

**NO DISCLAIMER FOR THE DOMESTIC SUPPORT EVADER:  
WHY ALIMONY AND CHILD SUPPORT OBLIGORS SHOULD BE  
BARRED FROM THEIR RIGHT TO DISCLAIM INHERITANCES**

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INTRODUCTION

The demography of the American family has changed drastically over the last thirty-five years due to increasing divorce rates and children born of parents who are not legally married.<sup>1</sup> This in turn has led to a drastic increase in the number of families who rely on support from the parent or spouse for maintaining their household.<sup>2</sup> As a result, the arena of family law has had to evolve and respond to the changing family dynamic by making profound changes in the area of child support and alimony laws during this period.<sup>3</sup> “Analyses by the U.S. Census Bureau

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1. Ronald P. Barriere et al., Massachusetts Divorce Law Practice Manual § 10.1 (2016).

2. *Id.*

3. *Id.*

since 1978 have consistently shown that less than 60 percent of children in single-parent families have child support orders; of those with orders, fewer than half receive full payment and many receive nothing at all.”<sup>4</sup> Furthermore, children raised in these environments are five times more likely to live in poverty than children living with both parents.<sup>5</sup>

Congress has recognized the importance of child support and alimony enforcement as both an antipoverty measure and a way to protect the public, and “has slowly but steadily entered the arena of family law, an area traditionally left to the states.”<sup>6</sup> Congress has also periodically enacted child support and alimony legislation to reduce the negative impact on single-parent households, not just in the family law arena, but in the bankruptcy and probate arenas as well.<sup>7</sup> And while most federal uniform statutes and state statutes have been amended recently to provide protection to this vulnerable group of society, there are still some that have yet to respond to the progressive public policy initiatives supporting creditors who are owed alimony and child support. One of them is the Uniform Disclaimer of Property Interests Act of 1999 (“UDPIA”, or the “Act”),<sup>8</sup> the uniform statute covering disclaimers of inheritances.

An inheritance “disclaimer” is the refusal by a beneficiary to inherit property designated for them in the distribution of an estate.<sup>9</sup> Beneficiaries who disclaim an inheritance usually do so for reasons relating to financial planning (tax or family) or to avoid creditor claims.<sup>10</sup> “The typical explanation for an attempted ‘disclaimer’ of an inheritance is not ingratitude but planning of some sort.”<sup>11</sup> Disclaimers of inheritance were first addressed and developed under common law, but are now regulated and allowed as lawful and non-taxable events by both state

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4. *Id.* (referencing 2000, 2007, and 2009 Current Population Reports issued by the U.S. Census Bureau).

5. *Id.*

6. *Id.*

7. *See infra* Part II and Part III.

8. Unif. Disclaimer of Prop. Interests Act 1999 § 6, (Nat’l Conference of Comm’rs on Unif. State Laws, amended 2006), *codified under* the Unif. Prob. Code § 2–1101 et seq. (Nat’l Conference of Comm’rs on Unif. State Laws, amended 2010).

9. Unif. Prob. Code § 2–1102(3) (Nat’l Conference of Comm’rs on Unif. State Laws, amended 2010).

10. Adam J. Hirsch, *The Code Breakers: How States are Modifying the Uniform Disclaimer of Property Interest Act*, 46 Real Prop. Tr. & Est. L.J. 325, 326 (2011) [hereinafter Hirsch, *The Code Breakers*].

11. *Id.*

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substantive law and federal tax law.<sup>12</sup> These disclaimer laws had to answer a number of questions, including the timing of the disclaimer, the procedures necessary to disclaim, who can disclaim on a beneficiary's behalf, and what events operate to bar a disclaimer.<sup>13</sup>

