And Now for Something Completely Different: Spendthrift, Discretionary, and Protective Trusts in North Carolina and the Federal Tax Lien*

I. Introduction

Your children have never been good with money. When they were young and you gave them their weekly allowance, they spent all of their money on candy at the corner store within hours. As your children grew older, they accepted every offer of free credit, opened accounts at every retailer, and indulged themselves at every opportunity to squander what little money they had. Although you tried to teach them how to manage their money, their generation does not seem to understand the value of a dollar. One of your children is even behind on his taxes and has Uncle Sam breathing down his neck.

Despite their shortcomings in terms of financial responsibility, you desire to leave them an inheritance. You do not, however, want your life savings squandered in the same fashion as your children's childhood allowance. After consulting with your family attorney, you learn of several options to transfer your wealth to your children. The first is simply letting your assets pass via intestacy, an option certainly not palatable to a person who wants to exert some control over how their assets are distributed. The second option, according to your attorney, is by will; while you can designate who will receive your money, there isn't much you can do to influence what is done with it once it leaves your estate. Finally, your attorney informs you that in North Carolina there are several types of trusts that offer the type of protection and control you are looking for. Spendthrift, discretionary, and support trusts offer you the ability to direct how and when (if at all) payments are made and insulate everything but trust distributions from the reach of creditors.[1] Your attorney tells you that when properly configured, under a recent modification to North Carolina law, the trustee of a discretionary or spendthrift trust may even make payments directly to the beneficiary of such a trust in spite of a creditor's liens.[2] However, the added benefits of the newly changed law are both mis-

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1. *See* N.C. Gen. Stat. § 36C-5-501 (2006); N.C. Gen. Stat. § 36C-5-502 (2006); N.C. Gen. Stat. § 36C-504 (2006); N.C. Gen. Stat. § 36C-5-508 (2006).

2. *See* § 36C-5-504; § 36C-5-501.

leading and inconsistent with the common law, especially as applied to discretionary trusts.[3]

Prior to January, 2006, North Carolina trust law was atypical of most jurisdictions around the country.[4] Unlike other states, North Carolina did not recognize spendthrift trusts and offered fairly standard protections against creditors of the beneficiaries of support, discretionary, and protective trusts.[5] However, as North Carolina adopts more of the Uniform Trust Code (UTC), longstanding common law principles backed up by sound public policy are being swept under the carpet. While each change alone may not be radical, hasty adoption of these UTC provisions alters basic aspects of the common law without even so much as a murmur of explanation.

The most puzzling changes came in the form of sections 36C-5-501 and 36C-5-502 of the North Carolina General Statutes. Given that the vast majority of states recognize spendthrift trusts,[6] it should come as no surprise that North Carolina has come to follow these states and recognize such trusts. Surprising, however, are the accompanying changes made to the provisions protecting beneficiaries of spendthrift, discretionary, and protective trusts from the reach of creditors. Essentially usurping the common law, trustees of the aforementioned trusts may make distributions directly to beneficiaries regardless of whether a lien or attachment exists.[7] Furthermore, by giving similar, if not identical, protections to the beneficiaries of spendthrift, discretionary, and protective trusts, the legislature is slowly eroding the distinction between these various devices.

There is strong public policy in favor of protecting a beneficiary of a spendthrift, discretionary, or support trust from the claims of creditors.[8] These trusts are created by settlors with the express purpose of

3. *See* RESTATEMENT (SECOND) OF TRUSTS § 155 (1959); *compare* Alan Newman, Article, *The Rights of Creditors of Beneficiaries Under the Uniform Trust Code: An Examination of the Compromise*, 69 TENN. L. REV. 771, 807 (2002) ("Without a spendthrift provision, creditors of the beneficiary may attach 'present or future distributions to or for the benefit of the beneficiary' that must then be paid to the creditor.") (citation omitted), *with* § 36C-5-501, *and* § 36C-5-504.

4. Before section 36C-5-502 of the North Carolina General Statutes became effective in January, 2006, North Carolina was in the extreme minority of states that did not recognize spendthrift trusts in any form. *See* C. R. McCorkle, Annotation, *Validity of Spendthrift Trusts*, 34 A.L.R.2d 1335 (1954 & Supp. 2007) (discussing the law of spendthrift trusts in each state).

5. *Id*.

6. *Id*.

7. N.C. GEN. STAT. § 36C-5-504(2) (2006); N.C. GEN. STAT. § 36C-5-501(b) (2006).

8. *See, e.g.*, *In re* Morgan's Estate, 72 A. 498, 499 (Pa. 1909).

providing an inheritance to those who simply cannot be trusted to manage money on their own.[9] Creditors are the primary threat to the continued vitality of a trust settled for the benefit of a profligate beneficiary. In recognition of the interest trust settlors have in controlling what becomes of their estates after their death and to effectuate their intent, state legislatures as well as courts have created several tools to restrain both the voluntary and involuntary alienation of these trust interests.[10]

However, the recent changes discussed above threaten to cause confusion among settlors, trustees, and beneficiaries. Moreover, it is "contrary to sound public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and to be able at the same time to keep it from his creditors."[11] In effect, the recent changes adopted by the North Carolina legislature allow the trustee of a discretionary, spendthrift, or protective trust to ignore the claims of creditors completely and continue to make disbursements to the beneficiaries of such trusts. Furthermore, due to the seemingly indomitable power of a federal tax lien, in certain situations federal law arguably allows a tax lien to attach to payments before they reach a beneficiary (as per the common law), while other creditors can only reach the interest once received by the beneficiary. This could effectively give priority to a federal tax lien, rather than adhering to the traditional common law approach, which entitles the creditor that files a lien first to priority over liens filed later. As the Supreme Court noted, "Federal tax liens do not automatically have priority over all other liens."[12]

This Comment seeks to discuss the impact of the revisions made to North Carolina trust law effective January, 2006 (discussed above) in the context of their incongruity with the common law and the potential for favoritism toward federal tax liens over prior liens attached by state creditors (including liens for state taxes). In order to rectify the problems created by the revisions, North Carolina should either clarify the impact of these changes so as not to leave settlors, trustees, or beneficiaries with unrealistic expectations or revise the code to fill in the gaps created by the revisions.

