



1-1-2013

How an Obscure Tennessee Opinion Uncovers the Veil of Legal Malpractice Between Asset-Protection Trusts and the Uniform Trust Code.

Charles Epps Ipock

Follow this and additional works at: <https://commons.stmarytx.edu/lmej>



Part of the [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Charles E. Ipock, *How an Obscure Tennessee Opinion Uncovers the Veil of Legal Malpractice Between Asset-Protection Trusts and the Uniform Trust Code.*, 3 ST. MARY'S JOURNAL ON LEGAL MALPRACTICE & ETHICS 308 (2013).

Available at: <https://commons.stmarytx.edu/lmej/vol3/iss1/10>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Journal on Legal Malpractice & Ethics by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu, jcrane3@stmarytx.edu.

CASE NOTE

Charles Epps Ipock

How an Obscure Tennessee Opinion Uncovers the Veil of
Legal Malpractice Between Asset-Protection Trusts and the
Uniform Trust Code

CONTENTS

I. The Uniform Trust Code	308
II. Asset-Protection Trusts	309
III. Asset-Protection Trusts Within the Uniform Trust Code	310
IV. <i>In re Estate of Stidham</i>	312
V. Illusion of Asset-Protection Trusts in a UTC State .	314
VI. How to Protect Assets If Within a UTC Jurisdiction?	315
VII. Does an Attorney Commit Malpractice by Attempting to Protect Assets in a UTC State?	316
VIII. Conclusion	318

I. THE UNIFORM TRUST CODE

In the year 2000, the Uniform Law Commissioners approved the Uniform Trust Code (UTC).¹ This was the first effort to provide states

1. Robert T. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 CARDOZO L. REV. 2551, 2552 (2006).

with an all-inclusive model for codifying their trust laws.² Since then, at least twenty-three states adopted some, or most, of the UTC.³ However, “[t]he UTC has not been without controversy.”⁴ Most controversial are provisions within the UTC regarding asset-protection trusts.⁵

II. ASSET-PROTECTION TRUSTS

A trust that prevents “a beneficiary’s creditors from reaching the beneficiary’s interest in trust property” is an asset-protection trust.⁶ While often used by the wealthy to shield their children from future creditors, the more often utilized purpose of these trusts is to shield beneficiaries with special needs.⁷ The cardinal asset-protection trusts are discretionary and spendthrift trusts.⁸ The central mechanism that protects assets within a discretionary trust is the following:

[The trustee has] discretion to make distributions of principal or income to, or for the benefit of, a beneficiary. Under the general common law view, a beneficiary has no interest in the discretionary trust’s assets unless and until the trustee decides to make a distribution to the beneficiary. Consequently, if a trustee chooses not to make a distribution to the beneficiary, that beneficiary has no interest in the trust assets that a creditor of that beneficiary could reach.⁹

Put another way, the protection of a discretionary trust is based on the beneficiary’s inability to compel a distribution from the trustee.¹⁰ As a result, no creditor can stand in the beneficiary’s shoes and force a

2. *Id.*

3. See Turney P. Berry, David M. English & Dana G. Fitzsimons Jr., *Disclose. Disclose! Disclose? Longmeyer Distorts the Trustee’s Duty to Inform Trust Beneficiaries*, PROB. & PROP., July/Aug. 2010, at 12, 15 (demonstrating the states that have adopted the UTC interestingly range from very conservative, such as South Carolina, to quite liberal, such as New Hampshire and Vermont).

4. Robert T. Danforth, *Article Five of the UTC and the Future of Creditors’ Rights in Trusts*, 27 CARDOZO L. REV. 2551, 2552 (2006).

5. See *id.* at 2555 (“The UTC has been the subject of pointed criticism from a small segment of the estate planning bar, most of whom apparently focus their practices on so-called asset protection planning—that is, the structuring of clients’ affairs to shelter assets from the claims of creditors.”).

6. S. Alan Medlin, *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. REV. 137, 177 (2005).

7. *Id.*

8. *Id.*; see also BLACK’S LAW DICTIONARY 737 (3d pocket ed. 1996) (defining a spendthrift trust as one “that protects the beneficiary’s interest from being assigned and also prevents a creditor from attaching that interest”).

