secure the benefits of someone else managing assets in a responsible way). Such trusts can contain a variety of assets, can be revocable or irrevocable and can have many different characteristics. Generally, however, such transfers have no pre-death benefit *vis-a-vis* creditors.

2. **Spendthrift Trusts.** Most states deny creditor protection to "self-settled spendthrift trusts" because it is against public policy for an individual to be able to have access to assets while protecting them from proper creditors. Traditionally, this rule has been upheld pursuant to case law, not statutory law.[189] This rule has been codified as part of the Uniform Trust Code ("UTC").[190] Many states have adopted one version or another of the Uniform Trust Code and for practitioners in those states, care must be taken to consider the impact of the applicable language. In particular, §505 of the Uniform Trust Code provides as follows:

> (a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

> (1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.
>
> (2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.
>
> (3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.[191]

This statute should settle once and for all in jurisdictions adopting this part of the UTC the issue of whether a living trust provides creditor protection during the settlor's lifetime. Except to the extent that the settlor of an irrevocable trust is specifically limited as to the amount that the trustee may distribute to him or her (e.g. a trust providing that discretionary distributions to the settlor may not exceed one-half of the trust principal), all revocable and virtually all irrevocable trusts in which the settlor retains a right to distributions will be fully available for attachment and execution by the settlor's creditors during his or her lifetime.

In other jurisdictions, the rule set forth above appears either by statute or by case law.[192]

3. **Domestic Asset Protection Trusts.** Seventeen American jurisdictions have adopted some form of self-settled asset protection vehicle over the past two decades. While each jurisdiction has its own peculiarities, there are common threads to most. This outline will highlight the most "mature" of these statutes, those of Alaska, Delaware and Nevada.

As the states compete to entice a potential settlor to create a self-settled asset protection trust in their jurisdictions, it is interesting to note that there are significant variances in the suggested or required contacts with the jurisdiction to establish situs. Notably, none of the fifteen jurisdictions require that the settlor be a resident of the state avail himself or herself of the laws of the jurisdiction.

4. **Alaska Trusts.** Not quite an offshore jurisdiction, but far from Pennsylvania, Alaska adopted the Alaska Trust Act (the "Alaska Act"), effective April 2, 1997. The Alaska Act presents some interesting asset protection planning opportunities through the use of "Alaska Trusts."[193]

a. **Rule Against Perpetuities.** The Alaska Act effectively eliminates the rule against perpetuities.

b. **Creditor Protection.** The Alaska Act allows a person to set up a self-settled spendthrift trust, which is a trust for the settlor's own benefit that is immunized from creditors' claims. Note that this is directly contrary to the Uniform Trust Act provision cited above at D.2. This vehicle offers considerably more flexibility than a spendthrift trust for heirs, which may shelter trust corpus and income from creditors through spendthrift provisions that allow the trustee to retain trust income and corpus if any given beneficiary is attacked by creditors. The Alaska Act provides that, outside of certain specific situations[194] the assets in trust are not subject to the claims of the settlor's creditors unless the original transfer to the trust was intended to defraud the settlor's known creditors or renders the settlor insolvent. Thus, a settlor can transfer assets to an irrevocable Alaska Trust and be a discretionary beneficiary to whom the trustee may distribute trust property. So long as the trustee is not obligated to distribute assets to the settlor, the assets will not be subject to creditors' claims. This protection applies even if the settlor is the only beneficiary. If there are multiple beneficiaries, the protection from creditors' claims applies even though the settlor retains the right to veto distributions to other trust beneficiaries or the right to direct where trust property passes on his or her death. By retaining such powers, the settlor will have made an incomplete gift: no gift tax liability will be incurred upon the settlor's transfer into the trust and the trust assets will be includible in the settlor's taxable estate. If the settlor does not retain such powers, the transfer into the trust will be a completed gift subject to gift tax and may be excludable from the settlor's taxable estate.[195]

c. **Act Limitations.** There are limitations to the Alaska Act. A creditor may reach trust assets in the following circumstances:

1. If the transfer was intended in whole or in part to hinder, delay, or defraud creditors or other persons;[196]

2. If the settlor retains the power to "revoke or terminate all or part of the trust without the consent of a person who has a substantial beneficial interest in the trust and [whose] interest would be adversely affected by the exercise of the power held by the settlor to revoke or terminate all or part of the trust;"[197]

3. If "the trust requires that all or a part of the trust's income or principal, or both, must be distributed to the settlor;"[198] or

4. If, "at the time of transfer, the settlor is in default by [thirty] or more days of making a payment due under a child support judgment or order."[199]

d. **Enforceability.** It is questionable whether another state's courts will honor the protection offered by the Alaska Act if the creditor seeks assets within the jurisdiction of the non-Alaska Court. Foreign courts may construe the asset protection provisions as merely administrative and apply instead the law of the forum state. There are no opinions where a state other than Alaska has applied Alaska law to an Alaska Trust (or where the laws of any state that has created a domestic asset protection trust statute have been applied outside of that state).

In the recent case of *In re Zukerkorn*, the Ninth Circuit considered the application of a settlor's choice of law in cases involving self-settled asset protection trusts. In *Zukerkorn,* the court held that the mere fact that California law, unlike Hawaii law, imposed limits on scope of protection that may be provided by spendthrift provisions in trust did not mean that Hawaii law, which fully recognized validity of spendthrift clauses in trusts that were not self-settled, was contrary to fundamental policy of California law. In *dicta*, the court suggested that if application of the settlor's choice of law would violate a strong public policy of the forum state, a court should apply the forum state's law rather than the settlor's choice of law as indicated in the trust instrument.[200] In *In re Huber Trust,* a recent decision in the Western District of Washington, the United States Bankruptcy Court declined to apply Alaska law to an Alaska Trust. Instead, the court applied Washington law, citing Washington's strong public policy against self-settled asset protection trusts, and held that settlor's transfer of assets to the self-settled trust was invalid.[201]

Ruling such as *Huber* and *Zukerkorn* indicate that Alaska Trusts and other similar domestic asset protection trusts may be of limited utility to out-of-state settlors with limited contacts with their jurisdiction of choice. Some commentators have suggested that, in light of the ruling in *Huber Trust*, practitioners would be wise to encourage clients who are creating domestic asset protection trusts in states other than their own to enhance their contacts with the state whose law they designate as governing.

e. **The Cost.** Alaska exacts a price for this creditor protection. To qualify under the Alaska Act, trust administration must take place in Alaska[202] and the settlor must use an Alaska resident or an Alaska-headquartered bank or trust company as trustee or co-trustee.[203] This trustee must have certain duties including selecting the trust tax return preparer and maintaining trust books and records.[204] Note, however, that recent legislation permits certain national trust companies to qualify as residents of each of the fifty states. Such legislation may lower the cost of Alaska trusts.

5. **Delaware Trusts.** Delaware, long known as a trust-friendly jurisdiction because of a variety of other tax and legal rules, quickly responded to the Alaska "threat." On July 9, 1997 Governor Carper signed into law Delaware House Bill No. 356, titled the Qualified Dispositions in Trust Act (the "Delaware Act").[205] The Delaware Act provides similar creditor protection and estate planning opportunities to those in the Alaska statute described above.[206]

a. **Act Limitations.** There are limitations under the Delaware Act, as well. One exception is for a creditor of the settlor who can prove by clear and convincing evidence that the transfer to the self-settled trust was "made with actual intent to defraud such creditor."[207] In addition, a creditor who is entitled to support or alimony from the settlor, and tort victims who are injured (or who suffer property damage) on or before the date that a settlor/tortfeasor created a self-settled trust may reach the assets of the trust; these claimants need not prove actual intent to defraud to recover trust assets.[208] A successful creditor may be entitled not only to assets of the self-settled trust (in an amount necessary to satisfy the claim), but also to attorneys' fees, in the discretion of the court[209] if the transfer was to defraud creditors.[210]

b. **Enforceability.** As in the case of the Alaska Act, the protection offered by the Delaware Act may be limited to assets within the exclusive jurisdiction of Delaware Courts.[211]

In *TrustCo Bank v. Mathews*,[212] the Delaware Court of Chancery engaged in a significant contacts test to determine the applicable statute of limitations period for alleged fraudulent transfers to a Delaware trust where the trust's settlor was not a Delaware resident. The Court declined to determine whether the Delaware Act modified the general rule pertaining to the statute of limitations for actions against fraudulent transfers to Delaware trusts where there was a sufficient other basis to dismiss the claims at issue under general conflict of rules laws. Ultimately, the Delaware asset protection planning employed by the settlor was successful, but primarily because the Court rejected the creditor's claims under a laches (statute of limitations) defense.

c. **The Cost.** Similar to Alaska, Delaware requires the settlor to use a Delaware resident or a corporate trustee authorized by Delaware law "and whose activities are subject to supervision by the Bank Commissioner of [Delaware], the Federal Deposit Insurance Corporation, the Comptroller of the Currency, or the Office of Thrift Supervision."[213] Furthermore, the trustee must "materially participate" in trust administration.[214]

6. **Nevada Trusts.** In May 1999, Nevada adopted the Spendthrift Trust Act.[215]

a. **Creditor Protection.** As with the Alaska and Delaware statutes, so long as the trustee is not obligated to distribute assets to the settlor, the assets in trust are not subject to the claims of creditors.[216] The statute does not require other income beneficiaries.

b. **Act Limitations.** The Nevada statute is more aggressive than the Alaska and Delaware statutes, in that there is no specific exception for child support or alimony creditors and the periods with respect to which an action may be brought are shorter than under the Alaska and Delaware statutes. A creditor is able to reach the trust assets to the extent necessary to pay the creditor's claim if:

1. the transfer was intended to hinder, delay or defraud known creditors;

2. the action with respect to the transfer of property is brought within two years after the transfer is made;[217] or,

3. with respect to creditors of the settlor at the time of the transfer, the action is brought within six months after the creditor discovers or reasonably should have discovered the transfer.[218]

c. **Enforceability.** See again the caveats discussed above about assets in the jurisdiction of other state courts. Similar to *In re Huber Trust*, in *Dahl v. Dahl,*[219] the Supreme Court of Utah declined to apply Nevada law to a Nevada trust created by a Utah resident where the Court found that Utah's marital laws created a strong overriding public interest in seeing that its laws regarding the division of marital estates was respected. Interestingly, Utah has enacted a domestic asset protection trust statute, but the Court was still unwilling to apply the Nevada statute. Commentators have suggested that in states that have not adopted a domestic asset protection trust statute, the courts will be even less willing to apply another state's laws under its (the forum state's) conflict-of-rules laws.

d. **The Cost.** The Nevada statute appears to allow several options for a settlor wishing to fall under its protection. A trust will qualify under the statute if it holds real property in Nevada, if all or part of the trust's personal property is held in the state (query if a bank or custodian account is sufficient) or if the settlor's domicile is Nevada.[220] Most important, a trust qualifies if at least one of the trustees is a Nevada resident or a trust company or bank that maintains an office in Nevada and the trustee maintains the records of the trust and prepares the trust tax returns.[221]

7. **Other States.** Colorado,[222] Hawaii,[223] Mississippi,[224] Missouri,[225] New Hampshire,[226] Ohio,[227] Oklahoma,[228] Rhode Island,[229] South Dakota,[230] Tennessee[231], Utah,[232] Virginia,[233] West Virginia[234] and Wyoming[235] and all have adopted statutes similar to those in Alaska, Delaware and Nevada.

8. **Florida Inter Vivos Qualified Terminable Interest Property Trusts.** Florida does not have a domestic asset protection trust statute. However, recently Florida

enacted legislation to protect assets transferred by a settlor to an inter vivos QTIP trust for a beneficiary/spouse from the settlor's creditors after the death of the beneficiary/spouse. The Florida statute regarding creditors' claims against settlors provides that after the death of a beneficiary/spouse, assets remaining in a QTIP trust will be considered to have been contributed by the beneficiary/spouse, and not by the settlor.[236] Accordingly, a QTIP trust would not be considered to be "self-settled" (and so would not be available to satisfy creditors' claims) after the death of the beneficiary/spouse.

Florida is not alone in offering this protection. Eight other states, in addition to certain states that have enacted domestic asset protection trust legislation (including Delaware[237] and Virginia[238]), have legislation providing that an inter vivos QTIP trust generally will not be treated as self-settled, even if the settlor might benefit by surviving the beneficiary/spouse. These states include Arizona,[239] Kentucky,[240] Maryland,[241] Michigan,[242] North Carolina,[243] Oregon,[244] South Carolina[245] and Texas.[246]

9. **Impact of Bankruptcy Law.** The 2005 Bankruptcy Act includes special provisions pertaining to self-settled assets protection trusts, both foreign and domestic. Section 548 of the Bankruptcy Act sets forth detailed fraudulent transfer rules applicable to bankruptcy proceedings.[247] Under new §548(e), the trustee in bankruptcy may look back ten years prior to the filing of the bankruptcy petition to void a transfer as follows:

> In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if (a) such transfer was made to a self-settled trust or similar device; (b) such transfer was by the debtor; (c) the debtor is a beneficiary of such trust or similar device; and (d) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.[248]

Since most asset protection trusts have a self-evident asset protection purpose and because this provision includes an intent to hinder future, as well as existing, creditors, it may be difficult to avoid having such transfers brought back into the bankruptcy estate.

A recent case from the United States Bankruptcy Court in Alaska has given some disturbing context to section 548(e). In *Battley v. Mortensen,*[249] the Bankruptcy Court found that a self-settled Alaska trust was voidable by the trustee in bankruptcy under the somewhat convoluted facts of the particular case.

In another recent case, *In Re Huber Trust*, the United States Bankruptcy Court in Washington applied section 548(e) to a trust which the settlor indicated was to be governed by Alaska law.[250] To determine whether or not the debtor's transfer of assets to the trust was fraudulent, the Bankruptcy Court examined the following "circumstantial indicia of fraudulent intent:"

> (1) actual or threatened litigation against the debtor; (2) a purported transfer of all or substantially all of the debtor's property, (3) insolvency or other unmanageable indebtedness on the part of the debtor; (4) a special relationship between the debtor and the transferee; and, after the transfer, (5) retention by the debtor of the property involved in the putative transfer.[251]

The Bankruptcy Court found that all five of these "badges of fraud" existed and the debtor was therefore in violation of 548(e).[252] The court further held that the debtor's reliance on counsel in creating a self-settled asset protection trust does not negate his fraudulent intent because he knew that the purpose of the transfers was to hinder or delay creditors.[253] *Huber* is an important reminder that self-settled asset protection trusts are not an appropriate vehicle for insolvent debtors to use to try to avoid their creditors.

10. **Trusts Created by Others.**

a. **In General.** It is generally the law of every United States jurisdiction that a creditor's rights to reach assets owned by a trust created not by the debtor but by someone else (often referred to as a "third party trust") are very circumscribed. For example, until 2006 when Pennsylvania adopted the Uniform Trust Code, the extent to which a creditor could reach the beneficiary's interest in a trust governed by Pennsylvania law and containing a spendthrift provision was based in part on a provision of the Probate Estate and Fiduciary Code (20 Pa. C.S. §§ 101-8815) and in part on case law.[254] As a result of the enactment of the Uniform Trust Code ("UTC"), Pennsylvania and twenty-six other jurisdictions now have a fairly clear statutory roadmap controlling the rights of a beneficiary's creditors to the beneficiary's interest in the trust.

b. **Uniform Trust Code.** The UTC contains several provisions which bear on this analysis (§§ 501-507):[255]

1. Section 501 provides as follows:

> To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.[256]

The impact of this provision is self-evident; in the absence of a spendthrift provision, a beneficiary's creditors and assignees have very broad rights to access assets in the trust.

2. Section 502 provides as follows:

> (a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.
>
> (b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.
>
> (c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this [article], a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.[257]

While subparagraph (b) appears to reduce the apparent strictness of subparagraph (a) (which appears to require specific terms for a spendthrift provision to be operative), it would seem sensible for every trust to contain words of restriction as suggested by subparagraph (a) in an abundance of caution.

3. Section 503 provides in relevant part as follows:

> (a) . . .
>
> (b) A spendthrift provision is unenforceable against:
>
> (1) a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance;
>
> (2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and
>
> (3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.
>
> (c) A claimant against which a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances.[258]

These exceptions to the protection otherwise afforded by a spendthrift provision are mostly similar to the exceptions under prior law. The language in §503(b)(3) is new and reflects a decision to permit a beneficiary's counsel fees to be paid from an otherwise spendthrift-protected trust.

4. Section 504 provides as follows:

> (a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.
>
> (b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:
>
> (1) the discretion is expressed in the form of a standard of distribution; or
>
> (2) the trustee has abused the discretion.
>
> (c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:
>
> (1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and
>
> (2) the court shall direct the trustee to pay to the child, spouse, or former spouse 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.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(e) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or cotrustee.[259]

This section expands the potential rights of certain creditors even with regard to discretionary trusts but only if the creditor (a child, a spouse or former spouse or another person with a court-ordered support right) can demonstrate that the trustee has not complied with a standard of distribution or abused a discretion.

5. Section 505 provides as follows:

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

(b) For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on the effective date of this Code, or as later amended.[260]

Again this is a wholly new provision in the law. Notice that there is no limit on the class of creditors who may reach assets subject to a power of withdrawal, even after lapse or waiver.

Understanding the reach of this new provision requires an understanding of the definition of a power of withdrawal. For example, pursuant to § 505(b)(2), so-called "5 and 5" powers do not give rise to creditor rights when waived or lapsed. However, if a settlor's child has the right to withdraw 1/3 of the principal of a trust at any time after reaching age twenty-five, the child's assignees and all of the child's creditors have the same rights to reach the principal as would a creditor of the settlor of a revocable trust once the child reaches age twenty-five.

6. Section 506 provides as follows:

> (a) In this section, "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, including a distribution upon termination of the trust. The term does not include a distribution subject to the exercise of the trustee's discretion even if (1) the discretion is expressed in the form of a standard of distribution, or (2) the terms of the trust authorizing a distribution couple language of discretion with language of direction.
>
> (b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.[261]

This is a wholly new provision in the law which may or may not reflect what a court might have done in certain circumstances. If, for example, a trust instrument provides that the a trust terminates when the settlor's child reaches age thirty-five, the child's creditors may reach the principal if the trustee does not distribute it within a reasonable time after that date. Note that this does not apply to distributions pursuant to a standard; the creditor in those situations is relegated to §504 and even then, only certain creditors have any rights.

c. **Other jurisdictions.** All American jurisdictions have laws pertaining to third party trusts and the rights of creditors of beneficiaries. Some have the Uniform Trust Code in one version or another. Some rely on statutory law and some on case law.[262]

d. **Estate Planning.** If an estate planner is asked to comment on estate planning being prepared for others who may make gifts or testamentary transfers to the planner's own client (typically a parent), the planner should point out that such interests could be structured to limit claims of the beneficiary's creditors. Such advice should also be given to clients considering the asset protection concerns of their heirs.

e. **Exceptions.** In *Sligh v. First National Bank of Holmes County*,[263] the Supreme Court of Mississippi decided an important case concerning tort creditors. In *Sligh*, the Court held that where the conduct of a beneficiary of a spendthrift trust is particularly egregious, his creditors may be able to make claims against the trust interest despite the existence of common law spendthrift protection. The result in this case was subsequently overturned by statute.

In *Scheffel v. Krueger*,[264] a mother sued the defendant for sexually assaulting her minor son, videoing the attack, and posting the video on the internet. The New Hampshire Supreme Court held that she could not reach assets that were held in a spendthrift trust for his benefit, and that there was no public policy exception to the New Hampshire statute governing spendthrift provisions.[265]

G. Limited Partnerships

1. **In General.** Limited partnership interests are a special breed of asset. They have some of the characteristics of personally-owned assets.[266] In some respects, however, they are like trusts. Although a creditor may attach a limited partner's interest in the partnership, and thereby obtain some economic satisfaction, his power with respect to the interest will be limited.

2. **History.** The Uniform Law Commission first drafted a Limited Partnership Act in 1916. In 1976, the Uniform Law Commission completed a Revised Limited Partnership Act ("RULPA"). In 2001, the Uniform Law Commission completed a new Uniform Limited Partnership Act ("2001 Act"). Unlike the 1976 Act, the 2001 Act was "de-linked" from both the new from both the original general partnership act ("UPA") and the Revised Uniform Partnership Act ("RUPA").[267] The 2001 Act is far longer and more complex than the 1976 Act because it incorporates provisions both from RUPA and from the Uniform Limited Liability Company Act (ULLCA) in order to be able to stand alone.[268]

The 2001 Uniform Limited Partnership Act has been adopted by 19 jurisdictions, including Alabama, Arkansas, California,[269] the District of Columbia, Florida,[270] Hawaii, Idaho, Illinois,[271] Iowa, Kentucky, Maine, Minnesota, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Utah, and Washington.[272] The 1976 Version of the Act (RULPA) is still the law in many jurisdictions, including Georgia,[273] New Jersey,[274] New York,[275] North Carolina,[276] Ohio,[277] Pennsylvania,[278] South Carolina,[279] Tennessee,[280] Texas,[281] Virginia,[282] and West Virginia.[283]

3. **Statutory Structure.** The 1976 and 2001 Uniform Acts are fairly similar in their treatment of liabilities of limited partners. Significant differences between the Acts will be noted in both the text and the footnotes.[284]

RULPA offers asset protection in several ways:

a. A limited partner is not liable for the obligations of the Limited Partnership ("LP"), except under certain narrow circumstances.[285] Limiting personal liability outside of the corporate context is an important consideration for many investors, particularly when the risk of liability in excess of the entity's assets is relatively high.[286]

b. Correspondingly, the LP is protected against the liabilities of its individual limited partners. Absent contrary provisions in the LP agreement, a limited partner can only assign his economic interest in the LP. The partner's non-economic rights are not transferable.

c. Section 703 of RULPA limits the rights of creditors with respect to a limited partnership interest:

> On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the

> partnership interest. This chapter does not deprive any partner of the benefit of any exemption laws applicable to his partnership interest.[287]

Thus, a creditor's ability to satisfy its judgment out of an LP interest is limited in three significant ways:

1. The creditor must seek a "charging order" from the court;[288]

2. The creditor only has the economic rights of an assignee[289] (it may not attach or otherwise reach partnership property); and

3. The debtor is nevertheless entitled to any exemptions applicable to the partnership interest.[290]

d. As a practical matter, if a court approves the creditor's request and issues a charging order with respect to the debtor's economic interest in the partnership, the creditor will only receive what those in charge of the LP, typically one or more general partners, are prepared to distribute. Moreover, as the economic assignee, the creditor assumes his debtor's income tax liability with respect to the partnership interest.[291] Because of the risks of tax liability in excess of receipts, creditors may be wary of seeking to attach limited partnership interests.

e. For purposes of asset protection under the 2001 Act, a limited partner now has no liability for the limited partnership's obligations, whether or not that limited partner participates in the control of the limited partnership. The act specifically states, "[a]n obligation of a limited partnership, whether arising in contract, tort, or otherwise, is not the obligation of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership."[292]

f. Ordinarily, a charging order will not give the creditor the power to sell the partnership interest or to participate in the management of the business. Thus, for example, in *Green v. Bellerive Condominiums Limited Partnership*,[293] the court found that a charging creditor was not entitled to notice of a partnership opportunity to purchase a note at discount or to participate in or object to such a purchase.

g. Note that the Florida Supreme Court recently held that in Florida, a court may order a debtor to surrender the debtor's interest in a *limited liability company* to satisfy a judgment based on a claim arising outside of the LLC.[294] The Court in *Olmstead, et al. v. Federal Trade Commission* reasoned that unlike the Florida RULPA, the comparable Florida LLC statute did not specifically provide that the charging order is the only and exclusive remedy to a judgment creditor of a partner.[295] In response to *Olmstead*, the Florida Legislature revised its LLC statute to clarify that a charging order is the exclusive remedy for a multi-member LLC.[296] However, for a single-member LLC, the charging order is not the sole and exclusive remedy. A court may order the sale of the member's interest in the LLC pursuant to a foreclosure sale.[297]

h. Beware, however, that several courts, including the Eastern District of Pennsylvania, have held that the provision in the general partnership statute giving the court authority to "make all other orders, directions, accounts and inquiries which the debtor partner might have made or which the circumstances of the case may require,"[298] applies to LP interests and permits a court to charge and sell a partnership interest in an LP.[299]

i. The New Jersey Superior Court limited a creditor's rights through a charging order on a law firm partner's distributive share, citing the exemption in New Jersey for "wages, debts, earnings, salary, income from trust funds or profits due and owing," in excess of 10%, unless the debtor's annual income exceeds $7,500, in which case, the court may order a larger percentage.[300] In *Zavodnick v. Leven*, the court remanded, requiring the trial court "to strike an equitable balance between the interests of the judgment creditor and debtor."[301] Note, however, that the corresponding exemption provision in Pennsylvania is for "wages, salaries and commissions," and does not include profits.[302] Moreover, the Pennsylvania courts have interpreted this exemption to apply only to wages earned by the labor of the individual and not to "profits on the labor of others."[303]

4. **Limited Liability Companies**. Limited Liability Companies, also known as LLCs, are generally subject to the same charging order rules as limited partnerships.

H. Fraudulent Transfers / Voidable Transactions

1. **In General.** In implementing the asset protection strategies discussed in other sections of this outline, lawyers will frequently discuss with their clients the option of moving or re-titling assets. In some instances, those transfers of assets will be considered due to concern about looming liabilities (e.g., potential or actual exposure to litigation). In others, the transfers will be considered in anticipation of possible future liabilities. In those circumstances, lawyers and their clients bring into play the rights of creditors who may at some point seek to un-wind those transactions so that the creditors can access those assets. Both federal bankruptcy law and state law provide statutory procedures for creditors (or bankruptcy trustees) to satisfy claims against assets that a debtor has fraudulently transferred. This section will provide an overview of the law of fraudulent conveyances so that practitioners can attempt to avoid the pitfalls that arise when a client seeks to protect his or her assets.

2. **Fraudulent Transfer Law – A Brief History.** The Prefatory note to the Uniform Fraudulent Transfers Act[304] that was adopted in 1984 provides:

> The Uniform Fraudulent Conveyance Act[305] was promulgated by the Conference of Commissioners on Uniform State Law in 1918. The Act has been adopted in 25 jurisdictions, including the Virgin Islands . . . . The Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfers was part of the law of every American jurisdiction. Since the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts had relied on badges of fraud. The weight given these badges varied greatly from jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a

fraudulent transfer was to depend on the evidence of actual intent.[306]

In 1979, the Conference appointed a committee to study the Uniform Fraudulent Conveyance Act ("UFCA") and to draft a revision.[307] In 1984, the National Conference of Commissioners on Uniform State Laws approved the Uniform Fraudulent Transfer Act ("UFTA").[308] Currently, forty-five jurisdictions, including California, Connecticut, Florida, Georgia, Idaho, Illinois, North Carolina, New Jersey, Ohio, Oregon, Pennsylvania, Texas, Washington, and West Virginia, have adopted a version of UFTA.[309]

Under UFTA, a creditor may avoid a fraudulent transfer "to the extent necessary to satisfy the creditor's claim."[310] The statute also permits other remedies, including attachment, injunction and appointment of a receiver.[311]

In 2014, the Uniform Law Commission amended UFTA for the first time since its creation in 1984. These changes address a few narrowly defined issues, and are not a comprehensive revision.

Most notably, the title of the Act is now the "Uniform Voidable Transfers Act" (UVTA, pronounced "you-vee-ta"). Many commentators felt that the original title was a misleading description because fraud was never a necessary element of a claim under the UFTA and the Act has always applied to the incurrence of obligations, as well as to transfer of property. Thus, the name change aims to clarify the purpose and application of the Act.

The principal features of the amendments include: (1) the addition of a choice-of-law rule for claims governed by the Act, (2) the addition of uniform rules allocating the burden of proof and defining the standard of proof with respect to claims and defenses under the Act, (3) the deletion of a special definition of "insolvency" applicable to partnerships and (4) minor revisions relating to defenses under the Act.

Some commentators have noted that the new choice-of-law provisions under UVTA[312] may cast too wide of a net and catch the "good guy" debtors in its midst.[313] New Section 10 of UVTA provides that "a claim for relief under [UVTA] is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred."[314] Historically, there was a question as to which law governs – the law of the settlor/debtor's domicile state or the law of the domestic asset protection trust state. Even if a court in the debtor's domicile state deemed the conveyance to be fraudulent or voidable, the debtor could look to the domestic asset protection trust state for protection under its law. Such state could then argue that the trust is valid in such state and that it would not afford full faith and credit to a judgment from the debtor's domicile state. If a domestic asset protection trust state adopts Section 10 of UVTA, then it arguably would have a more difficult time not affording full faith and credit to the judgment of the debtor's domicile state. More remains to be seen on this issue.

