

ANSWER TO QUESTION 8

Paul's Capacity to Challenge the Trust:

Under the doctrine of election (also termed estoppel by acceptance) a beneficiary who elects to accept the benefits of a trust is thereafter barred from challenging the validity of the trust, including claims of insufficient capacity or undue influence.

In re Beglinger Trust, 221 Mich App 273 (1997); *Holzbaugh v Detroit Bank & Trust Co*, 371 Mich 432 (1963). Thus, under the doctrine of election, Paul would be precluded from challenging the validity of the trust because he elected to accept benefits under the trust.

However, a recent amendment to the Michigan Trust Code may permit Paul to challenge the trust based on undue influence. Public Act 2009, No. 46, applies to "all trusts created before, on, or after" the statutory effective date of April 1, 2010. MCL 700.8206(1)(a). MCL 700.7406 was amended to simply state that a "trust is void to the extent its creation was induced by fraud, duress, or undue influence." The statutory provision contains no exception or exclusion for those who have accepted trust benefits. Therefore, a plausible argument could be made that Paul retains the ability to challenge the trust based on a claim of undue influence under the new statutory amendment, despite accepting the \$25,000 annual benefit.

Spendthrift Clause:

The clause described in the fact pattern is a "spendthrift provision," a trust provision that "restrains either the voluntary or involuntary transfer of a trust beneficiary's interest." MCL 700.7103(j). Spendthrift provisions are valid and enforceable in Michigan. MCL 700.7502(1). Spendthrift provisions generally preclude the beneficiary's creditors from satisfying the beneficiary's debt with the beneficiary's trust interest.

However, there are several exceptions to this rule. MCL 700.7504(1) (a)-(c) states that a trust beneficiary's interest may be reached to satisfy an enforceable claim where the claims involve:

- (a) A trust beneficiary's child or former spouse who has a judgment or court order against the trust beneficiary for support or maintenance.
- (b) A judgment creditor who has provided services that

enhance, preserve, or protect a trust beneficiary's interest in the trust.

(c) This state or the United States.

Because Sara has a "judgment or court order against the trust beneficiary for support or maintenance," Sara may reach Paul's trust interest despite the spendthrift provision in order to satisfy the child support obligation.

However, Sara will not be able to recoup the entire amount of the arrearage all at once. MCL 700.7504(2) states that the court shall order all or part of a judgment satisfied "only out of all or part of distributions of income or principal as they become due." Because Paul's annual trust distribution is only \$25,000 per year, the most Sara could receive is \$25,000 when the distribution is due on January 1. However, the remainder of the arrearage can be paid in subsequent years.

Discretionary Trust Provision:

The alternate clause described in the fact pattern is a "discretionary trust provision." Such a provision exists where the trustee is given the discretion to determine whether, or in what amount, to distribute trust assets to beneficiaries. MCL 700.7103(d) (i-v).

If the trust contained a discretionary trust provision, Sara could not file a claim against Paul's trust distribution. MCL 700.7504, the statutory provision permitting certain types of claims to be enforced against a beneficiary's trust interests, specifically does not apply to a trust containing a discretionary trust provision. MCL 700.7504(3). Rather, where a discretionary trust provision exists, a trust beneficiary's creditor does not have a right to any amount of trust assets, and trust property cannot be reached until the assets are "distributed directly to the trust beneficiary." MCL 700.7505. Thus, Sara would be required to attempt to collect the past due child support from Paul after he receives the trust distribution.