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Articles Family Law

Determining When Trusts are Property for the Purpose of Equitable Division
by Suzanne Griffiths, Melanie Jordan

Family Law articles are sponsored by the CBA Family Law Section to provide information to family law practitioners. Articles focus on practice tips and discussions of current issues within the realm of family law.

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This article discusses how to determine when a beneficiary spouse's interest in an irrevocable trust will be considered property. Whether the interest will be characterized as property depends in large part on the interest the beneficiary spouse holds in the remainder of the trust.

Modern divorce often entails complex property valuations. One particularly complex issue involves the determination of whether a spouse's interest in an irrevocable trust¹ amounts to a property interest. When determining what property is divisible in divorce, a court decides whether an interest can be characterized as property, and then whether the property is separate or marital.² A beneficiary spouse's interest in a discretionary trust often fails to meet the first prong of the test.

In the case of discretionary trusts where the beneficiary spouse does not hold a remainder interest in the corpus of the trust,³ it is unlikely that the beneficiary spouse's interest will be considered marital property subject to equitable division. This is true whether the beneficiary spouse's interest takes the form of discretion by the trustee to invade the corpus of the trust, a mandatory income interest with no remainder interest, or a discretionary power of withdrawal.

This article discusses the characterization of a spouse's interest in a trust and whether that interest constitutes a property interest in a dissolution of marriage proceeding. The discussion focuses on Colorado case law.

Characterizing an Interest in a Trust

Characterization of a spouse's interest in a trust largely depends on the powers that the trustee holds to invade the corpus and whether the beneficiary spouse has a vested remainder in the corpus. Where a beneficiary may receive distributions from the corpus of the trust at the discretion of the trustee but does not possess a vested remainder interest in the corpus, the beneficiary spouse does not have a property interest.⁴ In addition, a beneficiary spouse, without a vested remainder interest in the corpus, does not have a property interest in income distributions, even when such distributions are mandatory, if the beneficiary spouse does not have the power to control how the corpus of the trust is invested.⁵

Finally, even in cases where a beneficiary spouse has a discretionary power to withdraw the greater of \$5,000 or 5 percent of the trust's value on an annual basis (5 & 5 power), such a discretionary power of withdrawal usually will not constitute a property interest.⁶ In contrast, the Colorado Supreme Court has held that a remainder interest in an irrevocable trust represents a present fixed right to future enjoyment that gives rise to a vested property interest in the trust, subject to valuation and division of the appreciation thereon.⁷

Discretionary Interests in the Trust Corpus

Discretionary trusts typically allow the trustee to invade the corpus as reasonably necessary or as advisable for certain enumerated needs or desires of the beneficiary spouse. By contrast, nondiscretionary trusts direct the trustee to invade the corpus in certain circumstances, making it a mandatory (rather than a discretionary) action. Where the trust does not create a contractual right that would allow the beneficiary to force the trustee to distribute all or part of the corpus of the trust, the interest will be characterized as discretionary rather than mandatory and will not be a property interest subject to division.⁸

Where a beneficiary spouse does not have a vested remainder interest in the corpus of a trust, a discretionary ability to access the principal of the trust is not sufficient to create a property right.⁹ Initially, Colorado courts relied on the lack of cash value of a discretionary interest in a trust to determine it was not property.¹⁰ The dominant analysis now focuses on whether the beneficiary has an enforceable right under the trust document to distributions of the principal.¹¹

The *Rosenblum* Opinion

*In re Marriage of Rosenblum*¹² first determined that discretionary interests in trusts were not a property interest. The beneficiary spouse was a co-trustee and had no remainder interest.¹³ The settlors gave absolute discretion to the trustees to distribute "all, none, or any part" of the income and principal of the trust to the beneficiaries.¹⁴ The beneficiary spouse could not receive any distributions from the trust exceeding those "necessary for his health, education, maintenance and support," as long as he remained a trustee.¹⁵ The trust specifically excluded any right of enforcement to demand distribution of trust income or principal.¹⁶