As of January 2016, nine jurisdictions – California, George, Idaho, Iowa, Kentucky, Minnesota, New Mexico, North Carolina and North Dakota – have adopted a version of UVTA.[315] In 2016, a version of UVTA was introduced for enactment in Indiana, Massachusetts, Rhode Island and South Carolina.

3. States' Fraudulent Transfer and Voidable Conveyances Laws.

a. Alabama, Arizona, Arkansas, California,[316] Colorado, Connecticut,[317] Delaware, District of Columbia, Florida,[318] Georgia,[319] Hawaii, Idaho, Illinois,[320] Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina,[321] North Dakota, Ohio,[322] Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas,[323] Utah, Vermont, Washington, West Virginia,[324] Wisconsin, and Wyoming have all enacted versions of the UFTA. In this outline, and to provide a sample from the enacting states, references to the UFTA will include in footnotes references to the specific statutes of West Virginia, North Carolina, Georgia and Florida; to the extent there are corresponding statutory cites for Virginia and South Carolina, they will be noted as well.

b. Only six states – Alaska, Louisiana, Maryland, New York,[325] South Carolina[326] and Virginia[327] – have not enacted a version of UFTA or UVTA; however, legislation is pending in South Carolina.

4. **Elements of a Fraudulent Transfer / Voidable Conveyance.**

a. The creditor must have a claim, which is defined as "[a] right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatched, disputed, undisputed, legal, equitable, secured or unsecured."[328]

b. The debtor must have made a transfer with respect to the asset.[329] In general, a transfer is made when the creditor cannot acquire an interest in the asset that is superior to that of the transferee.[330] Note that "a transfer is not made until the debtor has acquired rights in the asset transferred."[331] Consequently, it can be argued that valid disclaimers are not susceptible to fraudulent transfer actions[332] because a debtor who validly disclaimed property never obtained an interest in that property. As discussed below, this argument has been rejected by the United States Supreme Court in a matter involving a federal tax lien, and has also been rejected by the Superior Court of Pennsylvania. UVTA defines transfer very broadly as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance"[333] thereby including both direct transfers as well as the assumption of obligations.

c. An asset means "property of a debtor" but specifically does not include: property to the extent it is encumbered by a valid lien; to the extent it is generally exempt under non-bankruptcy law; or an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.[334]

The definition of asset brings into play the provisions of state laws governing the exemption, or non-exemption, of various assets from the claims of creditors.[335]

d. The creditor must demonstrate that the transfer was voidable as to a creditor.[336]

e. A creditor may establish that a transfer is voidable as to that creditor by showing either "actual intent to hinder, delay or defraud any creditor of the debtor" or constructive fraud.[337]

f. Actual intent may be established by circumstantial evidence.[338] UVTA sets forth the following eleven factors (frequently referred to as "badges of fraud") that the court may consider in determining whether the creditor had actual intent:

1. the transfer or obligation was to an insider;

2. the debtor retained possession or control of the property transferred after the transfer;

3. the transfer or obligation was disclosed or concealed;

4. before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

5. the transfer was of substantially all the debtor's assets;

6. the debtor absconded;

7. the debtor removed or concealed assets;

8. the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

9. the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

10. the transfer occurred shortly before or shortly after a substantial debt was incurred; and

11. the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[339]

These "badges of fraud" permit a court to infer intent to defraud, but the statute expressly permits a court to consider the enumerated badges "among other factors."[340] As the Tennessee Supreme Court has stated, "[Fraud] therefore has to be ferreted out by carefully following its marks and signs; for fraud will, in most instances, though ever so artfully and secretly contrived, like the snail in its passage, leave its slime by which it may be traced." [341] As such, as the United States Bankruptcy Court for the Eastern District of Pennsylvania once noted, "even in the absence of any of the enumerated badges, a court can find actual fraud."[342]

The courts of Virginia have enumerated "badges of fraud" consistent with those set forth in UVTA; a party who establishes the existence of badges of fraud "creates a prima facie case that must be rebutted by the party seeking to uphold the transfer."[343]

South Carolina courts have also identified "badges of fraud" consistent with those set forth in UVTA.[344]

The UVTA's codified "badges of fraud" do not differ materially from New York cases interpreting the UFCA.[345]

g. Absent proof of actual intent, a creditor may establish **constructive fraud** by showing a transfer was made for less than reasonably equivalent consideration,[346] and

1. the debtor "was engaged or was about to engage in a business or a transaction" with unreasonably small capitalization;[347] or

2. the debtor "intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they come due."[348]

5. **A Transfer or Conveyance is <u>Deemed</u> Fraudulent or Voidable as to Certain Existing Creditors if:**

a. the "claim arose before the transfer was made;"[349]

b. the debtor made the transfer for less than reasonably equivalent consideration;[350] and

c. "the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer."[351]

To establish whether a debtor is insolvent, the UVTA contains a balance sheet concept in which a determination is made whether "the sum of the debtor's debts is greater than all of the debtor's assets."[352] The complexities in applying this definition are obvious: what are the debtor's assets; what are they worth; and what are the debtor's debts?[353]

The UFCA has a slightly different definition of when a transfer is deemed "fraudulent."[354]

6. **Special Problems -- Defining a Transfer Under the UVTA.**

A transfer, broadly defined as noted above, occurs when one party conveys an interest to another. A transfer has occurred for purposes of the UVTA when the creditor cannot acquire an interest in the asset that is superior to that of the transferee.[355] When a party delivers the deed to a home, or stock of a corporation, or his or her grandfather's clock, or the proceeds of a bank account to another person then it is obvious that a "transfer" has occurred. It seems equally obvious that a transfer occurs when a person converts one type of asset into another when the latter becomes unavailable for attachment. This section will address briefly some situations that are more complex.

a. **Treatment of Disclaimer of Gift or Interest in Will or Trust.**

As noted above, most states conclude that a disclaimed interest that results in a person or entity other than the original beneficiary owning funds or an asset does not constitute a transfer because an effective disclaimer causes the disclaimed interest to pass as if the disclaimant had died immediately before the date of transfer of the interest (e.g., the death of the testator who made a bequest in his or her will to the disclaimant). Because the disclaimer "relates back" to the date of the original transfer (date of death), the disclaimant is deemed never to have received the interest and therefore has not made a transfer.[356]

The Superior Court of Pennsylvania, however, has disagreed with that argument. In *Gallaher v. Riddle*,[357] a creditor had obtained a judgment against a husband prior to the intestate death of his wife. The debtor filed a timely disclaimer of his intestate share of his wife's estate under Pennsylvania law. Even though Pennsylvania's disclaimer statute contained the "relation back" and "pre-deceased" language discussed above, the Superior Court held that the disclaimer constituted a transfer for purposes of Pennsylvania's version of UFTA and simply ignored the presumption of predecease. This conclusion is in accord with the United States Supreme Court's recent decision to ignore a similar state disclaimer law in *Drye v. United States*,[358] where the Court held that a disclaimer of property by a debtor was not effective to defeat a federal tax lien.

In addition, in order for a debtor to disclaim properly, the debtor must typically refrain from exercising any control over the disclaimed interest. As such, where a Virginia debtor, prior to the death of his mother, entered into a contract to divide his mother's estate, a court held that the debtor had exercised dominion over the estate and therefore prevented him from disclaiming an interest in the estate.[359] The debtor's creditors were then allowed to satisfy their claims out of assets that would have come to the debtor had he not disclaimed.

b. Conveyance of Property Held as Tenants by the Entirety to One Spouse in His or Her Own Name.

The lessening protection provided by the doctrine of tenants by the entirety is discussed at length above.[360] Nevertheless, under UVTA, property held as tenants by the entireties and not subject to process by a creditor holding a claim against only one tenant is not an "asset" subject to attachment.[361]

New York courts, by contrast, have held that the transfer by a husband of his undivided one-half interest in the marital home to his wife when the husband was the subject of an unpaid judgment and while husband was insolvent constituted a fraudulent conveyance.[362] In so holding, one court noted both that "transactions within the immediate family are to be carefully scrutinized," and that "fraud is so easily practiced and concealed under the cover of the marriage relation." [363] These rulings are consistent with federal bankruptcy law, because a conveyance of property held as tenants by the entireties to one spouse individually can be voided under the United States Bankruptcy Code, which does not exclude property held as tenants by the entireties from the definition of "asset."[364]

In a North Carolina case[365] decided prior to North Carolina's enactment of UFTA, but consistent with UVTA, a husband and wife who were far along in the process of obtaining a divorce executed a separation agreement prior to the issuance of a final divorce decree. Under the separation agreement, the wife was to receive a substantial cash payment from her husband within five days of execution of the agreement, and the husband was to receive the remainder of the marital property, including their marital residence which was held as tenants by the entirety. Upon execution of the separation agreement, the wife received her payment, and the husband and wife promptly executed a deed conveying the marital residence to husband's parents. The Court stated, "all defendants admit that this transfer of real property was without consideration, was for the purpose of preventing the marital residence from being subject to the claims of [husband's] individual creditors and that the transfer left [husband] without property fully sufficient and available to pay his then existing creditors."[366]

A creditor of husband obtained a judgment against husband six months after the divorce became final, and eight months after the conveyance at issue. The creditor then filed a fraudulent conveyance action. In rejecting the creditor's fraudulent conveyance claim, the Court of Appeals of North Carolina emphasized that the real property at issue was held as tenants by the entirety at the time of the transfer, and the transfer therefore "could not be the subject of a conveyance in defraud of [husband's] individual creditors."[367] The Court also rejected the creditor's argument that the separation agreement constituted a severance of the tenancy by the entireties, because the agreement did not purport to divide the interest in the marital home.[368]

Although UVTA may shield conveyances of property held as tenants by the entireties to one spouse individually, practitioners must note that such transfers may be subject to avoidance under the United States Bankruptcy Code, which does not exclude property held as tenants by the entireties from the definition of "asset."[369]

Furthermore, although property held as tenants by the entirety is not an "asset" for purposed of the UVTA, the United States District Court for the Eastern District of Pennsylvania found to the contrary in *United States v. Sheehan*.[370] In *Sheehan*, the debtor/husband was convicted of mail fraud and ordered to pay restitution to his victims through the government. The husband paid only a minimal portion of the payments owed. His wife was diagnosed with pancreatic cancer after the restitution judgment had been entered. Shortly thereafter, the husband transferred his interest in the marital home by deed to his wife for the stated consideration of $1.00. His wife promptly executed a will leaving her real property to her children and died five days later.

The government sought to void the transfer of the real property under both the Federal Debt Collection Procedure Act[371] and Pennsylvania's version of UFTA so that the husband would become sole owner of the property, thus making the property available to satisfy the restitution claim. The court held that the tenancy by the entirety had not been severed because Husband produced no evidence to demonstrate that the spouses jointly conveyed the estate or reached a mutual agreement to sever the tenancy. As such, the court held that no transfer occurred and Husband, "as the surviving spouse, became the sole owner of the real estate upon his wife's passing."[372]

c. **Conveyance of Property Held Individually by One Spouse Into a Tenancy by the Entireties.**

In a Pennsylvania case, a husband/judgment debtor arranged to sell his ownership interest in a corporation.[373] The purchase price was paid over time, and the debtor deposited many of the checks (which had been issued to him individually) into a joint checking account that he shared with his wife. Before holding that those deposits constituted fraudulent transfers, the Bankruptcy Court stated, the

> conversion of property owned solely by a debtor which would constitute an asset under the UFTA into entireties property which would not, constitutes a transfer under the UFTA. Thus to the extent that Debtor has insulated his vulnerable individually owned property by transferring it to himself and his wife as tenants by the entireties, such transfers are subject to avoidance if the statutory elements of the UFTA are satisfied.[374]

In a Virginia bankruptcy case, the Fourth Circuit Court of Appeals, applying federal bankruptcy law, deemed fraudulent a transfer by a judgment debtor of real property from himself to himself and his wife as tenants by the entirety.[375] The debtor claimed that he executed and recorded a "Deed of Correction" whereby he effectuated the transfer, allegedly to correct a "mistake" made when his parents deeded the property to husband alone six months prior.[376] The Fourth Circuit noted that the debtor transferred the property one day after the entry of the judgment against him, agreed with the District Court's conclusion that the debtor "acted not with the intent to correct the deed, but with the intent to defraud," and affirmed the District Court's denial of debtor's requested discharge in bankruptcy.[377]

In a similar vein, New York courts have held that "[w]here a debtor purchases or owns real property and later causes title to be conveyed to himself and his wife as a tenancy by the entirety, the transfer may be set aside by a creditor if it was made without consideration."[378]

7. **"Claim" Under the UVTA.**

As noted above, under UVTA, a "claim" is a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured or unsecured."[379] This all-encompassing definition of a "claim" aims to avoid hair-splitting and, typically, post-transfer justifications for the shifting of assets.

Virginia's fraudulent transfer statute expressly authorizes a creditor to file a fraudulent conveyance action against a debtor before obtaining a judgment on the underlying claim.[380] Furthermore, Virginia's statute states that a creditor "shall have a lien from the time of bringing his suit on all the estate, real and personal…" of the debtor.[381]

South Carolina law also permits a creditor who has not yet reduced his or her claim to judgment to file a fraudulent conveyance action.[382]

The classic fraudulent transfer occurs when the creditor has filed suit or obtained a judgment prior to the transfer.[383] In *Coscia v. Hendrie*,[384] a claim for unpaid child support resulting from the ex-husband's failure to comply with a support agreement reached years earlier constituted a "claim" under the Pennsylvania Fraudulent Conveyance Act (the predecessor to Pennsylvania's version of the UFTA), even though the debtor's ex-wife had not obtained an order holding the husband liable for the accrued arrearages before he transferred the proceeds of a personal injury settlement into a joint account that he held with his new wife. The Superior Court noted that "[the plaintiff's] claim for child support is not [a] mere allegation, it is a legal obligation, acknowledged and guaranteed by [the defendant's] signing of the 1981 divorce agreement."[385] By way of further example, a father who defaulted on a car loan and who then conveyed his real property to his daughter and son-in-law for no consideration was deemed to have committed a fraudulent conveyance even though the creditor/bank had not yet commenced collection activities against him.[386]

In an 2011 opinion issued by the United States District Court for the Northern District of Georgia, corporate noteholders whose notes were not due to mature in some cases for many years filed a fraudulent conveyance action against the principals of the debtor corporation, which they described as "a test case to determine whether creditors of rapidly failing companies may pursue Uniform Fraudulent Transfer Act ("UFTA") claims against insiders who plunder the corporation for self-gain."[387] The noteholder plaintiffs alleged that the corporate insiders engaged in a series of transactions, including issuing dividends for the first time which benefitted primarily the corporate insiders, and spinning off the corporation's only profitable business in a transaction that would allegedly benefit primarily the corporate insiders, which endangered the prospects of the noteholders being paid in the future.[388]

The defendants moved to dismiss the UFTA claim on the basis that the noteholders, whose payments were not yet due, presented only a "speculative" claim "based upon conjecture" which was "not ripe for adjudication."[389] In denying the motion to dismiss, the District Court emphasized the "extremely broad" definition of a "claim" under Georgia's UFTA statute.[390] In holding that the UFTA contained no "ripeness" provision which prevented the lawsuit from moving forward, the Court stated:

> CompuCredit does not dispute that Plaintiffs have a right to payment, but they essentially argue that Plaintiffs cannot take steps under the UFTA to protect that right unless CompuCredit has

> 'missed a payment' or 'breached an obligation' – regardless of whether the corporation currently may be rendering itself insolvent through insider transfers so that it will ultimately be unable to repurchase the notes at full value when they become due. Reaching this conclusion would require the Court to disregard the plain language of the UFTA that expressly encompasses claims that are unmatured and contingent.[391]

In light of UFTA's expansive definition of a "claim" and the cases interpreting the statute, practitioners would be wise to avoid overly technical definitions of a "claim" for purposes of UFTA when advising clients.[392]

8. Remedies Available to a Creditor who Proves a Fraudulent Transfer.

a. Civil Remedies.

1. Judgment against the transferee of the asset or the recipient of the fraudulent obligation in accordance with the procedure prescribed by law in obtaining such a remedy. For example, where a debtor transferred his real property for no consideration, the court entered judgment in favor of the creditor and against the transferees in the amount of the fair market value of the property on the date of the transfer, while also giving the creditor the option of avoiding the transfer.[393]

2. "Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim."[394] For example, in a Pennsylvania case, a court avoided a series of charitable contributions made by a debtor corporation after concluding that the corporation had engaged in a Ponzi scheme and that the charitable donations "were made as part of the fraudulent scheme to impress investors that the [d]ebtor was a profitable and charitable enterprise."[395]

3. "An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by applicable law."[396] In *Coscia v. Hendrie*,[397] an ex-husband purchased a home with his sole funds but titled the home as tenants by the entirety with his new wife. As the ex-husband was delinquent in child-support payments at the time the home was purchased, the court allowed the ex-wife to attach the real property to satisfy the child support obligations.

4. "[A]n injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property."[398]

5. "[A]ppointment of a receiver to take charge of the asset transferred or of other property of the transferee."[399]

6. "[A]ny other relief the circumstances may require."[400] For example, in *Liebersohn v. Zisholtz* (*In re Martin's Aquarium, Inc.)*,[401] where the owner (now the debtor in bankruptcy) of all of the shares of stock in a closely held corporation transferred the primary income generating service of the corporation to a new corporation to avoid paying an individual who had loaned a substantial sum of money to the first corporation. The Bankruptcy Court held that the owner/debtor was required to provide an accounting to the lender, with any further specific relief to be awarded after the accounting was completed.

7. Under some circumstances, a creditor can have a debtor's transfer voided if the creditor files a petition with the Bankruptcy Court within one year to void the transfer.[402]

8. Under Virginia's fraudulent conveyance statute, a successful creditor is entitled to recover attorney's fees from the debtor.[403]

b. **Civil Remedies of Particular Concern to Counsel for Debtor.**

Perhaps a more pressing concern for attorneys involved in assisting their clients in asset protection efforts is the very real likelihood that counsel may be sued as a co-conspirator in the alleged fraudulent transfers at issue, either under a state-law conspiracy theory or under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO").[404]

1. **Elements of State-Law Civil Conspiracy Claim.**

As a general rule, in order to establish a civil conspiracy claim (including a conspiracy to commit a fraudulent conveyance), a plaintiff must establish "(1) a combination of two or more persons acting with a common purpose to do an unlawful act by unlawful means or for [an] unlawful purpose; (2) an overt act done in pursuance of the common purpose, and (3) actual legal damage."[405] In a Pennsylvania case[406] the court held that the plaintiff judgment creditor had stated a cause of action for civil conspiracy where the defendant judgment debtor and the additional defendants (both corporations and individuals) had transferred the assets, goodwill, business opportunities and many employees from the judgment debtor corporation to two different successor corporations via asset purchase agreements in an attempt to avoid paying the judgment.

Although the judgment creditor in the Pennsylvania case discussed above sued only the corporations and business-persons involved in the transaction, attorneys should understand that in some circumstances they may prove to be an all too inviting target. For example, in an Arizona case[407] (which was decided under the UFCA but remains valid today), the debtors owned a home free and clear of all encumbrances that they placed into a spendthrift trust for the benefit of their son, who was the sole beneficiary of the trust. Stone, counsel to the debtors, was a co-trustee and drafted the trust documents. In the two months prior to the creation of the trust, the debtors received a series of letters threatening litigation against them. The debtors continued to live in the home after the creation of the trust. Approximately eighteen months after the creation of the trust, the debtors deeded the home out of trust and borrowed $180,000 against it. They soon re-conveyed the home to the trust, only to again deed it out of the trust within three months to borrow an additional $110,000 against the home. The debtors made no payments on the loans, and the home was ultimately sold at a foreclosure sale. The creditor who had threatened litigation filed suit and obtained a judgment against the debtors, who disappeared. The creditor sued Stone, counsel for the debtors, under a conspiracy to commit fraudulent conveyance theory. The Arizona Court of Appeals reversed the trial court's grant of summary judgment in favor of the attorney, holding that the creditor had made out a *prima facie* case of conspiracy to commit fraudulent conveyance under the standards set forth above. The court also held that the attorney-client privilege did not apply to this action because the client used the services of the attorney to commit a fraud.

A recent opinion issued by the United States District Court for the Middle District of Georgia arose out of a lawsuit filed by a judgment creditor against a judgment debtor, its parent company, subsidiaries, executives and attorneys for allegedly conspiring to evade the payment of the judgment.[408] Plaintiff alleged, among other things "that the attorneys of the law firm…were involved in and furthered Defendants' efforts to avoid payment of judgments against H&S."[409]Among the acts of alleged malfeasance by counsel involved the creation of a new corporate entity which acquired the assets of the judgment debtor. The Court's opinion addressed not the ultimate merits of the litigation, but instead resolved a discovery dispute regarding the judgment creditor's efforts to obtain documents from the files of the judgment debtor's attorneys (who were now defendants in the fraudulent transfer action). The Court, after an *in camera* review of communications exchanged between the judgment debtor and its attorneys, concluded that the "crime-fraud" exception required the production of various attorney-client communications, and stated that "Plaintiff has established a prima facie case that some of the communications were made in furtherance of a fraudulent activity."[410]The Court's extensive discussion of the documents sent by counsel to his client, and its description of counsel's apparent active involvement in devising and executing a strategy whereby his client could avoid paying the judgment creditor[411] should make you think more than twice when a client seeks your advice about enlisting your efforts to attempt to transfer assets beyond the reach of creditors.

2. **RICO Liability.**

A 2005 opinion from the United States District Court of Connecticut, *Cadle Co. v. Flanagan*,[412] should also be a cautionary tale to practitioners. *Cadle Co.* arose out of an underlying federal lawsuit in which the Cadle Company obtained a judgment against Flanagan in the amount of $90,747.87. The court denied motions for summary judgment where the evidence suggested that the debtor and his counsel employed four different "schemes." The "Settlement Proceeds Scheme" involved the re-characterization of settlement funds due and owing to Flanagan by a company of which he was a co-owner from 1099 miscellaneous income to wage income.[413] The "Checking Account Scheme" involved counsel's advice (followed by the client, Flanagan) to open checking accounts in the names of Flanagan's minor children so that the client could collect rental income from three rental properties owned by entities that were owned and controlled by Flanagan.[414] The "Shifting Stock Scheme" involved the refusal of Flanagan and his counsel to turn over stock in a closely-held business, pursuant to a court order, and the post-judgment and post-turn-over order insertion of a restrictive legend on the stock certificates in order to limit their transferability.[415] When the creditor continued its relentless pursuit of satisfaction of its judgment, Flanagan paid the judgment but soon filed for bankruptcy, which led to the "Bankruptcy Fraud Scheme."[416] In his bankruptcy Petition (prepared by the same counsel), Flanagan, among other things, failed to identify the three properties that he owned and failed to state that he received rental income from those properties.

A detailed explanation of the RICO statute is beyond the scope of this outline, but to establish liability, a RICO plaintiff must prove that a defendant committed two or more acts constituting a pattern of racketeering activity directly invested in or participated in an enterprise the activities of which affected interstate commerce.[417] "Racketeering activity is defined in RICO to mean any act or threat involving specified state-law crimes, any act indictable under various specified federal statutes, and certain federal offenses."[418] The Cadle Company alleged that the debtor and his counsel engaged in the acts of mail fraud and wire fraud by using the mails and telephone lines to defraud the plaintiff out of its right to collect on its judgment, and that they committed bankruptcy fraud by, among other things, concealing the debtor's property from the bankruptcy court and his creditors.

In denying the motion of the debtor and his attorney for summary judgment, the court concluded that ample evidence existed to demonstrate that the attorney's conduct "far exceeds the rendering of legal advice and suggests participation in fraudulent conduct."[419] A jury convicted the attorney on June 10, 2005 of participating in all four of the "schemes" and engaging in a RICO conspiracy, and awarded damages in the amount of $500,000. Although the verdict has been appealed, the case demonstrates the danger of crossing the line from a zealous advocate to a co-conspirator.

c. **Criminal Remedies as to Debtor or Co-Conspirator (Including Attorneys).**

Although an analysis of the criminal statutes of all states is beyond the scope of this outline, counsel should be mindful of the fact that many states have criminal statutes regarding fraudulent conveyances.[420] For example, Title 18, section 4111 of the Pennsylvania Consolidated Statutes Annotated provides:

> A person commits a misdemeanor of the second degree if, knowing that proceedings have been or are about to be instituted for the appointment of a receiver or other person entitled to administer property for the benefit of creditors, or that any other composition or liquidation for the benefit of creditors has been or is about to be made, he: (1) destroys, removes, conceals, encumbers, transfers, or otherwise deals with any property with intent to defeat or obstruct the claim of any creditor, or otherwise to obstruct the operation of any law relating to the administration of property for the benefit of creditors; (2) knowingly falsifies any writing or record relating to the property; or (3) knowingly misrepresents or refuses to disclose to a receiver or other person entitled to administer property for the benefit of creditors, the existence, amount or location of the property, or any other information which the actor could be legally required to furnish in such an administration.[421]

Furthermore, Title 18, section 4110 of the Pennsylvania Consolidated Statutes Annotated provides that "[a] person commits a misdemeanor of the second degree if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest or after levy has been made thereon with intent to hinder enforcement of such interest."[422]

Although we did not locate a case indicating that a party had been imprisoned in accordance with its terms, one section of South Carolina's fraudulent conveyance statute states, among other things, that a party to a fraudulent conveyance, "being lawfully convicted, shall suffer imprisonment for one-half year."[423]

9. **Relevant Model Rules of Professional Conduct.**

As of May 2016, all of the states (except California) and the District of Columbia have adopted the Model Rules of Professional Conduct in whole or in part. [424] The Model Rules of

Professional Conduct are a set of rules created by the American Bar Association (ABA) that prescribe baseline standards of legal ethics and professional responsibility for lawyers in the United States. California has its own set of unique rules governing professional attorney conduct.[425] Although many of the rules are similar and sometimes identical to the ABA Model Rules, the California rules differ markedly from the ABA Model Rules in format, scope and content. In discussing asset protection strategies with clients, the practitioner should keep in mind the following select Model Rules of Professional Conduct.[426]

a. Rule 1.2(d) states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[427] Practitioners who develop expertise in this area will learn that in many instances, the client who seeks advice with respect to the re-titling or transferring of assets often does so after the proverbial cow has left the barn. Once the tort has been committed or the judgment has been entered, counsel often has little choice but to advise the client that any attempts to transfer assets will likely be construed as a fraudulent transfer and would therefore be inadvisable.

b. Rule 1.16 addresses the subject of declining or terminating representation.[428] Among the permissible reasons for withdrawing as counsel (if allowed to do so by the Court) are:

1. withdrawal can be accomplished without material adverse effect on the interests of the client;

2. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

3. the client has used the lawyer's services to perpetrate a crime or a fraud; [and]

4. the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.[429]

Counsel may need to invoke these rules when a client is determined to commit a fraudulent transfer despite counsel's advice against doing so. Sometimes the client's desire to deny the judgment creditor or the ex-wife the satisfaction (emotional and financial) of payment overrides sound advice to the contrary.

c. Finally, Rule 8.4 provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[430]

Counsel who ignore these rules may find themselves the subject of disciplinary proceedings, such as the two attorneys in South Carolina who, among other acts of alleged misconduct, participated in various fraudulent conveyances of real property on behalf of their drug-dealer client (both during the client's lifetime and then in connection with efforts to shield assets of the client's estate from creditors) – transactions which the Supreme Court of South Carolina concluded warranted the indefinite suspension of one lawyer and the public reprimand of the other.[431] The various and sundry conveyances at issue are too convoluted to detail in this outline. Significantly, in response to the attorneys' argument that one of the transactions at issue did not reach the level of a fraudulent conveyance because creditors were allegedly not injured (a point with which the Court did not necessarily agree), the Court stated, "acts sufficient to constitute the civil definition of fraudulent conveyances do not have to be found for us to find misconduct. We do not have to find fraudulent conveyances – only fraudulent or dishonest conduct…assisting clients to cheat creditors is 'dishonesty' under DR 1-102(A)(4)."[432]

The Iowa Supreme Court also had the recent opportunity to examine whether an attorney committed an ethical violation in assisting a client with transactions that were later determined by a court to be fraudulent transfers.[433]

10. **Statute of Limitations for Fraudulent Transfer Actions.**

In states including California, Florida, Georgia, Illinois, New Jersey, North Carolina, Ohio, Pennsylvania, Texas, and West Virginia, the cause of action for a fraudulent transfer or voidable conveyance is subject to a statutory period of limitations:

a. For transfers fraudulent as to present and future creditors under statutory provisions which address transfers made with actual intent to hinder, delay or defraud any creditor, [434] the action must be brought "within four years after the transfer was made . . . or, if later, within one year after the transfer . . . was or reasonably could have been discovered by the claimant."[435]

b. For transfers fraudulent as to present creditors under statutory provisions which address transfers made with constructive fraud,[436] the action must be brought "within four years after the transfer was made or the obligation was incurred."[437]

c. For transfers fraudulent as to present creditors under statutory provisions which address transfers made to an insider for an antecedent debt when the debtor was insolvent and the insider had reasonable cause to believe that the debtor was insolvent,[438] the action must be brought "within one year after the transfer was made or the obligation was incurred."[439]

California adds an additional limitation: all actions must be brought "within seven years after the transfer was made or the obligation was incurred."[440]

Texas law further specifies that "[i]f a creditor entitled to bring an action . . . is under a legal disability when a time period prescribed by this sections tarts, the time of the disability is not included in the period."[441] The law defines disability for the purpose of this section as being under 18 years of age or being "of unsound mind."[442] Texas also decrease the statute of limitations for cases being brought on behalf of a minor, spouse, or ward.[443]

Under South Carolina law, the statute of limitations to pursue a fraudulent conveyance action is three years from the date on which the complaining party discovers the fraud, or from the date on which the complaining party learned of facts which would have led to knowledge of the fraud "if pursued with reasonable diligence."[444]

NYUFCA does not codify a statute of limitations for fraudulent transfer actions, but the courts of New York apply a six year statute of limitations, beginning at the date of the conveyance at issue. [445] In *Mills v. Everest Reinsurance Company*,[446] the United States District Court for the Southern District of New York explained that in cases where there are multiple, incremental fraudulent transfers, each such incremental transfer has its own separate statute of limitations period. In *Mills*, the Court held that although one of the fraudulent transfers occurred more than six years prior to the filing of the action and was beyond the statute of limitations, the claims relating to transfers which occurred within six years of the filing were timely.[447]

In bankruptcy cases, based on the Bankruptcy Code, so long as the petition for relief was filed within the six year statute of limitations period, the bankruptcy trustee will be permitted to bring a fraudulent conveyance action within two years of the petition, even if the traditional six year statute of limitations has expired.[448]

Under Virginia law, there is a five year statute of limitations for fraudulent conveyance actions under VA Code Ann. § 55-81 (which relates to voluntary transfers made without valuable consideration or upon consideration of marriage by an insolvent transferor or by a transferor who is thereby rendered insolvent).[449] In actions brought pursuant to VA Code Ann. § 55-80 (which relates to transfers made with actual intent to delay, hinder or defraud creditors), there is no statute of limitations, although the doctrine of laches applies to any such actions.[450]

Note that a transfer or obligation will only be void as to creditors, and only to the extent of the debt owed. Thus, a fraudulent transfer cannot be set aside either by a grantor or for the benefit of heirs or beneficiaries. The excess in value of the transfer over the amount needed to satisfy the debt will remain with the transferee.