9. *See generally* 90 C.J.S. *Trusts* § 23 (2002).

10. GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 222 (rev. 2d ed. Supp. 1984).

11. Ullman v. Cameron, 78 N.E. 1074, 1076 (N.Y. 1906) (quoting Hallett v. Thompson, 5 Paige Ch. 581, 584 (N.Y. Ch. 1836)).

12. United States v. McDermott, 507 U.S. 447, 449 (1993).

II. A Brief History of Trusts in Anglo-American Law

A trust is nothing more than a complex arrangement to make a gift.[13] While a gift is typically a two-party relationship, a trust involves a third party known as the trustee.[14] The trustee holds legal title to the property to be held in trust, while the beneficiary holds an equitable interest that varies in scope depending on the type of trust created by the settlor (the creator of the trust).[15] Trusts began in feudal England primarily as a means to circumvent the rules of primogeniture and dower—laws that required freehold land to pass by descent—and other archaic forms of taxation.[16] These early English trusts were known by the term "use," describing the relationship between the trustees and beneficiaries where "a landowner conveyed his land to his friends (the trustees) 'for the use' of the landowner's children."[17] Creating a "use" allowed a landowner to ensure that only his family received his property at his death, rather than having the property fall to the king or some other feudal lord.[18] The creation of uses was difficult due to the various formalities that had to be observed; thus, remedies were often limited unless the use was created in complete accord with the formalities.[19] These uses or trusts were employed by married women to prevent their husbands from inheriting by them, by those attempting to skirt the mortmain laws (designed to compel forfeiture of land conveyed to religious organizations to the lord), and also as a method to avoid the claims of creditors.[20]

The use system received a major overhaul in 1535 when the Statute of Uses was passed by the English Parliament.[21] The Statute of Uses effectively ended the "passive" use, where a trustee simply held the land for the use of the beneficiary.[22] As explained by one commentator:

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13. John H. Langbein, *The Contractarian Basis of the Law of* Trusts, 105 YALE L.J. 625, 632 (1995).

14. *Id*.

15. RESTATEMENT (SECOND) OF TRUSTS, § 128 (1959).

16. Langbein, *supra* note 13, at 632.

17. Joseph A. Rosenberg, *Supplemental Needs Trusts For People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91, 100 (2000).

18. *Id*.

19. BOGERT & BOGERT, *supra* note 10, at § 3.

20. Rosenberg, *supra* note 17, at 102. *See generally* BOGERT & BOGERT, *supra* note 10, at § 4.

21. Rosenberg, *supra* note 17, at 102.

22. *Id*.

> The object of the Statute was to abolish uses, and this it proposed to do by wiping out the estate of the feoffee to uses, and giving to the cestui que use the legal estate. . . . Instead of leaving it to the feoffee to uses to transfer the legal title to the cestui que use when the latter required it, the Statute transferred such interest immediately on the creation of the use.[23]

Instead, uses were only valid if the trustee had duties outside of simply holding the land (for example, caring for the land or collecting rents and profits).[24] In essence, the Statute of Uses forced trusts to have some sort of purpose beyond simply skirting the law; a trustee had to have specific duties toward the beneficiary other than holding property for a period of time.[25]

The move from employing trusts as a vehicle to dodge unfavorable feudal laws (the passive use) to the development of more intricate trust arrangements with functions beyond landholding represented more than just a change in the law. Trusts developed into a method of maintaining wealth and transferring it to successive generations.[26]

Trusts came to America with its earliest settlers and were employed to protect a wide variety of assets for individuals as well as corporations.[27] One commentator noted that while the development of trusts in early America was a slow process, "towards the end of the eighteenth century, when trusts came into more common use in America, the English system had been well developed, and was adopted in substantial entirety by the American colonial and early state chancellors."[28] While American innovation in the area of trust law was late to develop, it is responsible for the introduction of the professional trustee.[29] The tendency to have corporate or professional trustees "produces a situation very different from that which used to be the typical situation in England, where a man induced two or three of his friends . . . to take upon themselves the onerous and thankless task of administering his estate for the benefit of his family."[30] Thus, while America took the trust (along with the rest of the common law) from England, the development of trust law in the United States has seen decidedly American innovations. As each state began to develop its

23. BOGERT & BOGERT, *supra* note 10, at § 4.
24. Rosenberg, *supra* note 17, at 102.
25. *Id*.
26. *Id.* at 103.
27. *Id.*
28. BOGERT & BOGERT, *supra* note 10, at § 222.
29. 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 1.8, at 28 (4th ed. 1987).
30. *Id.*

own unique trust law, separation between the states became readily apparent.[31]

III. SPENDTHRIFT, PROTECTIVE, AND DISCRETIONARY TRUSTS IN NORTH CAROLINA

A. *Spendthrift Trusts*

Like all of the original colonies, North Carolina trust law is based on the English common law.[32] However, the trust law of each state is unique and has developed along its own path.[33] Because the focus of this Comment relates to spendthrift, protective, and discretionary trusts, in the interest of economy, the history of these devices in North Carolina law will be examined alone, rather than including a more general history of North Carolina trust law.

Spendthrift trusts in North Carolina are a product of the legislature.[34] North Carolina courts have historically been unwilling to create spendthrift trusts via case law.[35] In fact, before spendthrift trusts were created by the legislature, no such trusts were recognized in North Carolina.[36] One later decision noted:

> North Carolina has valiantly withstood efforts in its courts to have valid spendthrift trusts born out of case law. Traditional notions of public policy and fair play have remained predominant. The view of the North Carolina courts is that whatever interests a debtor has in property of any sort may be reached by his creditors, in law or equity, according to the nature of the property.[37]

The spendthrift trust recognized statutorily in North Carolina had its beginnings in the latter part of the nineteenth century.[38] The original North Carolina statute limited the amount of income the benefici-

31. *See* BOGERT & BOGERT, *supra* note 10, at § 7 (discussing the development of trust law in the United States).