9. S. Alan Medlin, *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. REV. 137, 177 (2005) (citing Marc Merric & Steven J. Oshins, *How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?*, 31 EST. PLAN. 478, 479 (2004)).

10. *Id.*

distribution.¹¹ Furthermore, a trustee is within his discretion if he bypasses payment to a beneficiary and pays off a service provider directly.¹² The net result is that “virtually no creditor could recover from a discretionary trust even though the beneficiary continued to benefit from the trust.”¹³

The mechanism that protects assets within a spendthrift trust is “a provision that prevents a beneficiary’s creditors, other than certain exception creditors, from reaching the trust assets before the beneficiary receives the assets.”¹⁴ Most jurisdictions recognize “exception creditors” to spendthrift trusts that can attack the trust assets; certain federal governmental claims, alimony, and child support are typical examples.¹⁵ Thus, in both discretionary and spendthrift trusts, notwithstanding exception creditors, a creditor can only get to the trust assets if the trustee makes a distribution outright to the beneficiary.

III. ASSET-PROTECTION TRUSTS WITHIN THE UNIFORM TRUST CODE

The UTC contains language contrary to the common law principles stated above—in short, the UTC “changes the rules.”¹⁶ Most notably, the UTC abolishes a “125-year common law distinction . . . so that discretionary trusts must now rely on spendthrift protection for their asset protection value.”¹⁷ The net result of this UTC provision essentially disposes of discretionary trusts by forcing the trusts to contain spendthrift language. Similarly, section 501 of the UTC states, “To the extent a beneficiary’s interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the

11. *Id.* at 178.

12. Mark Merric, Douglas Stein & Jane Freeman, *Uniform Trust Code and Asset Protection in Non-Self Settled Trusts*, STEVE LEIMBERG’S ASSET PROTECTION PLANNING NEWSLETTER, Sept. 14, 2004, at 3, available at <http://www.bsdd.com/CM/Custom/Leimberg%20Lisi53.pdf>.

13. *Id.*

14. S. Alan Medlin, *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. REV. 137, 180 (2005).

15. Mark Merric, Robert Gillen & Jane Freeman, *Malpractice Issues and the Uniform Trust Code*, EST. PLAN. MAG., Dec. 2004, at 1.

16. Mark Merric, Douglas Stein & Jane Freeman, *Uniform Trust Code and Asset Protection in Non-Self Settled Trusts*, STEVE LEIMBERG’S ASSET PROTECTION PLANNING NEWSLETTER, Sept. 14, 2004, at 3, available at <http://www.bsdd.com/CM/Custom/Leimberg%20Lisi53.pdf>.

17. Mark Merric, Robert Gillen & Jane Freeman, *Malpractice Issues and the Uniform Trust Code*, EST. PLAN. MAG., Dec. 2004, at 1. See generally UNIF. TRUST CODE § 504 cmt. (2005) (“This section addresses the ability of a beneficiary’s creditor to reach the beneficiary’s discretionary trust interest . . . [and] [t]his section, similar to the Restatement [(Third) of Trusts], eliminates the distinction between discretionary and support trusts, unifying the rules for all trusts fitting within either of the former categories.”).

beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means."¹⁸ Again, the marriage of the distinct trusts by the UTC forces the use of spendthrift language for asset protection.¹⁹ The undesirable effect of these provisions is that without a spendthrift clause "any creditor can attach a beneficiary's interest and, standing in that beneficiary's shoes, demand payment of any distribution directly to that creditor instead of to the beneficiary."²⁰

This is bothersome because settlors must now utilize spendthrift trust language to protect assets from creditors. "The range of permitted exemption creditors under the UTC is further enlarged because the [UTC] explicitly permits extension in the number and scope of exception creditors by both the judiciary and the legislature."²¹ The future possibility and current realization of an increased number of exception creditors under the UTC creates great pause in their utilization as asset-protection trusts.²²

18. UNIF. TRUST CODE § 501 (2005).

19. See S. Alan Medlin, *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. REV. 137, 180 (2005) (citing Marc Merric & Steven J. Oshins, *How Will Asset Protection of Spendthrift Trusts Be Affected by the UTC?*, 31 EST. PLAN. 478, 482 (2004)) ("UTC opponents contend that the UTC's elimination of the distinction between support trusts and discretionary trusts means that asset protection is available only through spendthrift provisions.").