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[1] *See In re Schayes*, 483 B.R. 209, 213 (Bankr. D. Ariz. 2012).

[2] *See, e.g., id*. ("While the concept of domicile therefore includes an element of intent, a residence does not.") Judge Haines, writing for the *Schayes* court also notes that "[m]y dog has a residence, even if some would contend he lacks the mental capacity to form the requisite intent to have a domicile (though he would dispute that as well)." *Id*.

[3] *See* Black's Law Dictionary 435 (Fifth Ed. 1979) (defining domicile as the place where an individual has his or her permanent home, and the place where he or she intends to return to whenever he or she is absent). *See, e.g., Smith v. Smith*, 288 P.2d 497, 499 (Cal. 1955) (defining domicile as "the act of residence and an intention to remain"); *In re Schayes*, 483 B.R. at 213 ("A domicile is defined as a place where a person has a residence in fact plus an intention to return there."); *Hill v. City of Scranton*, 411 F.3d 118, 130 (3d Cir. 2005) ("In Pennsylvania [t]he domicile of a person is the place where he has voluntarily fixed his habitation with a present intention to make it either his permanent home or his home for the indefinite future"); *Bloomfield v. City of St. Petersburg Beach*, 82 So.2d 364, 368 (Fla. 1955) ("[D]omicile means a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time."). Further, "[i]f one intends to remain indefinitely in the place of his actual residence, he is domiciled in that place, even if he has 'a floating intention to return [to some earlier residence] or to move somewhere else at some future period.'" *Black v. Black,* 740 S.E.2d 613, 617 n.3 (Ga. 2013) (citing *Campbell v. Campbell,* 231 Ga. 214, 215 (1973)).

[4] *In re Dorrance Estate*, 163 A. 303, 308, 310 (Pa. 1932) ("[T]he law is generally settled that, as regards the determination of domicile, a person's expression of desire may not supersede the effect of his conduct."); *In re Nomination Petition of Prendergast*, 673 A.2d 324, 327-38 (Pa. 1996).

[5] For example, Florida has enacted FLA. STAT. § 196.015, which includes the following factors to determine domicile:

(1) A formal declaration of domicile by the applicant recorded in the public records of the county in which the exemption is being sought.

(2) Evidence of the location where the applicant's dependent children are registered for school.
(3) The place of employment of the applicant.
(4) The previous permanent residency by the applicant in a state other than Florida or in another country and the date non-Florida residency was terminated.
(5) Proof of voter registration in this state with the voter information card address of the applicant, or other official correspondence from the supervisor of elections providing proof of voter registration, matching the address of the physical location where the exemption is being sought.
(6) A valid Florida driver's license issued under s. 322.18 or a valid Florida identification card issued under s. 322.051 and evidence of relinquishment of driver's licenses from any other states.
(7) Issuance of a Florida license tag on any motor vehicle owned by the applicant.
(8) The address as listed on federal income tax returns filed by the applicant.
(9) The location where the applicant's bank statements and checking accounts are registered.
(10) Proof of payment for utilities at the property for which permanent residency is being claimed.

Id.

6 In Pennsylvania, the courts have opined on this matter. *See, e.g.*, *Blackwood, Inc. v. Ventresca*, No. CIV.A. 00-3112, 2002 WL 31898887, at *7 (E.D. Pa. Dec. 19, 2002) (interpreting Pennsylvania domicile law for diversity purposes, using six factors: "(1) voting registration and voting practice; (2) location of personal and real property; (3) the residence claimed for tax purposes; (4) place of employment or business; (5) driver's license and automobile registration; and (6) payment of taxes."); and *In re Prendergast*, 543 Pa. 498, 506, 673 A.2d 324, 328 (1996) (applying three factors: voter registration, active voter participation, and vehicle registration).

For income tax purposes, Pennsylvania defines a "resident individual" in two ways : (1) an individual who is not domiciled in Pennsylvania but is present in Pennsylvania for more than 183 days in a calendar year, or (2) a person who is domiciled in Pennsylvania, maintains a "permanent place of abode" in Pennsylvania, and spends at least 30 days in Pennsylvania each taxable year. *See* 72 Pa. C.S. §7301; 61 Pa. Code §101.1 (defining "permanent place of abode" as a "dwelling place, maintained by the taxpayer, whether or not owned by him."); *see also Hvizdak v. Commonwealth*, 50 A.3d 788, 792 (Pa. Cmwlth. Ct. 2012) (holding that if an individual is domiciled in Pennsylvania, the maintenance of a permanent place of abode in Pennsylvania alone is sufficient to make him or her a Pennsylvania resident for income tax purposes); "Determining Residency for PA Personal Income Tax Purposes," REV-611 PO (07-13).

7 *In re Dorrance Estate*, 309 Pa. at 172, 163 A. at 310 (1932).

8 *See generally* 39 AM. JUR. PROOF OF FACTS 2d 587 (Originally published in 1984). For a discussion of domicile by birth, *see, e.g.*, *Matter of Adoption of Baby Child*, 700 P.2d 198, 201 (N.M. Ct. App. 1985), *Riker v. Curtis*, 17 Misc. 134, 136, 39 N.Y.S. 340, 341 (App. Term 1896) ("The evidence established that the defendant was born in Connecticut, so that that was his domicile by birth.").

Several courts have addressed whether an incapacitated person may change domicile. *See, e.g.*, *Matter of Urdang*, 194 A.D.2d 615, 616, 599 N.Y.S.2d 60, 61 (1993) ("[An] incapacitated person is unable to express an intention to establish a new domicile."). The criteria for change of domicile by operation of law vary by jurisdiction. *See, e.g.*, *In re Gillmore's Estate*, 243 A.2d 263, 270 (N.J. App. Div. 1968) (finding change of domicile by operation of law of elderly incapacitated woman where "[f]or all practical purposes, her permanent residence was [in New Jersey]" and she had no residence elsewhere).

9 Not surprisingly, the courts of several northeastern states are fairly aggressive in asserting the retention of domicile over individuals seeking to relocate to Florida, especially with respect to state income taxation matters. *See, e.g.*, *Hvizdak v. Commonwealth*, 50 A.3d 788, 792 (Pa. Cmwlth. Ct. 2012) (addressing whether an individual who maintains a residence in Pennsylvania, but assets domicile in Florida, is still considered a Pennsylvania

domiciliary for income tax purposes); *see also Kartiganer v. Koenig*, 194 A.D.2d 879, 881, 599 N.Y.S.2d 312, 314 (1993).

[10] U.S. ART. OF CONFEDERATION, art. IV.

[11] U.S. CONST. art. IV, § 2, cl. 1.

[12] *Shapiro v. Thompson*, 394 U.S. 618 (1969).

[13] *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

[14] *Dunn v. Blumstein*, 405 U.S. 330 (1972).

[15] *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

[16] *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978).

[17] These exemptions serve two purposes: First, they provide state law protection for a debtor from creditors. Second, they provide a structure of exemptions that may be applicable in a federal bankruptcy proceeding because federal bankruptcy law permits a bankrupt debtor to elect the available state-law exemptions or, alternatively, the so-called "federal exemptions" unless the state has "opted out" from this choice.

[18] 11 U.S.C. § 522(b)(3)(A).

[19] 11 U.S.C. § 533(b)(1).

[20] *Id.* § 522(b)(2).

[21] 42 PA. CONS. STAT. ANN. §§ 8121-8127 (2014).

[22] *Id.* § 8122.

[23] *Id.* § 8123.

[24] *Id.* § 8124(a).

[25] *Id.* § 8124(b)(1)(i)-(vi).

[26] *Id.* § 8124(b)(1)(vii).

[27] *Id.* § 8124(b)(1)(viii).

[28] I.R.C. §§ 401, 403, 409, 530 (2012).

[29] ERISA qualified plans are protected from creditor claims under federal law as well. In *Patterson v. Shumate*, 504 U.S. 753 (1992), the United States Supreme Court unanimously held that section 541(c)(2) of the Bankruptcy Code (11 U.S.C. 541) applied to ERISA-qualified pension plans. Section 541(c)(2) excludes a beneficial interest in a trust from the bankruptcy estate when there is a restriction on transfer of the interest that is enforceable under applicable non-bankruptcy law. The Court found that the anti-alienation provisions required in ERISA-qualified plans satisfy §541(c)(2). *Patterson*, 504 U.S. at 760. Consequently, the Court concluded that the assets of an ERISA pension plan were not included in the debtor's bankruptcy estate. *Id.* at 765. The anti-alienation provision also protects ERISA qualified plans in non-bankruptcy situations.

[30] 42 PA. CONS. STAT. ANN. § 8124(b)(1)(ix) (2014). The exception of rollovers from the one year before bankruptcy and $15,000 per annum limitations was added to the statute in 1998 in reaction to a decision by the

United States Court of Appeals for the Third Circuit. *See* 1998, Pa. Laws 170, 173-74; *In re Barshak*, 106 F.3d 501 (3d Cir. 1997). In *Barshak*, the debtor's employer had made contributions to an ERISA-qualified plan from 1974 to 1989. *Barshak*, 106 F.3d at 501-2. Mr. Barshak left his employment in 1989. *Id.* at 502. He received a distribution from the account in 1992, which he rolled over into an IRA within nine days. *Id.* More than two years later, Mr. Barshak filed for bankruptcy. *Id.* Referring to 42 Pa. Cons. Stat. § 8124(b)(1)(ix), which did not then include the exception for rollovers, the bankruptcy trustee sought to include $55,000 of the IRA in the bankruptcy estate as an amount in excess of $15,000 contributed to the fund within a one-year period. *Barshak*, 106 F.3d at 502-506. The Bankruptcy Court sided with the trustee. *Id.* at 501. The District Court reversed the bankruptcy court, but the Third Circuit reversed the District Court, emphasizing the plain language of the statute, which did not distinguish between "rollover contributions" and "contributions." *Id.* at 506. The Pennsylvania legislature responded with section 8124(b), expressly exempting transfers and rollovers between funds. *See* 42 PA. CONS. STAT. ANN. § 8124(b) (2014).

31 *See e.g.*, *In re Jarboe*, 365 B.R. 717, 725 (Bankr. S.D. Tex. 2007); *In re Kirchen*, 344 B.R. 908, 914 (Bankr. E.D. Wis. 2006); *In re Taylor*, Bankruptcy No. 05-93559, 2006 WL 1275400, *2 (Bankr. C.D. Ill. May 9, 2006); *In re Navarre*, 332 B.R. 24, 31 (Bankr. M.D. Ala. 2004); *In re Greenfield*, 289 B.R. 146, 150 (Bankr. S.D. Cal. 2003). For an in-depth summary and analysis of bankruptcy cases involving inherited IRAs prior to 2010, see James L. Boring, et. al, *Protection of Inherited IRAs*, 36 ACTEC L.J. 577 (2010).

In 2012, the Fifth Circuit held that funds in inherited IRAs constituted "retirement funds" within the meaning of § 522 of the Bankruptcy code and therefore were exempt from the bankrupt's bankruptcy estate. *In re Chilton*, 674 F.3d 486 (5th Cir. 2012), *abrogated by Clark v. Rameker*, 134 S. Ct. 2242 (2014). The Fifth Circuit examined lower courts' decisions and noted that "the statute does not explicitly limit 'retirement funds' to retirement funds that belong to the debtor." *Chilton*, 674 F.3d at 489. The court found the reasoning that "'retirement funds' can include the funds that others had originally set aside for their retirement" to be persuasive, and so held that funds contained in an inherited IRA constitute "retirement funds" under the bankruptcy code. *Id.*

In 2013, the Seventh Circuit disagreed, creating a split between the circuits which was resolved in favor of the Seventh Circuit's position by the Supreme Court in 2014. *In re Clark*, 714 F.3d 559 (7th Cir. 2013), *aff'd sub nom. Clark v. Rameker*, 134 S. Ct. 2242 (2014). The court, noting that the Bankruptcy Code does not define the term "retirement funds," determined that its plain language meaning controlled:

> The ordinary meaning of "fund[s]" is "sum[s] of money ... set aside for a specific purpose." American Heritage Dictionary 712 (4th ed. 2000). And "retirement" means "[w]ithdrawal from one's occupation, business, or office." Id., at 1489. Section 522(b)(3)(C)'s reference to "retirement funds" is therefore properly understood to mean sums of money set aside for the day an individual stops working.

Clark v. Rameker, 134 S. Ct. 2242, 2246 (2014).

Therefore, because the owner of an inherited IRA cannot contribute to it, because they are required to withdraw money from it either yearly or within a year of inheriting it regardless of retirement status, and because they may withdraw the entire contents at any time, the Court held inherited IRAs do not satisfy this definition and are not exempt under the Bankruptcy code. *Id.* at 2244, 2247.

32 108 F. App'x 717 (3d Cir. 2004).

33 *See id.* at 719-22.

34 *Rousey v. Jacoway*, 544 U.S. 320, 325 (U.S. 2005).

35 *Id.* at 324 (quoting 11 U.S.C. § 522(d)(10)(e)) (quotations omitted).

36 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, enacted April 20, 2005 (codified as amended in scattered sections of 11 U.S.C).

[37] *Id.*; *see also* 11 U.S.C. § 522(n) (2012).

[38] 134 S. Ct. 2242 (2014).

[39] *See* 11 U.S.C. § 522(b)(3)(C) (2012).

[40] *Clark v. Rameker*, 134 S. Ct. 2242, 2247 (2014).

[41] *Id.* at 2234.

[42] *See* Fla. Stat. § 222.21(2)(c); Ohio Rev. Code § 2329.66(A)(10); Mo. Rev. Stat. § 513.430(1)(10)(f); Alaska Stat. § 09.38.017(a)(3)(A); Tex. Prop. Code § 42.0021(a).

[43] 24 PA. STAT. ANN. § 6901.309.2 (West 2015).

[44] *See*, *e.g.*, N.Y. C.P.L.R. 5205(j) (McKinney 2015); Ohio Rev. Code Ann. § 2329.66(A)(10)(c).

[45] 42 PA. CONS. STAT. ANN. § 8124(c).

[46] *Id.* § 8125. This exemption was added to the statute in 1876, presumably in anticipation of the Centennial Exhibition, where it would have been awkward to have items removed from exhibits by creditors.

[47] *Id.* § 8126.

[48] *Id.* § 8127.

[49] California's exemptions are governed by Article 3, Chapter 4, Division 2, Title 9, Part 2 of the California Code of Civil Procedure. This article provides exemptions for:

1. Motor vehicles, up to $2,300 (either from equity in a vehicle, proceeds from sale of a vehicle, or insurance proceeds from loss, damage, or destruction of a vehicle). CAL. CIV. PROC. CODE § 704.010.
2. Household furnishings, appliances, provisions, wearing apparel, and other personal effects, if "ordinarily and reasonably necessary to and personally used or procured for use by, the judgment debtor and members of the judgment debtor's family at the judgment debtor's principal place of residence." CAL. CIV. PROC. CODE § 704.020.
3. Material that is about to be applied to the repair or improvement of a residence, up to $2,425. CAL. CIV. PROC. CODE § 704.030.
4. Jewelry, heirlooms, and works of art not to exceed $6,075. CAL. CIV. PROC. CODE § 704.040.
5. "Health aids necessary for the debtor, his spouse, or his dependent to work or sustain health, and prosthetic and orthopedic appliances." CAL. CIV. PROC. CODE § 704.050.
6. Tools, implements, instruments, materials, uniforms, furnishings, books, equipment, one commercial motor vehicle, one vessel, and other personal property necessary for a trade or business, not to exceed $6,075 per spouse (or twice that amount if "reasonably necessary to and actually used by the judgment debtor <u>and</u> by the spouse of the judgment debtor in the exercise of the same trade, business, or profession by which both earn a livelihood"), and the motor vehicle's equity should not exceed $4,850 per spouse. CAL. CIV. PROC. CODE § 704.060 (emphasis added).
7. Accounts into which public or social security benefits are directly deposited by the government are exempt, where an account holder is the payee of those benefits, are exempt in the amount of $1,225 for public benefit payments, or $1,825 if two or more depositors are designated payees, and $2,425 for social security payments, or $3,650 if two or more depositors are designated payees. CAL. CIV. PROC. CODE § 704.080.
8. The funds of a debtor in a correction facility, held in trust by the government for that debtor, are exempt up to $1,225. Each spouse is entitled to a separate exemption or the spouses may combine

their exemptions. However, if the judgment is for a restitution order or fine, the exemption is only $300 (non-adjustable). CAL. CIV. PROC. CODE § 704.090.

9. Unmatured life insurance policies (but not the loan value of those policies) are exempt. The loan value is exempt up to $9,700 (spouses get separate exemptions, may choose to combine. Benefits from matured life insurance policies are exempt "to the extent reasonably necessary for the support of the judgment debtor and [his] spouse and dependents." CAL. CIV. PROC. CODE § 704.100.
10. Amounts held by a public entity derived from contributions thereto for public retirement purposes, as well as rights and benefits accrued under a public retirement system, are exempt without making a claim. On motion of the creditor, a court may allow those seeking to enforce a spousal, family, or child support claim to reach otherwise exempt assets under CAL. CIV. PROC. CODE §§ 703.070, 704.110.
11. State employee vacation credits are exempt, but amounts paid periodically or as a lump sum representing vacation credits are subject to any earnings withholding order or assignment order. CAL. CIV. PROC. CODE § 704.113.
12. Amounts held, controlled or in process of distribution by a private retirement plan, are exempt, except if it is to be applied to a satisfaction of a judgment for child, family, or spousal support against the retirement plan holder, and only to the amount necessary to provide for the support of the judgment debtor, his spouse, and dependent when he retires (taking into account all resources that will likely be available for his support when he retires). CAL. CIV. PROC. CODE § 704.115.
13. Contributions to unemployment fund by both employers and workers, as well as amounts held payable for benefits, are often exempt. CAL. CIV. PROC. CODE § 704.120.
14. Before payment, benefits from a disability or health insurance policy or program are exempt. After payment, benefits are exempt with a few exceptions, and those exceptions are limited to one half of the debtor's disposable earnings. CAL. CIV. PROC. CODE §§ 704.130, 706.052.
15. A cause of action for personal injury or wrongful death is generally exempt where the creditor has obtained a lien against a debtor who is party to a pending action. CAL. CIV. PROC. CODE §§ 704.140, 708.410 et seq.
16. A claim for workman's compensation is exempt. So are awards after payment, except to the extent that support judgment creditors seek to apply the benefit to satisfy the support judgment as provided elsewhere in the code. CAL. CIV. PROC. CODE § 704.160.
17. Aid payment by a charitable organization or a fraternal benefit society is exempt. CAL. CIV. PROC. CODE § 704.170.
18. Relocation benefits for displacement are exempt. CAL. CIV. PROC. CODE § 704.180.
19. Financial aid for expenses while attending school provided to a student by an institute of higher education is exempt. CAL. CIV. PROC. CODE § 704.190.
20. A family plot is exempt, but "[l]and held for the purpose of sale or disposition as cemetery plots or otherwise is not exempt." CAL. CIV. PROC. CODE § 704.200.
21. Property that is not subject to enforcement of a money judgment is exempt. CAL. CIV. PROC. CODE § 704.210.

Section 703.150 provides for periodic adjustment of most of these amounts.

[50] In Connecticut, the debtor may choose to use either the Connecticut state exemptions or the federal bankruptcy exemptions. However, if one elects the Connecticut state exemptions, the so-called federal nonbankruptcy exemptions are still available. Such exemptions are called nonbankruptcy exemptions because they exist under laws other than bankruptcy and include specialized exemptions concerning civil, military or foreign service employees, social security recipients and veterans.

Under Section 52-352b of the Connecticut General Statutes, the following property is exempt:

(a) Necessary apparel, bedding, foodstuffs, household furniture and appliances;
(b) Tools, books, instruments, farm animals and livestock feed, which are necessary to the exemptioner in the course of his or her occupation, profession or farming operation;
(c) Burial plot for the exemptioner and his or her immediate family;

(d) Public assistance payments and any wages earned by a public assistance recipient under an incentive earnings or similar program;
(e) Health and disability insurance payments;
(f) Health aids necessary to enable the exemptioner to work or to sustain health;
(g) Workers' compensation, Social Security, veterans and unemployment benefits;
(h) Court-approved payments for child support;
(i) Arms and military equipment, uniforms or musical instruments owned by any member of the militia or armed forces of the United States;
(j) One motor vehicle to the value of three thousand five hundred dollars, provided value shall be determined as the fair market value of the motor vehicle less the amount of all liens and security interests which encumber it;
(k) Wedding and engagement rings;
(*l*) Residential utility deposits for one residence, and one residential security deposit;
(m) Any assets or interests of an exemptioner in, or payments received by the exemptioner from, a plan or arrangement described in section 52-321a;
(n) Alimony and support, other than child support, but only to the extent that wages are exempt from execution under section 52-361a;
(o) An award under a crime reparations act;
(p) All benefits allowed by any association of persons in this state towards the support of any of its members incapacitated by sickness or infirmity from attending to his usual business;
(q) All moneys due the exemptioner from any insurance company on any insurance policy issued on exempt property, to the same extent that the property was exempt;
(r) Any interest of the exemptioner in any property not to exceed in value one thousand dollars;
(s) Any interest of the exemptioner not to exceed in value four thousand dollars in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the exemptioner under which the insured is the exemptioner or an individual of whom the exemptioner is a dependent;
(t) The homestead of the exemptioner to the value of seventy-five thousand dollars, or, in the case of a money judgment arising out of services provided at a hospital, to the value of one hundred twenty-five thousand dollars, provided value shall be determined as the fair market value of the real property less the amount of any statutory or consensual lien which encumbers it; and
(u) Irrevocable transfers of money to an account held by a debt adjuster licensed pursuant to sections 36a-655 to 36a-665, inclusive, for the benefit of creditors of the exemptioner.

Conn. Gen. Stat. Ann. § 52-352b (West)

Additional exemptions are provided for (1) income from spendthrift trust to the extent that it is used for support, § 52-321, (2) tuition and medical savings accounts, §§ 52-321, -321a, (3) the greater of (i) 75% of earned but unpaid disposable earnings or (ii) 40 times the state or federal minimum hourly wage, § 52-361a, (4) pensions of state employees, municipal employees and teachers, §§ 5-171, -192w, 7-446, 10-183q, (5) unemployment compensation, §§ 31-272, (6) certain life insurance proceeds, §§ 38a-453, -454, -637, and (7) farm partnership animals and livestock feed required to reasonably run a farm where 50% or more of the partners are from the same family, § 52-352d.

Debtors may also exempt tax-exempt retirement accounts (including 401(k)s, 403(b)s, profit-sharing and money purchase plans, SEP and SIMPLE IRAs and defined benefit plans), and IRAs and Roth IRAs up to $1,171,150. 11 U.S.C. § 522.

[51] Delaware's exemptions include those set forth in § 4902 of Title 10 of the Delaware Code, as follows:

(a) Every person residing within this State shall have exempt from execution or attachment process, or distress for rent, the following articles of personal property: The family Bible, school books and family library, family pictures, a seat or pew in any church or place of public worship, a lot in any burial ground, all the wearing apparel of the debtor and the debtor's family.

(b) In addition to the articles specifically named in subsection (a) of this section, each person residing in this State shall have exempt the tools, implements and fixtures necessary for carrying on his or her trade or business, not exceeding in value $75 in New Castle and Sussex Counties, and $50 in Kent County.

(c) All sewing machines owned and used by seamstresses or private families, shall be exempt from levy and sale on execution or attachment process and also from distress and sale for rent. This provision shall not apply to persons who keep sewing machines for sale or hire.

(d) All pianos, piano playing attachments and organs leased or hired by any person residing in this State, shall be exempt from levy and sale on execution or from distress for rent due by such person so leasing or hiring any such piano, piano playing attachment, or organ in addition to other goods and chattels exempt by law. The owner of any such piano, piano playing attachment or organ or such owner's agent, or the person so leasing or hiring the same shall give notice to the landlord or the landlord's agent that the instrument is hired or leased.

A "head of family" exemption is also provided under § 4903:

> Every person residing in this State, and being the head of a family, shall have exempt from execution or attachment process, in addition to the exemptions in § 4902 of this title, other personal property not exceeding $500, the articles to be selected by the debtor. The exemptions in this section shall not apply to goods or chattels of a merchantable character bought to be sold and trafficked in by the person in the prosecution of the person's regular business or occupation. No person shall have exempt from execution or attachment process any personal property, excepting that which is expressly exempted by § 4902 of this title when such exemption would prevent the collection according to law of any debt or claim that may be due or growing due for labor or services (other than professional services) rendered by any clerk, mechanic, laborer, or other employee of any person or persons against whom such execution or attachment process may be issued.

In addition to the exemptions provided in §§ 4902 and 4903, Delaware also exempts assets held or amounts payable under any retirement plan, life insurance contract or annuity contract, including eligible rollover distributions and rollover contributions as defined for federal tax purposes (including inherited IRAs).

[52] Florida's exemptions are mostly contained in Title XV, Chapter §222 of the Florida Statutes and include disposable earnings of the "head of a family" (§222.11) and life insurance policies (§222.13), and the following items of personal property (§222.25):

(1) A debtor's interest, not to exceed $1,000 in value, in a single motor vehicle.
(2) A debtor's interest in any professionally prescribed health aids for the debtor or a dependent of the debtor.
(3) A debtor's interest in a refund or a credit received or to be received, or the traceable deposits in a financial institution of a debtor's interest in a refund or credit, pursuant to § 32 of the Internal Revenue Code of 1986, as amended (the earned income tax credit). This exemption does not apply to a debt owed for child support or spousal support.
(4) A debtor's interest in personal property, not to exceed $4,000, if the debtor does not claim or receive the benefits of a homestead exemption under s. 4, Art. X of the State Constitution. This exemption does not apply to a debt owed for child support or spousal support.

Florida also affords a constitutional homestead exemption of 160 acres outside of a municipality, or one half of an acre within a municipality, regardless of monetary value. FLA. CONST. art. X, § 4.

[53] Georgia offers debtors a number of "safe harbors" from garnishment, attachment or execution by a judgment creditor. The protections available differ, however, between bankruptcy and non-bankruptcy situations.

Georgia offers only modest protection for the assets of the non-bankrupt debtor, but significantly limits garnishment of wages and pension payments.