32. Scott, *supra* note 29, at 28.

33. BOGERT & BOGERT, *supra* note 10, at § 7.

34. There seem to be no cases in North Carolina where spendthrift trusts were recognized by judicial fiat.

35. Spendthrift trusts did arise out of case law in other American jurisdictions. The genesis of spendthrift trusts can be traced to dicta in Nichols v. Eaton, 91 U.S. 716 (1875), where Justice Miller laid the foundation for the validity of the modern spendthrift trust. *See also* BOGERT & BOGERT, *supra* note 10, at § 222.

36. *Id*. (citing Dick v. Pitchford, 21 N.C. 480 (1837); Mebane v. Mebane, 39 N.C. 131 (1845); McKimmon v. Rogers, 56 N.C. 200 (1857); Pace v. Pace, 73 N.C. 119 (1875)).

37. Swink v. Swink, 169 S.E.2d 539, 541 (N.C. Ct. App. 1969).

38. Gilbert T. Stephenson, *The North Carolina Spendthrift Trust Statute*, 31 N.C. L. REV. 175 (1952).

ary could receive from the trust each year.[39] As a further restriction, the income could only be used for certain purposes—for the support and maintenance of the beneficiary.[40] In addition, the settlor of the trust could only create a spendthrift trust under the statute for the benefit of "children, grandchildren, and other relation of the creator of the trust."[41] One criticism of this early statute was that it was unclear as to the scope of what relatives fell under the "other relation" clause.[42]

North Carolina's early "spendthrift" statute allowed the creation of spendthrift trusts in name only. This stemmed to some degree from the negative image engendered by spendthrift trusts as a vehicle to allow the rich to provide for their layabout children in a manner that would allow them to escape even the lowest level of responsibility—primarily to creditors.[43] Furthermore, former section 41-9 of the North Carolina General Statutes, which authorized limited "spendthrift" trusts under North Carolina law, was repealed in 1979 by former section 36A-115—a statute that did not offer a spendthrift provision at all.[44] Needless to say, North Carolina's early law governing the implementation of spendthrift trusts is dotted with suspicion and extreme caution.[45]

Although the history of spendthrift provisions under North Carolina law would suggest that change is uncommon, a revision to the North Carolina version of the UTC abolished former section 36A-115 and replaced it with a new statute.[46] The new statute not only recognizes spendthrift provisions but also makes significant, and perplexing, changes to other types of trusts, most notably discretionary trusts. The text of the new statute, section 36C-5-501, "Rights of beneficiary's creditor or assignee," is as follows:

> (a) Except as provided in subsection (b) of this section, 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 that relief as is appropriate under the circumstances.

39. *Id*. at 176.

40. *Id.*

41. *Id.* (citation omitted).

42. *Id*.

43. *See* JAMES B. MCLAUGHLIN & RICHARD T. BOWSER, 2 WIGGINS WILLS & ADMINISTRATION OF ESTATES IN N.C. § 23:11, at 19 (rev. 4th ed. 2005 & Supp. 2007).

44. N.C. GEN. STAT. § 41-9 (1872), *repealed by* Act of March 22, 1979, ch. 180, §2, 1979 N.C. Sess. Laws 126; N.C. GEN. STAT. § 36A-115 *repealed by* Act of July 15, 2005, ch. 192, §1, 2005 N.C. Sess. Laws 345.

45. *See generally* Stephenson, *supra* note 38.

46. N.C. GEN. STAT. § 36C-5-501 (2006).

(b) This section shall not apply and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary, to the extent that a beneficiary's interest:

(1) Is subject to a spendthrift provision;

(2) Is a discretionary trust interest as defined in G.S. 36C-5-504(a)(2); or

(3) Is a protective trust interest as described in G.S. 36C-5-508.[47]

As noted above, the new statute officially recognizes spendthrift trusts in North Carolina. While some may argue that the early, nineteenth century spendthrift statute already recognized such trusts, its complex requirements and restrictive application offered nowhere near the same level of protection as the new statute that became effective January 1, 2006. The new statute provides sound protection from most creditors, with the sole statutory exception to such provisions being where "a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary."[48] Although the former section 36A-115 allowed for the creation of protective trusts, which were the closest analog to the spendthrift provision found in the new statute, the new statute fully recognizes the prototypical spendthrift trust.[49]

Spendthrift provisions were not created to protect an irresponsible beneficiary; instead, such trusts arose out of "consideration for the right of the donor to control his or her bounty and dispose of the donor's property in any manner the donor sees fit."[50] In essence, spendthrift trusts were created to protect the *settlor's* right to distribute his property without having to fear that a careless or immature beneficiary could squander his fortune by simply handing it over to some creditor.[51] Allowing a settlor to create a trust that thwarts the claims of a beneficiary's creditor is justified on the grounds that, "[a] settlor is under no legal or moral obligation to the creditors of the beneficiary of a spendthrift trust, and the creation of such a trust takes nothing from a creditor of the beneficiary to which the creditor previously had the right to look for payment."[52] Thus, the spendthrift trust is a mechanism to allow a settlor to retain some dead hand control over her for-

47. *Id.*

48. N.C. GEN. STAT. § 36C-5-503(b) (2006).

49. MCLAUGHLIN & BOWSER, *supra* note 43, at 19.

50. 90 C.J.S. *Trusts* § 23 (2002).

51. *See generally* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

52. 90 C.J.S. *Trusts* § 23 (2002).

tune and prevent a less responsible beneficiary from wasting his inheritance.[53]

A spendthrift provision must meet the following criteria defined by section 36C-5-502 in order to be valid under North Carolina law:

> (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.[54]

The key protection against creditors in subsection (c) is also a part of section 36C-5-501 and essentially shields the trustee of a spendthrift trust (as well as trustees of discretionary and protective trusts) from being compelled to make distributions directly to creditors.[55] A creditor may only attempt to attach to a distribution from a spendthrift trust once the beneficiary has received the funds.[56] While it may seem that a spendthrift trust is close to a discretionary trust in the type of protection it offers, traditionally in order for a spendthrift trust to be considered as such, "the trustee [cannot have] discretion as to the distribution of the income except in the event of an attempted alienation by the beneficiary or application to payment of debts."[57] Thus, a beneficiary's interest in a spendthrift trust is considerably greater than the mere expectation interest held by the beneficiary of a discretionary trust.