20. *Id.* at 181.

21. Mark Merric, Douglas Stein & Jane Freeman, *Uniform Trust Code and Asset Protection in Non-Self Settled Trusts*, STEVE LEIMBERG'S ASSET PROTECTION PLANNING NEWSLETTER, Sept. 14, 2004, at 5, available at <http://www.bsdd.com/CM/Custom/Leimberg%20Lisi53.pdf>.

22. Of course, some scholars vehemently disagree with the sentiment expressed. See Kevin D. Millard, *Rights of a Trust Beneficiary's Creditors Under the Uniform Trust Code*, 34 ACTEC J. 58, 67 (2008) ("The critics [of the UTC] also believe that the list of exception creditors in a UTC state may be expanded by the courts. On this point, the critics are simply wrong."). However, Mr. Millard loses sight of the forest through the trees. While he is correct that the UTC does not allow courts to expand the list of exception creditors, the UTC does allow the legislature to do so, as he admits: "Consequently, section 503's list of exception creditors is exclusive and may be expanded only by the legislature, not by the courts." *Id.* at 67-68. Thus, UTC opponents argue the future possibility of broadly expanded exception creditors, coupled with the UTC's essential dilution of discretionary trusts, greatly reduces asset protection. Reviewing South Carolina's recent legislative action certainly gives credence to the argument that the UTC dilutes asset-protection trusts used at common law. "Cognizant of the debate over asset protection issues, especially with respect to spendthrift trusts and discretionary trusts, the drafters of the [South Carolina Trust Code] changed a number of the Part 5 UTC provisions to confirm the protection afforded by [asset-protection] trusts . . ." S. Alan Medlin, *The Impact of Significant Substantive Provisions of the South Carolina Trust Code*, 57 S.C. L. REV. 137, 183 (2005). The result was codification of the following language in the South Carolina Trust Code after their adoption of the UTC:

(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 a beneficiary's interest:

(1) is protected by a spendthrift provision, or (2) is a discretionary trust interest as referred to in S.C. Code Section 62-7-504.

IV. *IN RE ESTATE OF STIDHAM*

In October 2008, Omer Stidham passed away while living in a retirement home in Tennessee.²³ Prior to his death, a revocable trust containing his real property was transferred.²⁴ The court gave the impression that Mr. Stidham was the settlor of the trust, but the possibility exists that the daughter, who had a power-of-attorney for her father, transferred the real property into the trust of which she was a beneficiary.²⁵ Upon Mr. Stidham's death, his estate was insolvent.²⁶ Subsequently, the Bureau of TennCare, a state government operated medical program, alleged that because Mr. Stidham received medical assistance through TennCare, it was entitled to reimbursement for the services rendered.²⁷ Because the estate was insolvent, TennCare argued the real property transferred into the revocable trust during Mr. Stidham's lifetime should be imputed into the estate to pay the debt.²⁸ The district court agreed with TennCare's reasoning, and, on appeal, the court of appeals examined three issues:

- A. Whether the statute of limitations precluded the Bureau's claim for the recovery of justly paid medical benefits. B. Whether the Bureau may use assets held in a revocable trust to satisfy a claim against an estate for medical benefits. C. Whether allowing the Bureau to recover assets in similar claims places an unintended and unlawful obligation upon the trustees of revocable trusts.²⁹

The pertinent consideration for this Case Note is item B.³⁰ In

S.C. PROB. CODE ANN. § 62-7-501 (2007).

23. *In re Estate of Stidham*, E2011-02507-COA-R3-CV, 2012 WL 3612386, at *1 (Tenn. Ct. App. Aug. 23, 2012).

24. *Id.*

25. According to the Brief of the Tennessee Bureau of TennCare:

On December 5, 2005, Mr. Stidham began receiving medical assistance benefits through the Bureau of TennCare Approximately one year later, Ms. Scott, as the attorney-in-fact, transferred the residential property via a warranty deed dated December 1, 2006, to a revocable trust with herself and other heirs named as beneficiaries.