By constitutional mandate, Georgia allows a "homestead" exemption of personal or real property or both up to the amount of $5,000, or $21,500 for the debtor's primary residence. GA. CODE ANN. § 44-13-1, GA. CONST. Art. VII, § 2. A debtor may, however, waive the homestead exemption by granting a security interest in the "exemptible" property.

Georgia has also codified exemptions for particular assets (and particular sources of income) in separate statutory sections.

For example, Georgia protects a debtor's right to receive certain state benefits, such as unemployment benefits (GA. CODE ANN. §34-8-252), old age assistance (GA. CODE ANN. §49-3-35), aid to the blind (GA. CODE ANN. §49-4-58) and state pensions. *See, e.g.,* GA. CODE ANN. §§47-2-332 and 47-4-120.

Georgia also limits the amount of a debtor's disposable earnings that is subject to garnishment: The garnishment may not exceed the lesser of (i) twenty-five percent of weekly after-tax earnings and (ii) the amount by which after-tax weekly income exceeds thirty times the federal minimum hourly wage. GA. CODE ANN. §18-4-20.

Pension and retirement funds are exempt from garnishment until paid; when paid, such funds are entitled to the substantial protection provided for disposable earnings, described in section (ii) above. GA. CODE ANN. 18-4-22).

Georgia also protects the non-debtor beneficiaries and assignees of life insurance and annuity contracts against claims of creditors of the assignor or insured. GA. CODE ANN. 33-25-11 and 33-28-7. Moreover, subject to a claim of fraudulent transfer, a creditor may not garnish the cash surrender value of a life insurance policy. *Farmers' & Mechanics Bank v. National Life Ins.*, 131 S.E. 902, 904 (Ga. 1926).

In 1980, Georgia opted out of the federal bankruptcy exemptions and established its own set of statutory exemptions for purposes of bankruptcy and intestate insolvent estates. §44-13-100(b). Those exemptions closely track the federal exemptions, protecting, for example, Social Security, veterans' and disability benefits, the debtor's interest in a motor vehicle, tools of the trade and household goods, unmatured life insurance contracts (the policy itself, but not the cash value), as well as the homestead exemption. *Id.* A debtor in bankruptcy may elect these exemptions in lieu of the homestead exemption under GA. CODE ANN. §44-13-1.

Georgia's bankruptcy exemptions also specifically include pension, annuity, qualified plan and IRA payments "reasonably necessary for the support of the debtor and any dependent of the debtor." GA. CODE ANN. 44-13-100(a)(2)(E)-(F). Arguably, federal law requires even greater protection for ERISA qualified plan and IRA assets. In *Patterson v. Shumate*, 504 U.S. 733 (1992), the United States Supreme Court found that the anti-alienation provisions required for ERISA qualified plans necessarily exclude such assets from a debtor's bankruptcy estate. And before Georgia extended the statutory bankruptcy exemptions to include payments out of IRAs, the Eleventh Circuit had concluded that because Georgia protects IRAs from the nonbankrupt debtor's creditors, they are necessarily excluded from the bankruptcy estate as well. *Meehan v. Wallace*, 102 F.3d 1209, 1211 (11th Cir. 1997). Note, however, that unlike the federal exemption statute, Georgia does not exclude employee stock ownership plans from the bankruptcy estate. GA. CODE ANN. §44-33-100(a)(2)(E). *See also In re Gillespie*, 63 B.R. 124 (Bankr. N.D. Ga. 1985) (holding debtor's interest in stock ownership plan not excludable).

In a bankruptcy context, in lieu of the homestead exemptions, a debtor is entitled to exempt up to $21,500 ($43,000 if title is in one of two spouses who is a debtor) of personal and real property used as a residence or burial plot, and a motor vehicle worth up to $5,000. GA. CODE ANN. 44-13-100. Tools in trade, health aids, etc., are also exempted up to a point. *Id.*

[54] Idaho Code Annotated § 11-601 to 11-609 provides exemptions for Idaho residents which include:

(1) a burial plot for the individual and his family; (2) health aids reasonably necessary to enable the individual or a dependent to work or to sustain health; (3) benefits the individual is entitled to receive under federal social security, or veteran's benefits, except the restrictions under this subsection shall not apply to enforcement of an order for the support of any person by execution, garnishment, or wage withholding under chapter 12, title 7, Idaho Code; (4) benefits the individual is entitled to receive under federal, state, or local public assistance legislation; (5) benefits payable for medical, surgical, or hospital care; (6) state unemployment compensation to the extent provided for in section 72-1375, Idaho Code.

Idaho Code Ann. § 11-603 (West 2015)

Debtors are also entitled to the exemption of property to the extent necessary for the support of him or herself and his or her dependents including insurance proceeds and judgments or settlements from a bodily injury or the wrongful death or bodily injury of an individual of which the debtor was a dependent. If, however, the debtor commingles these funds with other funds, they lose their exempt status and are eligible for collection by a creditor. IDAHO CODE ANN. § 11-604(1).

Idaho also provides for the exemption of various household items including the following:

(1) An individual is entitled to exemption of the following property to the extent of a value not exceeding seven hundred fifty dollars ($750) on any one (1) item of property and not to exceed a total value of seven thousand five hundred dollars ($7,500) for all items exempted under this subsection:

(a) Household furnishings, household goods, and appliances held primarily for the personal, family, or household use of the individual or a dependent of the individual;

(b) If reasonably held for the personal use of the individual or a dependent, wearing apparel, animals, books, and musical instruments; and

(c) Family portraits and heirlooms of particular sentimental value to the individual.

(2) An individual is entitled to exemption of jewelry, not exceeding one thousand dollars ($1,000) in aggregate value, if held for the personal use of the individual.

(3) An individual is entitled to exemption, not exceeding two thousand five hundred dollars ($2,500) in aggregate value, of implements, professional books, business equipment and tools of the trade; and to an exemption of one (1) motor vehicle to the extent of a value not exceeding seven thousand dollars ($7,000).

(4) An individual is entitled to an exemption of provisions of food or water together with storage containers and shelving, sufficient for twelve (12) months for use of the individual or a dependent or dependents of the individual.

[. . .]

(6) All arms, uniforms and accouterments required for the use of an individual as a peace officer, a member of the national guard or military service.

(7) A water right not to exceed one hundred sixty (160) inches of water used for the irrigation of lands actually cultivated by the individual, and the crop or crops growing or grown on fifty (50) acres of land, leased, owned or possessed by an individual cultivating the same, provided, that the amount of the crops so exempted shall not exceed the value of one thousand dollars ($1,000).

(8) An individual is entitled to exemption of one (1) firearm valued at seven hundred fifty dollars ($750), or less.

(9) Any unmatured life insurance contract owned by an individual, other than a credit life insurance contract.

(10) An individual's aggregate interest, not to exceed five thousand dollars ($5,000) in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the individual under which the insured is the individual or a person of whom the individual is a dependent.

(11) An individual's aggregate interest in any tangible personal property, not to exceed the value of eight hundred dollars ($800).

(12) An individual is entitled to an exemption for his disposable earnings . . . not to exceed one thousand five hundred dollars ($1,500) in a calendar year. This exemption shall not affect the application or operation of the garnishment restrictions set forth in section 11-207, Idaho Code.

Idaho Code Ann. § 11-605 (West)

Idaho residents are also entitled to a homestead exemption limited to the lesser of the total net value of the home and land or $100,000. *Id.* § 55-1003. The homestead includes a home or mobile home, appurtenant buildings, land, or unimproved land on which the owner resides or intends to reside. *Id.* § 55-1001(2). The homestead exemption is automatic if the land is occupied as a homestead. If it is not, the owner must file a declaration of homestead in order to claim the exemption. *Id.* § 55-1004.

The proceeds of life insurance policies are protected from creditors as long as the policy is on the life of someone other than the insured or the person effecting the policy. *Id.* § 41-1833(1). However, if payments are made with the intent to defraud, the proceeds resulting from those payments are available to creditors, with interest. *Id.* § 41-1833(1).

Annuity payments are exempt from the claims of creditors and the annuitant may not be forced to exercise their rights, powers or options under the annuity contract. *Id.* § 41-1836(1). Annuity payments up to $1,250 per month are exempt but any amount in excess of $1,250 is available to creditors. *Id.* § 41-1836(1)(b).

Finally, Idaho law provides that assets paid to a beneficiary or that beneficiary's interest in retirement or profit-sharing plans, individual retirement accounts, Roth IRAs and employee stock ownership plans are exempt from creditors if the claim arises out of a negligent or wrongful act. *Id.* § 55-1011(1). This exemption is not available for claims arising from a qualified domestic relations order. *Id.* § 55-1011(2). Furthermore, payments made from these plans by reason of age, illness, disability or length of service are exempt from creditors' claims to the extent necessary for the debtor's support and the support of his or her decedents. *Id.* § 11-604A(3), (4).

[55] Illinois has opted out of the federal bankruptcy code exemptions. 735 ILCS § 5/12-1201. Illinois exempts the following personal property from judgment or attachment:

(a) The necessary wearing apparel, bible, school books, and family pictures of the debtor and the debtor's dependents
(b) The debtor's equity interest, not to exceed $4,000 in value, in any other property
(c) The debtor's interest, not to exceed $2,400 in value, in any one motor vehicle,
(d) The debtor's equity interest, not to exceed $1,500 in value in any implements, professional books, or tools of the trade of the debtor,
(e) Professionally prescribed health aids for the debtor or a dependent of the debtor;
(f) All proceeds payable because of the death of the insured and the aggregate net cash value of any or all life insurance and endowment policies and annuity contracts payable to a wife or husband of the insured, or to a child, parent, or other person dependent upon the insured, or to a revocable or irrevocable trust which names the wife or husband of the insured or which names a child, parent, or other person dependent upon the insured as the primary beneficiary of the trust, whether the power to change the beneficiary is reserved to the insured or not and whether the insured or the insured's estate is a contingent beneficiary or not;
(g) The debtor's right to receive:
    (1) a social security benefit, unemployment compensation, or public assistance benefit;
    (2) a veteran's benefit;
    (3) a disability, illness, or unemployment benefit; and
    (4) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.
(h) The debtor's right to receive, or property that is traceable to:
    (1) an award under a crime victim's reparation law;
    (2) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor;
    (3) a payment under a life insurance contract that insured the life of an individual of whom the

debtor was a dependent, to the extent reasonably necessary for the support of the debtor or a dependent of the debtor;

(4) a payment, not to exceed $15,000 in value, on account of personal bodily injury of the debtor or an individual of whom the debtor was a dependent; and

(5) any restitution payments made to persons pursuant to the federal Civil Liberties Act of 1988[1] and the Aleutian and Pribilof Island Restitution Act, P.L. 100-383.

For purposes of this subsection (h), a debtor's right to receive an award or payment shall be exempt for a maximum of 2 years after the debtor's right to receive the award or payment accrues; property traceable to an award or payment shall be exempt for a maximum of 5 years after the award or payment accrues; and an award or payment and property traceable to an award or payment shall be exempt only to the extent of the amount of the award or payment, without interest or appreciation from the date of the award or payment.

(i) The debtor's right to receive an award under Part 20 of Article II of this Code relating to crime victims' awards.

(j) Moneys held in an account invested in the Illinois College Savings Pool of which the debtor is a participant or donor, except the following non-exempt contributions:

(1) any contribution to such account by the debtor as participant or donor that is made with the actual intent to hinder, delay, or defraud any creditor of the debtor;

(2) any contributions to such account by the debtor as participant during the 365 day period prior to the date of filing of the debtor's petition for bankruptcy that, in the aggregate during such period, exceed the amount of the annual gift tax exclusion under Section 2503(b) of the Internal Revenue Code of 1986, as amended, in effect at the time of contribution; or

(3) any contributions to such account by the debtor as participant during the period commencing 730 days prior to and ending 366 days prior to the date of filing of the debtor's petition for bankruptcy that, in the aggregate during such period, exceed the amount of the annual gift tax exclusion under Section 2503(b) of the Internal Revenue Code of 1986, as amended, in effect at the time of contribution.

For purposes of this subsection (j), "account" includes all accounts for a particular designated beneficiary, of which the debtor is a participant or donor.

Money due the debtor from the sale of any personal property that was exempt from judgment, attachment, or distress for rent at the time of the sale is exempt from attachment and garnishment to the same extent that the property would be exempt had the same not been sold by the debtor.

If a debtor owns property exempt under this Section and he or she purchased that property with the intent of converting nonexempt property into exempt property or in fraud of his or her creditors, that property shall not be exempt from judgment, attachment, or distress for rent. Property acquired within 6 months of the filing of the petition for bankruptcy shall be presumed to have been acquired in contemplation of bankruptcy.

The personal property exemptions set forth in this Section shall apply only to individuals and only to personal property that is used for personal rather than business purposes. The personal property exemptions set forth in this Section shall not apply to or be allowed against any money, salary, or wages due or to become due to the debtor that are required to be withheld in a wage deduction proceeding under Part 8 of this Article XII.

735 ILCS § 5/12-1001.

Illinois also exempts benefits and refunds payable by pensions, retirement funds. 735 ILCS § 5/12-1006. Illinois also has a homestead exception of $15,000 of a debtor's interest "in a farm or lot of land and buildings thereon, a condominium, or personal property, owned or rightly possessed by lease or otherwise and occupied by him or her as a residence, or in a cooperative that owns property that the individual uses as a residence." 735 ILCS § 5/12-901. However, this homestead exception is inferior to federal tax liens. *In re Laredo*, 334 B.R. 401, 410 (Bankr. N.D. Ill. 2005).

[56] New Hampshire law allows you to use the exemptions found in the U.S. bankruptcy code or the exemptions provided under New Hampshire law.

Under New Hampshire statute, the following goods and property are exempted from attachment and execution:

i. The wearing apparel necessary for the use of the debtor and the debtor's family.
ii. Comfortable beds, bedsteads and bedding necessary for the debtor, the debtor's spouse and children.
iii. Household furniture to the value of $3,500.
iv. One cook stove, one heating stove and one refrigerator and necessary utensils belonging to the same.
v. One sewing machine, kept for use by the debtor or the debtor's family.
vi. Provisions and fuel to the value of $400.
vii. The uniform, arms and equipments of every officer and private in the militia.
viii. The Bibles, school books and library of any debtor, used by the debtor or the debtor's family, to the value of $800.
ix. Tools of the debtor's occupation to the value of $5,000.
x. One hog and one pig, and the pork of the same when slaughtered.
xi. Six sheep and the fleeces of the same.
xii. One cow; a yoke of oxen or a horse, when required for farming or teaming purposes or other actual use; and hay not exceeding 4 tons.
xiii. Domestic fowls not exceeding $300 in value.
xiv. The debtor's interest in one pew in any meetinghouse in which the debtor or the debtor’s family usually worship.
xv. The debtor's interest in one lot or right of burial in any cemetery.
xvi. One automobile to the value of $4,000.
xvii. Jewelry owned by the debtor or the debtor's family to the value of $500.
xviii. The debtor's interest in any property, not to exceed $1,000 in value, plus up to $7,000 of any unused amount of the exemptions provided under paragraphs iii, vi, viii, ix, xvi and xvii of this section.
xix. Subject to the Uniform Fraudulent Transfer Act, RSA 545-A, any interest in a retirement plan or arrangement qualified for tax exemption purposes under present or future acts of Congress; provided, any transfer or rollover contribution between retirement plans shall not be deemed a transfer which is fraudulent as to a creditor under the Uniform Fraudulent Transfer Act. “Retirement plan or arrangement qualified for tax exemption purposes” shall include without limitation, trusts, custodial accounts, insurance, annuity contracts, and other properties and rights constituting a part thereof. By way of example and not by limitation, retirement plans or arrangements qualified for tax exemption purposes permitted under present acts of Congress include defined contribution plans and defined benefit plans as defined under the Internal Revenue Code (IRC), individual retirement accounts including Roth IRAs and education IRAs, individual retirement annuities, simplified employee pension plans, Keogh plans, IRC section 403(a) annuity plans, IRC section 403(b) annuities, and eligible state deferred compensation plans governed under IRC section 457. This paragraph shall be in addition to and not a limitation of any other provision of New Hampshire law which grants an exemption from attachment or execution and every other species of forced sale for the payment of debts. This paragraph shall be effective for retirement plans and arrangements in existence on, or created after January 1, 1999, but shall apply only to extensions of credit made, and debts arising, after January 1, 1999.
xx. One computer.

N.H. REV. STAT. ANN. § 511:2.

New Hampshire also protects life insurance proceeds, but not cash value, under certain circumstances. *See generally* N.H. REV. STAT. ANN. §§ 408:1, -2 and *In re Monahan*, 171 B.R. 710 (Bankr. D.N.H. 1994). *See also* N.H. REV. STAT. ANN. § 402:69 (firefighters; aid insurance), N.H. REV. STAT. ANN. § 418:17 (fraternal benefit society benefits).

Various pensions are also afforded certain protections. *See* N.H. REV. STAT. ANN. § 512:21(IV) (federally created pensions); N.H. REV. STAT. ANN. § 102:23 (firefighters); and N.H. REV. STAT. ANN. § 103:18 (police officers). Additional exemptions may apple to public benefits. *See* N.H. REV. STAT. ANN. § 167:25 (aid to blind, aged, disable; public assistance); N.H. REV. STAT. ANN. § 282-A:159 (unemployment compensation); and N.H. REV. STAT. ANN. § 281-A:52 (workers' compensation).

57 New Jersey has a variety of statutes which set forth certain exemptions from attachment or execution by a judgment creditor.

The proceeds of life insurance **on the debtor's life** are exempt from the insured's debts when received by the beneficiary. N.J. STAT. ANN. § 17B:24-6. Notice that this provision does not appear to exempt the cash value of a policy in the policy in the hands of the insured. Health insurance benefits and the proceeds of group insurance plans are also exempt, as are payments from annuities to the extent that they do not exceed $500 per month. N.J. STAT. ANN. § 17B:24-7 to -9 (West 2015).

Certain specified "qualified trusts" which includes all manner of ERISA plans (§401(k) plans, pension and profit-sharing plans, Keogh Plans, ESOP's, etc.) and IRAs are exempt. N.J. STAT. ANN. § 25-2-1(b). Various other small exemptions are also available to New Jersey debtors, such as $1,000 of household goods and furniture (N.J. STAT. ANN. § 2A-26-4), "all wearing apparel" (N.J. STAT. ANN. § 2A-17-19), etc.

58 The New York exemptions are set forth in Chapter 8, Article 52, Sections 5205 and 5206 of Civil Practice Law and Rules. Section 5205 exempts personal property from application to the satisfaction of money judgments. Section 5205(a) details the specific exempt tangible personal property, which are:

a. A sewing machine and all stoves kept in the judgment debtor's dwelling house and fuel for the stoves for one hundred twenty days;
b. The family religious text, pictures, and school books, and all other books not exceeding $500;
c. A seat or pew at the judgment debtor's place of worship;
d. Domesticated animals and sixty days' worth of food for the animals, the total not to exceed $1,000, and all necessary food for the judgment debtor or his or her family for one hundred twenty days;
e. All clothes, household furniture, health aids, a refrigerator, radio, television, cell phone, computer, crockery, tableware, and cooking utensils necessary for the judgment debtor and his family;
f. A watch, art, jewelry, and a wedding ring, the total not to exceed $1,000;
g. Necessary tools and implements for carrying out the judgment debtor's profession or calling, the total not to exceed $3,000 including food for a team for one hundred twenty days;
h. A car, not to exceed $4,000 (or $10,000 if the debtor is disabled);
i. If the debtor does not qualify for the homestead exception, $1,000 in cash or personal property.

New York exempts "all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from a person *other* than the judgment debtor" from judgment creditors. In New York, "all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either a trust or plan" which qualifies as a retirement account under Sections 408, 408A, 401, and 457 of the Internal Revenue Code, including plans created as a result of rollovers pursuant to Sections 402(a)(5), 403(a)(4), 408(d)(3), and 408A (such as IRAs, qualified pension and profit sharing plans and the like) are considered exempt trusts. The exemption applies even if the judgment debtor is the settlor and depositor of an IRA, a self-employed individual, a partner in an entity sponsoring a Keogh (HR-10) plan, the shareholder of a corporation sponsoring a retirement plan, or a participant in a section 457 plan. N.Y. C.P.L.R. 5205(c)(2) (McKinney 2015).

A judgment debtor's right to accelerate payment of a death benefit or special surrender value under a life insurance policy is exempt from satisfaction of a judgment creditor. Similarly, settlements with life insurance companies are exempt from judgment creditors. *Id*. 5205(i).

Certain funds in a New York state college tuition savings program under Article Fourteen-A of Education Law are exempt from judgment creditors. *See* N.Y. EDUC. LAW § 695-A to –G (McKinney 2015). Funds in an account established in connection with a scholarship program or where the judgment debtor is the owner is a minor and the creator and beneficiary of the account are exempt, but if the judgment debtor is the owner of the account and is not a minor, then only the first $10,000 are exempt. *Id*. 5205(j).

Other exemptions include payments, pensions, horses, swords and medals (among other items) payable to a member of the armed forces; ninety percent of unpaid milk proceeds due to a judgment debtor; security deposits on rental units or utilities; certain funds of a convicted person; and, unless a court determines that it is unnecessary, service animals or "all medical and dental accessions to the human body" or medical equipment necessary "to assist in sustaining or maintaining one or more major life activities" or to provide mobility. *Id.* 5205(e), (f), (h).

If an individual recovers monetary damages for the taking or damaging of one of the above exempt items, the money recovered is itself exempt for one year if the individual subsequently becomes a judgment debtor. *Id*. 5205(b).

The value of New York's homestead exemption varies based on the county in which the real property (or mobile home) is located. In the counties of Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester, and Putnam, the exemption is $150,000; in Dutchess, Albany, Columbia, Orange, Saratoga and Ulster, $125,000, and $75,000 in all other counties. *Id.* 5206(a). New York allows the homestead exemption to apply to the following types of property; a lot of land with a dwelling on it, shares of stock in a cooperative apartment corporation, units of a condominium apartment, or a mobile home. *Id*. The homestead exemption continues after the death of the judgment debtor for the benefit of the debtor's spouse or surviving children until the spouse's death and children reach the age of majority. *Id*. 5206(b). The homestead exemption will end if the property ceases to be occupied as a residence by the judgment debtor, unless the debtor ceases occupancy as a result of damage or destruction to the property and the period is for less than one year. *Id*. 5206(c).

If the value of the property exceeds the homestead exemption amount, the judgment lien attaches to the home on the surplus. A judgment creditor with a lien on the surplus may commence a special proceeding for a sale of the homestead with court permission. Money from a sale of homestead property, up to the applicable homestead amount, paid to the judgment debtor is exempt from further judgments for up to one year. If the judgment debtor uses that money to purchase another exempt homestead within the year, any remaining money is no longer exempt, although the new homestead will remain exempt as to all creditors. *Id*. 5206(e).

"Land, set apart for a family or private burial ground" of no more than 1/4 of an acre is exempt from judgment creditors so long as a portion of the land has actually been used as a burial ground and there are no buildings, other than vaults or other "places of deposit for the dead, or mortuary monuments" on the property. *Id*. 5206(f).

New York has opted out of the federal bankruptcy exemptions. Therefore, New York bankruptcy debtors must rely on the exempt categories in Chapter 12, Article 10-A, Sections 282 through 283 of the Debtor and Creditor Law. Section 282 permits bankrupt debtors to exempt all the exempt property described above in Chapter 8, Article 52, sections 5205 and 5206 of Civil Practice Law and Rules. N.Y. DEBT. & CRED. LAW § 282 (McKinney 2015). However, the aggregate exempt amount of property under Section 5205(a) (relating to personal tangible property) cannot exceed $10,000. *Id.* § 283(1). If the debtor does not avail him or herself to the exemptions in Section 5206 (related to homestead) and the property exempted Section 283(1) does not reach the $10,000, then the debtor limit may exempt the difference between $5,000 and the amount of property already claimed for exemption or $5,000, whichever is less. *Id.* § 283(2). Also exempt are:

a. Insurance policies and annuity contracts, as well as the proceeds from those policies (N.Y. DEBT. & CRED. LAW § 282(ii) (McKinney 2015), however, certain annuity contracts are also limited by the $10,000 aggregate exemption limit described above (*Id*. § 283(1));
b. A motor vehicle not exceeding $4000 (*Id*. § 282(iii)(1));
c. Benefits from social security; unemployment; public assistance; veteran's benefits; disability, illness, or unemployment benefits; alimony and support to the extent reasonably necessary to support the debtor and dependents of the debtor; and stock bonus, pension, profit sharing plans on account of illness, disability, death, age, or length of service. However, the plan is not exempt if the plan was established by the debtor (or under the auspices of an insider that employed the debtor at the time the debtor's rights to the plan arose), the plan was on account of age or length of

service, and the plan does not qualify under Sections 401(a), 403(a), 403(b), 408, 408A, 409, or 457 of the Internal Revenue Code (*Id*. § 282(ii)(2)); and

d. The right to receive property that is traceable to an award under a crime victim's reparation law; a wrongful death payment to the dependent of a decedent; payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is a dependent, to the extent reasonably necessary to support the debtor and any dependent of the debtor; and, in an amount not to exceed $7,500, a personal injury payment not including pain and suffering or compensation for actual pecuniary loss (*Id*. § 282(iii)(3)).

As an asset under Section 5205(c)(2), IRAs are exempt from bankruptcy creditors under Section 282(i). Because New York residents must use New York exemptions, IRAs will generally be exempt in a New York bankruptcy. The 2005 Bankruptcy Act includes special rules for the treatment of IRAs in bankruptcy; the rules apply whether the bankrupt elects federal or state exemptions. The exemption is generally limited to $1 million in an IRA exclusive of rollover contributions (which continue to be wholly exempt), unless the Bankruptcy Court increases the limit "in the interests of justice." Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (enacted April 20, 2005) (codified as amended in scattered sections of 11 U.S.C.).

All trusts, custodial accounts, annuities, insurance contracts, or other interests described in Sections 5205(b)(1-2) are conclusively presumed to be spendthrift trusts, including cases arising under Sections 101 to 130 of the United States Bankruptcy Code. N.Y. C.P.L.R. 5205(c)(3) (McKinney 2015).

However, any asset under Section 5205(c) will not be exempt to the extent that creditor has a right to the property under an order of support, alimony, or maintenance or under a qualified domestic relations order under Section 414(b) of the United States Internal Revenue Code. *Id.* 5205(c)(4). An asset will also not be exempt if the asset was made within ninety days of the claim, or if it is considered a fraudulent conveyance under New York's Uniform Fraudulent Conveyance Act. *Id*. 5205(c)(5).

[59] North Carolina has opted out of protection for debtors under the federal bankruptcy code. N.C. GEN. STAT. ANN. § 1C-1601(f). The majority of North Carolina's statutory exemptions are included in N.C. Gen. Stat. Ann. § 1C-1601(a) and include:

(1) The debtor's aggregate interest, not to exceed thirty-five thousand dollars ($35,000) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor; however, an unmarried debtor who is 65 years of age or older is entitled to retain an aggregate interest in the property not to exceed sixty thousand dollars ($60,000) in value so long as the property was previously owned by the debtor as a tenant by the entireties or as a joint tenant with rights of survivorship and the former co-owner of the property is deceased.

(2) The debtor's aggregate interest in any property, not to exceed five thousand dollars ($5,000) in value of any unused exemption amount to which the debtor is entitled under subdivision (1) of this subsection.

(3) The debtor's interest, not to exceed three thousand five hundred dollars ($3,500) in value, in one motor vehicle.

(4) The debtor's aggregate interest, not to exceed five thousand dollars ($5,000) in value for the debtor plus one thousand dollars ($1,000) for each dependent of the debtor, not to exceed four thousand dollars ($4,000) total for dependents, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed two thousand dollars ($2,000) in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

(6) Life insurance as provided in Article X, Section 5 of the Constitution of North Carolina.

(7) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(8) Compensation for personal injury, including compensation from private disability policies or annuities, or compensation for the death of a person upon whom the debtor was dependent for support, but such compensation is not exempt from claims for funeral, legal, medical, dental, hospital, and health care charges related to the accident or injury giving rise to the compensation.

(9) Individual retirement plans as defined in the Internal Revenue Code and any plan treated in the same manner as an individual retirement plan under the Internal Revenue Code, including individual retirement accounts and Roth retirement accounts as described in section 408(a) and section 408A of the Internal Revenue Code, individual retirement annuities as described in section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in section 408(c) of the Internal Revenue Code. Any money or other assets or any interest in any such plan remains exempt after an individual's death if held by one or more subsequent beneficiaries by reason of a direct transfer or eligible rollover that is excluded from gross income under the Internal Revenue Code, including, but not limited to, a direct transfer or eligible rollover to an inherited individual retirement account as defined in section 408(d)(3) of the Internal Revenue Code.