53. *Id*. ("Public policy considerations behind enforcing spendthrift trust provisions include the right of donors to dispose of their property as they wish, the public interest in protecting spendthrift beneficiaries from personal pauperism, so that they do not become public burdens, and the responsibility of creditors to make themselves aware of their debtors' spendthrift trust protections.").

54. N.C. GEN. STAT. § 36C-5-502 (2006).

55. N.C. GEN. STAT. § 36C-5-501 (2006).

56. § 36C-5-502(c).

57. 97 C.J.S. *Wills* § 1431 (2001), (citing *In re* Bucklin's Estate, 51 N.W.2d 412 (Iowa 1952)).

B. Discretionary Trusts

Discretionary trusts offer the same type of strong protection from creditors[58] but limit a beneficiary's interest even further while allowing the trustee to retain more control.[59] North Carolina defines discretionary trusts by statute, although it is mostly a codification of the common law.[60] Section 36C-5-504(a)(2) explains the function of a discretionary trust:

> "Discretionary trust interest" means an interest in a trust that is subject to the trustee's discretion, whether or not the discretion is expressed in the form of a standard of distribution. A discretionary trust interest shall include an interest in any one or any combination of the following:
>
> a. A trust in which the amount to be received by the beneficiary, including whether or not the beneficiary, or a class of beneficiaries, is to receive anything at all, is within the discretion of the trustee.
>
> b. A trust in which the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or apply on behalf of the beneficiary, those sums that the trustee, in the trustee's discretion, determines are appropriate for the support, education, or maintenance of the beneficiary.[61]

As explained above, the most significant difference between spendthrift and discretionary trusts is that a trustee under a discretionary trust is under absolutely no obligation to make disbursements to the beneficiary.[62] Moreover, subsection (c) of the statute provides that, "a creditor of a beneficiary may not compel a distribution from a trust in which the beneficiary has a discretionary trust interest even if the trustee has abused the trustee's discretion."[63] When read along with subsection (d), it is clear that only the beneficiary may compel distribution based on a trustee's abuse of discretion.[64] Thus, the drafters of the new statutory scheme unquestionably meant to secure absolute protection for the beneficiaries of spendthrift, support, and discretionary trusts from their creditors.

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58. § 36C-5-501
59. *See* RESTATEMENT (SECOND) OF TRUSTS § 155 (1959).
60. MCLAUGHLIN & BOWSER, *supra* note 43, at 22.
61. N.C. GEN. STAT. § 36C-5-504(a)(2) (2006).
62. § 36C-5-504(a)(2)(b).
63. § 36C-5-504(c).
64. § 36C-5-504(d).

This represents a marked change from the former section 36A-115, which did not include any provision with such stringent protection.[65] It has been suggested that:

> It is now clear beyond any doubt that a trustee may make a distribution to the beneficiary even after being served with an attachment or an attempt to otherwise levy on the beneficiary's interest by a creditor. It is interesting, perhaps even fascinating, to read the North Carolina Comment to this section in that they state that this is not a change in North Carolina law.[66]

While both the common law and former section 36A-115 of the North Carolina General Statutes provided that a trustee could not be compelled to make distributions to the creditors of a beneficiary of a discretionary trust,[67] it seems that under the new statutory scheme a creditor cannot divert distributions made to the beneficiary.[68] In other words, a creditor cannot intercept the payments once the trustee has exercised her discretion. It has been noted that this represents a shift in the law and that under the former section 36A-115, "[a]fter the exercise of the discretion, which by necessity occurs before the actual distribution itself, the creditor may seize the property awarded to the beneficiary while it is still in the possession of the trustee."[69] If it is the case that the new statute alters a creditor's right to intercept payments made to a beneficiary after the trustee has exercised his discretion, then North Carolina has significantly altered, and strengthened, the protections it offers to the beneficiaries of discretionary trusts.[70]

C. *Protective Trusts*

The final aspect of the new section 36C-5-501 that will be discussed here relates to protective trusts. North Carolina defines protective trusts as follows:

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65. *See* N.C. GEN. STAT. § 36A-115 (1979), *repealed by* Act of July 15, 2005, ch. 192, §1, 2005 N.C. Sess. Laws 345.

66. MCLAUGHLIN & BOWSER, *supra* note 43, at 21.

67. *See* § 36A-115 (" . . . the amount to be received by the beneficiary, *including whether or not the beneficiary is to receive anything at all*, is within the discretion of the trustee.") (emphasis added); Hutchens v. Stout, 339 S.E.2d 103, 106 (N.C. Ct. App. 1986) ("Under a true discretionary trust, the trustee may withhold the trust income and principal altogether from the beneficiary and the beneficiary, as well as the creditors and assignees of the beneficiary, cannot compel the trustee to pay over any part of the trust funds.").

68. MCLAUGHLIN & BOWSER, *supra* note 43, at 21.

69. *Id*. at 22.

70. *Id*.

> Except with respect to an interest retained by the settlor, a "protective trust interest" means an interest in a trust in which the terms of the trust provide that the interest terminates or becomes discretionary if:
>
> (1) The beneficiary alienates or attempts to alienate that interest; or
>
> (2) Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise; or
>
> (3) The beneficiary becomes insolvent or bankrupt.[71]

A protective trust offers many of the same protections from creditors afforded by spendthrift and discretionary trusts, with the primary difference being that a protective trust terminates or becomes discretionary (the latter being one of the "minor" modifications discussed by the North Carolina Comment) when one of the three criteria listed above are met.[72] Protective trusts offer settlors the power to have the added assurance that if the beneficiary or one of his creditors attempts to reach the beneficiary's interest in the trust, the trust will either terminate or become discretionary.[73] The primary modification to the statute is the addition of the "or becomes discretionary"[74] language.[75] What difference this new language will have on the effect of the statute remains to be seen, but it seems that a settlor could couple the stronger creditor protections of the new statute, along with the new provision allowing for protective trusts to become discretionary, to keep the trust intact after one of the three stated events but allow the trustee to refrain from making disbursements until the proverbial storm has passed.