The National Conference of Commissioners on Uniform State Laws also passed uniform acts beginning in 1969,<sup>14</sup> the most recent of these being the UDPIA.<sup>15</sup> UDPIA allows a beneficiary to disclaim his inheritance for any reason,<sup>16</sup> with only a few exceptions.<sup>17</sup> This statute does not protect creditors who may have an interest in claiming a right to the property being disclaimed by the debtor beneficiary,<sup>18</sup> nor does it even protect those creditors whose claims are backed by public policy.<sup>19</sup> As this note will discuss, this statute allows a beneficiary to freely disclaim an inheritance even if he or she owes alimony or child support, effectively denying any protection to domestic support creditors who could otherwise utilize funds from an inheritance to satisfy an outstanding alimony and child support obligation owed to them.<sup>20</sup> Instead, UDPIA defers to the states to set its own laws, other than those in the Act, that will bar a beneficiary from disclaiming an inheritance.<sup>21</sup> The provision states that a "disclaimer is barred or limited if so provided

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12. *Id.*

13. *Id.*

14. *Id.*

15. Unif. Disclaimer of Prop. Interests Act 1999 § 6, (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2006), *codified under* the Unif. Prob. Code § 2-1101 et seq. (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2010).

16. See Andrew S. Bender, *Disclaimer Law: A Call for Statutory Reform*, 2001 U. Ill. L. Rev. 887, 893-97 (2001) (discussing the current use of disclaimers: avoiding estate taxes, maintaining social assistance benefits, avoiding creditors, avoiding tax liens).

17. Unif. Prob. Code § 2-1113 (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2010) (including: if the beneficiary has already waived the right to disclaim; if the property has already been accepted by the disclaimant; if the disclaimant has contracted its right to disclaim; if a judicial sale of the interest occurs; or if the disclaimer is barred by law other than what is stated in this statute).

18. Adam Hirsch, *Disclaimer Law and UDPIA's Unintended Consequences*, 36 Est. Plan. 34, 39 (2009) [hereinafter Hirsch, *Disclaimer Law and UDPIA's Unintended Consequences*] (explaining that the drafters of UDPIA, in recognizing the divergence of opinion over whether or not a disclaimant should enjoy the right to disclaim property, took a neutral stance on the matter and omitted any language on how to handle an insolvent disclaimant).

19. See Adam Hirsch, *The Problem of the Insolvent Heir*, 74 Cornell L. Rev. 587, 604 (1989) [hereinafter Hirsch, *The Problem of the Insolvent Heir*].

20. See *id.* at 619-20.

21. Unif. Prob. Code § 2-1113(e) (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2010).

by law other than this [part].”<sup>22</sup> Many states have taken it upon themselves to modify and improve the core policies of UDPIA.<sup>23</sup>

Most states have set laws through statute and common law that bar beneficiaries’ disclaimers for four reasons: 1) they are an insolvent debtor, 2) they receive Medicaid or other public assistance, 3) they owe federal taxes, or 4) they received property that contains an environmental hazard. Only a handful of states, however, bar beneficiaries from disclaiming inheritances if they owe alimony and child support.<sup>24</sup> In the inheritance law arena, the lack of protection for this class of familial creditor is deficient when compared to the other federal uniform laws and statutes that provide protection to creditors who are owed alimony and child support obligations, such as the United States Bankruptcy Code and the Uniform Trust Code.

Although an inheritance is not the first source a domestic support creditor would pursue to satisfy the court-ordered alimony or child support obligation owed to them, assets from an inheritance might be the only opportunity an ex-spouse or child has to collect on the debt, especially if the obligor does not have a steady source of income or assets in their possession. UDPIA’s lack of statutory protections to creditors<sup>25</sup> allow a disclaiming debtor to divert funds away from the ex-spouse or child and redirect the inheritance to his or her own side of the family.<sup>26</sup>

Overall, there has been much criticism of the ineffectiveness of UDPIA<sup>27</sup> and its ability to protect creditors from being damaged by a beneficiary’s disclaimer, including those creditors who are owed alimony and child support.<sup>28</sup> This note will argue for a revision to the UDPIA statute to include protections on a federal level for alimony or child support recipients. In addition, this note will set forth reasons why the State of New Jersey needs to follow in the tracks of those few states that have already adopted legislation specifically barring a disclaimer of inheritance when alimony and child support are owed.

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22. *Id.* (alteration in original).

23. Hirsch, *The Code Breakers*, *supra* note 10, at 329.

24. *See* statutes cited *infra* note 171.