(10) Funds in a college savings plan qualified under section 529 of the Internal Revenue Code, not to exceed a cumulative limit of twenty-five thousand dollars ($25,000), but excluding any funds placed in a college savings plan account within the preceding 12 months (except to the extent any of the contributions were made in the ordinary course of the debtor's financial affairs and were consistent with the debtor's past pattern of contributions) and only to the extent that the funds are for a child of the debtor and will actually be used for the child's college or university expenses.

(11) Retirement benefits under the retirement plans of other states and governmental units of other states, to the extent that these benefits are exempt under the laws of the state or governmental unit under which the benefit plan is established.

(12) Alimony, support, separate maintenance, and child support payments or funds that have been received or to which the debtor is entitled, to the extent the payments or funds are reasonably necessary for the support of the debtor or any dependent of the debtor.

N.C. GEN. STAT. ANN. § 1C-1601 (West 2015).

In addition, North Carolina has statutes which protect insurance proceeds and pensions. N.C. GEN. STAT. ANN. § 58-58-165 (West 2015); *see, e.g.*, N.C. GEN. STAT. ANN. § 58-86-90 (West 2015) (exemption firefighters' pensions).

[60] Ohio exempts certain items of personal property, including the person's interest, not to exceed $3,225, in one motor vehicle; the person's interest, not to exceed $400, in cash on hand, money due and payable, money to become due within ninety days, tax refunds, and money on deposit with a bank, savings and loan association, credit union, public utility, landlord, or other person, other than personal earnings; the person's interest, not to exceed $525 in any particular item or $10,775 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, firearms, and hunting and fishing equipment that are held primarily for the personal, family, or household use of the person; the person's aggregate interest in one or more items of jewelry, not to exceed $1,350, held primarily for the personal, family, or household use of the person or any of the person's dependents; the person's interest, not to exceed an aggregate of $2,025, in all implements, professional books, or tools of the person's profession, trade, or business, including agriculture, the person's professionally prescribed or medically necessary health aids and the person's interest in a burial lot. OHIO REV. CODE ANN. § 2329.66.

Ohio also allows debtors to exempt one parcel or real property that either the debtor or one of the debtor's dependents uses as a primary residence, up to a value of $125,000. OHIO REV. CODE ANN. § 2329.66(A)(1).

With certain exceptions and limitations, Ohio also exempts the debtor's interests in: contracts of life or endowment insurance or annuities, a policy of group life insurance or the proceeds of a policy of group insurance, money, benefits charity, relief or aid to be paid, provided or rendered by a fraternal benefit society, and monies paid or payable for living maintenance, workers' compensation, unemployment compensation benefits, cash assistance payments under the Ohio works first program, benefits and services under the prevention, retention, and contingency program, disability financial assistance payments, payments under section 24 or 32 of the Internal Revenue Code of 1986, rights or interests in a pension, benefit or retirement plan, deductible contributions to and rights or interests in retirement accounts or 529 plans, interests and rights to assets in Keogh/H.R. 10 plans, right to receive spousal or child support (to the extent necessary to support the debtor and his dependents), an award of reparations, payment of up to $20,200 from civil action against a government employee or entity for bodily injury, a payment for loss of future earnings to the extent reasonably necessary for support, personal earnings up to the greater of seventy-five percent of the disposable earnings owed or thirty times the federal minimum wage if paid weekly, sixty times if paid bi-weekly, and sixty-five times if paid semimonthly, or one hundred thirty times if paid monthly, right in specific partnership property, a seal and official register of a notary public, interest in a tuition unit or payment pursuant to a tuition payment contract, or any other property specifically exempted by federal statute (other than the Bankruptcy Reform Act of 1978). OHIO REV. CODE ANN. § 2329.66(A)(6)-(17). Ohio further allows a debtor an exemption of $1,075 in any property, but this exemption is specifically limited to bankruptcy proceedings. *Id.* at § 2329.66(A)(18).

The monetary amounts of these exceptions are pegged to the consumer price index and are adjusted each year. OHIO REV. CODE ANN. § 2329.66(B).

Ohio has opted out of protection for debtors under the federal bankruptcy code. OHIO REV. CODE ANN. § 2329.662.

[61] Oregon Revised Statutes § 18.300 allows Oregon residents to use either state law exemptions, or the exemptions listed under §522(d) of the Federal Bankruptcy Code, including:

(1) The debtor's aggregate interest, not to exceed $22,975 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.
(2) The debtor's interest, not to exceed $3,675 in value, in one motor vehicle.
(3) The debtor's interest, not to exceed $575 in value in any particular item or $12,250 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.
(4) The debtor's aggregate interest, not to exceed $1,550 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.
(5) The debtor's aggregate interest in any property, not to exceed in value $1,225 plus up to $11,500 of any unused amount of the exemption provided under paragraph (1) of this subsection.
(6) The debtor's aggregate interest, not to exceed $2,300 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.
(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.
(8) The debtor's aggregate interest, not to exceed in value $12,250 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.
(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.
(10) The debtor's right to receive—
    (A) a social security benefit, unemployment compensation, or a local public assistance benefit;
    (B) a veterans' benefit;
    (C) a disability, illness, or unemployment benefit;
    (D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—
   (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;
   (ii) such payment is on account of age or length of service; and
   (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 4 08 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to—
   (A) an award under a crime victim's reparation law;
   (B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
   (C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
   (D) a payment, not to exceed $22,975, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
   (E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

11 U.S.C.A. § 522 (West 2015) (Dollar amounts in this section are adjusted every three years according to 11 U.S.C. § 104).

Oregon’s state law exemptions include:

(a) Books, pictures and musical instruments to the value of $600.
(b) Wearing apparel, jewelry and other personal items to the value of $1,800.
(c) The tools, implements, apparatus, team, harness or library, necessary to enable the judgment debtor to carry on the trade, occupation or profession by which the judgment debtor habitually earns a living, to the value of $5,000.
(d) A vehicle to the value of $3,000. As used in this paragraph “vehicle” includes an automobile, truck, trailer, truck and trailer or other motor vehicle.
(e) Domestic animals and poultry kept for family use, to the total value of $1,000 and food sufficient to support such animals and poultry for 60 days.
(f) Household goods, furniture, radios, a television set and utensils all to the total value of $3,000, if the judgment debtor holds the property primarily for the personal, family or household use of the judgment debtor; provisions actually provided for family use and necessary for the support of a householder and family for 60 days and also 60 days’ supply of fuel.
(g) All property of the state or any county or incorporated city therein, or of any other public or municipal corporation of like character.
(h) All professionally prescribed health aids for the debtor or a dependent of the debtor.
(i) Spousal support, child support, or separate maintenance to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.
(j) The debtor’s right to receive, or property that is traceable to, an award under any crime victim reparation law.

(k) The debtor's right to receive, or property that is traceable to, a payment or payments, not to exceed a total of $10,000, on account of personal bodily injury of the debtor or an individual of whom the debtor is a dependent.

(*l*) The debtor's right to receive, or property that is traceable to, a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(m) Veterans' benefits and loans.

(n) The debtor's right to receive an earned income tax credit under the federal tax laws and any moneys that are traceable to a payment of an earned income tax credit under the federal tax laws.

(o) The debtor's right to the assets held in, or right to receive payments under, a medical savings account or health savings account authorized under section 220 or 223 of the Internal Revenue Code.

(p) The debtor's interest, not to exceed $400 in value, in any personal property. However, this exemption may not be used to increase the amount of any other exemption.

Or. Rev. Stat. Ann. § 18.345(1).

Oregon state law also exempts one shotgun or rifle and one pistol, the total value of which may not exceed $1,000. *Id.* at § 18.362.

The debtor must select and reserve the personal property claimed exempt but if the exempt property is found to be worth more than the exempt amount, the levying officer may sell such property and pay the debtor the surplus amount. *Id.* at § 18.345(2).

Up to 75% of a debtor's disposable earning are exempt from execution. *Id.* at § 18.385.

Oregon provides a $40,000 homestead exemption for individuals and a $50,000 homestead exemption for married debtors. *Id.* at §18.395(1). Property outside of the state as well as up to 160 acres or one city block may be claimed as part of the debtor's homestead. *Id.* at § 18.402. Houseboats and manufactured dwellings are also eligible. *Id.* at § 18.395(10). The exemption does not protect against liens on the property for work done or liens or mortgages on the homestead. *Id.* at § 18.406. The homestead exemption also applies to the proceeds from the sale of the homestead and proceeds held for up to one year after the sale to be used for purchasing another homestead. *Id.* at § 18.395(2). Unlike the personal property exemptions, the debtor does not need to make an explicit claim to receive the homestead exemption.

Life insurance proceeds and the cash surrender value of an insurance policy are exempt under Oregon law as long as the policy is in favor of someone other than the creator of the policy and as long as the payments were not made with the intent to defraud creditors. *Id.* at § 743.047. Likewise annuities are protected from creditors and annuitants cannot be compelled to exercise any rights, privileges or options under an annuity. *Id.* at § 743.049(1). Further only $500 in annuity payments are exempt each month, and amounts in excess of $500 may be subject to execution by the annuitant's creditors. *Id.*

Qualified retirement plans including pension plans, trusts, profit-sharing plans, deferred compensation, individual retirement accounts or annuities and other pension plans are considered spendthrift trusts and therefore exempt from creditor attachment. *Id.* § 18.358(2). Contributions to the plan which are not permitted under the Code are invalid as fraudulent transfers and may be reached by creditors. *Id.* at § 18.358(3). Up to 50% of a beneficiary's interest in a retirement plan is likewise exempt from execution by a creditor arising from a support obligation. *Id.*

[62] South Carolina's has opted out of the provisions of the federal bankruptcy code. S.C. CODE ANN. § 15-41-35. The following items are exempt under S.C. Code Ann. §15-41-30: The debtor's aggregate interest, not to exceed $50,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence; the debtor's interest, not to exceed $5,000 in value, in one motor vehicle; the debtor's interest, not to exceed $4,000 in aggregate value in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor; the debtor's aggregate interest, not to exceed $1,000 in value, in jewelry held

primarily for the personal, family, or household use of the debtor or a dependent of the debtor; the debtor's aggregate interest in cash and other liquid assets to the extent of a value not exceeding $5,000, except that this exemption is available only to an individual who does not claim a homestead exemption; the debtor's aggregate interest, not to exceed $1,500 in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor; the debtor's interest in any property, not to exceed $5,000 of the above unused exemptions; any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

[63] Tennessee identifies certain assets that are exempt from attachment or execution by a judgment creditor, most of what appear to be set forth in Title 26, sections 26-2-101 *et seq.* of the Tennessee Code Annotated although some appear as well in Title 56. Some of the specific exemptions are:

Personal property of the judgment debtor up to the value of $10,000. TENN. CODE ANN. § 26-2-103.

Certain personal property over and above the amount specified in § 26-2-103, including wearing apparel and the "trunks or receptacles necessary to contain same," family portraits and pictures, family bibles and schoolbooks. *Id.* at § 26-2-104.

Certain specified state pension plans. *Id.* at § 26-2-105(a).

75% of disposable earnings. *Id.* at § 26-2-106.

Homestead property (consisting of the debtor's principal residence), limited to $5,000 or $7,500 for married couples. *Id.* at § 26-2-301.

Payments from an insurance company or other insurer under the terms of an accident, health or disability policy. *Id.* at § 26-2-110.

Various other "miscellaneous exemptions," best described as periodic payments such as Social Security and unemployment compensation payments, periodic payments from qualified plans, alimony, litigation awards etc. *Id.* at § 26-2-111.

IRAs and other qualified plans described in Sections 401, 403, 408 of the Internal Revenue Code (such as IRAs, qualified pension and profit sharing plans and the like). *Id.* at § 26-2-105(b).

[64] The Texas Property Code limits personal property exemptions to $60,000 for a family and $30,000 for a single person. TEX. PROP. CODE ANN. § 42.001(a). Property that is included in this exemption includes home furnishings, including family heirlooms, provisions for consumption, farming or ranching vehicles and implements, tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession, wearing apparel, jewelry (which can only make up 25% of the aggregate limit of $60,000 or $30,000), two firearms, athletic and sporting equipment, including bicycles, a two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person; two horses, mules, or donkeys and a saddle, blanket, and bridle for each, 12 head of cattle, 60 head of other types of livestock, 120 fowl, forage for the consumption of the aforementioned animals, and household pets. *Id*. § 42.002. Additional personal items are exempt and not included in the $60,000/$30,000 limitation, including current wages for personal services, professionally prescribed health aids, alimony, support, or separate wages received for support, and a religious bible or other book containing sacred writings of a religion. *Id*. at § 42.001(b). The code also allows an exemption for certain college savings plans and funds. *Id*. at § 42.0022.

Section 42.0021 of the Texas Property Code provides that assets held in or a person's right to receive payments from stock bonus, pension, profit-sharing, health savings, or similar plans, or individual retirement accounts (IRAs), including a simplified employee pension plan, regardless of the amount or value of the plan or account assets, are exempt from attachment, execution, and seizure for the satisfaction of debts. The plan or account must "qualify" under the Internal Revenue Code to be exempt under the Texas law, which means that the original contributions were deductible for federal income tax purposes. Accordingly, certain types of "nonqualified" retirement plans or accounts, such as those employer retirement, savings or deferred compensation plans designed to compensate a limited group of employees, are generally not exempt under the Texas law.

A 2011 legislative amendment to Section 42.0021 made it clear that exempt property now includes even inherited IRAs, individual retirement annuities and health savings account, thus preempting a 2007 Bankruptcy Court case holding that such inherited retirement accounts were not exempt from creditor claims. *See In re Jarboe*, 365 B.R. 717 (Bankr. S.D. Tex 2007).

The Texas homestead exemption consists of up to 10 acres of land for an urban homestead, or up to 100 acres for a rural homestead or two hundred when occupied by a family rather than a single individual. *Id*. at § 42.002. There is no limitation on the monetary worth of homestead property.

The Texas Insurance Code also provides a very broad exemption for insurance policy cash values and proceeds, and for annuity contracts:

> (a) Except as provided by Section 1108.053, this section applies to any benefits, including the cash value and proceeds of an insurance policy, to be provided to an insured or beneficiary under:
> > (1) an insurance policy or annuity contract issued by a life, health, or accident insurance company, including a mutual company or fraternal benefit society; or
> > (2) an annuity or benefit plan used by an employer or individual.
>
> (b) Notwithstanding any other provision of this code, insurance or annuity benefits described by Subsection (a):
> > (1) inure exclusively to the benefit of the person for whose use and benefit the insurance or annuity is designated in the policy or contract; and
> > (2) are fully exempt from:
> > > (A) garnishment, attachment, execution, or other seizure;
> > > (B) seizure, appropriation, or application by any legal or equitable process or by operation of law to pay a debt or other liability of an insured or of a beneficiary, either before or after the benefits are provided; and
> > > (C) a demand in a bankruptcy proceeding of the insured or beneficiary.

Tex. Ins. Code Ann. § 1108.051 (West 2015)

However, Section 1108.053 of the Texas Insurance Code provides that these exemptions are not applicable to premium payments made in fraud of a creditor, to a debt of the insured or beneficiary secured by a pledge of the insurance policy or the proceeds of the policy, or to a child support lien or levy under the provisions of the Texas Family Code.

In a 2008 case in the 5th Circuit Court of Appeals arising out of bankruptcy proceedings, the debtors bought a $30,000 annuity, and then filed bankruptcy the very next day, claiming that the annuity was exempt. When the bankruptcy trustee challenged the exemption claim, and the issue of the meaning of "in fraud of a creditor" in Insurance Code Section 1108.053 (above) was litigated, the 5th Circuit three judge panel held that the exemption claim for the annuity could not stand. *In re Soza*, 542 F.3d 1060, 1063 (5th Cir. 2008).

[65] Virginia's exemptions are in §§ 23-38.81, 34-26, 34-27, 34-29, and 64.1-151.3 of the Virginia Code. Virginia residents may only use these state law exemptions, as Virginia has opted out of the federal exemptions enumerated in 11 U.S.C. § 522(d). Va. Code Ann. § 34-3.1.

The personal property exemptions available in Virginia are:

1. The family Bible.
1a. Wedding and engagement rings.
2. Family portraits and family heirlooms not to exceed $5,000 in value.
3. (i) A lot in a burial ground, and (ii) any preneed funeral contract not to exceed $5,000.

4. All wearing apparel of the householder not to exceed $1,000 in value.

4a. All household furnishings including, but not limited to, beds, dressers, floor coverings, stoves, utensils, not to exceed $5,000 in value.

4b. One firearm, not to exceed $3,000 in value.

5. All animals owned as pets, such as cats, dogs, birds, squirrels, rabbits and other pets not kept or raised for sale or profit.

6. Medically prescribed health aids.

7. Tools, books, instruments, implements, equipment, and machines, including motor vehicles, vessels, and aircraft, which are necessary for use in the course of the householder's occupation or trade not exceeding $10,000 in value, except that a perfected security interest on such personal property shall have priority over the claim of exemption under this section. A motor vehicle, vessel or aircraft used to commute to and from a place of occupation or trade and not otherwise necessary for use in the course of such occupation or trade shall not be exempt under this subdivision. "Occupation," as used in this subdivision, includes enrollment in any public or private elementary, secondary, or career and technical education school or institution of higher education.

8. A motor vehicle, not held as exempt under subdivision 7, owned by the householder, not to exceed $6,000 in value, except that a perfected security interest on the motor vehicle shall have priority over the claim of exemption under this subdivision.

Va. Code Ann. § 34-26

In addition, if the debtor is "engaged in the business of agriculture," the following items are also exempt:

> a pair of horses or mules unless he selects or has selected a horse or mule under § 34-26, in which case he shall be entitled to select under this section only one, with the necessary gearing, one wagon or cart, one tractor, not exceeding in value $3,000, two plows, one drag, one harvest cradle, one pitchfork, one rake, two iron wedges and fertilizer and fertilizer material not exceeding in value $1,000.

Id. at § 34-27.

Virginia also allows for a homestead exemption of $5,000 (or $10,000 if the debtor is 65 or older), plus $500 per each dependent of the debtor. *Id.* at § 34-4. Most retirement plans such as those under I.R.C. §§ 401, 403 (a), 403 (b), 408, 408 A, 409, or 457 are exempt. *Id.* at § 34-34. Finally, wages may not be garnished beyond 25% of the debtor's disposable income or 40 times the minimum wage, whichever is less. *Id.* at § 34-29.

[66] In Washington, exemptions from attachment are set forth in Revised Code of Washington § 6.15.010 *et seq.* and include:

(a) All wearing apparel of every individual and family, but not to exceed three thousand five hundred dollars in value in furs, jewelry, and personal ornaments for any individual.

(b) All private libraries including electronic media, which includes audiovisual, entertainment, or reference media in digital or analogue format, of every individual, but not to exceed three thousand five hundred dollars in value, and all family pictures and keepsakes.

(c) To each individual or, as to community property of spouses maintaining a single household as against a creditor of the community, to the community:

(i) The individual's or community's household goods, appliances, furniture, and home and yard equipment, not to exceed six thousand five hundred dollars in value for the individual or thirteen thousand dollars for the community, no single item to exceed seven hundred fifty dollars, said amount to include provisions and fuel for the comfortable maintenance of the individual or community;

(ii) Other personal property, except personal earnings as provided under RCW 6.15.050(1), not to exceed three thousand dollars in value, of which not more than one thousand five hundred dollars in value may consist of cash, and of which not more than:

(A) Until January 1, 2018:

(I) For debts owed to state agencies, two hundred dollars in value may consist of bank accounts, savings and loan accounts, stocks, bonds, or other securities. The maximum exemption under (c)(ii)(A) of this subsection may not exceed two hundred dollars, regardless of the number of existing separate bank accounts, savings and loan accounts, stocks, bonds, or other securities.

(II) For all other debts, five hundred dollars in value may consist of bank accounts, savings and loan accounts, stocks, bonds, or other securities. The maximum exemption under (c)(ii)(B) of this subsection may not exceed five hundred dollars, regardless of the number of existing separate bank accounts, savings and loan accounts, stocks, bonds, or other securities.

(B) After January 1, 2018: For all debts, five hundred dollars in value may consist of bank accounts, savings and loan accounts, stocks, bonds, or other securities. The maximum exemption under this subsection (1)(c)(ii)(B) may not exceed five hundred dollars, regardless of the number of existing separate bank accounts, savings and loan accounts, stocks, bonds, or other securities;

(iii) For an individual, a motor vehicle used for personal transportation, not to exceed three thousand two hundred fifty dollars or for a community two motor vehicles used for personal transportation, not to exceed six thousand five hundred dollars in aggregate value;

(iv) Any past due, current, or future child support paid or owed to the debtor, which can be traced;

(v) All professionally prescribed health aids for the debtor or a dependent of the debtor; and

(vi) To any individual, the right to or proceeds of a payment not to exceed twenty thousand dollars on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or the right to or proceeds of a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. The exemption under this subsection (1)(c)(vi) does not apply to the right of the state of Washington, or any agent or assignee of the state, as a lienholder or subrogee under RCW 43.20B.060.

(d) To each qualified individual, one of the following exemptions:

(i) To a farmer, farm trucks, farm stock, farm tools, farm equipment, supplies and seed, not to exceed ten thousand dollars in value;

(ii) To a physician, surgeon, attorney, member of the clergy, or other professional person, the individual's library, office furniture, office equipment and supplies, not to exceed ten thousand dollars in value;

(iii) To any other individual, the tools and instruments and materials used to carry on his or her trade for the support of himself or herself or family, not to exceed ten thousand dollars in value.

(e) Tuition units, under chapter 28B.95 RCW, purchased more than two years prior to the date of a bankruptcy filing or court judgment, and contributions to any other qualified tuition program under 26 U.S.C. Sec. 529 of the internal revenue code of 1986, as amended, and to a Coverdell education savings account, also known as an education individual retirement account, under 26 U.S.C. Sec. 530 of the internal revenue code of 1986, as amended, contributed more than two years prior to the date of a bankruptcy filing or court judgment.

WASH. REV. CODE ANN. § 6.15.010.

It is important to note, however, that these exemptions are not automatic – the debtor must deliver to the officer making the levy a written claim of exemption listing the exempt property. WASH. REV. CODE § 6.15.060(3)(a).

Life Insurance. Under RCW 48.18.410, a debtor's rights under an existing life insurance policy including the cash value of life insurance and premium payments on the policy are protected from the creditors of the insured whether the insurance was purchased before or after the debt was incurred. *Id.* § 48.18.410(1); *see also In re Elliot*, 74 Wash. 2d 600, 624 (1968) (holding that "whether or not the cash surrender value of the policy could be exempt in the hands of the insured, he cannot be compelled to surrender the policy and thus defeat the interest of the beneficiary"). This protection covers proceeds from both individual and group insurance policies. On the other hand, proceeds payable to the estate of the insured are not protected against the creditors of the insured. *Elsom v. Gadd*, 93 Wash. 603 (1916), *reh'g granted on other grounds Elsom v. Gadd*, 93 Wash. 603 (1917). The proceeds of life insurance are protected from the creditors of a beneficiary if the creditor's claim existed at the time the life insurance proceeds are provided to the beneficiary. WASH. REV. CODE 48.18.410(1). This protection is also limited to debts in existence at the time the proceeds are payable. For example, in *Feminist Women's Health Center v. Codispoti*, 118 Wash. 2d 99 (1991), the Supreme Court of Washington held that policy proceeds paid after the wrongful conduct had occurred but before a judgment was entered related to the claim were protected from the creditor because liability attaches at the time of the wrongdoing, not at the judgment. Further, not only are policy proceeds protected, there is no limit to the protected proceeds and any property purchased with the proceeds is protected as well. *Northern Savings and Loan Ass'n v. Kneisley*, 193 Wash. 372, 387-88 (1938).

Life insurance proceeds and premium payments are not protected to the extent they are transferred or paid with the intent to defraud creditors. *See generally* WASH. REV. CODE § 19.40.011-904 (Washington's Uniform Fraudulent Transfers Act). The only restriction on such monies is that the insurer is liable to the creditor to the extent of the proceeds remaining in the insurer's possession at the time the home office receives notice of the creditor's claims with the specific amounts claimed. WASH. REV. CODE § 48.18.410(3)(b).

Wages and Annuities. Annuity payments up to $3,000 per month are also exempt from creditors' claims, as are wages in the amount of the greater of 35 times the federal minimum hourly wage or 75% of the debtor's disposable earnings. *Id*. at §§ 6.27.150, 48.18.430. Any amount in excess of these limits is subject to garnishee execution in the case of both annuities and wages or salary payments. *Id*. at §§ 6.27.150, 48.18.430. An annuitant cannot be compelled to exercise his or her rights, powers or options under the annuity and creditors are not allowed to interfere with or terminate the contract. *Id.* § 48.18.430(1).

Employee Benefit and Retirement Plans. Employee benefit plans, including any pension, profit-sharing, stock bonus, retirement, disability, death benefit or other similar types of employee-benefit plans including Keough plans, tax-sheltered annuities, individual retirement accounts, Roth IRAs, education IRAs, and Washington Guaranteed Education Tuition accounts are exemptions from creditor attachment as well. *Id.* § 6.15.020(3). These plans are considered spendthrift trusts for purposes of Washington law. *Id.* at § 6.15.020(5). It is important to note that while individual retirement accounts are exempt from execution, garnishment or seizure under Washington law, as noted above, Washington law also protect individual IRAs including Roth and education IRAs. *Id.* at § 6.15.020(4).

Homestead. Washington provides for a homestead exemption of up to $125,000 of the real and personal property of the debtor's residence. *Id.* at § 6.13.010, 030.

[67] W. Va. Code Ann. §38-8-1 protects the following personal property of any resident from creditors under any process, provided that no more than $15,000 in the aggregate can be protected under sections (1) through (4) below:

(1) Such individual's interest, not to exceed five thousand dollars in value, in one motor vehicle;
(2) Such individual's interest, not to exceed eight thousand dollars in aggregate value, in household goods, furniture, toys, animals, appliances, books and wearing apparel that are held primarily for the personal, family or household use of such individual;
(3) Such individual's aggregate interest, not to exceed three thousand dollars, in any implements, professional books or tools of such individual's trade;
(4) Such individual's funds on deposit in a federally insured financial institution, wages or salary, not to exceed the greater of: (i) One thousand dollars; or (ii) one hundred twenty-five percent of the

amount of the annualized federal poverty level of such individual's household divided by the number of pay periods for such individual per year; and

(5) Funds on deposit in an individual retirement account (IRA), including a simplified employee pension (SEP), in the name of such individual: *Provided,* That the amount is exempt only to the extent it is not or has not been subject to an excise or other tax on excess contributions under Section 4973 or Section 4979 of the Internal Revenue Code of 1986, or both sections, or any successor provisions, regardless of whether the tax is or has been paid.

West Virginia has specifically opted out of the protections provided to debtors under the federal bankruptcy code and provides its own set of bankruptcy exemptions in W. Va. Code Ann. §38-10-4. West Virginia provides for separate exemptions from those above for a debtor in bankruptcy, such as:

(a) The debtor's interest, not to exceed twenty-five thousand dollars in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence or in a burial plot for the debtor or a dependent of the debtor. . . .

(b) The debtor's interest, not to exceed two thousand four hundred dollars in value, in one motor vehicle.

(c) The debtor's interest, not to exceed four hundred dollars in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor: *Provided,* That the total amount of personal property exempted under this subsection may not exceed eight thousand dollars.

(d) The debtor's interest, not to exceed one thousand dollars in value, in jewelry held primarily for the personal, family or household use of the debtor or a dependent of the debtor.

(e) The debtor's interest, not to exceed in value eight hundred dollars plus any unused amount of the exemption provided under subsection (a) of this section in any property.

(f) The debtor's interest, not to exceed one thousand five hundred dollars in value, in any implements, professional books or tools of the trade of the debtor or the trade of a dependent of the debtor.

(g) Any unmeasured life insurance contract owned by the debtor, other than a credit life insurance contract.

(h) The debtor's interest, not to exceed in value eight thousand dollars less any amount of property of the estate transferred in the manner specified in 11 U.S.C. § 542(d), in any accrued dividend or interest under, or loan value of, any unmeasured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(i) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(j) The debtor's right to receive:

  (1) A social security benefit, unemployment compensation or a local public assistance benefit;

  (2) A veterans' benefit;

  (3) A disability, illness or unemployment benefit;

  (4) Alimony, support or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

  (5) A payment under a stock bonus, pension, profit sharing, annuity or similar plan or contract on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, and funds on deposit in an individual retirement account (IRA), including a simplified employee pension (SEP) regardless of the amount of funds, unless:

    (A) The plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under the plan or contract arose;

    (B) The payment is on account of age or length of service;

    (C) The plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code of 1986; and

(D) With respect to an individual retirement account, including a simplified employee pension, the amount is subject to the excise tax on excess contributions under Section 4973 and/or Section 4979 of the Internal Revenue Code of 1986, or any successor provisions, regardless of whether the tax is paid.