The Colorado Court of Appeals determined that, when distributions of trust income or principal are discretionary, "a beneficiary has no property interest or rights in the undistributed funds."¹⁷ In reaching this finding, the court focused on the lack of cash value of the interest, including the spendthrift provision protecting the interest from creditors.¹⁸ The court determined the husband had no property interest even though he was a trustee and sometimes used trust assets as if they were his own.¹⁹

The *Jones* Opinion

In 1991, the Colorado Supreme Court took up a similar matter in *In re Marriage of Jones*.²⁰ There, the trustees had uncontrolled discretion to distribute income and principal to the trustee (the wife's father); to the wife; or to the descendants of the wife "as necessary for health, welfare, comfort, support, maintenance, and education."²¹ The beneficiary spouse did not have a remainder interest in the trust, because the trust terminated after her own and her father's death. In that event, the trust proceeds went to the beneficiary spouse's descendants.²²

In reaching its decision that the beneficiary spouse's interest was not a property interest, the Court compared cases that found that a spouse's right in a pension was a property right.²³ In the pension cases, courts focused on the beneficiary's contractual right to receive the pension.²⁴ Even when the rights to receive the pension were conditional—such as requiring staying with a company for a certain period of time—courts found them to be property rights.²⁵ The courts focused on determining whether the beneficiary has a contractual right to enforce payment to determine whether a property interest existed.²⁶

The Court contrasted pension rights with educational degrees. Colorado does not consider educational degrees property.²⁷ The cases analyzing whether educational degrees are property emphasize that degrees do not have cash value and provide no contractual right to receive payment or something of value in the future, so they do not equal property.²⁸ They can be considered an economic circumstance when determining what an equitable division of property would be, but their value itself cannot be property subject to division.²⁹

Similarly, rights in a discretionary trust where the beneficiary has no vested remainder interest in the principal of the trust have no readily exchangeable cash value and provide no contractual right to receive something of value in the future.³⁰ Like educational degrees, the interest in the trust is an economic circumstance to be considered in dividing marital property, but it is not a property right and thus is not subject to division.³¹

Although the Court's reasoning in *Jones* differed slightly from *Rosenblum*,³² the Court still affirmed the result in *Rosenblum*—that an interest in a discretionary distribution from a trust is not a property interest.³³ Arguably, *Jones* also can be read more expansively to hold that only a vested remainder interest, fully distributable at some point in time, is property subject to allocation by a court in a dissolution of marriage.³⁴ At the very least, *Jones* conclusively established that in divorce proceedings, interests in discretionary trusts are not property interests where the beneficiary has no vested remainder interest.

Case Law After *Jones*

The Colorado Court of Appeals has twice revisited the issue of discretionary interests as property in marriage dissolution cases since *Jones*. The U.S. District Court for the District of Colorado also has considered the issue. These opinions are discussed below.

The Pooley Opinion

In 1999, the Colorado Court of Appeals in *In re Marriage of Pooley* determined that neither the corpus nor the income of the trust constituted a property interest subject to division.³⁵ Though not explicitly stated, the result in *Pooley* could be supported by the Colorado Supreme Court's reasoning that the beneficiary spouse did not have a contractual right to enforce payment from the corpus, and thus the interest in the trust fell short of becoming a property right.

In *Pooley*, the wife placed her personal injury settlement into an irrevocable trust fund with herself as the beneficiary and her parents as the trustees.³⁶ The trust allowed the trustees to:

[p]ay all, none, or part of the income and principal as trustees in their sole and absolute discretion determine to be necessary or advisable for the supplemental care, comfort, support, health, maintenance, education, and welfare of the beneficiary.³⁷

As in *Rosenblum* and *Jones*, the beneficiary spouse in *Pooley* had no control over the principal or income and no right to demand or request distributions.³⁸

The Guinn Opinion

The court of appeals reached a similar conclusion in *In re Marriage of Guinn*, when it determined that the beneficiary spouse had no property interest in a discretionary trust.³⁹ The beneficiary spouse's parents were the trustees, with the remainder interest in the trust belonging to the children of the beneficiary spouse.⁴⁰ The trustees had discretion to distribute part or all of the corpus to the beneficiary spouse if "reasonably necessary for health, maintenance, support, and education."⁴¹