D. *Making Sense of the Changes*

After reviewing the recent changes in the North Carolina version of the UTC dealing with spendthrift, discretionary, and protective trusts, it would be hard to argue that a significant shift in the law has not taken place. While the former section 36A-115 was simply a codification of the common law, it seems that the new statute alters the common law in several significant ways.[76] First, it recognizes full spendthrift trusts for the first time under North Carolina law.[77] This

71. N.C. GEN. STAT. § 36C-5-508 (2006).

72. *Id.*

73. *Id.*

74. *Id.*

75. MCLAUGHLIN & BOWSER, *supra* note 43, at 23.

76. *Id.* at 19.

77. While former N. C. GEN. STAT. § 41-9 (repealed 1979) did purport to recognize "spendthrift" trusts, N.C. GEN. STAT. § 36C-5-502 (2006), is the first instance of spendthrift trusts, as they are commonly known, under North Carolina law.

represents a major shift in terms of public policy.[78] Second, the new statute expands the protection from creditors offered by discretionary trusts by providing that the creditors of a beneficiary of a discretionary trust may not attach a lien on payments made by the trustee to the beneficiary until *after* the beneficiary has received the funds.[79] The common law provided for a window where once a trustee had exercised his discretion and decided to make a payment to the beneficiary, the creditor could intercept the payment before its receipt by the beneficiary.[80] Section 36C-5-501 changes this common law rule and permits trustees to make distributions to beneficiaries even in the face of liens or attachments.[81] Third, and least significant, is the change made to protective trusts, giving the settlor the option of creating a trust that either terminates or becomes discretionary if one of the three criteria listed in section 36C-5-508 are met.[82]

IV. POTENTIAL IMPLICATIONS

To a casual observer, quarreling about these changes may seem like splitting hairs; but they represent considerable changes to North Carolina law that could cause unexpected consequences. The new law seems to create more of a burden on creditors attempting to collect from the beneficiary of one of these trusts. However, one of the unintended consequences of the new statute could be its impact on federal income tax liens. The federal tax lien statute provides that:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.[83]

It has been held that in determining what constitutes "property" or "rights to property" the Court looks:

> [I]nitially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'prop-

78. *See generally* Stephenson, *supra* note 38 (discussing spendthrift trusts being against public policy in North Carolina).

79. *See* MCLAUGHLIN & BOWSER, *supra* note 43, at 21.

80. *See, e.g.*, United States v. O'Shaughnessy, 517 N.W.2d 574 (Minn. 1994); Calloway v. Smith, 186 S.W.2d 642 (Ky. 1945).

81. N.C. GEN. STAT. § 36C-5-501 (2006).

82. § 36C-5-508.

83. 26 U.S.C. § 6321 (2000).

> erty' or 'rights to property' within the compass of the federal tax lien legislation.[84]

While it may come as no surprise that what composes a taxpayer's "property" or "rights to property" is initially determined by state law, and federal law dictates whether the interest may be reached via a tax lien,[85] the true problem created by the changes made to the North Carolina version of the UTC are far deeper. The United States Supreme Court has not ruled on whether the expectation interest held by the beneficiary of a discretionary trust is enough of an interest to allow a federal tax lien to attach or whether a trustee's duties are defined by state or federal law. The closest analog seems to be the Court's decision in *United States v. Craft,*[86] where the Court held that a taxpayer's expectation interest in a tenancy by the entireties property was significant enough to allow a tax lien to attach.[87] However, at least one court has held that there is no authority suggesting that a trustee must notify the Internal Revenue Service (IRS) when making a disbursement.[88] When viewed in light of section 36C-5-501 of the North Carolina General Statutes, it is possible to interpret the responsibility of the trustee (under North Carolina law) to be solely to the beneficiary and create no obligation to honor the liens of, or communicate with, any creditor.[89]

Whether a trustee has an obligation under federal law to divert payments to the IRS (or even to notify the IRS of disbursements), or whether he may follow the new North Carolina law and make payments without respect to a creditor's lien or attachment, is a matter that has not been confronted by any court. It would seem that, at least against a federal tax lien, a trustee cannot ignore the IRS and make a disbursement to the beneficiary.[90] However, if this is the case, it is certainly misleading to settlors (who expect that the protections afforded by section 36C-5-501 will apply against any creditor), trustees (who expect that the statute will guide them as to their obligations to

84. Drye v. United States, 528 U.S. 49, 58 (1999); *accord* United States v. Craft, 535 U.S. 274 (2002).

85. *Id*.

86. 535 U.S. 274.

87. *Id*. at 288.

88. *In re* Wilson, 140 B.R. 400, 407 n.6 (Bankr. D. Tex. 1992).

89. *See* N.C. GEN. STAT. § 36C-5-501(b) (2006) ("[A] trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary."). Given the fact that the trustee under this section has no liability to creditors whatsoever, it is logical to conclude that a trustee also has no duty to communicate with such creditors concerning potential trust distributions.

90. *But cf. In re Wilson*, 140 B.R. at 407 n.6.

creditors), and beneficiaries (who rely on the protections of the statute to preserve discretionary payments made from the trust). This type of inconsistency also favors the federal government as a creditor and forces private creditors and the state to look at a beneficiary's other assets. While a federal tax lien is certainly one of the most powerful encumbrances recognized by law, it does not always have priority before other liens; "Federal tax liens do not automatically have priority over all other liens. Absent provision to the contrary, priority for purposes of federal law is governed by the common-law principle that 'the first in time is the first in right.'"[91] When coupled with the fact that state laws barring creditors from reaching trust distributions until receipt by the beneficiary are "not determinative of the reach of the Federal Tax Lien," it is apparent that North Carolina has placed federal tax liens in a special category (albeit unintentionally).[92]

Moreover, the decision in *Craft* calls into question whether the Supreme Court now views the corpus of a discretionary trust as fair game for a tax lien. While courts have found that a beneficiary's interest to income in a spendthrift trust is enough of a property interest to allow a lien to attach, these same courts have been reluctant to allow a lien to attach to the corpus of such trusts.[93] In light of the fact that a beneficiary under a discretionary trust has only an expectation that he will receive some benefit, the *Craft* decision at least calls into question whether future decisions may seek to attach to more than just the expectation interest and seek to burden the corpus as well.