(k) The debtor's right to receive or property that is traceable to:

(1) An award under a crime victim's reparation law;

(2) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(3) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of the individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(4) A payment, not to exceed fifteen thousand dollars on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent;

(5) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(6) Payments made to the prepaid tuition trust fund or to the savings plan trust fund, including earnings, in accordance with article thirty, chapter eighteen of this code on behalf of any beneficiary.

W. VA. CODE ANN. § 38-10-4.

West Virginia also provides for a homestead exemption of $5,000 on the principal residence of the debtor. *Id.* at § 38-9-1.

68 Dollar amount as adjusted by the Judicial Conference of the United States, as of April 2016.

69 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 § 322, 119 Stat. 96-97 (codified as amended at 11 U.S.C. § 522(p) (2012)). These updates occur every three years, with the next occurring in 2016. 11 U.S.C. § 104. This limit does not apply to a "family farmer for the principal residence of such farmer." 11 U.S.C. § 522(p)(2)(A) (2012).

70 FLA. CONST. art. X, § 4(a).

71 *Matter of Cooke*, 412 So. 2d 340, 341 (Fla. 1982); 11 U.S.C. § 522(b)(3)(A). But see *In re Whitehead*, 278 B.R. 597, 598-99 (Bankr. M.D. Fla. 2002) (holding that debtor's presence of 103 days of the 180 prior to filing was sufficient for debtor to avail herself of homestead protection because of her intent to remain in Florida). Florida law allows a debtor to file a sworn statement of domicile, which, while not conclusive, will serve as evidence of intent to remain in the state. FLA. STAT. § 222.017. The state considers the following factors for determining Florida residency:

(1) A formal declaration of domicile by the applicant recorded in the public records of the county in which the exemption is being sought.

(2) Evidence of the location where the applicant's dependent children are registered for school.

(3) The place of employment of the applicant.

(4) The previous permanent residency by the applicant in a state other than Florida or in another country and the date non-Florida residency was terminated.

(5) Proof of voter registration in this state with the voter information card address of the applicant, or other official correspondence from the supervisor of elections providing proof of voter registration, matching the address of the physical location where the exemption is being sought.

(6) A valid Florida driver's license issued under s. 322.18 or a valid Florida identification card issued under s. 322.051 and evidence of relinquishment of driver's licenses from any other states.

(7) Issuance of a Florida license tag on any motor vehicle owned by the applicant.

(8) The address as listed on federal income tax returns filed by the applicant.
(9) The location where the applicant's bank statements and checking accounts are registered.
(10) Proof of payment for utilities at the property for which permanent residency is being claimed.

FLA. STAT. § 196.015.

[72] *Id*. § 4(a)(1). It is interesting to note that the municipality of Jacksonville, which encompasses all of Duval County, provided in its charter that grandfathered old city limits would apply for the purposes of the application of Florida's homestead protection in order to ensure that not all of Jacksonville homesteads would be limited to one half acre. JACKSONVILLE FLORIDA CODE OF ORDINANCES, CHARTER AND RELATED LAWS, Art. 2, § 6 *available at* https://library.municode.com/HTML/12174/level3/CHRELA_PTACHLACHJAFL_ART2GEURSEDI.html#CHRELA_PTACHLACHJAFL_ART2GEURSEDI_S2.06HOLA.

[73] 11 U.S.C. § 522(o).

[74] TEX. PROP. CODE ANN. § 41.002(a).

[75] *Id*. at § 41.002(b).

[76] *Id*. at § 41.002(c).

[77] *In re Niland*, 825 F.2d 801, 807 (5th Cir. 1987).

[78] *Id.* (quoting *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 314 (Tex.App.—Houston 1983)).

[79] California has a homestead exemption of $100,000, if the debtor or spouse who resides in the homestead is a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest is a community property interest with the judgment debtor, or $175,000 if the debtor or residing spouse is at the time of the attempted sale 65 or older, or a person physically or mentally disabled who as a result of that disability is unable to engage in substantial gainful employment, a person 55 or older with a gross annual income of not more than $25,000, or if the debtor is married, the income including the income of the spouse is not greater than $35,000, or otherwise $75,000. CAL. CIV. PROC. CODE § 704.730. For a full explanation of the California Homestead exception, see § 704.710 – 704.850. For a property to be eligible, it must be the dwelling where the debtor actually resides, and he must reside there continuously between the time a judgment lien attaches and the date that a court determines that the dwelling is a homestead. *Id.* at § 704.710. *See also Law v. Siegel*, 134 S.Ct. 1188 (2014), in which the United States Supreme Court held that the Bankruptcy Court may not contravene the provisions of the Bankruptcy Code by ordering that a debtor's exempt property under the California homestead exemption be used to pay debts and expenses for which that property is not liable under the Code.

As with other the homestead exemptions in other states, a debtor must first establish California residency before taking advantage of California's homestead exemption. When determining California residency, the factors that a court will consider are "physical occupancy of the property and the intention with which the property is occupied." *In re Kelley*, 300 B.R. 11, 21 (B.A.P. 9th Cir. 2003).

[80] Conn. Gen. Stat. Ann. § 52-352b(t) (West 2015). For property to be eligible for homestead protection, it must be "owner-occupied real property, co-op or mobile manufactured home, . . . used as a primary residence." *Id.* at § 52-352a. Connecticut does not impose further residency requirements, and since the $75,000 homestead amount falls below the 11 U.S.C. § 522(p) threshold of $125,000, the 1,215 day federal residency requirement does not apply.

[81] 735 ILCS 5/12-901. For property to be eligible for homestead protection, it must be occupied as a residence. *Id.* There is an exception to this exemption when the home is seized as a result of a drug asset forfeiture. 735 ILCS 5/12-903.5. Since the $75,000 homestead amount falls below the 11 U.S.C. § 522(p) threshold of $125,000, the 1,215 day federal residency requirement does not apply.

[82] N.H. REV. STAT. ANN. § 480:1.

[83] N.C. GEN. STAT. ANN. § 1C-1601 (West). A North Carolina resident debtor may elect to take the personal property ($500) and homestead ($1,000) exemption provided in Article X of the North Carolina Constitution instead of those provided by this statute. *Id*. § 1C-1602. The North Carolina homestead exemption is "conditioned upon continued use as a residence and continued ownership." *In re Love*, 42 B.R. 317, 319 *aff'd*, 54 B.R. 947 (E.D.N.C. 1985)

[84] OHIO REV. CODE ANN. § 2329.66(A)(1)(a). "Actual physical occupancy" is not strictly required to take advantage of the Ohio homestead, and constructive occupancy "defined as physical absence from a premises coupled with an intent to return to the premises at some point in the future" may suffice. *In re Lusiak*, 247 B.R. 699, 703 (Bankr. N.D. Ohio 2000) (finding absent debtors claim of constructive domicile in Ohio per se invalid where debtor claimed domicile in Michigan on her bankruptcy petition).

[85] S.C. CODE ANN. § 15-41-30. For property to be eligible for homestead protection, it must be occupied as a residence. *Id.* Since the homestead amount falls below the 11 U.S.C. § 522(p) threshold of $125,000, the 1,215 day federal residency requirement does not apply.

[86] VA. CODE ANN. § 34-4 (West 2015). Any householder, defined as "any resident of Virginia," is eligible to claim the homestead exemption. *Id.* at §§ 34-1, 34-4. Since the homestead amount falls below the 11 U.S.C. § 522(p) threshold of $125,000, the 1,215 day federal residency requirement does not apply.

[87] $1,000 worth of personal property is also exempt. W. Va. Const. art. VI, §48. The homestead exemption is available to "[a]ny husband or parent, residing in this state, or the infant children of deceased parents." *Id.* In bankruptcy, there is a $25,000 residence exemption. W. VA. CODE ANN. § 38-10-4 (West 2015). Since the homestead amount falls below the 11 U.S.C. § 522(p) threshold of $125,000, the 1,215 day federal residency requirement does not apply.

[88] Washington offers a homestead exemption to an owner-occupier that provides that the homestead is exempt from attachment, execution or forced sale for the debts of the owner up to a specified amount (currently $40,000). WASH. REV. CODE ANN. §§ 6.13.030, 6.13.070. "The proceeds of the voluntary sale of the homestead in good faith for the purpose of acquiring a new homestead, and proceeds from insurance covering destruction of homestead property held for use in restoring or replacing the homestead property," up to $40,000, are also exempt for up to one year, as is a new homestead acquired with those proceeds. *Id.*§ 6.13.070(1). Unlike the exemptions for personal property, noted above, the homestead exemption attaches automatically to the debtor's property while the debtor is occupying the property. *Id.* § 6.13.040(1). If the property is unoccupied, the debtor must file a homestead declaration. *Id.* Since the homestead amount falls below the 11 U.S.C. § 522(p) threshold of $125,000, the 1,215 day federal residency requirement does not apply.

[89] *But see Drye v. U.S.*, 528 U.S. 49, 52 (1999) (holding that a disclaimer of property by a debtor was not effective to defeat a federal tax lien).

[90] UNIF. DISCLAIMER OF PROP. INTERESTS ACT, Prefatory Note (2002/2010).

[91] Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa, Maryland, Minnesota, Nevada, New Mexico, North Dakota, Oregon, U.S. Virgin Islands, Virginia, and West Virginia. *Disclaimer of Property Interests Act*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Act.aspx?title=Disclaimer%20of%20Property%20Interests%20Act (last visited Feb. 22, 2015).

[92] UNIF. DISCLAIMER OF PROP. INTERESTS ACT, § 6 (2002/2010).

[93] *Id. at* § 5(f).

[94] *See, e.g.*, *Tompkins State Bank v. Niles*, 537 N.E.2d 274 (Ill. 1989).

[95] 20 PA. CONS. STAT. ANN. §§ 6201-6207 (West 2015).

[96] *See* discussion *infra* Part II.G.

[97] *See* discussion *infra* Part II.G.6.a (citing *Gallaher v. Riddle*, 850 A.2d 748, 751 (Pa. Super. Ct. 2004)..

[98] In California, disclaimers are governed by the California Probate Code, §§ 260-295. In Connecticut, disclaimers are governed by Chapter 802g of Title 45a (§§ 45a–578 to 45a–585) (Probate Courts and Procedure) of the General Statutes. In Georgia, disclaimer rules are set forth in Ga. Code Ann. § 53-1-20. Idaho Code §15-2-801, governs disclaimers in Idaho. In Illinois, disclaimers are governed by 755 ILCS 5/2-7. Chapter 17-B, Article 2, Section 2-1.11 of the Estates, Powers and Trusts Laws sets forth the law governing New York disclaimers. Disclaimers in Ohio are governed by Ohio Rev. Code. Ann. § 5815.36 (West 2015). Section 31-1-103 of the Tennessee Code Annotated sets forth the law governing Tennessee disclaimers. In Texas, disclaimers are governed by the Probate Code. TEX. ESTATES CODE ANN. §§ 122.002-153 (WEST). In Washington, disclaimers are governed by RCW §§ 11.86.011-090.

[99] While Ohio abolished tenancy by the entireties in 1985, tenancies that were created prior to 1985 under the old statute are still valid and recognized. OHIO. REV. CODE. ANN. 5302.17, 21.

[100] *Green v. Cannady*, 77 S.C. 193, 57 S.E. 832, 835 (1907) (abolishing tenancy by the entireties in South Carolina, noting that "[i]t would seem that the reason for the peculiar estate known as "estate by entirety" no longer exists in this state").

[101] *McNeeley v. S. Penn Oil Co.*, 52 W. Va. 616 (1903) (finding that tenancy by the entireties had been abolished by the creation of separate estates for women).

[102] Alaska, Arkansas, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio (for estates created before 1985), Oklahoma, Oregon, Rhode Island, Tennessee, Vermont, Virginia, and Wyoming.

[103] *Patwardhan v. Brabant*, 439 A.2d 784, 785 (Pa. Super. Ct. 1982) ("It is well settled that entireties property is unavailable to satisfy the claims of the creditor of one of the tenants.").

[104] *Heitz v. Sayers*, 121 A. 225, 228 (Del. Super. Ct. 1923) ("nor can a judgment against one tenant become a lien on the entirety property or on any interest therein, during the joint lives of the husband and wife").

[105] *In re Knapp*, 285 B.R. 176, 178-79 (2002) (holding that under North Carolina law, real property held in tenancy by the entireties is not subject to a claim by a creditor of only one spouse); N.C. Gen Stat. § 39-13.6 (neither spouse may encumber any real property held in tenancy by the entireties without the written joinder of the other spouse).

[106] *Vasilion v. Vasilion*, 192 Va. 735, 740, 66 S.E.2d 599, 602 (1951) (*cited in Rogers v. Rogers*, 512 S.E.2d 821 (Va. 1999)) (holding that real property held in tenancy by the entireties is exempt from the claims of creditors who do not have joint judgments against husband and wife).

[107] *Beal Bank, SSB v. Almand & Associates*, 780 So. 2d 45, 53 (Fla. 2001) ("[W]hen property is held as a tenancy by the entireties, only the creditors of both the husband and wife, jointly, may attach the tenancy by the entireties property; the property is not divisible on behalf of one spouse alone, and therefore it cannot be reached to satisfy the obligation of only one spouse.").

[108] *See, e.g.*, *Patterson v. Hopkins*, 371 A.2d 1378, 1382 (Pa. Super. Ct. 1977) ("Where a husband or wife conveys his or her individual property to a tenancy by the entireties in fraud of creditors, the defrauded creditors may execute on the property so transferred.").

[109] *See e.g.,* In re Lyons, 177 B.R. 767, (Bankr. N.D.N.Y.1994).

[110] *See Bowling v. Bowling*, 91 S.E.2d 176, 180 243 N.C. 515, 519 (1956) (holding that an estate by the entireties in personal property is not recognized in North Carolina); *See generally* N.C. GEN STAT. § 39-13.6.

[111] *See Wilde v. Mounts*, 95 Or. App. 522, 769 P.2d 802 (1989). When a lien is placed on the debtor's property, it is effectively placed on the entire property and the entire property is encumbered subject to the nondebtor's right of survivorship. *Id.*

[112] *Whitlock v. Pub. Serv. Co. of Ind.*, 239 Ind. 680, 691, 159 N.E.2d 280, 285 (1959) ("If the proceeds from the sale are considered to be held by the entireties, as stated in the cases cited above, the principle is applicable only so long as the proceeds are intact and have not been divided or disbursed.").

[113] N.Y. EST. POWERS & TRUSTS LAW § 6-2.2 (McKinney).

[114] Illinois recognizes tenancy by the entireties only for homestead property. 765 ILCS 1005/1c. However, Illinois recently passed a law that allows married couples to hold property in tenancy by the entireties and to use that property to fund a revocable inter vivos trust for estate planning purposes. *See* 765 ILCS 1005/1c, 735 ICLS 5/12-112.

[115] Mass. Gen. Laws Ann. ch. 209, § 1 (West 2015) "The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse *so long as such property is the principal residence of the nondebtor spouse*." *Id.* (emphasis added).

[116] *Freda* v. Commercial Trust Co. of New Jersey, 118 N.J. 36, 45, 570 A.2d 409, 414 (1990).

[117] *Newman v. Chase*, 70 N.J. 254, 260 (1976)

[118] *Id.* at 266.

[119] *Faulk v. Estate of Haskins*, 714 P.2d 354, 354-56 (Alaska 1986).

[120] *Du Pont v. Du Pont*, 33 Del. Ch. 571, 576 (1953) (applying the presumption to personal property); *Fischer v. Fischer*, 864 A.2d 98, 103 (Del. Ch. 2005) (applying the presumption to real property).

[121] *Ridgely v. Ridgely*, 188 A.2d 296, 297 (D.C. 1963).

[122] *In re Estate of Suggs*, 405 So. 2d 1360, 1361 (Fla. 5th DCA 1981) (holding that "[a] conveyance to spouses as husband and wife creates an estate by the entirety in the absence of express language showing a contrary intent.").

[123] *Diamond v. Diamond*, 298 Md. 24, 32 (1983).

[124] *Holdener v. Fieser*, 971 S.W.2d 946, 951 (Mo. Ct. App. 1998).

[125] *Clingerman v. Sadowski*, 513 Pa. 179, 183 (1986).

[126] *Lamberth v. S & L Plumbing Co.*, 935 S.W.2d 411, 412 (Tenn. Ct. App. 1996).

[127] *See, e.g., In re Manicure*, 29 B.R. 248, 250 (Bankr. W.D. Va., 1983) (holding that where a deed to real property did not evidence intent to create tenancy by the entirety, the property was not, under Virginia law, held by the entireties).

[128] N.C. GEN. STAT. ANN. § 39-13.3(b); N.C. GEN STAT. ANN. § 41-2(b).

[129] *See*, *e.g.*, *Lurie v. Blackwell*, 2002 WY 110, 51 P.3d 846 (Wyoming 2002); *In re Koesling*, 210 B.R. 487 (Bankr. N.D. Fla. 1997). For a detailed discussion of tenancy by the entirety's history and development, variations in treatment with respect to bankruptcy law and federal tax liens, and recommendations for tax planning, see Fred Frank, *Asset Protection and Tenancy by the Entirety*, 34 ACTEC L.J. 210 (2009).

[130] 11 U.S.CA. § 541.

[131] 11 U.S.C.A. § 522. *See generally In re Ford*, 3 B.R. 559 (Bankr. D. Md. 1980) (setting forth the legislative history of § 522(b)(2)).

[132] *See Blackwell v. Lurie*, 71 P.3d 509 (N.M. Ct. App. 2003).

[133] *See, e.g.*, *McNeilly v. Geremia (In re McNeilly)*, 249 B.R. 576 (1st Cir. 2000).

[134] *Ford*, 3 B.R. at 576.

[135] *Id.*

[136] 535 U.S. 274 (2002).

[137] *Id.* at 278 (quoting 26 U.S.C. § 6321) (citations and quotations omitted).

[138] *See*, *e.g.*, Richard W. Nenno, Domestic Asset Protection Trusts 1 (September 14, 2002) (Wilmington Trust Company White Paper).

[139] 326 F. Supp. 2d 594 (E.D. Pa. 2004), *aff'd* 131 F. App'x 816 (3d Cir. 2005).

[140] 380 F.3d 174 (4th Cir. 2004).

[141] *Id.* at 179.

[142] *Id.*

[143] 391 F.3d 1295 (11th Cir. 2004).

[144] *Id*. at 1298.

[145] *See*, *e.g.*, *Spears v. Boyd*, 313 B.R. 212 (W.D. Mich. 2004); *In re Greathouse*, 295 B.R. 562 (Bankr. D. Md. 2003); *In re Kelly*, 289 B.R. 38 (Bankr. D. Del. 2003); *In re Knapp*, 285 B.R. 176 (Bankr. M.D.N.C. 2002).

[146] No. Civ. A. 03-CV-6331, 2004 WL 2700348 (E.D. Pa. 2004).

[147] *Basher v. United States*, Nos. 02-12328DWS, 02-0346, 2002 WL 31856712 (Bankr. E.D. Pa. Dec. 3, 2002).

[148] The *Basher* court noted that "*Craft* is understandably silent as to any of the implication of its holding that federal tax liens attach to entireties property, including the IRS' enforcement remedies." *Id.* at 4. For example, the IRS may have no enforcement rights against entireties property while the debtor and the non-debtor spouse remain married but such rights are still valuable because the lien "would be enforceable against subsequent encumbrances on the formerly entireties property" upon either divorce or death of the non-debtor spouse. *Id.* at 5.

[149] Del. Code Ann. tit. 12, §§ 3334, 3574(f) (2010);

[150] Haw. Rev. Stat. Ann. § 509-2 (West 2012).

[151] 765 Ill. Comp. Stat. 1005/1c (West 2011); 735 Ill. Comp. Stat. 5/12-112 (West 2011).

[152] Ind. Code § 30-4-3-35.

[153] Md. Est. & Tr. Code § 14-113.

[154] Mo. Rev. Stat. § 456.950.

[155] Va. Code § 55-20.2.

[156] W.S. § 4-10-402(c)-(e).

[157] For an excellent summary of current legislation and joint spousal trusts generally, see Robert K. Kirkland, *The Good, the Bad and the Innovative: The Evolution of Joint Spousal Trusts in Today's Estate Planning*, 2013 ACTEC Fall Meeting (2013). *See also* Craig Harrison, *Trusts: TBE or Not TBE*, 87 Fla. Bar J. 30 (2013); Steve R. Akers, *ACTEC 2013 Fall Meeting Musings*, 9-13 (2013).

[158] Del. Code Ann. tit. 12 § 3334.

[159] Del. Code Ann. tit 12 § 3574(f). Thus, even if a creditor successfully brings a claim against a Delaware asset protection trusts that contains entireties property, "the sole remedy available to the creditor with respect to trust property treated as though it were tenancy by the entireties property shall be an order directing the trustee to transfer the property to both spouses as tenants by the entireties." *Id*. For a more detailed discussion of STETs, see Duncan E. Osborne and Marc Osborne, *Asset Protection Trust Planning*, SU002 ALI-ABA 1, 22-23 (2013).

[160] 135 S.Ct. 2071 (2015).

[161] 133 S.Ct. 2675 (2013).

[162] The amount sheltered from estate tax is currently $5,250,000. I.R.C. § 2010(c).

[163] Pub. L. 111-312, 124 Stat. 3296, H.R. 4853.

[164] PL 112-240, January 2, 2013, 126 Stat 2313.

[165] 20 PA. CONS. STAT. ANN. §§ 6201-6207.

[166] *Id.* § 6201.

[167] Treas. Reg. § 25.2511-1(c)(1) (2005).

[168] *See* I.R.C. § 2518. A qualified disclaimer is one that 1) is in writing, 2) is made within nine months of (a) the transfer creating the disclaimed interest or (b) the date the disclaimant turns 21, whichever is later, 3) is made before the disclaimant has accepted the interest or any of its benefits and 4) will result in the interest passing, without any direction on the part of the disclaimant, to the spouse of the original transferor or to a person other than the disclaimant. *Id.* § 2518 (b).

[169] Treas. Reg. § 25.2518-2(c)(4)(i) (2005).

[170] *Id.* Note, however, that a non-citizen surviving spouse may disclaim the entire interest if all the consideration was furnished by the decedent and the entire interest would be includible in the surviving spouse's estate under section 2040 of the Internal Revenue Code. Treas. Reg. § 25.2518-2(c)(4)(ii) (2005).

[171] Treas. Reg. § 25.2518-2(c)(4)(iii) (2005).

[172] *See* discussion *infra* Part II.G.

[173] In New York, although the definition of disclaimable properties includes tenancy by the entireties, the disclaimer statute limits that power by providing that a tenant by the entirety "may not renounce that portion of an interest in joint property or property held by the entirety which is allocable to amounts contributed by him to the interest in such property." Therefore, a surviving tenant by the entirety may only renounce that part of the tenancy by the entirety that was contributed by the decedent. N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(B)(1). In California, disclaimers are governed by the California Probate Code, §§ 260-295. In Connecticut, disclaimers are governed by Chapter 802g of Title 45a (§§ 45a–578 to 45a–585) (Probate Courts and Procedure) of the General Statutes. In Georgia, disclaimer rules are set forth in Ga. Code Ann. § 53-1-20. Idaho Code §15-2-801, governs disclaimers in Idaho. In Illinois, disclaimers are governed by 755 ILCS 5/2-7. Disclaimers in Ohio are governed by Ohio Rev. Code. Ann. § 5815.36 (West 2015). Section 31-1-103 of the Tennessee Code Annotated sets forth the law governing Tennessee disclaimers. In Texas, disclaimers are governed by the Probate Code. TEX. ESTATES CODE ANN. §§ 122.002-153 (WEST). In Washington, disclaimers are governed by RCW §§ 11.86.011-090.

[174] WASH. REV. CODE ANN. § 26.16.020; *In re Dougherty's Estate*, 27 Wash. 2d 11, 176 P.2d 335 (1947); *Burch v. Rice*, 37 Wash. 2d 185, 222 P.2d 847 (1950).

[175] *deElche v. Jacobsen*, 95 Wash. 2d 237, 622 P.2d 835 (1980).

[176] *Id.*

[177] WASH. REV. CODE ANN. § 26.16.200.

[178] *Caplan v. Sullivan*, 37 Wash. App. 289, 679 P.2d 949 (Div. 1 1984).

[179] WASH. REV. CODE ANN. § 26.16.200.

[180] *Id*. § 26.16.120.

[181] *Smith v. Idaho State University Federal Credit Union*, 114 Idaho 680, 685, 760 P.2d 19, 24 (1988); *Twin Falls Bank & Trust Co. v. Holley*, 111 Idaho 349, 352, 723 P.2d 893, 896 (1986); *Williams v. Paxton*, 98 Idaho 155, 164, 559 P.2d 1123 (1976).

[182] CAL. FAM. CODE. ANN. § 910.

[183] *Id*. § 913.

[184] *Id*. § 911.

[185] *Id*. § 914.

[186] The Texas Family Code provides that each spouse has the sole management, control, and disposition of personal earnings, revenue from separate property, recoveries for personal injury, the increase and mutations of, and the revenue from, all property subject to the spouse's sole management, control, and disposition. TEX. FAM. CODE ANN. § 3.102(a). Otherwise, it is considered to be under joint control.

[187] TEX. FAM. CODE ANN. §§ 3.201-3.202

[188] *Id*. § 3.202(a).

[189] *See, e.g.*, *Morton v. Morton*, 147 A.2d 150 (Pa. 1959).

[190] The UTC was completed by the Uniform Law Commissioners in 2000, and amended in 2001, 2003, 2004, 2005 and 2010. The goal of the UTC was to "provide States with precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code will for the first time provide a uniform rule. The Code also contains a number of innovative provisions." UTC PREFATORY NOTE. Twenty-six jurisdictions have adopted versions of the UTC: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming . New Jersey introduced the UTC in 2013. "Legislative Fact Sheet, Trust Code," http://www.nccusl.org/LegislativeFactSheet.aspx?title=Trust Code.

[191] UTC § 505. *See* ALA. CODE § 19-3B-505; FL. STAT. ANN.. § 736.0505; N.C. GEN. STAT. ANN.. § 36C-5-505; 20 PA. CONS. STAT. ANN. § 7745; S.C. ST. § 62-7-505; TENN. CODE ANN. § 35-15-505; VA. CODE ANN. § 55-545.05.

Although Ohio has adopted the Uniform Trust Code, it has also created a type of self-settled asset protection trust called a "legacy trust" and so has significantly changed its version of UTC § 505. Ohio splits its version into 2 sections, one addressing "Attachment of mandatory distributions absent spendthrift provision" and one entitled "right of settlor's creditors- right of withdrawal." OHIO REV. CODE ANN. §§ 5805.05-5805.06. Section 5805.05 allows courts to authorize creditor attachment of mandatory distributions or to reach a beneficiaries interest by other means, if a trust does not contain a spendthrift provision. The court also has the power to limit an award "to the relief that is appropriate under the circumstances". A court should consider factors including the support needs of the beneficiary, his or her spouse and or dependent children, and the supplemental needs of the beneficiary. *Id*. § 5805.05 also allows for attachment regardless of whether a trust has a spendthrift provision is a distribution is mandatory and the trustee has not made the distribution within a reasonable time after the designated distribution date. *Id*. § 5805.05(B).

5805.06 allows a creditor to attach to the property of a revocable trust during the lifetime of the settlor regardless of whether or not the trust contains a spendthrift provision. *Id*. § 5805.06(A)(1). 5805.06(2) provides that except to the extent that a so-called "legacy trust" is established, a creditor of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. *Id*. § 5805.06(A)(2). The holder of a power of withdrawal is treated the same as a settlor for the purposes of (A). *Id*. § 5805.06.

[192] In California, the Probate Code denies protection against creditors to self-settled spendthrift trusts. CAL. PROB. CODE § 15304.

Georgia law provides that if a debtor creates a trust for his or her own benefit, the spendthrift provision is not valid with respect to the debtor to the extent of the proportion of the trust property attributed to his or her contribution. GA. CODE ANN. §53-12-80(f); *see also Street v. Street*, 263 Ga. 166, 430 S.E.2d 348 (1993). However, § 53-12-80(f) does not apply to self-settled special needs trusts created pursuant to 42 U.S.C. § 1396p(d)(4)(A) or pooled community trusts created pursuant to 42 U.S.C. § 1396p(d)(4)(C). GA. CODE ANN. §53-12-80(f).

In Idaho, self-settled spendthrift trusts are governed by IC 15-7-502. Paragraph (4) of the statute provides that "[i]f a person is both a settlor and beneficiary of the same trust, a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest in such trust does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate that relates to the portion of the trust that was contributed by the settlor." This does not apply, however, to irrevocable trusts created by the settlor and taxed for federal income tax purposes pursuant to the grantor trust rules of the Internal Revenue Code, "if the settlor's only beneficial interest in such trust consists of the right to receive a distribution from such trust in an amount equal to or less than the amount of the federal and state income tax liability incurred by the settlor as a result of such trust being characterized as a grantor trust…."