Unlike previous cases, in *Guinn*, the beneficiary spouse had a mandatory rather than discretionary right to distributions of income. However, the trustees had discretion over how to allocate income and principal.⁴² In addition, the beneficiary had no right to force the trustees to pursue an investment strategy to maximize income.⁴³ Like the preceding cases, with no contractual right to receive distributions of the corpus, the court found that the beneficiary spouse did not have a property right in the corpus of the trust.⁴⁴

The Delano Opinion

The U.S. District Court for the District of Colorado, applying Colorado law, reached a different result in *United States v. Delano*.⁴⁵ There, the issue was whether a taxpayer had a property interest in the corpus of a trust that could be subject to a federal tax lien. The taxpayer was both the beneficiary and a co-trustee of a trust settled by his mother.⁴⁶ The trust required, by the use of the word "shall," that the trustee pay income and/or principal in the trustee's absolute discretion that was deemed necessary or advisable for his maintenance, health, education, comfort, and welfare.

The *Delano* trust gave considerably more discretion to the trustee to invade the corpus than the trusts in *Rosenblum*, *Jones*, *Pooley*, and *Guinn*. The trustee had discretion to add undistributed income to the principal.⁴⁷ The taxpayer, as trustee, had discretion to terminate the trust and retain all of the trust assets.⁴⁸ Notably, the trust expressly authorized the trustee to disregard the beneficiary's financial need in making decisions.⁴⁹

The *Delano* court distinguished *Rosenblum* and *Jones* on the basis that those trusts were discretionary and expressly gave the trustee the discretion to withhold payments to the beneficiaries.⁵⁰ The court determined that the use of the language "shall" rather than "may" in the *Delano* trust indicated an intention to compel the trustee to make at least some payment to the beneficiary.⁵¹

In addition, the court looked to the intention of the settlor. Because the settlor had created a trust with a single lifetime beneficiary with the power to dispose of the trust entirely during his life and without regard to the assets available to the taxpayer-beneficiary, the court determined that the settlor intended that the beneficiary have a right to access all the income and principal of the trust.⁵²

Mandatory Income Interests Without Vested Remainders

Under Colorado law, a discretionary interest to invade the trust corpus without a coupled interest in the remainder of the trust is not a property right.⁵³ Similarly, a discretionary right to income is not a property right. In some cases, even a mandatory right to income from a trust is not a property interest.⁵⁴

Many settlors establish trusts that have a mandatory income life beneficiary. If the beneficiary does not have a vested interest in the remainder of the trust, the court of appeals has held that even a mandatory income life beneficiary does not have a property interest in the trust.⁵⁵ Because the mandatory income life beneficiary is receiving income generated from a third person's property, the beneficiary has no property interest in future distributions of income.⁵⁶

In *Guinn*, the court of appeals determined that a beneficiary spouse's interest in mandatory income did not rise to the level of a property interest.⁵⁷ The beneficiary spouse was entitled to mandatory distributions of income and discretionary distributions of the corpus if "reasonably necessary for health, maintenance, support, and education."⁵⁸ The language used—that the "Trustee shall pay to or apply for the benefit of [the beneficiary spouse] the net income of the trust annually or at more frequent intervals"—obliged the trustees to make payment to the beneficiary spouse.⁵⁹

The trustees, the beneficiary spouse's parents, had considerable discretion to determine what constituted the income and principal of the trust.⁶⁰ The trust document gave the trustees authority to "invest in any kind of property" and determine in their "reasonable discretion what is principal and what is income of the trust."⁶¹ The beneficiary spouse's children had the remainder interest in the corpus of the trust.⁶²

The *Guinn* court held that an interest in future mandatory distributions of income from the trust was not a property interest, and that any income actually received was a separate property interest.⁶³ It reasoned that because there was no set amount of income specified and the trust left considerable discretion to the trustees as to how to allocate income and principal, no right to property existed until actual distribution to the beneficiary spouse.⁶⁴