25. Adam J. Hirsch & Richard R. Gans, *Disclaimer Reform and UDPIA: The Disappointing Amendments of 2006*, 33 *Est. Plan.* 24, 28 (2006) (“[T]he issue of creditors’ rights is nowhere raised, or even mentioned, suggesting that the drafters overlooked it.”).

26. Hirsch, *The Code Breakers*, *supra* note 10, at 342.

27. *See, e.g.*, Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 *Fla. St. U. L. Rev.* 109 (2001); Hirsch, *Disclaimer Law and UDPIA’s Unintended Consequences*, *supra* note 18, at 39.

28. *See, e.g.*, Hirsch, *The Problem of the Insolvent Heir*, *supra* note 19.

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Part I of this note will discuss the basics of disclaimer law under UDPIA, and what public policy exceptions have formed under judicial intervention of the statute barring a beneficiary from disclaiming an inheritance. This section will also discuss why no provisions in the Act protect creditors. Part II will discuss the protections allowed to claimants for unpaid domestic support obligations (alimony and child support) under the Uniform Trust Code. Part III will discuss the protections afforded to creditors who are owed domestic support obligations under the Federal Bankruptcy Code. This section will also discuss Congress's public policy reasons for doing so. Part IV will evaluate UDPIA and discuss why UDPIA needs to be amended to mirror the Uniform Trust Code and Bankruptcy Code's public policy provisions that protect this class of creditors. Part V will discuss disclaimer legislation enacted by few states that has specific statutory language protecting creditors who are owed alimony and child support, as well as briefly discuss some other state legislation that attempts to solve this creditor rights issue by barring insolvent disclaimers. Part V will also discuss and evaluate New Jersey's current disclaimer statute, which lacks any protections for creditors who are owed alimony and child support, and it will argue why it needs to be amended to include language specifically barring disclaimers by beneficiaries who have outstanding alimony and child support obligations.

## I. DISCLAIMER LAWS UNDER UDPIA

The legality of disclaimer was first addressed and developed under common law, and for a long time states and various tax laws have offered scattered responses in trying to resolve when an individual can and cannot disclaim inheritances.<sup>29</sup> UDPIA is the most recent attempt to regulate this area of disclaimer law.<sup>30</sup> Twenty-three states and a few United States' territories have adopted the UDPIA.<sup>31</sup> The Act omits any

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29. Hirsch, *The Code Breakers*, *supra* note 10, at 326.

30. This Act was incorporated into the Uniform Probate Code (UPC) in 2002, which was amended in 2006. Unif. Prob. Code §§ 2-1101-1117 (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2010).

31. *Disclaimer of Property Interests Act—Enactment Map*, Unif. Law Comm'n, <https://www.uniformlaws.org/committees/community-home?communitykey=7118ea8a-f4f9-4b0a-be20-d918c59bd650&tab=groupdetails> (last visited Nov. 2, 2019). UDPIA is currently adopted in the following states, districts, and territories: Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa,

language regarding potential protections to creditors or priority obligations.<sup>32</sup>

When drafting the UDPIA, the Commissioners could not reach a consensus on how to approach creditor protections, so they remained neutral on the issue,<sup>33</sup> and decided it was best to leave the issue of creditors' rights to other law or to the states.<sup>34</sup> In its decision to leave creditor rights up to the States, UDPIA has once again created confusion and scattered results.<sup>35</sup> All the confusion with UDPIA has resulted in "seventeen different versions of UDPIA in each of the seventeen UDPIA states,"<sup>36</sup> which is far from the "uniform" intention of the statute.

Adding to the confusion, the new version of UDPIA does not provide that the Act supersedes common law.<sup>37</sup> Earlier versions of the Act included such statutory provisions that kept states from overriding provisions in UDPIA.<sup>38</sup> The current version of the Act, however, expressly allows states to make changes and add provisions based on their preferences.<sup>39</sup> And unlike most other federal statutes, UDPIA does not

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Maine, Maryland, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Dakota, Oregon, Tennessee, Texas, U.S. Virgin Islands, Virginia, and West Virginia. *Id.*

32. Unif. Prob. Code §§ 2-1101-17 (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2010); *see also* Hirsch, *The Code Breakers*, *supra* note 10, at 367 ("[A]n area of disclaimer law where UDPIA's drafters fully anticipated and invited local modification is the treatment of creditors' claims—more exactly, creditors' rights to prevent a beneficiary from disclaiming and thereby thwarting satisfaction of their claims out of inherited property.").