In Illinois, self-settled spendthrift trusts are governed by 735 ILCS 5/2-1403; this section provides that self-settled spendthrift trusts are not valid under Illinois law.

In New Jersey it is quite clear that when an individual creates a trust for his or her own benefit, he or she cannot by that mechanism alone insulate the assets in the trust from the claims of his or her own creditors. *See* N.J.S.A. 3B:11-1, which provides "The right of any creator of a trust to receive either the income or the principal of the trust or any part of either thereof, presently or in the future, shall be freely alienable and shall be subject to the claims of his creditors, notwithstanding any provision to the contrary in the terms of the trust."

New York denies creditor protection to "self-settled spendthrift trusts" because it is against public policy for an individual to be able to have access to assets while protecting them from proper creditors: "A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator." N.Y. EST. POWERS & TRUSTS LAW § 7-3.1 (McKinney 2007).The settlor's creditors can reach the full interest retained by the settlor in a self-settled trust without alleging or proving that the transfer to the trust was a fraudulent conveyance:

> "[W]hen a person creates for his own benefit a discretionary trust, his creditors can reach the maximum amount which the trustee under the terms of the trust *could* pay to him or apply for his benefit, even though the trustee in the exercise of his discretion wishes to pay nothing to the beneficiary or his creditors, and even though the beneficiary could not compel the trustee to pay him anything." *Vanderbilt Credit Corp v. Chase Manhattan Bank, NA*, 100 A.D.2d 544 (N.Y. App. Div. 1984).

Oregon's statue settles the issue of whether a living trust provides creditor protection during the settlor's lifetime. *See, e.g., id.* § 130.315. Except to the extent that the settlor of an irrevocable trust is specifically limited as to the amount that the trustee may distribute to him or her (e.g., a trust providing that discretionary distributions to the settlor may not exceed one-half of the trust principal), all revocable and virtually all irrevocable trusts in which the settlor retains a right to distributions will be fully available for attachment and execution by the settlor's creditors during his or her lifetime.

In Texas, when a settlor is also a beneficiary, "a provision restraining the voluntary or involuntary transfer of the settlor's beneficial interest does not prevent the settlor's creditors from satisfying claims from the settlor's interest in the trust estate." TEX. PROB. CODE 112.035(D). Texas specifically provides that a settlor is not considered a beneficiary "solely because a trustee who is not the settlor is authorized . . to pay . . any tax on trust income or principal that is payable by the settlor under the law imposing the tax. *Id*. Likewise, Texas law also provides that a beneficiary is not considered a settlor in certain situations, described in Tex. Prob. Code 112.035 (e) and (f).

In Washington, self-settled spendthrift trusts are governed by RCW 19.36.020. In a bankruptcy case in the Western District of Washington, the Bankruptcy Court found that where debtors executed a quit-claim deed transferring their residence to a self-settled spendthrift trust, not only was such transfer a fraudulent transfer and therefore void as to debtors' creditors, the transfer of an asset to a self-settled spendthrift trust of which debtors were settlors, trustees and beneficiaries was void as to debtors' creditors. *In re Wallaert*, 149 B.R. 665 (W.D. Wash. 1992).

[193] *See Is Your Trust Well Placed?*, FORBES (June 16, 1997).

[194] *See* discussion *infra* Part II.E.10.

[195] *See* Private Ltr Rul. 9837007; Private Ltr Rul. 200944002.

[196] ALASKA STAT. § 34.40.010(b)(1) (2005). Section 34.40.110(d) generally imposes a four-year limitation on such attacks. A person may not bring an action with respect to a claim that a transfer was intended in whole or in part to hinder, delay, or defraud creditors or other persons if the person (1) is a creditor when the trust is created unless the action is "brought within the later of (A) four years after the transfer is made; or (B) one year after the transfer is or reasonably could have been discovered by the" person; or "(2) becomes a creditor subsequent to the transfer" unless the action is brought within four years after the transfer is made.

[197] *Id.* § 34.40.010(b)(2).

[198] *Id.* § 34.40.010(b)(3).

[199] *Id.* § 34.40.010(b)(4).

[200] 484 B.R. 182 (B.A.P. 9th Cir. 2012).

[201] The court applied the Restatement (Second) of Conflict of Laws, which provides that the settlor's choice of law normally applies to a trust, so long as application of that state's law "does not violate a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship." Because the settlor and all the beneficiaries were Washington residents, and all the trustees except the corporate trustee (who the court found was a "straw man" and did not actually participate in the administration of the trust) were Washington residents, and because all of the assets, except for $10,000, were located in Washington and not Alaska, the court found that Washington had the most significant relationship with the trust.

Citing the Revised Code of Washington § 19.36.020, which makes transfers to self-settled trusts void against existing or future creditors, the court found that Washington has a strong public policy against self-settled asset protection trusts, and therefore declined to apply Alaska law and applied Washington law instead. The court therefore found that the settlor's transfer of assets to the Alaska Trust void.

In re Huber, 201 B.R. 685 (Bankr. W.D. Wash.).

[202] ALASKA STAT. § 13.36.035(c)(4).

[203] *Id.* §§ 13.36.390(2)(A)-(C).

[204] *Id.* § 13.36.035(c)(3).

[205] Codified as title 12 of the Delaware Code, sections 3570-3576.

[206] *See* discussion *supra* Part II.E.4. Rhode Island enacted a statute modeled very closely on the Delaware statute (before the Delaware statute was amended in 2000) in July 1999. *See* R.I. GEN. LAWS §§ 18-9.2-1 to -7 (2005). In addition, South Dakota also enacted a statute in June 2005 modeled after the Delaware statute. *See* S.D. CODIFIED LAWS §§ 55-16-1 to -16 (2005).

[207] *Id.* § 3572.

[208] *Id.* § 3573.

[209] 12 DEL. CODE ANN. § 3574 (2005).

[210] *Id.* § 3572(b)(1). The Delaware Act's statute of limitations in section 3572(b) is identical to that of the Alaska Act. *See supra* note 193 and accompanying text. Title 6, sections 1304 and 1305 of the Delaware Code describe fraudulent transfers.

[211] *See* discussion *supra* Part II.E.5.

[212] *TrustCo Bank v. Mathews*, C.A. No. 8374-VCP, V.C. Parsons (Del. Ch. Jan. 22, 2015).

[213] 12 DEL. CODE ANN. § 3570(a).

[214] 12 DEL. CODE ANN. § 3570(b).

[215] NEV. REV. STAT. §§ 166.010-170 (2005).

[216] *Id.* § 166.040.

[217] *Id.* §§ 166.170(1)(a), 166.170(2).

[218] *Id.* § 166.170(1)(b).

[219] *Dahl v. Dahl*, 2015 UT 23 (2015).

[220] *Id.* § 166.015.

[221] *Id.*

[222] COLO. REV. STAT. § 38-10-111 (1861).

[223] HAW. REV. STAT. 554G (Act 182; 2010 Regular Session).

[224] Miss. Code § 91-9-701, *et seq.*

[225] MO. ANN. STAT. §§ 356.501 to 507 (2005).

[226] NH STAT. § 564-D (2009).

[227] OHIO REV. CODE. ANN. §§ 5816.01-14. Ohio's version of domestic asset protection trusts are called "legacy trusts." *Id*. at 5816.02.

[228] OKLA. STAT. ANN. TIT. 31 §§ 10-18 (2005).

[229] R. I. GEN. LAWS §§ 18-9.1-1, 18-9.2 (1999).

[230] 2005 SD SESS. LAWS CH. 261 (2005).

[231] TENN. CODE ANN. §§ 35-16-102, 35-16-104 (2007).

[232] UTAH CODE ANN. § 25-6-14 (2005).

[233] VA CODE ANN. §§ 55-545.03:2 and 55-545.03:3

[234] W. VA CODE §§ 44D-5-503a, -503b, -503c, and -505 (2016).

[235] WYO. STAT. §§ 4-1-505, 4-10-510 to 523 (2007).

[236] FL. STAT. ANN. §736.0505(3) (effective July 1, 2010).

[237] 12 DEL. CODE § 3536(c)(2).

[238] VA. CODE ANN. § 55-545.05(B)(3).

[239] ARIZ. REV. STAT. § 14-10505(E).

[240] Ky. Rev. Stat. § 381.180.

[241] Md. Code Ann., Estates & Trusts § 14-116.

[242] MICH. COMP. LAWS § 700.7506(4).

[243] N.C.G.S. § 36C-5-505(c).

[244] ORS 130.315.

[245] S.C. Code Ann. § 62-7-505.

[246] Texas Prop. Code § 112.035(g).

[247] 11 U.S.C. § 548(e)(1).

[248] *Id.*

[249] *Battley v. Mortensen*, Adv. No. A09-90036-DMD (Bankr. D. Alaska 2011).

[250] *In re Huber*, 2013 WL 2154218 (Bankr. W.D. Wash.). See *supra* note 148 and accompanying text for a summary of the bankruptcy court's ruling as to choice of law.

[251] *Id*. at *10.

[252] *Id*. at *12.

[253] *Id*.

[254] *See Sproul-Bolton v. Sproul-Bolton*, 117 A.2d 688 (Pa. 1955). *See e.g.*, 20 PA. CONS. STAT. ANN. § 6112 (providing that "[i]ncome of a trust subject to spendthrift or similar provisions shall nevertheless be liable for the support of anyone whom the income beneficiary shall be under a legal duty to support."); *See also Lippincott v. Lippincott*, 37 A.2d 741 (Pa. 1444)(holding that a predecessor to section 6112 applied only to support due an income beneficiary's existing family and not to alimony due an ex-wife). *In re Ware Trust*, 814 A.2d 725 (Pa. Super. Ct 2002); *Butcher Trusts*, 20 Fid. Rep. 2d at 99, 101-02 (Mont. Cty, O. C. 2000) (citing 20 PA. CONS. STAT. § 6112 (2000); RESTATEMENT (SECOND) OF TRUSTS § 157 (1959).

[255] *See* ALA. CODE §§ 19-3B-501–19-3B-507; FL. STAT. ANN.. §§ 736.0501–736.0507; OHIO REV. CODE ANN. §§ 5805.01–5905.07. S.C. STAT. ANN. §§ 62-7-501–62-7-507; N.C. GEN. STAT. ANN. §§ 36C-5-501–36C-5-508; 20 PA. C.S. §§ 7741–7748; TENN. CODE ANN. §§ 35-15-501–35-15-507; VA. CODE ANN. §§ 55-545.01–55-545.07.

[256] UTC § 501.

[257] *Id.* § 502.

[258] *Id.* § 503. Pennsylvania differentiates between the potential rights of a child with a judgment for support and maintenance to both income and principal from the creditor's trust (20 PA. CONS. STAT. ANN. § 7743(b)(1)) compared to the potential rights of a spouse (or any other party) with a judgment for support and maintenance only to the income from the creditor's trust (20 N.C. GEN. STAT. ANN. § 7743(b)(2)). North Carolina and South Carolina limit the exception from creditor protection only to a beneficiary's child who has a judgment or court order against a beneficiary for support and maintenance. N.C. GEN. STAT. ANN. § 36C-5-503(b); S.C. CODE ANN. § 62-7-503(b) (in addition, South Carolina provides that the exception does not apply against a special needs trust or supplemental needs trust for a disabled beneficiary if the provision would invalidate the trust's exemption from consideration as a countable resource for Medicaid or Supplemental Security Income. *Id*. § 62-7-503(c)). Ohio specifically provides that a spendthrift provision is enforceable against a former spouse. OHIO. REV. CODE ANN. § 5805.02.

[259] UTC § 504. Pennsylvania also permits income (but not principal) from a trust for the creditor's benefit to be used to satisfy a judgment against the creditor for the support and maintenance of any person other than the creditor's child. 20 PA. CONS. STAT. ANN. § 7744(c)(2). North Carolina, South Carolina and Virginia limit the ability of a court to compel distributions from a trust only to satisfy a court order against the creditor for the support and maintenance of the creditor's child. N.C. GEN. STAT. ANN. § 36C-5-504(d); S.C. STAT. ANN. § 62-7-504(d); VA. CODE ANN. § 55-545.04(c). Florida omits subsection (c) of UTC § 504 altogether. FL. STAT. ANN. § 736.0504.

[260] UTC § 505.

[261] *Id.* § 506.

[262] The California Probate Code defines the scope of California's spendthrift protections and the exceptions thereto at §§ 15300 – 15309.

For Connecticut, see generally Section 321 of Chapter 904 (Attachments) of Title 52 (Civil Actions) of the General Statutes and related case law.

In Georgia, a creditor's ability to reach trust assets is generally limited to the beneficiary's vested interest. For example, if the trust instrument requires the trustee to distribute the income currently to the beneficiary or gives the beneficiary the unrestricted right to withdraw the principal, the creditor will likely be able to attach such an interest. If however, the trust instrument contains a spendthrift provision, the creditor cannot reach the beneficiary/debtor's interest until it is actually distributable to the beneficiary, subject to the significant exceptions. *See* GA. CODE ANN. §53-12-80. Another type of interest in which creditor's rights are severely limited is a legal life estate created by another where the beneficiary/debtor's interest is simply a right of use or occupancy. Under newly-enacted law, similar to UTC §505(b)(1), creditors may reach assets subject to the beneficiary's power of withdrawal. *Id.* at § 53-12-83. However, unlike UTC 505(b)(2), the lapse, release or waiver of a power of withdrawal shall *not* cause the holder to be treated as a settlor of the trust. *Id*.

In Idaho, spendthrift trusts are recognized and stating that a trust is a spendthrift trust is sufficient to invoke the spendthrift trust protection under IDAHO CODE ANN. §15-7-502. The statute further provides that a beneficiary is not considered the settlor of the trust merely because of a lapse, waiver or release of a power of appointment over the trust or the right to withdraw a part of the trust property greater than the amount specified in §§ 2041(b)(2), 2514(e) or 2503(b) of the Internal Revenue Code. *Id*. § 15-7-502(5). Additionally, a beneficiary is not considered the settlor of a trust for his or her benefit if he or she has a special or testamentary power of appointment or has the power to use the trust assets for his or her own benefit subject to an ascertainable standard. *Id.* § 5-17-502(6). Based on the foregoing, the Idaho Bankruptcy Court held that a creditor is entitled to the remainder of a debtor's interest in a trust for her benefit but not entitled to the debtor's interest in principal or income from the trust. *In re Dias*, 37 B.R. 584 (Bankr. D. Idaho 1984).

Illinois recognizes spendthrift trusts. *E.g. Geiger v. Geer*, 395 Ill. 367 (1946). "To determine whether a trust qualifies as a spendthrift trust under Illinois law, courts examine the following characteristics: (1) whether the trust restricts the beneficiary's ability to alienate and the beneficiary's creditors' ability to attach the trust corpus; (2) whether the beneficiary settled and retained the right to revoke the trust, and [3] whether the beneficiary has exclusive and effective dominion and control over the trust corpus, distribution of the trust corpus and termination of the trust. The degree of control which a beneficiary exercises over the trust corpus is the principal consideration under Illinois law." Matter of Perkins, 902 F.2d 1254, 1257 n.2 (7th Cir. 1990) (internal citations omitted).

While Illinois law provides for garnishment of wages to collect past-due child support *In re Matt*, 105 Ill. 2d 330, 735 ILCS 5/2-1403, it does not allow garnishment of wages for future support. *In re Marriage of Chapman,* 697 N.E.2d 365, 370 (Ill. App. 1998).

Practitioners should be mindful of the United States Bankruptcy Court's recent ruling in *In re Castellano*, 11 B.R. 46854 (N.D. Ill. 2014), in which the court applied Section 548(e) of the Bankruptcy Code to disregard a third-party trust containing spendthrift provisions created by the mother of a debtor for the benefit of the debtor. The court concluded that the debtor transferred assets to a "device" similar to a self-settled trust with the intent to delay or hinder creditors where, during the course of settlement of the mother's estate and trust following her death, the debtor's attorney wrote a letter to the trustee indicating that the debtor was insolvent and that the trustee should act in accordance with the spendthrift provisions of the mother's trust. The court reasoned that the debtor had effectuated an indirect transfer by refusing to accept a distribution of trust assets and directing the trustee to distribute assets to the spendthrift trust. At least one commentator has suggested that the bankruptcy court "got in wrong" in *Castellano* and notes that the case is not mandatory authority for any other court. *LISI* Asset Protection Planning Newsletter #259 (Sept. 10, 2014).

In New York, creditors' rights against a trust beneficiary are hindered by spendthrift provisions when the beneficiary is not the settlor of the trust. In fact, a beneficiary's rights cannot be "transferred by assignment or otherwise" unless a power to do so is given to the beneficiary by the trust instrument. N.Y. EST. POWERS & TRUSTS LAW § 7-1.5 (McKinney 2007).

In Oregon, the relevant provisions can be found at OR. REV. STAT. ANN. § 130.300 *et seq*.

In Washington, trusts that contain express spendthrift provisions are governed by common law. Trusts that do not contain spendthrift provisions are exempted from seizure by judgment creditors so long as the trust is created by someone other than the debtor. WASH. REV. CODE ANN. § 6.32.250. Income created by a person other than the debtor will not be protected, however, against a child support order or claims for necessities or alimony. A trustee in bankruptcy may not reach the trust assets. *In re Finley*, 286 B.R. 163, 49 Collier Bankr. Cas. 2d 1233 (Bankr. W.D. Wash. 2002).

Where a trust does contain a spendthrift provision, the provision will be held valid unless it violates public policy. For example, in *Erickson v. Bank of California*, 97 Wash. 2d 246, 643 P.2d 670 (Wash. 1982), the Supreme Court of Washington found that claims for necessities, support of a spouse or child and claims for alimony can be recovered from a spendthrift trust. The court had already determined that even a spendthrift trust may be subjected to the support of a wife or child, and now determined that a bankruptcy trustee may invade a spendthrift trust in the place of creditors who furnished necessities to the beneficiary. *Knettle v. Knettle*, 197 Wash. 225, 84 P.2d 996 (1938). Spendthrift trusts are thereby sanctioned for the purpose of providing the beneficiary with living expenses which applies equally to suppliers of necessities. *Id.* The *Erickson* court also stated that unlike statutes in other states, WASH. REV. CODE ANN. § 6.32.250 has the effect of clothing "every active trust with statutory spendthrift provisions," thereby extending statutory protection to all trusts created for third parties.

In Texas, the Texas Property Code authorizes spendthrift trusts in section 112. TEX. PROP. CODE § 112.035 A court may order a trustee of a spendthrift trust to make disbursements for the support of a child pursuant to Tex. Fam. Code § 154.005.

[263] 704 So. 2d 1020 (Miss. 1997).

[264] 782 A.2d 410 (N.H. 2001).

[265] *Id* at 412-413.

[266] *See* discussion *supra* Part II.B.

[267] U.L.P.A (2001) Prefatory Note.

[268] *Id.*

[269] The Act is found in the California Corporations Code at §§ 15900 *et seq.*

[270] The Act is found in Title XXXVI of the Florida Statutes, at §§ 620.1101 *et seq*.

[271] The Act is found in 805 ILCS 215/101, *et. seq.*

[272] Washington has adopted the 2001 Act. The Act is found in Chapter 25, Section 10 of the Revised Code of Washington.

[273] Georgia has adopted a slightly modified version of RULPA. The Act is found in Ga. Code Ann. Title 14, "Corporations, Partnerships, and Associations", Chapter 9 at §§100 *et seq.*

[274] New Jersey has adopted RULPA. The Act is found in Title 42 of New Jersey Statutes Annotated, at §§ 2A-1 *et seq.*

[275] New York's Revised Limited Partnership Act ("Revised Act") generally follows the 1985 Amendments to the 1976 Act. It also follows some portions of NY's prior limited partnership act, and incorporates some concepts from New York's Business Corporation Law. N.Y. P'SHIP LAW §§ 121-101 to 121-1300 (McKinney 2001). The sections quoted in this outline generally track the language in the 1976 RULPA.

[276] North Carolina has adopted RULPA. The Act is found in Chapter 59 of the North Carolina General Statutes, at §§ 59-101 *et seq*.

[277] Ohio has adopted RULPA. The act is found in Chapter 15 of the Ohio Revised Code annotated, at Ohio Rev. Code Ann. §§ 1782.01 *et seq.*
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[278] 15 PA. CONS. STAT. ANN. §§ 8501-8594 (2005).

[279] South Carolina has adopted RULPA. The Act is found in Title 33 of the South Carolina Code of Laws, at §§ 33-42-10 *et seq*.

[280] Tennessee has adopted RULPA. The Act is found in Title 21 of the Tennessee Code, at §§ 61-2-101 *et seq*.

[281] Many states refer to their version of the 2001 Act as the Revised Uniform Limited Partnership Act, or "RULPA", while in its official materials on the 2001 Act, the Uniform Laws Commission refers to the 1976 Act as "RULPA". This outline will refer to the 2001 version as the "2001 Act" as such to avoid confusion.

[282] Virginia has adopted RULPA. The Act is found in Title 50, "Partnerships" of the Code of Virginia, at §§ 50-73.1 *et seq*.

[283] West Virginia has adopted RULPA. The Act is found in Chapter 47 of the West Virginia Code, at §§ 47-9-1 *et seq*.

[284] A chart of the significant differences between RULPA and ULPA is available on the Uniform Laws Commission website at http://www.uniformlaws.org/shared/docs/limited%20partnership/ulpa_final_2001rev.pdf.

[285] 15 PA. CONS. STAT. ANN. § 8523; R.U.L.P.A. § 703 (1976, amended 1985); U.L.P.A. § 703 (2001).

[286] This outline does not discuss the other primary (and in some cases, more compelling) reason for using LPs as an estate planning tool–discounting the value of assets in the partnership for transfer tax purposes.

[287] *Id.* § 8563; R.U.L.P.A. § 703 (1976, amended 1985). The 2001 Act's corresponding section reads:

On application to a court of competent jurisdiction by any judgment creditor of a partner or a transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require to give effect to the charging order.

U.L.P.A. § 703(a) (2001).

Unlike the 1976 Act, the 2001 Act goes on to provide:

A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure upon the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

U.L.P.A. § 703(b) (2001).

[288] *Id.* *See* PA. R.C.P. 3148 (providing the procedure to enforce a charging order).

Note also that in Pennsylvania and New York (unlike most other jurisdictions), a creditor may proceed either by charging order or by garnishment. Whether by charging order or garnishment, the creditor will be limited to his debtor's economic interest in the LP.

Some jurisdictions, such as Virginia, expressly provide in their statute that a charging order is the exclusive remedy by which a judgment creditor of a partner or of a partner's assignee may satisfy a judgment out of the judgment debtor's transferable interest in the limited partnership. VA. CODE ANN. § 50-73.46:1.

[289] 15 PA. CONS. STAT. ANN. § 8563; R.U.L.P.A. § 703 (1976, amended 1985). The corresponding section of the 2001 act refers to a "transferee" rather than an "assignee" and goes on to define charging order. *See supra* note 214, *supra*.

[290] *Id.*

[291] *See* Rev. Rul. 77-137, 1911-1 C.B. 178.

[292] U.L.P.A. § 303 (2001).

[293] 763 A.2d 252 (Md. Ct. Spec. App. 2000), *cert. denied*, 363 Md. 206, 768 A.2d 55 (2001), *and cert. denied*, 534 U.S. 824, 122 S. Ct. 60, 151 L. Ed. 2d 28 (2001)

[294] *Olmstead, et al. v. Federal Trade Commission*, SC08-1009 (Fla. 2010).

[295] *See* FL. STAT. § 620.1703.

[296] FL. STAT. § 608.433(5).

[297] *Id.* § 608.433(6).

[298] 15 PA. CONS. STAT. ANN. § 8345.

[299] *See, e.g., Nigri v. Lotz*, 453 S.E.2d 780 (Ga. Ct. App. 1995); *Auburn Steel v. Am. Steel Eng'g*, No. Civ. A. 91-5747, 1993 WL 257379 (E.D. Pa. July 2, 1993), *aff'd*, 22 F.3d 300 (3d Cir. 1994).

This is not the case in "exclusive remedy" jurisdictions like Virginia.

[300] *Zavodnick v. Leven*, 773 A.2d 1170, 1175 (N.J. Super. Ct. App. Div. 2001).

[301] *Id.*

[302] 15 PA. CONS. STAT. ANN. § 8127(a).

[303] *See, e.g., Continental Bank v. Abrams*, 47 Pa. D. & C. 3d 582, 586 (Pa. Ct. Com. Pl. 1987); *E. Lithography Corp. v. Neville*, 198 A.2d 391, 394 (Pa. Super. Ct. 1964) (citation omitted).

[304] UNIF. FRAUDULENT TRANSFERS ACT prefatory note (1998).

[305] UNIF. FRAUDULENT CONVEYANCE ACT (1918).

[306] UNIF. FRAUDULENT TRANSFERS ACT prefatory note (1998) (citation omitted).

[307] UNIF. FRAUDULENT TRANSFERS ACT prefatory note (1998).

[308] UNIF. FRAUDULENT TRANSFERS ACT historical notes (1998).

[309] UNIF. FRAUDULENT TRANSFERS ACT table of jurisdictions.

[310] N.C. GEN. STAT. ANN.. § 39-23.7(a)(1); GA. CODE ANN. § 18-2-77(a)(1); FLA. STAT. ANN. § 726.108(1)(a); W. VA. CODE ANN. § 40-1A-7(a)(1); A trustee in bankruptcy has the same remedy under analogous provisions of the federal bankruptcy code. *See* 11 U.S.C. § 548(a)(1).

[311] N.C. GEN. STAT. ANN. § 39-23.7(a); GA. CODE ANN. § 18-2-77(a); FLA. STAT. ANN. § 726.108(1); W. VA. CODE ANN. § 40-1A-7(a).

[312] UNIF. VOIDABLE CONVEYANCE ACT § 10 (2014).

[313] LISI Asset Protection Planning Newsletter #317 (Mar. 15, 2016) at http://www.LeimbergServices.com ((George Karibjanian, J.J. Wehle, Robert Lancaster and Michael Sneeringer, *New Uniform Voidable Transactions Act: Good for the Creditors' Bar, But Bad for the Estate Planning Bar? Part Two*).

[314] UNIF. VOIDABLE CONVEYANCE ACT § 10 (2014).

[315] Uniform Law Commission, Legislative Fact Sheet (http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Voidable Transactions Act Amendments (2014) - Formerly Fraudulent Transfer Act).

[316] CAL. CIV. CODE § 3739.001 *et. seq.*

[317] CONN. STAT. CH. 923a.

[318] FLA. STAT. ANN. §§ 726.101 to 726.112.

[319] GA. CODE ANN. §§ 18-2-70 – 18-2-80.

[320] 740 ILCS 160/.

[321] N.C. GEN. STAT. §§ 39-23.1 – 39-23.12.

[322] OHIO REV. CODE ANN. § 1336.01 *et. seq.*

[323] TEX. BUS. & COM. CODE ANN. § 24.001 *et seq.*

[324] W. VA. CODE §§ 40-1-A-1 – 40-1-A-12.

[325] New York has not codified UFTA and continues to rely on the provisions of UFCA. N.Y. DEBT. & CRED. LAW §§ 270-281. Under the New York UFCA, a creditor may avoid a fraudulent transfer "to the extent necessary to satisfy the creditor's claim." *Id*. at §278. (Note that a trustee in bankruptcy has the same remedy under the analogous provisions of the federal bankruptcy code. See 11 U.S.C. § 548(a)(1).) The statute also permits other remedies, including attachment, injunction, and appointment of a receiver. N.Y. DEBT. & CRED. LAW §§278-79.

[326] South Carolina's fraudulent transfer laws are codified at S.C. Code Ann. §§ 27-23-10 to 27-23-90.

[327] Virginia's fraudulent transfer laws are codified at Va. Stat. Ann. §§ 55-80 to 55-96.

[328] N.C. GEN. STAT. ANN. § 39-23.1(3); GA. CODE ANN. § 18-2-71(3); FLA. STAT. ANN. § 726.102(3); W. VA. CODE ANN. § 40-1A-1(c). Although the N.Y. UFCA does not define a "claim", UFTA's definition is consistent with New York case law. *See, e.g.* Shelly v. Doe, 173 Misc. 2d 200 (N.Y. Co. Ct. 1997), *aff'd as modified*, 249 A.D. 2d 756 (N.Y. App. Div. 1998) (cause or right of action possessed by abused child based upon her abuser's completed intentional tort qualified as unmatured and unliquidated claim and rendered child both a "claimant" and a "future creditor" within the meaning of the NY statute).

[329] *See generally*, N.C. GEN. STAT. ANN. §§ 39-23.4 and 39-23.5; GA. CODE ANN. §§ 18-2-75 and 18-2-76; FLA. STAT. ANN. §§ 726.105 and 726.106; W. VA. CODE ANN. §§ 40-1A-4 and 40-1A-5.