Furthermore, income generated from the property that is vested in other persons does not constitute a property interest.⁶⁵ The court considered the income that the beneficiary spouse had actually received to be separate property.⁶⁶ However, income to be received in the future or not yet received was not property, because it was derived from the property of third persons—in this case, the remaindermen.⁶⁷

The holding in *Guinn* that mandatory income interests are not marital property has been reached by one other state. Delaware courts also have found that mandatory income interests are not marital property, but reached that conclusion because the income interest could not be reduced to actual possession; however, none of the Delaware courts focused on the lack of a vested remainder in the corpus of the trust.⁶⁸

Vested Remainder Interests

Colorado law has carved out an exception to the general rule that no property right exists where the interest in a trust is discretionary. The exception exists if the beneficiary spouse holds a vested remainder interest in the corpus of the trust. The *Guinn* court succinctly summarized this distinction in Colorado law, stating that:

a remainder interest in an irrevocable trust represents a present fixed right to future enjoyment that gives rise to a vested property interest in the trust property[,], even if that interest is subject to complete divestment or defeasance.⁶⁹

On several occasions, Colorado courts have affirmed this distinction between beneficiary spouses with vested remainders and those without such interests. In 1995, the Colorado Court of Appeals decided *In re Marriage of Foottit* and determined that the income derived from separate property constituted marital property.⁷⁰ Like the *Guinn* trust, the beneficiary spouse in *Foottit* had a mandatory right to distributions of income.⁷¹ Unlike *Guinn*, the beneficiary spouse had a mandatory right to receive the remainder of the corpus of the trust, thus creating a vested remainder. In *Foottit*, the corpus vested in the beneficiary spouse when she turned 35, and she had reached that age at the time of the divorce.⁷² The parties in *Foottit* stipulated that the trust was separate property of the wife.⁷³ Accordingly, the court found that income derived from wife's separate property interest was marital property.⁷⁴

Similarly, the beneficiary spouse in *In re Marriage of Mohrlang* did not contest the trial court's determination that his interest in the trust was property.⁷⁵ There, the husband appeared to have a remainder interest in the trust as long as he survived his parents.⁷⁶ The court determined that he did have an enforceable right to require the trustee to distribute the corpus for his support, maintenance, health, and education.⁷⁷

In both *Foottit* and *Mohrlang*, the appellate court did not directly reach the issue of whether the interest was property. However, the outcome in both cases is consistent with the *Guinn* holding that vested remainders in irrevocable trusts are a property interest subject to equitable disposition in a dissolution of marriage.

Vested Remainder Interests Subject to Defeasance

A vested remainder interest subject to defeasance is an interest whereby the beneficiary of the interest is identified and is entitled to receive the interest in the future, but the entitlement could be completely divested on happening of some future event or occurrence.⁷⁸ For example, a person may have a vested remainder interest in the principal of a trust, but the interest will become possessory only if the holder of the remainder interest survives the current beneficiary. The Colorado Supreme Court addressed such an interest in *In re the Marriage of Balanson*.⁷⁹ There, the beneficiary spouse had no interest in income distributions.⁸⁰ Instead, she had a vested interest in the remainder of the trust subject to complete defeasance if she pre-deceased her father, the beneficiary of the trust.⁸¹ Because the trustees did not have discretion to withhold the property from the beneficiary spouse, the Court found that the remainder interest was an enforceable interest giving rise to a property interest.⁸²

The Court's reasoning turned on whether the beneficiary spouse had an enforceable contractual right to receive the property or merely an expectancy.⁸³ The Court listed several factors for determining whether an interest is property, including whether the interest could be sold, transferred, conveyed, or pledged, or whether the interest terminates on the death of the owner of the interest.⁸⁴

The Court found vested remainder interests to be

distinguishable from interests in discretionary trusts because although the value of such interests may be uncertain at the time of the dissolution of marriage, they nevertheless constitute property because they are certain, fixed interests subject only to the condition of survivorship.⁸⁵

Thus, if a person has an interest in a trust that is subject only to a condition of survivorship,⁸⁶ and such interest has some features like traditional property, such as having cash value, it is likely to be found to constitute a property interest in a dissolution of marriage.