Brief of Appellee, at 2, *In re Stidham*, 2012 WL 3612386 (E2011-02507-COA-R3-CV). Further, the court indicates Mr. Stidham was the settlor by their application of certain laws, most notably Tennessee Code § 35-15-505. TENN. CODE ANN. § 35-15-505 (LexisNexis Supp. 2012).

26. *In re Stidham*, 2012 WL 3612386, at *1.

27. *Id.*

28. *Id.*

29. *Id.* at *1-2.

30. It is imperative to understand why Mr. Stidham's real property was transferred into the revocable trust. Mr. Stidham began receiving benefits from TennCare, and one year later, his daughter transferred the house in trust. *Id.* Thus, there are two reasonable inferences. First, the

answering this question, the court largely based its decision on section 35-15-505 of the Tennessee Code.³¹ In analyzing the statute, the court stated: “Creditors may recover property held in a revocable trust when the assets held in the estate are inadequate.”³² The court reiterated their position: “Additionally, . . . property not necessarily held in the estate may be used to satisfy claims submitted by a decedent’s creditors”³³ Thus, because of the statute, the overlying result was that Mr. Stidham’s property, put in trust during his lifetime to protect the house from creditors, was subsequently recovered by creditors after his death. These facts raise a multitude of complex questions, the central being, Did Mr. Stidham’s attorney commit malpractice by failing to establish an asset-protection trust outside of Tennessee, a state that had adopted the UTC?³⁴ This central question begs other analogous questions such as, Why did his attorney not simply establish a spendthrift trust within Tennessee to protect the house? Why might an attorney need to establish a trust outside of a UTC state to better protect the asset? The following analysis of these questions will show why *In re Estate of Stidham* places all estate planning attorneys in UTC jurisdictions on notice; if a client expresses an interest in protecting her assets, attorneys may commit malpractice if they do not seriously consider creating an asset-protection trust outside of their jurisdiction.

house was not transferred to become eligible for the benefits because at the time of the transfer Mr. Stidham was already receiving benefits. Second, the transfer must have been for some other reason than to receive benefits, such as to protect the house from creditors. Considering the beneficiaries of the trust were the daughter attorney-in-fact and other beneficiaries, not the settlor Mr. Stidham, these inferences are made stronger. See *id.* (“Ms. Scott, as the attorney-in-fact, transferred the residential property via a warranty deed dated December 1, 2006, to a revocable trust with herself and other heirs named as beneficiaries.”).

31. *Id.* at *7.

32. *Id.* See generally TENN. CODE ANN. § 35-15-505(a)(5) (LexisNexis Supp. 2012) (“[T]he property of a trust that was revocable immediately preceding the settlor’s death is subject to claims of the settlor’s creditors, costs of administration of the settlor’s estate and the expenses of the settlor’s funeral and disposal of remains.”).

33. *In re Stidham*, 2012 WL 3612386, at *6.

34. Tennessee adopted the UTC in July of 2004. C. Shawn O’Donnell, Note, *Exploring the Tennessee Uniform Trust Code*, 38 U. MEM. L. REV. 489, 490 (2008); see also *id.* at 525 (reiterating the aforementioned trend of controversy over discretionary and spendthrift trusts of the UTC: “To say that article five of the UTC regarding creditors’ claims to spendthrift and discretionary trusts has generated the most discussion and controversy surrounding the UTC is not an overstatement”). For example, “the UTC abolishes any distinction between discretionary and support trusts and provides a uniform rule for both.” *Id.* at 526.

V. ILLUSION OF ASSET-PROTECTION TRUSTS IN A UTC STATE

“A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer[s] of a beneficiary’s interest.”³⁵ Further, “[a] beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.”³⁶ However, the reason establishing a spendthrift trust in a UTC state is troubling is because “[t]he State of Tennessee [and other UTC states], when acting as a creditor, can attach both the corpus and income from a trust protected by a spendthrift provision.”³⁷ Thus, even if an attorney set up a spendthrift trust, when the state is a creditor, as TennCare was, the protection afforded spendthrift trusts is nonexistent.