[330] N.C. GEN. STAT. ANN. §§ 39-23.6(1); Ga. Code Ann. §§ 18-2-76(1); FLA. STAT. ANN. §§ 726.107(1); W. VA. CODE ANN. §§ 40-1A-6(a). N.Y. DEBT. & CRED. LAW §§ 273-76.

[331] N.C. GEN. STAT. ANN. §§ 39-23.6(4); GA. CODE ANN. §§ 18-2-76(4); FLA. STAT. ANN. §§ 726.107(4); W. VA. CODE ANN. §§ 40-1A-6(a)(1)(D).

[332] *See* discussion *supra* Part II.B.7.

[333] UNIF. VOIDABLE CONVEYANCE ACT § 1(16) (2014).

[334] N.C. Gen. Stat. Ann. §§ 39-23.1(2); Ga. Code Ann. §§ 18-2-71(2); Fla. Stat. Ann. §§ 726.102(2); W. Va. Code Ann. §§ 40-1A-1(B).

In New York, an asset of a debtor means "property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets." N.Y. DEBT. & CRED. LAW § 270.

[335] *See* discussion *supra* Part II.B.2.

[336] N.C. GEN. STAT. ANN. §§ 39-23.4(a); GA. CODE ANN. §§ 18-2-74(a); FLA. STAT. ANN. §§ 726.105(1); W. VA. CODE ANN. §§ 40-1A-4(a).

[337] *Id.* The New York UFCA uses the phrase "either present or future creditors" in lieu of "any creditor of the debtor." N.Y. DEBT. & CRED. LAW § 276.

In New York, the necessary intent a creditor must prove to set aside a conveyance as fraudulent depends upon the classification of the debtor. The different classifications are:

a. Conveyances by insolvent (intent is irrelevant). *Id.* § 273. (Insolvency is defined at § 271).
b. Conveyances by defendants (intent is irrelevant if, after the final judgment for the plaintiff, the defendant fails to satisfy the judgment). *Id*. §§ 273-a.
c. Conveyances by persons in business (intent is irrelevant if, after the transfer, the remaining property in the business person's capital is "unreasonably small"). *Id* § 274.
d. Conveyances by a person about to incur debts (such conveyance is fraudulent if the debtor believes he or she will incur debts beyond his or her ability to pay them as they mature). *Id.* § 275.
e. Conveyance made with intent to defraud (such a conveyance is per se fraudulent regardless of intent). *Id*. § 276.
f. Conveyance of partnership property (conveyance of property which renders the partnership insolvent is fraudulent if the conveyance is made to a partner in the partnership (even if there is a promise to pay partnership debts) or to a person who is not a partner who does not supply adequate consideration. *Id*. §277.

[338] *See, e.g.*, *Continental Bank v. Marcus*, 363 A.2d 1318 (Pa. Super. Ct. 1976).

[339] N.C. GEN. STAT. ANN. §§ 39-23.4(b); GA. CODE ANN. §§ 18-2-74(b); FLA. STAT. ANN. §§ 726.105(2); W. VA. CODE ANN. §§ 40-1A-4(b).

[340] *Id*.

[341] *Floyd v. Goodwin*, 16 Tenn. 484 (1835).

[342] *Liebersohn v. Campus Crusade for Christ, Inc. (In re C.F. Foods, L.P.)*, 280 B.R. 103, 109 (Bankr. E.D. Pa. 2002).

[343] *In re Laines*, 352 B.R. 397, 403 (Bankr. E.D. Va 2005) (citations omitted).

[344] *In re Haddock*, 246 B.R. 810, 815 (Bankr. D.S.C. 2000) (*citing Coleman v. Daniel*, 261 S.C. 198, 199 S.E. 2d 74, 79 (1973).

[345] *See, e.g. In re Borriello*, 329 B.R. 367 (2005) (factors to consider under NYUFCA include (1) the lack of inadequacy of consideration; (2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the party sought to be charged both before and after the transaction in question; (5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (6) the general chronology of the events and transactions under inquiry).

[346] N.C. GEN. STAT. ANN. §§ 39-23.4(a)(2); GA. CODE ANN. §§ 18-2-74(a)(2); FLA. STAT. ANN. §§ 726.105(1)(b); W. VA. CODE ANN. §§ 40-1A-4(a)(2).

[347] *Id*.

[348] *Id*.

[349] N.C. GEN. STAT. ANN. §§ 39-23.5; GA. CODE ANN. §§ 18-2-75; FLA. STAT. ANN. §§ 726.106; W. VA. CODE ANN. §§ 40-1A-5; *accord* VA. CODE ANN. § 55-81. Although South Carolina's version of the Statute of Elizabeth does not contain language directly on point, the Courts of South Carolina have interpreted the statute as allowing a creditor to recover for constructive fraud akin to that set forth in UFTA (i.e. claim pre-dated transfer, transfer for less than reasonably equivalent consideration, debtor insolvent at the time of the transfer or rendered insolvent by the transfer); *see, e.g., In re Derivium Capital, LLC*, 380 B.R. 429, 437 (Bankr. S.C. 2006).

[350] *Id.*; *accord* Va. Code Ann. § 55-81; *In re Derivium Capital, LLC*, 380 B.R. 429, 437 (Bankr. S.C. 2006).

[351] *Id.*; *see also* N.C. GEN. STAT. ANN. §§ 39-23.2; GA. CODE ANN. §§ 18-2-72; FLA. STAT. ANN. §§ 726.103; W. VA. CODE ANN. §§ 40-1A-2 (each of which defines insolvency); *accord* VA. CODE ANN. § 55-81; *In re Derivium Capital, LLC*, 380 B.R. 429, 437 (Bankr. S.C. 2006).

[352] N.C. GEN. STAT. ANN. §§ 39-23.2(a); GA. CODE ANN. §§ 18-2-72(a); Fla. Stat. Ann. §§ 726.103(1); W. Va. Code Ann. §§ 40-1A-2(a).

[353] N.C. GEN. STAT. ANN. §§ 39-23.1(5); GA. CODE ANN. §§ 18-2-71(5); FLA. STAT. ANN. §§ 726.101(5); W. VA. CODE ANN. §§ 40-1A-1(e) (each of which defines a debt as "[l]iability on a claim").

[354] Under the UFCA in New York, "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." N.Y. DEBT. & CRED. LAW § 273.

[355] N.C. GEN. STAT. ANN. §§ 39-23.6(1); GA. CODE ANN. §§ 18-2-76(1); FLA. STAT. ANN. §§ 726.107(1); W. VA. CODE ANN. §§ 40-1A-6(a).

[356] *See* discussion *supra* Part II.B.7; *Tompkins State Bank v. Niles*, 537 N.E.2d 274 (Ill. 1989). New York courts agree with this analysis. *See e.g.*, *Estate of Vizzie*, 120 Misc.2d 161, 163 (N.Y. Sur. Ct. 1983); *Estate of Oot*, 95 Misc.2d 702, 707 (N.Y. Sur. Ct. 1978).

[357] 850 A.2d 748 (Pa. Super. Ct. 2004).

[358] 528 U.S. 49 (1999).

[359] *Niklason v. Ramsey*, 53 S.E 2d 783 (Va. 1987).

[360] *See* discussion *supra* Part II.C.

[361] N.C. GEN. STAT. ANN. §§ 39-23.1(2); GA. CODE ANN. §§ 18-2-71(2); FLA. STAT. ANN. §§ 726.102(2); W. VA. CODE ANN. §§ 40-1A-1(B).

[362] *In re* Borriello, 329 B.R. 367, 381 (Bankr. E.D.N.Y. 2005); *In re* Russo, 1 B.R. 369, 384-85 (Bankr. E.D. N.Y. 1979).

[363] *Russo*, 1 B.R. at 373 (citations omitted).

[364] *Krasny*, 257 B.R. at 769 *accord* Dolata v. Dolata, 306 B.R. 97, 115-16 (Bankr. W.D. Pa. 2004).

[365] *Dealer Supply Company v. Greene*, 108 N.C.App. 31, 422 S.E. 2d 350 (N.C. Ct. App. 1992).

[366] *Id.* at 33, 422 S.E. 2d at 351.

[367] *Id.* at 35, 422 S.E. 2d at 352-53.

[368] Id. at 36, 422 S.E. 2d at 353.

[369] *Krasny v. Nam*, 257 B.R. 749, 769 (Bankr. E.D. Pa. 2000); *accord Dolata v. Dolata*, 306 B.R. 97, 115-16 (Bankr. W.D. Pa. 2004).

[370] No. Civ. A. 03-CV-6331, 2004 WL 2700348 (E.D. Pa. Nov. 23, 2004).

[371] 28 U.S.C. § 3001-3308.

[372] *Sheehan*, 2004 WL 2700348, at *7.

[373] *Shubert v. Dawley (In re Dawley)*, Bankr. No. 01-32215DWS, Adversary No. 02-0332, 2005 WL 2077074 (Bankr. E.D. Pa. 2005).

[374] *Id.* at *4 (citation omitted).

[375] *Ford v. Poston*, 773 F.2d 52 (4th Cir. 1985).

[376] *Id.* at 53.

[377] *Id.* at 55.

[378] *Neshawat v. Salem*, 365 F.Supp.2d. 508, 520-21 (S.D.N.Y. 2005) (citing *A.L. Bazzini Co., Inc. v. Cappelini*, 282 A.D. 705, 122 N.Y.S. 2d 115 (N.Y. App. Div. 1953).

[379] N.C. GEN. STAT. ANN. §§ 39-23.1(3); GA. CODE ANN. §§ 18-2-71(3); FLA. STAT. ANN. §§ 726.102(3); W. VA. CODE ANN. §§ 40-1A-1(C).

[380] VA. CODE ANN. § 55-82.

[381] *Id.*

[382] *Lebovitz v. Mudd*, 293 S.C. 49, 52-53, 358 S.E. 2d 698, 700-01 (1987) (*citing*, among other authorities, South Carolina Rule of Civil Procedure 18(b), which addresses the joinder of claims, and states, *inter alia*, "in particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.").

[383] *See Triangle Bank v. Eatmon*, 143 N.C.App. 521, 547 S.E.2d 92 (2001) (evaluating transfer that occurred post-filing of litigation).

[384] 629 A.2d 1024 (1993).

[385] *Id.* at 1027.

[386] *In re Walter*, 261 B.R. 139 (Bankr. W.D. Pa. 2001).

[387] *Akanthos Capital Management, LLC v. CompuCredit Holdings Corp.*, 770 F.Supp.2d 1315, 1319 (N.D. Ga. 2011).

[388] *Id*. at 1320.

[389] *Id.* at 1328.

[390] *Id.*(citing Ga. Code Ann. § 18-2-71(3)).

[391] *Id.* at 1330.

[392] Under the NYUFCA, a "creditor" is defined as a "person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." This all-encompassing definition of a "creditor" aims to avoid hair-splitting and, typically, post-transfer justifications for the shifting of assets.

Shelly v. Doe provides a good overview of when a claim arises under New York law and how different sections of the NYUFCA are applied. 173 Misc.2d 200 (N.Y. Co. Ct. 1997), *aff'd as modified*, 249 A.D.2d 756 (N.Y. App. Div. 1998) In Shelly, the defendant sexually abused the minor plaintiff for approximately three years. In December 1993, the defendant was arrested for the abuse. The defendant owned a collection of hand guns which he turned over to the police. Following the advice of his attorney, he then had those guns transferred to his brother so the government would not seize the guns. The guns were worth approximately $5,750, and the transfer did not make him insolvent at the time. In 1997, a civil judgment was entered against the claimant, and the plaintiff in the civil action sought to set aside the gift of the guns as a fraudulent transfer.

The Shelly court began its analysis by analyzing the definitions of matured, liquidated, and contingent. A matured claim is one which "has become absolutely due without contingency, although not necessarily liquidated nor presently payable." *Id*. at 204. A claim is liquidated when it is "ascertained; fixed; settled; made clear or manifest." *Id*. A contingent claim "is one which has not accrued and which is dependent on some future event that may or may not happen." *Id*. The court then noted that at the time of the conveyances, the plaintiff was a claimant for NYUFCA purposes whose claim was unmatured, because no court had found in favor of her, and unliquidated, because there was no settled or fixed amount due. *Id*. at 205.

The court then noted that, at the time the guns were transferred, the defendant was not insolvent nor a defendant in an action for money damages. Therefore, Sections 273 and 273(a) of the NYUFCA did not apply. *Id*.

at 210 (see the discussion of classification of debtors above at note 269). Although the court suggested that there may have been a conveyance by a person about to incur debts under Section 275, the record was apparently deficient to prove such a claim. *Id*. at 211. Finally, the court examined whether there was a conveyance made with intent to defraud under Section 276. Id. at 212-213. Because, as a soon-to-be convicted felon, the guns would have been seized by the police, the court found that the burden had not been met to establish an intent to defraud the plaintiff; rather, the transfer was completed upon the advice of counsel based on the fact that the government would seize the guns anyway. *Id*. at 213.

The issue of when a claim exists, giving rise to a debtor-creditor relationship for fraudulent conveyance purposes, is often an issue in divorce cases. But when does one spouse have a "claim" against another spouse for fraudulent conveyance purposes? The most obvious example is when the spouses have separated and one spouse will be suing for support. For example, in *Kasinski v. Questel*, the husband left his wife and soon after sold the marital home to his girlfriend. 88 A.D.2d 396 (N.Y. App. Div. 1984). The girlfriend brought an action to remove the wife from the home, and the wife countersued to set aside the conveyance. There was no separation agreement or order of support. The court noted that a spouse's duty of support to the other spouse "is so firmly embedded in the law that even the parties themselves, acting in concert, cannot destroy it . . . [the wife] certainly had a claim, though it was unmatured and unliquidated. The fact that there was nothing due the wife at the time of the transfer [because there had been no order of support] does not deprive her of her status as a creditor." *Id*. at 397.

Even if the parties are not separated, courts seem more likely to find that a claim exists if some type of matrimonial litigation is expected. For example, in *Soldano v. Soldano*, the defendant, after pursuing a course of "cruel and inhuman treatment" in order to end the marriage, transferred several parcels of property "in the event of their anticipated matrimonial litigation and the enforcement of future alimony or support award." 66 A.D.2d 839, 840 (N.Y. App. Div. 1978). In a dissenting opinion, however, Judge Latham argued that the duty of support "is in the nature of the performance of a general marital duty [which is] too speculative" to be a legal duty. *Id*. at 843 (Latham, J., dissenting). Although a separation agreement can create a debt for which the plaintiff would have a claim, there can be no indebtedness while the parties were still living together. *Id.*

Judge Latham's dissent would be echoed in *Galgano v. Ortiz*. In *Galgano*, the plaintiff argued that the defendant transferred her interest in certain business property in order to avoid her financial obligations to the plaintiff. However, because the transfers took place "while they were still living together as husband and wife, several years prior to the commencement of an action for divorce," the court concluded that no claim existed.

[393] *In re Walter*, 261 B.R. 139, 145 (Bankr. W.D. Pa 2001). In another case, involving the NY UFCA statute, a debtor, the sole shareholder and thus an "insider" of a closely-held corporation directed that the corporation pay to a bank what amounted to a personal obligation of the debtor, the court (applying both NYUFCA and federal bankruptcy "preference" law) entered judgment in favor of the bankruptcy trustee and against the bank in the amount of the improper payments received by the bank. *In re Frank Santor Equipment Corp.*, 256 B.R. 354, 372-76 (Bankr. E.D.N.Y. 2000).

[394] N.C. GEN. STAT. ANN. §§ 39-23.7(a)(1); GA. CODE ANN. §§ 18-2-77(a)(1); FLA. STAT. ANN. §§ 726.108(1)(a); W. VA. CODE ANN. §§ 40-1A-7(a)(1). The NY UFCA describes this remedy as having "the conveyance set aside or obligation annulled to the extent necessary to satisfy [the] claim." N.Y. DEBT. & CRED. LAW § 278(a).

[395] *Liebersohn v. Campus Crusade for Christ, Inc. (In re C.F. Foods, L.P.)*, 280 B.R. 103, 111 (Bankr. E.D. Pa. 2002). In another case in New York, a court at the request of a judgment creditor avoided a $140,000 transfer by a corporation to its president (allegedly as re-payment of antecedent debt) because the transfer was made without fair consideration and rendered the corporation insolvent. *American Panel Tec v. Hyrise, Inc.,* 31 A.D.3d 586, 819 N.Y.S.2d 768, 2006 N.Y. Slip Op. 05734 (N.Y. App. Div. 2006).

[396] N.C. GEN. STAT. ANN. §§ 39-23.7(a)(2); GA. CODE ANN. §§ 18-2-77(a)(2); FLA. STAT. ANN. §§ 726.108(1)(b); W. VA. CODE ANN. §§ 40-1A-7(a)(2).

New York allows civil courts to "disregard the conveyance and attach or levy execution upon the property conveyed." N.Y. DEBT. & CRED. LAW § 278(b). In *Mishkin v. Kenney & Branisel, Inc.,* the United States District Court for the Southern District of New York had appointed a receiver to liquidate for the benefit of its creditors the affairs of an investment banking corporation that had allegedly engaged in, among other things, the sale of non-existent securities. 609 F. Supp. 1254 (S.D.N.Y. 1985). The corporation had also transferred to its parent corporation the proceeds of its sham transactions. The Court, applying NYUFCA, entered a pre-judgment order attaching the transferred assets held by the parent corporation.

397 629 A.2d 1024 (Pa. Super. Ct. 1993) (applying the Pennsylvania Uniform Fraudulent Conveyance Act).

398 N.C. GEN. STAT. ANN. §§ 39-23.7(a)(3)a.; GA. CODE ANN. §§ 18-2-77(a)(3)(A); FLA. STAT. ANN. §§ 726.108(1)(c)1.; W. VA. CODE ANN. §§ 40-1A-7(a)(3)(i).

New York allows the court to "restrain the defendant from disposing of his property." N.Y. DEBT. & CRED. LAW § 279(a). For example, the *Mishkin* court also entered an order enjoining the parent corporation from participating in the transfer of assets from its subsidiary. 609 F. Supp. at 1256-57.

399 N.C. GEN. STAT. ANN. §§ 39-23.7(a)(3)b.; GA. CODE ANN. §§ 18-2-77(a)(3)(B); FLA. STAT. ANN.. §§ 726.108(1)(c)2.; W. VA. CODE ANN. §§ 40-1A-7(a)(3)(ii).

400 N.C. GEN. STAT. ANN. §§ 39-23.7(a)(3)c.; GA. CODE ANN. §§ 18-2-77(a)(3)(C); FLA. STAT. ANN. §§ 726.108(1)(c)3.; W. VA. CODE ANN. §§ 40-1A-7(a)(3)(iii).

401 225 B.R. 868, 880 (Bankr. E.D. Pa. 1998).

402 11 U.S.C. § 548(a).

403 VA. CODE ANN. § 55-82.1.

404 18 U.S.C. § 1961(c).

405 *E.I. Fan Co. v. Angelo Lighting Co.*, No. 0327, 2003 WL 21990999, at *2 (Pa. Ct. Com. Pl. Aug. 18, 2003); *accord Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979); Virginia law is substantially similar, and requires a claimant alleging civil conspiracy to prove concerted action, legal malice and causally related injury. *Schlegel v. Bank of America, N.A.*, 505 F. Supp. 2d 321, 325 (W.D. Va. 2007); *see also Allen Realty Corp. v. Holbert*, 227 Va. 441, 449, 318 S.E.2d 593, 596 (1984). North Carolina law defines civil conspiracy as "an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." *Muse v. Morrison,* 66 S.E. 2d 783, 784 (1951).

The courts of New York do "not recognize a cause of action for civil conspiracy," and "[a]llegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." Lau v. Berman, 6 Misc. 3d 934, 792 N.Y.S.2d 292, 2004 Slip Op. 24546 (N.Y. Civ. Ct. 2004). Renowned pop musician Billy Joel sued a business partner and counsel to the partnership for allegedly diverting his partnership distributions and concealing from Mr. Joel the fact of the diversion of funds. Joel v. Weber, 197 A.D.2d 396, 602 N.Y.S.2d 383 (N.Y. App. Div. 1993). Mr. Joel also contended that the partnership engaged in a fraudulent conveyance when it paid the defendant law firm $75,000 when the partnership was insolvent. *Id*. at 397. Mr. Joel alleged that the defendant law firm "knowingly and recklessly encouraged, induced and assisted" in the diversion of funds. *Id*. at 396. In rejecting the law firm's motion to dismiss the claims against it, the Appellate Division noted that the defendant law firm could be held liable as an "aider and abettor," and stated, "under New York law, an attorney may be liable to third parties for actions taken in furtherance of his role as counsel upon proof, as alleged in detail by the plaintiffs herein, of the existence of 'fraud, collusion, malice or bad faith.'" *Id*. at 397 (citation omitted).

In *Contractors Casualty and Surety Company v. I.E.A. Electric Group*, the plaintiff had obtained a judgment against the defendant corporation ["Electric Group"]. 181 Misc.2d 469, 693 N.Y.S.2d 915, 1999 N.Y. Slip Op. 99359 (N.Y. Sup. Ct. 1999). Unable to satisfy the judgment, the plaintiff commenced a second action in which it alleged that the defendant corporation, with the assistance of its counsel (now a defendant in a fraudulent conveyance action), "counseled the other defendants to transfer all of Electric Group's assets, business and cash to a newly formed entity, Electric Services, including Electric Group's office equipment, furniture, office supplies, and accounts receivable." *Id.* at 471. The defendant attorney "incorporated Electric Services, which assumed all of the assets and property of Electric Group." *Id*. Plaintiff alleged that the defendant attorney "benefited from the conveyance by receiving legal fees, expenses and other consideration from Electric Group." *Id*. at 472. In denying the attorney's motion to dismiss, the court stated, "merely receiving payment of a fee should not make an attorney liable for the client's fraudulent conveyance. However, if the attorney receives more than payment of a past due fee, such additional consideration could lead to a finding of liability. Further, if the attorney counseled the client to engage in a fraud, the attorney might be liable for fraud, and/or for violations of the profession's ethical obligations." *Id*. at 473.

[406] *E.I. Fan Co.*, 2003 WL 21990999.

[407] *Pearce v. Stone*, 720 P.2d 542 (Ariz. Ct. App. 1986).

[408] *Tindall v. H&S Homes*, *LLC*, 757 F. Supp. 2d 1339 (M.D. Ga. 2011).

[409] *Id.* at 1346.

[410] *Id.* at 1352.

[411] *Id.* at 1361-63.

[412] No. Civ. 3:01CV531 (AVC), 2005 WL 1039005 (D. Conn. May 2, 2005).

[413] *Id.* at *3-4.

[414] *Id.* at *4.

[415] *Id.* at *5.

[416] *Id.* at *8-9.

[417] *Id.* at *10 (citations omitted).

[418] *Id.* (citations omitted).

[419] *Id.* at *11.

[420] Article 185.00 of the New York Penal law subjects people who participate in fraudulent transfers to criminal penalties:

> A person is guilty of fraud in insolvency when, with intent to defraud any creditor and knowing that proceedings have been or are about to be instituted for the appointment of an administrator, or knowing that a composition agreement or other arrangement for the benefit of creditors has been or is about to be made, he
>
> (a) conveys, transfers, removes, conceals, destroys, encumbers or otherwise disposes of any part of or any interest in the debtor's estate; or
> (b) obtains any substantial part of or interest in the debtor's estate; or
> (c) presents to any creditor or to the administrator any writing or record relating to the debtor's estate knowing the same to contain a false material statement; or

(d) misrepresents or fails or refuses to disclose to the administrator the existence, amount or location of any part of or any interest in the debtor's estate, or any other information which he is legally required to furnish to such administrator.

Fraud in insolvency in a class A misdemeanor.

[421] 18 PA. CONS. STAT. ANN. § 4111 (2005).

[422] *Id.* § 4110.

[423] S.C. Code Ann. § 27-23-30.

[424] A copy of the Model Rules, along with a list of the states who have adopted the Model Rules, is available online at http://www.americanbar.org/groups/professional_ responsibility/publications/model_rules_ of_professional_conduct/alpha_list_state_adopting_model_rules.html.

[425] A copy of the California Rules of Professional Conduct is available at http://rules.calbar.ca.gov/ portals/10/documents/2013_californiarulesofprofessionalconduct.pdf.

[426] MODEL RULES OF PROF'L CONDUCT.

[427] MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

[428] MODEL RULES OF PROF'L CONDUCT R. 1.16.

[429] MODEL RULES OF PROF'L CONDUCT R. 1.16(c)(1)-(4).

[430] MODEL RULES OF PROF'L CONDUCT R. 8.4.

[431] *In the Matter of Kenyon*, 327 S.C. 307, 491 S.E.2d 252 (1997).

[432] *Id.* at 310, 491 S.E. 2d at 254 (citations omitted).

[433] *See Iowa Supreme Court Attorney Disciplinary Board v. Ouderkirk*, 845 N.W. 2d 32 (Iowa 2014).

[434] CAL. CIV. CODE § 3439.04(a)(1), FLA. STAT. ANN. § 726.105(1)(a), GA CODE ANN. § 18-2-74(a)(1), 740 ILCS 160/5(a)(1); N.C. GEN. STAT. ANN. 39-23.4(a)(1), OHIO REV. CODE § 1336.04(A)(1); 12 Pa.C.S. § 5104(a)(1), TEX. BUS. & COM. CODE § 24.005(a)(1), and W. VA CODE ANN. § 40-1A-4(a)(1)

[435] 12 PA. CONS. STAT. ANN. § 5109(1); N.C. GEN. STAT. ANN. §§ 39-23.9(1); GA. CODE ANN. §§ 18-2-79(1); FLA. STAT. ANN. §§ 726.110(1); W. VA. CODE ANN. §§ 40-1A-9(a); CAL. CIV. CODE § 3439.09(a); 740 ILCS 160/10(a); OHIO REV. CODE § 1339(A); TEX. BUS. & COM. CODE § 24.010(a)(1).

[436] CAL. CIV. CODE § 3439.04(a)(2), FLA. STAT. ANN. § 726.105(1)(b), GA CODE ANN. § 18-2-74(a)(2); 740 ILCS 160/5(a)(2); N.C. GEN. STAT. ANN. 39-23.4(a)(2), 740 ILCS 160/5(a)(2); 12 PA. C.S. § 5104(a)(2), TEX. BUS. & COM. CODE § 24.005(a)(2), and W. VA CODE ANN. § 40-1A-4(a)(2).

[437] 12 PA. CONS. STAT. ANN. § 5109; N.C. GEN. STAT. ANN. §§ 39-23.9(2); GA. CODE ANN. §§ 18-2-79(2); FLA. STAT. ANN. §§ 726.110(2); W. VA. CODE ANN. §§ 40-1A-9(b); CAL. CIV. CODE § 3439.09(b); 740 ILCS 160/10(b); OHIO REV. CODE § 1339(B); TEX. BUS. & COM. CODE § 24.010(a)(2).

[438] N.C. GEN. STAT. ANN. 39-23.5(b), GA CODE ANN. § 18-2-75(b); FLA. STAT. ANN. § 726.106(2); or W. VA CODE ANN. § 40-1A-5(b), 740 ILCS 160/6(b), OHIO REV. CODE § 1336.05(B), TEX. BUS. & COM. CODE § 24.006(b).

[439] N.C. GEN. STAT. ANN. §§ 39-23.9(3); GA. CODE ANN. §§ 18-2-79(3); FLA. STAT. ANN. §§ 726.110(3); W. VA. CODE ANN. §§ 40-1A-9(c); 740 ILCS 160/10(c); OHIO REV. CODE § 1339(C); TEX. BUS. & COM. CODE § 24.010(a)(3).

[440] CAL. CIV. CODE § 3439.09(c).

[441] TEX. BUS. & COM. CODE § 24.010(b)(1).

[442] *Id*. at § 24.010(c).

[443] Actions on behalf of a minor, spouse, or ward under § 24.005(a) or 24.006(b), must be brought within two years after the cause of action accrues or within one year after discovery. Actions under § 24.006(b) must be brought within one year after the date the transfer was made.

[444] *In re J.R. Deans Company*, 249 B.R. 121 (Bankr. D. S.C. 2000) (citing S.C. CODE ANN. § 15-3-530(7).

[445] *See, e.g. Island Holding, LLC v. O'Brien*, 6 A.D.3d 498, 775 N.Y.S.2d 72 (2d Dep't. 2004).

[446] 410 F.Supp.2d 243 (S.D.N.Y 2006).

[447] *Id.* at 254.

[448] *In re* Borriello, 329 B.R. 367, 372 (Bankr. E.D.N.Y. 2005).

[449] *In re Laines*, 352 B.R. 397, 402 (Bankr. E.D. Va. 2005) (citing VA. CODE (1950) § 8.01-253.

[450] *Id.*