Noncumulative Discretionary Right of Withdrawal

Many trust documents allow a beneficiary spouse to annually withdraw a certain amount or percentage from the trust. Some trusts include a noncumulative right of withdrawal, meaning that if the beneficiary chooses not to make a withdrawal, the power to withdraw lapses. For example, a beneficiary with a 5 & 5 power (the power to withdraw \$5,000 or 5 percent of the principal of the trust on a yearly basis) could not refrain from making withdrawals for five years and then withdraw \$25,000. Instead, the beneficiary would have to withdraw the \$5,000 or 5 percent every year or forfeit that amount.

Arguments That a 5 & 5 Power Constitutes Property

Nonbeneficiary spouses in a dissolution of marriage proceeding sometimes argue that an unexercised power of withdrawal equates to a property interest, and that the appreciation thereon constitutes marital property. The argument's premises rest on the Restatement (Third) of Trusts and its discussion of ownership equivalence, as well as Internal Revenue Service regulations regarding a noncumulative right of withdrawal.

First, the *Restatement (Third) of Trusts* § 56 specifically mentions the *Rhodarmer* case, which held that a noncumulative 5 & 5 withdrawal power was not property. It states that this view is an "earlier and more limited view of the rights of creditors of donees of general powers of appointment."⁸⁷ It then states that the *Restatement* view—that a 5 & 5 noncumulative power of withdrawal is property—is supported by common law and policy.⁸⁸

Second, a beneficiary spouse is treated as owning the portion of the trust principal that he or she could have withdrawn under a noncumulative right of withdrawal for tax purposes.⁸⁹ The circumstances in which a "person other than the grantor shall be treated as the owner" of a portion of the trust are set forth at 26 U.S.C. § 678.⁹⁰ Subsection (a)(1) states that if a person, such as a beneficiary spouse, has the power that can be exercised only by the beneficiary spouse to vest the corpus or income in himself or herself, the portion of the trust over which the person has that power will be treated as his or her property for tax purposes.

However, what is treated as property for income tax purposes is not determinative when resolving what constitutes property in dissolution of marriage proceedings. Tax lawyers also debate whether § 678 requires the amount that a beneficiary could have withdrawn to be treated cumulatively, or whether it requires only the amount that a beneficiary could have withdrawn in the tax year to be treated as property for tax purposes.

Arguments That a 5 & 5 Power Does Not Constitute Property

There are several arguments supporting the proposition that a noncumulative 5 & 5 power is not property. First, Colorado courts already have determined in another context that a discretionary power to withdraw from the trust corpus is not a property interest. Further, a contrary conclusion

would result in burdensome and expensive accounting procedures, invite speculation, and provide minimal benefit to any nonbeneficiary spouse.

In *University National Bank v. Rhoadarmer*,⁹¹ the court of appeals determined that an annual 5 & 5 power did not form a property interest that could be subjected to a lien. The court compared the discretionary withdrawal provision to a power of appointment, which is not property.⁹² A power of appointment is not a property interest because it does not give the property to the person who can appoint it; rather, it allows that person to appoint the property on behalf of the original donor. The court also found that it did not matter that the annual withdrawal right might be taxable, because what is property for other purposes, such as divorce or liens, is not determined by the federal tax code.⁹³

The court further compared the withdrawal right to an offer that has not been accepted: until the beneficiary exercises the right of withdrawal, he or she has not accepted the offer to withdraw a portion of the trust principal. Without actual withdrawal of the money or property, no property right exists.⁹⁴ The *Rhoadarmer* court also did not find a property right in the amount of money that the beneficiary could access under the current year's right of withdrawal.⁹⁵

The reasoning in *Rhoadarmer* relating a right to withdrawal to a nongeneral power of appointment has been criticized by the *Restatement (Third) of Trusts*. Despite this, it has been viewed as authoritative in two other treatises.⁹⁶ Also, the *Restatement of Property* supports not treating a nongeneral power of appointment as a property interest.⁹⁷ The Uniform Trust Code does not follow the *Restatement of Trusts* rule and does not treat lapsed withdrawal powers as property interests.⁹⁸ Although academic commentators differ on this point, Colorado law is clear that rights of withdrawal are not property interests, at least in the lien context.