A. United States v. Craft*: A Bundle of Problems*

Justice O'Connor's opinion in *United States v. Craft*[94] represents one of the most controversial Supreme Court decisions concerning property law in recent history. The *Craft* Court held that a husband's interest in a tenancy by the entireties property was enough of an interest in property for a tax lien to attach—entitling the IRS to the proceeds from the sale of the home should the wife die before the husband leaving him the sole owner.[95] The Craft's, a couple from Michigan,

91. United States v. McDermott, 507 U.S. 447, 449 (1993); *cf.* 26 U.S.C. § 6323 (2000) (codifying the common law principle).

92. United States v. Cohn, 855 F. Supp. 572, 576 (D. Conn. 1994) (citing Olson v. Olson, 1992 Conn. Super. LEXIS 2955 (Conn. Super. Ct. 1992); Aquilino v. United States, 363 U.S. 509 (U.S. 1960)). *See also* IRS v. Orr, 180 F.3d 656 (5th Cir. 1999).

93. *See, e.g.*, Bank One Ohio Trust Co. v. United States, 80 F.3d 173 (6th Cir. 1996); *Cohn*, 855 F.Supp. 572; *In re* Lyons, 148 B.R. 88 (Bankr.D.D.C. 1992).

94. 535 U.S. 274 (2002).

95. *Id*. at 287.

purchased a home as tenants by the entirety in 1972.[96] As tenants by the entirety, the Craft's owned their home as a husband and wife entity, rather than individually or as co-tenants.[97] The crucial difference between tenancy by the entirety and other forms of property ownership is that neither spouse may individually alienate or encumber the property without the explicit authorization of the other spouse.[98] Similarly, the tenancy may not be severed without the agreement of both husband and wife, divorce, or the death of one of the parties.[99] In 1988, due to a failure to file timely tax returns, Don Craft was assessed $482,446 in tax liabilities by the Internal Revenue Service (IRS).[100] After Don Craft failed to pay the assessed tax liabilities, the IRS attached a tax lien to any interest in property belonging to Mr. Craft under section 6321 of the Internal Revenue Code.[101] The Craft's then attempted to transfer their interest in the property to Sandra Craft for a sum of one dollar, ending the tenancy by the entirety.[102] When Sandra Craft tried to sell the property several years later, the lien was revealed during a title search.[103] The IRS allowed the sale but would not release its lien on the property without "the stipulation that half of the net proceeds be held in escrow pending determination of the Government's interest in the property."[104]

Sandra Craft then brought an action to quiet title to the escrowed proceeds in the United States District Court for the Western District of Michigan.[105] The trial court found in favor of the IRS. Both parties then appealed, and the Sixth Circuit held that "the tax lien did not attach to the property because under Michigan state law, the husband had no separate interest in property held as a tenant by the entirety."[106] Following the decision of the Sixth Circuit, the case was remanded to the trial court. On remand, the court found that the Don Craft's use of monies not exempt from the reach of creditors to pay the mortgage on the entireties property was a fraudulent act under state law and entitled the IRS to one half of the proceeds from the sale of the

96. Craft v. United States, 233 F.3d 358, 361 (6th Cir. 2000), *rev'd*, United States v. Craft, 535 U.S. 274 (2002).
97. 41 C.J.S. *Husband and Wife* § 46 (1991).
98. *Id.*
99. *Id*.
100. *Craft*, 535 U.S. at 276.
101. *Id*. at 276-278.
102. *Id*. at 277.
103. *Id.*
104. *Id.*
105. *Id*.
106. *Id*.

entireties property.[107] Both parties appealed again and the decision was affirmed the district court.[108] The Supreme Court then granted certiorari.[109]

The issue, as framed by Justice O'Connor in her majority opinion, is "[w]hether the interests of respondent's husband in the property he held as a tenant by the entirety constitutes 'property and rights to property' for the purposes of the federal tax lien statute . . . is ultimately a question of federal law."[110] Traditionally, an interest in an entireties property has been considered merely an expectation interest, with possession only possible upon divorce, death, or by mutual agreement.[111] The Court, however, focused on the definition of what constitutes a "right to property" under the federal tax lien statute. Justice O'Connor's opinion spends considerable time inventorying the various "sticks" in Mr. Craft's "bundle" to determine if his interest in the entireties property is significant enough for a tax lien to attach.[112] Justice O'Connor points out, correctly, that "[n]either spouse was considered to own any individual interest in the estate; rather, it belonged to the couple."[113] However, even in light of this well recognized principle, the opinion continues to examine whether Mr. Craft individually has enough of an interest in the property to justify allowing a tax lien to attach.[114] Thus, the Court seems to ignore the very principles it lays down as a foundation for collecting the sticks in Mr. Craft's bundle. The Court defines Mr. Craft's rights in the entireties property as including:

> [T]he right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally.[115]

107. *Id*.
108. *Id.*
109. *Id.*
110. *Id*. at 278 (citing 26 U.S.C. § 6321).
111. 41 C.J.S. *Husband and Wife* § 46 (1991).
112. *Craft*, 535 U.S. at 278.
113. *Id.* at 281.
114. *Id*. at 282.
115. *Id*.

Utilizing the "bundle of sticks" analogy, O'Connor examines each "right" individually to determine whether it is hardy enough to allow a tax lien to attach.[116]

When assembling Mr. Craft's bundle, the majority looks to past decisions to pick and choose instances where tax liens have attached to various types of property interests.[117] The first type of interest the Court examined is the "right to use the property, to receive income produced by it, and to exclude others from it."[118] Similarly, the Court also considered the right to use the property along with the right to "alienate (or otherwise encumber) the property with the consent of respondent, his wife."[119] The Court then expands on its ruling in *United States v. Rodgers*[120] and analogized a spouse's interest in a tenancy by the entireties property to property claimed under a state homestead exemption.[121] Justice O'Connor explained, that "[e]xcluding property from a federal tax lien simply because the taxpayer does not have the power to unilaterally alienate it would, moreover, exempt a rather large amount of what is commonly thought of as property."[122] The Court did not consider, however, that the very purpose of creating property that cannot be unilaterally alienated in the context of a tenancy by the entirety is to prevent creditors of one spouse from affecting the interest of the other spouse in the property.[123] Needless to say, the Court ignored the idea that a tenancy by the entirety is owned by a husband/wife entity and not individually by either spouse.