33. Hirsch, *The Code Breakers*, *supra* note 10, at 367 (citing Proceedings in the Committee of the Whole, Unif. Disclaimer of Prop. Int. Act 45 (July 23-30, 1999) (on file with author Hirsch) (statement by Commissioner David Nixon)).

34. Hirsch, *The Code Breakers*, *supra* note 10, at 367.

35. *Id.* ("The drafters seem to have misunderstood how UDPIA would operate in conjunction with prior local law if the Act is left without amendment.").

36. *Id.* at 370. At the time of this article, seventeen states had adopted UDPIA. There are now 23 states that have adopted UDPIA. *See* Disclaimer of Property Interests Act—Enactment Map, *supra* note 31.

37. Hirsch & Gans, *supra* note 25, at 28. "No rationale for this change is provided anywhere in UDPIA's comments or explanatory materials." *Id.* at 29. UDPIA's drafters apparently misunderstood the implications of a non-exclusive disclaimer statute. *Id.*

38. *Id.* at 28 ("Every previous Uniform Act addressing disclaimers included a provision stating that the Uniform Act superseded the common law . . . but UDPIA was later modified to 'broaden [] the provisions of prior Uniform Acts' by allowing disclaimers 'under a law other than this [Act],' including common law, thus rendering the Act a non-exclusive safe harbor.") (alteration in original).

39. Unif. Prob. Code § 2-1104(b) (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2010) ("This [part] does not limit any right of a person to waive, release, disclaim, or renounce an interest in or power over property under a law other than this [part].") (alteration in original).

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limit any person's right to power over property under a law other than what is stated in the Act.<sup>40</sup> UDPIA's supplemental law provisions create many problems regarding enforcement of creditor rights.<sup>41</sup>

Beneficiaries who disclaim an inheritance usually do so for reasons relating to financial planning (tax or family) or to avoid creditor claims<sup>42</sup>—rationales that are not expressly prohibited under UDPIA and allowed in most jurisdictions.<sup>43</sup> The use of disclaimer to avoid creditor claims have been challenged by some states, with some barring the ability of an insolvent debtor creditor from disclaiming his or her inheritance,<sup>44</sup> and some barring disclaimers on the basis of it being a fraudulent transfer.<sup>45</sup> Only a few states consider disclaimer of inheritance to avoid creditors as a fraudulent transfer.<sup>46</sup>

Under UDPIA, a disclaimer acts as a nonacceptance of the disclaimed interest, rather than as a “transfer” of the disclaimed interest, an

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40. *Id.*

41. Hirsch & Gans, *supra* note 25, at 30–31 (UDPIA could be challenged for impairing the substantive rights of debtors and creditors if adopted by a state with its own statute explicitly permitting or barring disclaimers by insolvent debtors. In such a circumstance, UDPIA's provision allowing ‘other law’ would restore common law rules negated by the state statutes, thus affecting debtor or creditor rights).

42. Christopher P. Cline, Disclaimers in Estate Planning 165 (2d ed. 2012) (“The overwhelming use for disclaimers is in the area of federal gift tax avoidance . . . [and] is rarely used for non-tax, state law purposes. When such disclaimers do occur, they are almost always centered around some form of creditor avoidance.”) (alteration in original).

43. Hirsch, *Disclaimer Law and UDPIA's Unintended Consequences*, *supra* note 18, at 39.

44. Unif. Disclaimer of Prop. Int. Act 1999 § 13 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2006) (“Some States, including Minnesota (M.S.A. § 525.532 (c)(6)), Massachusetts (Mass. Gen. Laws ch. 191A § 8), and Florida (Fla. Stat. § 732.801(6)), bar a disclaimer by an insolvent disclaimant.”).

45. *Id.* (“In other [states] a disclaimer by an insolvent debtor is treated as a fraudulent ‘transfer.’”) (alteration in original) (citing *Stein v. Brown*, 18 Ohio St.3d 305 (1985); *Pennington v. Bigham*, 512 So.2d 1344 (Ala. 1987)).