When the Beneficiary is a Trustee

In *Delano*, the court determined that, because the beneficiary also was a co-trustee, the idea that the trustee would exercise discretion to not distribute a payment was less convincing than where the trustee is independent from the beneficiary.⁹⁹ In Colorado, the reason courts have found that discretionary trusts are not property is that the beneficiary has no right to enforce a payment or distribution.¹⁰⁰ By contrast, when the beneficiary also is the trustee, the trustee–beneficiary has complete discretion to distribute funds to himself or herself. Nonetheless, as a trustee, the beneficiary–trustee also must exercise the fiduciary role of a trustee. This means that the beneficiary–trustee is still bound to follow the provisions of the trust in distributing money to himself or herself as the beneficiary. The beneficiary–trustee also has a fiduciary relationship with any remaindermen in the principal or income of the trust, so the beneficiary–trustee theoretically does not have discretion to treat the trust as his or her own personal piggy bank.

In decisions where Colorado appellate courts have found that the interest in a trust was not a property interest, only *Rosenblum* involved a trust where the beneficiary also was the trustee. There, the beneficiary was only a co-trustee.¹⁰¹ In *Guinn*, the court's opinion states that the beneficiary spouse's parents were the trustees, but the beneficiary spouse had been the trustee until the litigation began.¹⁰² *Jones* and *Pooley* both involved trusts where parents were the trustees.¹⁰³

Colorado courts have not focused on the beneficiary's role as trustee and have even treated it as irrelevant, as was the case in *Rosenblum*, where the beneficiary spouse was a co-trustee who acted as though the trust was only for his benefit and the co-trustee simply accepted his decisions. *Delano* is the only case where the lack of independence between the beneficiary and trustee was expressly addressed, and *Delano* is not controlling in Colorado state court. The reasoning in *Delano*—that there is no difference between mandatory and discretionary interests

where the trustee who exercises discretion also is the beneficiary—is appealing because it addresses the appearance of bias when the trustee and beneficiary are identical.

However, none of the Colorado appellate cases presents facts identical to *Delano*, where the grantor’s intention was clearly to benefit only the lifetime beneficiary and the discretion given the lifetime beneficiary was so broad that he effectively could liquidate the trust’s assets at any time and distribute them to himself. If presented with such a case, the reasoning in *Delano* could be persuasive and Colorado courts might find that trustee–beneficiaries with broad discretion to distribute to and benefit themselves have a property interest in the trust corpus.

Other states have been persuaded that a discretionary interest in a trust is property when the trustee also is the beneficiary and has broad discretion. In *Caruso v. Caruso*, the Appeals Court of Massachusetts held that a husband’s interest in a trust was property where the husband and his accountant were co-trustees, and the evidence showed that the accountant always agreed with the husband in trust distribution decisions.¹⁰⁴ The Missouri Court of Appeals also focused on a wife’s status as the sole trustee and sole current beneficiary to determine that her interest in the trust was marital property.¹⁰⁵

Conclusion

Historically, discretionary interests in trusts without a vested remainder interest have not been considered property in divorce proceedings. Because a person with a discretionary interest in a trust cannot force a trustee to distribute income or principal, Colorado appellate courts have found that the person has no property interest; however, in cases where the beneficiary of a discretionary trust also is a trustee, it is arguable that such an interest constitutes property. A person with a mandatory income interest likely will be found to not have a property interest if the income is derived from the property of a third person. Finally, a discretionary right of withdrawal is not likely to constitute a property right, particularly where such a right has lapsed.