To expound further on the facts of *Stidham*, consider the following. Assume, as the court did, that Mr. Stidham was the settlor of the trust. TennCare would be considered a creditor of the settlor. Further assume that Mr. Stidham’s attorney set up the trust as a typical spendthrift trust. The result of this scenario is the creditor is still able to invade the trust. Why? Section 35-15-503 of the Tennessee Code states that “[a] spendthrift provision is unenforceable against a claim of this state.”³⁸ Further, a spendthrift trust generally does not provide protection against creditors of the settlor, only the creditors of the beneficiary.³⁹ Now, assume that the daughter was the settlor and the attorney set up the trust as a typical spendthrift trust. Astoundingly, this scenario still allows the creditor to invade the trust. Why? Again, note the language of section 35-15-503 of the Tennessee Code as stated above.⁴⁰ Thus, the end result is this: no matter the scenario, an asset-protection trust is not effective in UTC states with analogous exception creditors.⁴¹ A comparison of UTC states with non-UTC states is crucial in supporting this sentiment. In summary, it is common to have broad ranging exception creditors for

35. TENN. CODE § 35-15-502(a) (LexisNexis 2007).

36. *Id.* § 35-15-502(c).

37. C. Shawn O’Donnell, Note, *Exploring the Tennessee Uniform Trust Code*, 38 U. MEM. L. Rev. 489, 529–30 (2008).

38. TENN. CODE § 35-15-503 (LexisNexis 2007).

39. *See, e.g.*, TEX. PROP. CODE ANN. § 112.035 (West Supp. 2012) (“If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of the settlor’s beneficial interest does not prevent the settlor’s creditors from satisfying claims from the settlor’s interest in the trust estate.”).

40. TENN. CODE § 35-15-503.

41. Remember, these scenarios do not even consider section 35-15-505, which the Tennessee court relied on to invade the trust. TENN. CODE § 35-15-505 (LexisNexis Supp. 2012)

spendthrift trusts in UTC states.⁴²

VI. HOW TO PROTECT ASSETS IF WITHIN A UTC JURISDICTION?

As noted above, section 501 of the UTC provides: “To the extent a beneficiary’s interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary’s interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means.”⁴³ Thus, in large part, the UTC eliminates 50% of asset-protection trusts by debilitating discretionary trusts, and merely allows for asset-protection trusts through utilization of spendthrift clauses. As previously discussed, the asset protection power of spendthrift trusts is quaint considering the breadth of exception creditors.

Recognizing this issue within UTC states begs the question of what to

42. Texas is not a UTC state. Texas’s spendthrift statute does not list the State of Texas as a party that can invade a spendthrift trust and does not codify exception creditors. TEX. PROP. § 112.035. Oklahoma is also not a UTC state. Oklahoma codified the following language: “A creditor, including an exception creditor, has no greater rights than a beneficiary. In this respect, a creditor, including an exception creditor, cannot attach present or future distributions if the claim of the creditor does not come within the distribution standard.” OKLA. STAT. ANN. tit. 60, § 175.90(a) (West Supp. 2012). Further, Oklahoma states:

A restriction limiting the distribution powers of a trustee as to a trustee, which distribution might result in the loss of a beneficiary’s eligibility for participation in a federal or state benefits program, including, but not limited to, Medicaid, Supplemental Security Income, Social Security Disability Income, or other state or federal benefits program is valid, and no creditor, including an exception creditor, may attach present or future distributions from such a trust.

Id. § 175.90(b). Conversely, the following is an overview of UTC states and their exception creditors. South Carolina allows children of spendthrift trust beneficiaries to invade the trust if they have a judgment against the beneficiary. S.C. CODE ANN. § 62-7-503 (West 2009). North Carolina has a similar exception to South Carolina, and this exception seems reasonable. N.C. GEN. STAT. § 36C-5-503 (West 2011). Virginia follows North and South Carolina, but has further codified:

[N]o spendthrift provision shall operate to the prejudice of the United States, *the Commonwealth*, or any county, city, or town. A claimant against which a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distributions to or for the benefit of a beneficiary. The court may limit the award of such relief as is appropriate under the circumstances.