46. Unif. Disclaimer of Prop. Int. Act 1999 § 13 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2006); *see also* Adam J. Hirsch, *Disclaimers and Federalism*, 67 Vand. L. Rev. 1871, 1910 (2014) [hereinafter Hirsch, *Disclaimers and Federalism*] (“In [Massachusetts and Oklahoma], the statutes indicate that fraudulent conveyance law applies to insolvent disclaimers without stating explicitly that it has the effect of avoiding them . . . [and] in the remaining three states, [Florida, Louisiana, and Minnesota], the statutes specify that an insolvent disclaimer is ‘ineffective,’ or ‘annulled.’”) (alterations in original); William P. LaPiana, *Some Property Law Issues in the Law of Disclaimers*, 38 Real Prop. Prob. & Tr. J. 207, 233 (2003) (discussing *Stein v. Brown*, 480 N.E.2d 1121 (Ohio 1985); *Pennington v. Bigham*, 512 So. 2d. 1344 (Ala. 1987)).

element required to successfully prove a fraudulent transfer.<sup>47</sup> Therefore, a disclaimant is treated as never having received the disclaimed interest and is therefore deemed to never have had an ownership interest in the property.<sup>48</sup> This has led most state courts to find “that this lack of transfer [allows] the disclaimed property [to be kept] out of the hands of creditors and prevents the disclaimer from being a fraudulent transfer.”<sup>49</sup>

This legal fiction created by the Act makes objections to disclaimer based on claims of fraudulent transfers and creditor evasion hard to accomplish.<sup>50</sup> The drafters of UDPIA failed to address this unintended consequence of the proposed provisions during the drafting phases of UDPIA.<sup>51</sup> With the current provisions in place, insolvent debtors are thus able to “shift assets in which they have a proprietary interest into the hands of family members and out of the reach of creditors.”<sup>52</sup> Furthermore, UDPIA includes no language requiring a beneficiary to disclaim within any particular time frame, thus giving the disclaimant ample time to formulate a strategy or make a decision.<sup>53</sup>

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47. Unif. Disclaimer of Prop. Int. Act 1999 § 5(f) Unif. Disclaimer of Prop. Int. Act 1999 § 13 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2006) (“A disclaimer made under this [Act] is not a transfer, assignment, or release.”).

48. See Unif. Prob. Code § 2-1106(b)(3)(B) Unif. Disclaimer of Prop. Int. Act 1999 § 13 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2010) (“[D]isclaimed interest passes as if the disclaimant died immediately before the time of distribution.”); see also Hirsch, *The Code Breakers*, *supra* note 10, at 367 (noting that the UDPIA has the unintended consequence of permitting insolvent disclaimers, because a section of UDPIA specifies that disclaimers are not a “transfer”).

49. LaPiana, *supra* note 46, at 232 (citing *In re Estate of Hansen*, 248 N.E.2d 709 (Ill. Ct. App. 1969); *Essen v. Gilmore*, 607 N.W.2d 829 (Neb. 2000); *In re Estate of Schiffman*, 430 N.Y.S.2d 229 (Sur. Ct. 1980); *Dyer v. Eckols*, 808 S.W.2d 531 (Tx. Ct. App. 1991); *Abbott v. Willey*, 479 S.E.2d 528 (Va. 1997)).

50. See Hirsh, *Disclaimer Law and UDPIA's Unintended Consequences*, *supra* note 18, at 39 (“UDPIA also contains a separate provision stating unequivocally . . . that a disclaimer ‘is not a transfer.’ Common-law . . . in some jurisdictions . . . [that] bar insolvent disclaimers rest[s] invariably on the theory that [the disclaimers] comprise fraudulent transfers. UDPIA destroys the foundation for this argument and hence allows insolvent disclaimers, even if prior case law ruled otherwise.”); see also Hirsh, *The Code Breakers*, *supra* note 10, at 368 (“At least one Commissioner spotted the problem during the plenary debate, but her observation appears not to have registered with the drafters.”) (citing to Proceedings in the Committee of the Whole, Unif. Disclaimer of Prop. Int. Act 68 (July 23–30, 1999) (statement by Comm'r. Marilyn Phelan)). The drafters now acknowledge that this was an unintended effect of the Act. *Id.*

51. Hirsh, *The Code Breakers*, *supra* note 10, at 367.

52. *Id.* at 342.