Similarly, the Court latched onto the concept of the husband's right of survivorship as being a property interest resilient enough to allow a tax lien to attach.[124] The Court widened its holding in *Drye v. United States*[125] where the Court suggested that an expectation interest may not be reached by a tax lien prior to the time that it ripens.[126] The Court did not explicitly characterize the right of survivorship held by

116. *Id*.
117. *Id*. at 283
118. *Id*.
119. *Id*.
120. 461 U.S. 677 (1983).
121. *Craft*, 535 U.S. at 284.
122. *Id*.
123. Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1788 (1984) ("[O]ne of the primary functions of tenancy by the entirety [is the] protection of a surviving spouse from her deceased mate's creditors.").
124. *Craft*, 535 U.S. at 285.
125. Drye v. United States, 528 U.S. 49 (1999).
126. *Id*. at 60.

Mr. Craft as being significant enough to allow the tax lien to attach, but the Court did look at the right of survivorship as yet another "stick" held by Mr. Craft.[127]

Most surprisingly, in concluding that Mr. Craft had an adequate property interest in the tenants by the entireties property, the Court supported its decision by noting that "if the conclusion were otherwise, the entireties property would belong to no one for the purposes of [section] 6321."[128] Thus, it seems that the Court's justification for allowing the federal tax lien to attach was that if the government were not allowed to place a lien against Mr. Craft's interest, it would not be able to attach any lien at all. The circular nature of this argument underscores how astonishing the decision in *Craft* is when viewed in light of the reasons behind permitting couples to own property as tenants by the entirety. A tenancy by the entirety is a legal fiction specifically designed to allow spouses to own property as a husband wife entity.[129] This provides protections from creditors,[130] allows the marital home to be quickly and painlessly transferred to the surviving spouse upon the death of one of the tenants,[131] and does not allow either spouse to unilaterally alienate the property.[132] In this manner, tenancies by the entireties are in spirit very similar to spendthrift, discretionary, and protective trusts. If the Court hinged its argument on the principle that "well, somebody must own it," then the beneficiaries of discretionary trusts might as well tuck their tails and run. As one commentator noted, the *Craft* decision "extend[ed] the line of cases where property and rights to property were not defined by state-law legal fictions to those situations where a taxpayer never possessed the property under state law."[133]

127. *Craft*, 535 U.S. at 285.

128. *Id*.

129. *See, e.g.*, Combs v. Combs, 160 S.E.2d 308, 311 (N.C. 1968) ("This tenancy by the entirety takes its origin from the common law when husband and wife were regarded as one person, and a conveyance to them by name was a conveyance in law to but one person.").

130. *See, e.g.*, Foy v. Foy, 336 S.E.2d 707, 709 (N.C. Ct. App. 1985) (holding that property owned as tenants by the entirety is not subject to levy and sale under execution of a judgment against one spouse).

131. *See, e.g.*, Estate of Nelson *ex rel.* Brewer v. Nelson, 633 S.E.2d 124, 127 (N.C. Ct. App. 2006)

132. N.C. GEN. STAT. § 39-13.6 (2006).

133. Wade M. Fisher, Note, *The Internal Revenue Service Collects from an Innocent Spouse in United States v. Craft: Could Business Associates Be Next?*, 18 AKRON TAX J. 77, 112 (2003).

After all, neither the trustee[134] nor beneficiary[135] of a discretionary trust "owns" the corpus of the trust. While this in and of itself is not an analog to a tenancy by the entirety, it demonstrates how a beneficiary with a mere expectation interest in income from a trust is not all that different from a spouse (like Mr. Craft) who only has an expectation interest in a tenancy by the entirety. Granted, while the Court in *Craft* attaches great significance to the "sticks" held in Mr. Craft's bundle,[136] it is hard to apply that analogy to the type of interest enjoyed by a beneficiary of a discretionary trust. However, *Craft* exposes the tension that exists between the government's interest in collecting federal taxes and individual states' interests in allowing settlors to maintain some dead hand control while at the same time shielding beneficiaries of certain trusts from creditors. After *Craft*, it is unclear precisely what a trustee's duties are in terms of making discretionary payments to beneficiaries of discretionary trusts under section 36C-5-501 and section 36C-5-504(a)(2).[137] Furthermore, even if *Craft* only stands for the proposition that a federal tax lien may attach to an expectation interest (and that as with spendthrift trusts if a payment is made via that interest the government may intercept the disbursement), then the decision raises the question of whether a tax lien levied by the State of North Carolina prior to a federal lien would be powerless in light of section 36C-5-504(a)(2).

B. *The Expectations of the Settlor, Trustee, Beneficiary, and Creditors: Public Policy Tugging in Different Directions*

Perhaps the most significant impact of the changes to the North Carolina version of the UTC is impact on the public policy considerations that give the rationale for having strong creditor protection. One

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134. BOGERT & BOGERT, *supra* note 10, at § 16.

135. *In re* Marriage of Jones, 812 P.2d 1152 (Colo. 1991) (holding that the corpus of a discretionary trust is not "separate property" for purposes of marital dissolution proceeding because beneficiary has only an expectation in income from the corpus of the trust).

136. United States v. Craft, 535 U.S. 274, 278 (2002).

137. It seems that at least as far as spendthrift trusts are concerned, unless a trustee is vested with full discretion, the government may attach a lien successfully to a beneficiary's interest in such trusts and intercept payment before it reaches the beneficiary. *See* United States v. McDermott, 507 U.S. 447, 449 (1993). It is well established law that a beneficiary under a discretionary trust has the right to force payment where there is an abuse of discretion on the part of the trustee. *See, e.g.*, Woodard v. Mordecai, 67 S.E.2d 639, 644 (N.C. 1951). Thus, the right of a beneficiary to compel payment if a trustee abuses discretion is at least equal, if not more, than the right to survivorship that was held by Mr. Craft.

of the revised statutes provides that "a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary" if the trust is a spendthrift, discretionary, or protective trust.[138] As discussed above, this marks a distinct shift in the common law.[139] Under the common law approach either a trustee with full discretion or a trustee with partial discretion had to honor the liens of creditors once the trustee exercised discretion and decided to make a payment.[140] In other words, once "the day of payment arrives, the lien of the execution attaches."[141] This common law rule represents a better balance between the rights of creditors and the expectations of settlors and beneficiaries. Furthermore, it provides the trustee with clear guidance because all liens will be treated equally rather than permitting federal tax liens to sneak in under the door.