On the other hand, a spouse’s vested interest in the corpus of an irrevocable trust is likely to constitute property in a dissolution of marriage proceeding. Family law practitioners must read all trust documents carefully to determine what type of trust interest(s) are implicated, how the trust provisions are drafted, and how the trust is actually administered with respect to a beneficiary spouse to determine how the interest is likely to be characterized.

Notes

1. This article discusses only irrevocable trusts. By statute, revocable trusts do not create property interests in beneficiaries. CRS § 14-10-113 (7)(b).
2. *In re Marriage of Balanson*, 25 P.3d 28 (Colo. 2001). See also CRS § 14-10-113.
3. A remainder interest in the corpus of a trust is a future interest in the principal of a trust. For example, trusts often have lifetime income beneficiaries who receive all the benefits during their lifetime; then, the descendants of the lifetime income beneficiary have remainder interests in the corpus trust—meaning they have an interest in the principal of the trust after the death of the lifetime income beneficiary.
4. *In re Marriage of Rosenblum*, 602 P.2d 892 (Colo.App. 1979).
5. *In re Marriage of Guinn*, 93 P.3d 568 (Colo.App. 2004).

6. See *University Nat'l Bank v. Rhoadarmer*, 827 P.2d 561 (Colo.App. 1991).
7. *Balanson*, *supra* note 2 at 30.
8. *Rosenblum*, *supra* note 4 at 892.
9. *Id.*
10. *Id.* at 894.
11. *In re Marriage of Jones*, 812 P.2d 1152, 1156 (Colo. 1991).
12. *Rosenblum*, *supra* note 4 at 892.
13. *Id.*
14. *Id.* at 893.
15. *Id.*
16. *Id.*
17. *Id.* at 894.
18. *Id.*
19. *Id.* at 893-94.
20. *Jones*, *supra* note 11.
21. *Id.* at 1153.
22. *Id.*
23. *Id.* at 1155-56.
24. *Id.*
25. See *In re Marriage of Grubb*, 745 P.2d 661, 664 (Colo. 1987).
26. *Id.* at 665 ("[T]he controlling consideration [was] that an employee who is fully vested under a pension plan has a right to receive payment at some time in the future.").
27. *In re Marriage of Olar*, 747 P.2d 676 (Colo. 1987).
28. *Jones*, *supra* note 11 at 1154.
29. *Olar*, *supra* note 27 at 680.
30. *Jones*, *supra* note 11 at 1154.

31. *Id.*

32. *Id.* at 1156.

33. Chorney, "Trusts in Divorce Property Divisions" *40th Annual Heckerline Institute on Estate Planning* (2008) (on file with authors).

34. *Id.*

35. *In re Marriage of Pooley*, 996 P.2d 230 (Colo.App. 1999).

36. *Id.* at 231.

37. *Id.*

38. *Id.*

39. *Guinn*, *supra* note 5.

40. *Id.* at 570.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 571.

45. *United States v. Delano*, 182 F.Supp.2d 1020 (D.Colo. 2001).

46. *Id.* at 1021.

47. *Id.* at 1022.

48. *Id.* at 1023.

49. *Id.* at 1023-24.

50. *Id.* at 1022-23.

51. *Id.* at 1023.

52. *Id.* at 1022-24.

53. *Id.* at 1022 ("Under Colorado law, the beneficiary of a discretionary trust has a mere expectancy rather than a property interest in the trust.").

54. *See, e.g., Guinn*, *supra* note 5 at 571-72.