VA. CODE ANN. § 64.2-744(c)–(d) (West 2007) (emphasis added). Alabama follows Virginia, codifying that spendthrift clauses are unenforceable against “a claim of this [s]tate.” ALA. CODE § 19-3B-503 (2007). Finally, Florida, Arizona, Utah, and Nebraska (list is not exhaustive) also codified the same language. ARIZ. REV. STAT. § 14-10503 (LexisNexis 2012–13); FLA. STAT. ANN. § 736.0503 (West 2010); NEB. REV. STAT. § 30-3848 (2008); N.D. CENT. CODE ANN. § 59-13-03 (West 2010); UTAH CODE ANN. § 75-7-503 (LexisNexis 2012). Thus, it is common for UTC states to have much broader exception creditors than non-UTC states.

43. UNIF. TRUST CODE § 501.

do if a client living in a UTC state wishes to protect his assets. States such as Alaska and Delaware are known for their favorable laws regarding asset-protection trusts.⁴⁴ “The Alaska Trust Act and Delaware’s Qualified Disposition in Trust Act amend[ed] their codes to allow settlors to make lifetime transfers into trust from which they are eligible, but not entitled, to receive distributions according to the discretion of a third-party trustee.”⁴⁵ Further, the Alaska statutes abolished the rule against perpetuities.⁴⁶ The language in Alaska is as follows: “If a trust contains [the appropriate language], . . . the transfer restriction prevents a creditor existing when the trust is created or a person who subsequently becomes a creditor from satisfying a claim out of the beneficiary’s interest in the trust”⁴⁷ The Delaware language is analogous to Alaska.⁴⁸ In sum, “[t]he amendments create extremely settlor-friendly rules,”⁴⁹ and the question must be asked, If a client seeks protection of their assets in a UTC state, is it malpractice for an attorney to not establish the trust in a state like Alaska or Delaware?

VII. DOES AN ATTORNEY COMMIT MALPRACTICE BY ATTEMPTING TO PROTECT ASSETS IN A UTC STATE?

An attorney may commit malpractice by establishing a trust that purports to be an asset-protection trust in a UTC jurisdiction.⁵⁰ To establish legal malpractice, the general requirements are: “(1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) the

44. See Amy Lynn Wagenfeld, Note, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth That Follows*, 32 VAND. J. TRANSNAT’L L. 831, 850–51 (1999) (“Alaska and Delaware recently enacted legislation that purports to make it possible for residents of any state to create self-settled spendthrift trusts. They claim to allow settlors to create trusts under this new legislation that will be protected should creditors’ claims arise.”).

45. *Id.* at 851.

46. *Id.*

47. See ALASKA STAT. § 34.40.110(b) (LexisNexis 2012) (listing some exceptions, such as fraudulent transfers—but this will always be true in any jurisdiction).

48. DEL. CODE ANN. tit. 12, § 3570 (West Supp. 2010).

49. Amy Lynn Wagenfeld, Note, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth That Follows*, 32 VAND. J. TRANSNAT’L L. 831, 852 (1999) (citations omitted).

50. For example, the Brief of Appellee indicated Mr. Stidham’s daughter transferred the house into trust after Mr. Stidham began receiving medical benefits from the state; thus, a logical inference is that the transfer was not made to gain benefits but rather to protect the house from the state if it later became a creditor. Brief of the Appellee, at 2, *In re Estate of Stidham*, E2011-02507-COA-R3CV, 2012 WL 3612386 (Tenn. Ct. App. Aug. 23, 2012). Subsequently the creditor trying to be avoided, TennCare, took possession of the house, thus, raising the question of malpractice. *Id.*

breach proximately caused the plaintiff's injuries, and (4) damages occurred."⁵¹ If a client seeks an attorney to protect her assets, that attorney owes a duty to the client. As in Mr. Stidham's case, an attorney would seem to breach that duty by establishing a trust that did not accomplish the protection the client sought. Further, if an attorney sets up a trust in a UTC state and does not recognize impending exception creditors, the proximate cause element may be satisfied. Possibly the best example is to consider what would have happened if Mr. Stidham's attorney established a spendthrift trust in Alaska: Mr. Stidham's daughter would be living in his house.⁵² This failure to establish an appropriate trust might satisfy the requirement of damages if the property is lost to a creditor.⁵³ Considering Mr. Stidham's particular situation, if his attorney looked to Alaska to set up the trust, the result would likely have been different; accordingly, a malpractice claim would be cognizable.⁵⁴

51. *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995).