Furthermore, by allowing a trustee to make payments directly to a beneficiary without being beholden to any liens, the new statute seems to carve out an unintentional exemption whereby the federal government may attach a tax lien even if a state tax lien was levied prior to that by the federal government.[142] This is of course a result of the awesome and seemingly invincible nature of the federal tax lien; nevertheless, one wonders why the legislature would permit the federal government to swoop in and intercept the payments made by a trustee under such trusts while allowing the dust to gather on equally valid state tax liens. The common law rule clearly supported the notion that even under a discretionary trust the trustee would have to honor attachments and liens he was aware of and divert payments to those creditors.[143] Courts would of course take into consideration whether the trust was designed for the care, support, or maintenance of the beneficiary and adjust the trustee's obligation to creditors accordingly.[144] By altering the common law and providing that a trustee is not liable at all to any creditor, North Carolina now allows beneficiaries of spendthrift, discretionary, or support trusts to enjoy a steady stream of income from such trusts and remain comfortable in the notion that regardless of what obligations they have to creditors, that income is exempt and protected from their claims. This step is firmly against longstanding public policy, case law, and statutory law in

138. N.C. GEN. STAT. § 36C-5-501(b) (2006).
139. *See supra* section II(B).
140. *See* Hamilton v. Drogo, 150 N.E. 496, 497 (N.Y. 1926).
141. *Id*.
142. *See supra* section IV(A).
143. *See* RESTATEMENT (THIRD) OF TRUSTS § 60 (2003).
144. *See id*.

North Carolina.[145] Although it is certainly in the province of legislature to make such changes to the law, the reasons behind North Carolina's uneasiness towards such trusts is well grounded.[146] Furthermore, other states have found room for various exceptions to spendthrift provisions based on the nature of the creditor.[147] Finally, as to protective and discretionary trusts, the protection from creditors arose not because of the fact that discretionary or protective trusts as such offered protections from creditors, but it resulted because of the quality of the interest a beneficiary had in such trusts.[148] This principle was how the former section 36A-115 provided its protection—the interest in the income and the corpus of the trust was inalienable.[149] The beneficiary could not alienate his interest, but once the interest ripened, a creditor could attach to the matured interest.[150]

In the constant surge to adopt uniform statutes, it is possible for a state to lose sight of the strong justifications behind its own unique rules. For decades, North Carolina resisted joining the herd of states allowing spendthrift trusts and enhancing protection from creditors. North Carolina has ignored the strong public policy against the recognition of such trusts and allowing for such strong protection from creditors. Beyond confusing the expectations of settlors, trustees, beneficiaries, and creditors, North Carolina has thrown out well defined rules based on sound public policy in favor of a uniform rule that does not fit North Carolina tradition.

V. CONCLUSION

The changes made to the common law by section 36C-5-501, section 36C-5-502, section 36C-5-504, and section 36C-5-508 of the North Carolina General Statutes reflect a lack of faith in the well developed public policy and common law principles that have developed through careful thought and legal analysis over several decades. The changes adopted by the legislature will lead to confusion as to the extent of the protection against creditors afforded to the beneficiaries of discretionary, spendthrift, and protective trusts, as well create a preference in favor federal tax liens where state tax liens would have been

145. *See generally* Stephenson, *supra* note 38.

146. *See*, e.g., Swink v. Swink, 169 S.E.2d 539, 541 (N.C. Ct. App. 1969).

147. *See* BOGERT & BOGERT, *supra* note 10, at § 224.

148. *See, e.g.*, Morrow v. Apple, 26 F.2d 543 (D.C. 1928).

149. N.C. GEN. STAT. § 36A-115 (1979), *repealed by* Act of July 15, 2005, ch. 192, §1, 2005 N.C. Sess. Laws 345.

150. This seems to be implied by former section 36A-115. *See also* BOGERT & BOGERT, *supra* note 10, at § 228.

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on more level footing before. Returning to the example given at the beginning of this Comment, the family attorney would be correct in the assertions he made to the would-be settlor: North Carolina offers strong protection against creditors. However, these protections are subject to vulnerability created by the possibility that a federal tax lien could nevertheless attach to income interests that are otherwise well protected. Public policy considerations and state tax lien preference issues discussed above are serious problems and could easily arise. Under the old statutory scheme, all liens were on equal footing. A creditor with a valid lien at least had some chance of recovering through attachment to trust payments. While the law is designed to effectuate the intent of the settlor of such trusts as much as possible, the law must also consider the rights of creditors—both state and private.

By unintentionally carving out an exception for the federal government's tax lien, the new statutory scheme lacks both the clarity and purpose of its predecessor. This Comment does not mean to suggest that the old scheme should be readopted, but it does argue that by adopting uniform code provisions while asserting that the law has not been changed is certainly not a practice that should be maintained. One possible solution could be to draft a state tax lien statute with language substantially similar to the federal statute, but this remedy may not alleviate all of the issues created by section 36C-5-501. The North Carolina legislature should consider the potential implications of decisions like *Craft* that represent the near invulnerability of a federal tax lien and adjust the North Carolina version of the UTC to reflect recognition of the fact that the creditor protections professed in the statute may not be effective against such liens. Moreover, the right of a trustee to be free from liability to the creditors of beneficiaries should not mean that once the trustee has exercised discretion a creditor may not attach to these payments. Doing so ignores that creditors have some right to recover debts they are owed and stands against the long standing public policy of North Carolina. There are benefits to uniformity, but states should not ignore the unique aspects of their law that recognize long standing public policy decisions grounded in reason.

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