55. *Id.*

56. *Id.* at 571.
57. *Id.* at 568.
58. *Id.* at 570.
59. "David Leslie Guinn 1990 Family Trust" 3 (Nov. 12, 1990) (on file with authors).
60. *Guinn*, *supra* note 5 at 570.
61. "David Leslie Guinn 1990 Family Trust," *supra* note 59 at 10-12.
62. *Guinn*, *supra* note 5 at 570.
63. *Id.* at 570-72.
64. *Id.* at 571.
65. *Id.*
66. *Id.* at 570-72.
67. *Id.* at 571-72, *citing* Diehl, "The Trust in Marital Law: Divisibility of a Beneficiary Spouse's Interests on Divorce," 64 *Tex. L.Rev.* 1301, 1349-50 (1986).
68. *Sayer v. Sayer*, 492 A.2d 238 (Del. 1985). *See also Cleaver v. Cleaver*, 935 S.W.2d 491, 493 (Tex.App. 1996) (holding that a wife's mandatory income interest in a trust was not marital property, because she acquired her interest in the trust before the marriage).
69. *Guinn*, *supra* note 5 at 571.
70. *In re Marriage of Foottit*, 903 P.2d 1209 (Colo.App. 1995).
71. "Jane O. Norsworthy Irrevocable Trust" art. (3)(a) (July 31, 1975) (on file with authors).
72. *Id.*
73. *Foottit*, *supra* note 70 at 1211.
74. *Id.* at 1212.
75. *In re Marriage of Mohrlang*, 85 P.3d 561, 562 (Colo.App. 2003).
76. *Id.*
77. *Id.*
78. *See Black's Law Dictionary* 217 (5th ed. 1983).
79. *Balanson*, *supra* note 2.

80. *Id.* at 40.

81. *Id.*

82. *Id.* at 35-41.

83. *Id.* at 35, 41.

84. *Id.* at 35, citing *In re Marriage of Graham*, 574 P.2d 76 (Colo. 197).

85. *Id.* at 41.

86. *Balanson*, *supra* note 2 need not be read to hold that all vested remainders in an irrevocable trust, even when subject to divestment, are property. Instead, it is arguable that, if additional conditions are present besides a condition of survivorship and the invasion of trust principal for the current beneficiary, such conditions might be sufficient to render the interest too speculative to be considered property. *Chorney*, *supra* note 33. In a Massachusetts case, for example, a husband had a vested remainder interest in the corpus of a trust, but his interest would be divested unless two conditions were met, including that his father die before a certain date and he survive to that date. *D.L. v. G.L.*, 811 N.E.2d 1013, 1026 (Mass.App. 1996).

87. *Restatement (Third) of Trusts* § 56 cmt. b (2007).

88. *Id.*

89. 26 U.S.C. § 678.

90. *Id.*

91. *Rhoadarmer*, *supra* note 6 at 564.

92. *Id.* at 562.

93. *Id.* at 563.

94. *Id.*

95. *Id.*

96. Ascher and Scott, *Scott and Ascher on Trusts* § 15.2.8 n.3 (5th ed., 2009) (*Rhoadarmer* opinion is not the majority position); Bowe and Parker, *Page on the Law of Wills* § 44.31 n.9 (3d ed., 2005) ("[i]f the property is given in trust and the trustee has discretion to give or withhold payments to the beneficiary, the beneficiary does not have such an interest, either in the income or the principal, as can be taken for his debts"); Bowe and Parker at § 45.24 n.2 (stating that the donee does not have a property right unless he or she exercises the power of appointment); Bogert *et al.*, *Bogert on Trusts* § 233 n.79, 82 (6th ed., 2009) ("Where the beneficiary had not exercised her noncumulative power to withdraw trust principal she had no property right subject to garnishment. Property subject to a donee's general power of appointment is available to his creditors only if the power is exercised.").

97. *Restatement (Third) of Property (Wills and Other Donative Transfers)* § 13.1 (2003).

98. Uniform Trust Code § 103 cmt. (2005) ("A power is not presently exercisable if exercisable only by the power holder's will or if its exercise is not effective for a specified period of time or until occurrence of some event.").

99. *Delano*, *supra* note 45 at 1024.

100. *See Jones*, *supra* note 11.

101. *Rosenblum*, *supra* note 4 at 893.

102. "David Leslie Guinn 1990 Family Trust," *supra* note 59 at 21.

103. *Pooley*, *supra* note 35 at 231; *Jones*, *supra* note 11 at 1153.

104. *Caruso v. Caruso*, 2008 WL 200301 (Mass.App. 2008).

105. *Moore v. Moore*, 189 S.W. 3d 627 (Mo.App. 2006).

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