52. It is worth noting that Alaska and Delaware also do not distinguish between the beneficiary's creditors and the settlor's creditors. See Amy Lynn Wagenfeld, Note, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth That Follows*, 32 VAND. J. TRANSNAT'L L. 831, 835 (1999) ("The Alaska and Delaware legislation attempts to change the existing law by allowing a settlor to create a trust which names the settlor as a beneficiary and includes a provision that protects the assets from the settlor's creditors, that will be enforced under their laws." (citations omitted)). Hence, even if Mr. Stidham was the settlor, and TennCare was his creditor, establishing the trust in Alaska would have protected his assets.

53. See generally TENN. CODE ANN. § 35-15-505(a)(2) (LexisNexis Supp. 2012) (providing a carved out exception for an investment services trust in Tennessee which allows a settlor to create a spendthrift-like trust and protect the settlor's assets from creditors after following numerous steps and provisions). This loophole may have provided protection to Mr. Stidham and is a stark difference to other UTC states. This exception should not minimize the illustration of the facts and subsequent results in UTC states.

54. This assertion is certainly not as simple as the above statement. An issue would first arise regarding conflict of laws. Would the statute in Tennessee trump the trust laws of Alaska? This question is beyond the scope of this Case Note. However, it seems reasonable to find that Mr. Stidham's attorney committed malpractice because the trust laws of Alaska and Delaware "allow a settlor to choose Alaska [or Delaware] law to govern the trust, and provide that the settlor's choice of law will be enforced as long as the trust meets certain conditions." Amy Lynn Wagenfeld, Note, *Law for Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth That Follows*, 32 VAND. J. TRANSNAT'L L. 831, 871 (1999). But see TENN. CODE § 35-15-107 (LexisNexis 2007) (codifying a strongly-worded public policy obviously intended to reduce forum shopping in trust matters:

The meaning and effect of the terms of a trust are determined by:

- (1) The law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or
- (2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.)

However strongly-worded it may be, an appellate court has yet to cite it after many years of

VIII. CONCLUSION

As of late February 2013, courts and secondary sources cited *In re Estate of Stidham* only once.⁵⁵ This citation was not related to the Uniform Trust Code, asset-protection trusts, or legal malpractice.⁵⁶ However, the case's latent importance lies in the questions it raises if the estate planning was performed in a different manner. These questions should inform all attorneys, especially those in UTC jurisdictions with clients that intend to protect their assets, to thoroughly research establishing an asset-protection trust in a jurisdiction most beneficial to the client. The client and attorney should consider the inconvenience of having the trust established outside of the client's jurisdiction, any extra costs that may be involved, and most importantly, if the decision is made to establish the trust in a UTC jurisdiction, the long-arm of exception creditors.⁵⁷ As was the case with Mr. Stidham, simply establishing the trust in a client's domicile may lead to malpractice. Because clients work their entire lives to acquire precious assets, attorneys owe a duty to zealously research the law and establish a trust that protects what clients worked so diligently to acquire.

codification.

55. See *In re Estate of Crumley*, E2012-00030-COA-R3-CV, 2012 WL 6596130, at *5-6 (Tenn. Ct. App. Dec. 18, 2012) (analyzing *In re Stidham*).

56. See *id.* at *6 (relying on *In re Stidham* to hold the suit was not barred by the statute of limitations).

57. Remember, "[t]he range of permitted exemption creditors under the UTC is further enlarged because the [UTC] explicitly permits extension in the number and scope of exception creditors by both the judiciary and the legislature." Mark Merric, Douglas Stein & Jane Freeman, *Uniform Trust Code and Asset Protection in Non-Self Settled Trusts*, STEVE LEIMBERG'S ASSET PROTECTION PLANNING NEWSLETTER, Sept. 14, 2004, at 5, available at <http://www.bsdd.com/CM/Custom/Leimberg%20Lisi53.pdf>.