53. Hirsh, *Disclaimer Law and UDPIA's Unintended Consequences*, *supra* note 18, at 36 (“No language in UDPIA affirmatively permits disclaimers to be made at any time; the Act simply fails to set a deadline.”); see also Hirsch, *The Code Breakers*, *supra* note 10, at 335–38.



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Notwithstanding the legal fictions created by UDPIA that keep a disclaimer from being designated as a “transfer,” courts have ruled that certain exceptions to disclaimer apply for public policy reasons.<sup>54</sup> Regarding disclaimants who owe federal taxes, the U.S. Supreme Court in *Drye v. United States* held that the disclaimant’s interest in the disclaimed “property” or “right to property” was subject to the federal tax lien statute.<sup>55</sup> The Court reasoned that Congress had intended the term “property” to reach “every species of right or interest protected by law and having exchangeable value”<sup>56</sup> and that the list of items exempted from levy under the Internal Revenue Code 26 U.S.C.A. § 6334 is exclusive, and any inheritances or devises disclaimed under state law are not included in the statute’s catalog of exempt property.<sup>57</sup> This decision by the U.S. Supreme Court “virtually ignor[ed] the relation-back doctrine”<sup>58</sup> that UDPIA created.

Beneficiaries may also be barred from disclaiming property if they have filed or are about to file a petition for bankruptcy.<sup>59</sup> The bankruptcy trustee would have the ability to make a claim to the inherited property under Section 544(b) or Section 548 of the United States Bankruptcy Code (“Bankruptcy Code”).<sup>60</sup> The Bankruptcy Code broadly defines the

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54. See, e.g., *Drye v. United States*, 528 U.S. 49, 61 (1999).

55. *Id.* Taxpayer attempted to utilize Arkansas state law to disclaim inheritance from mother’s estate because he owed \$325,000 on unpaid tax assessments to the IRS. *Id.* at 53. He disclaimed the inheritance so that it passed to his daughter, who then created a spendthrift trust for the benefit of the taxpayer, his spouse, and his daughter during their lifetime. *Id.* at 53–54. The Arkansas law created a legal fiction, similar to that created under UDPIA, where the disclaimant predeceased decedent, and consequently the disclaimant’s share of the estate passes on to the next person in line. *Id.* at 53. The Court found that the taxpayer’s disclaimer did not defeat the federal tax liens because the “Internal Revenue Code’s prescriptions are most sensibly read to look to state law for delineation of the taxpayer’s rights or interests [in the property the Government seeks to reach], but to leave to federal law the determination whether those rights or interests constitute ‘property’ or ‘rights to property’ under § 6321.” *Id.* at 52. Therefore, the Court rendered inoperative the Arkansas state law allowing Dyre right to disclaim his inheritance. *Id.*

56. *Id.* at 56.

57. *Id.*

58. Cline, *supra* note 42, at 166.

59. Hirsch, *Disclaimers and Federalism*, *supra* note 46, at 1910 (“If an insolvent debtor disclaims an inheritance prior to a petition for relief, the trustee in a bankruptcy could challenge the disclaimer’s validity, seeking to recover the inheritance for the bankruptcy estate.”).

60. *Id.* at 1910–12. (“The trustee might do so by recourse to either of two avoiding powers . . . under section 544(b) of the Bankruptcy Code, the trustee can exercise any right that an actual unsecured creditor would have had to ‘avoid any transfer’ at state law.”) (quoting 11 U.S.C. § 544(b)(1) (2012)). The other option is available to the trustee in bankruptcy under section 548 of the Bankruptcy Code, “which grants the trustee an

term “transfer” to include “direct or indirect . . . disposing of or parting with property or an interest in property,”<sup>61</sup> which could include disclaimer.<sup>62</sup> The powers vested in the bankruptcy trustee by Section 544(b) and 548 rely on state law, however, “so the usefulness of this avoiding power will turn on whether the domicile of the benefactor treats an insolvent disclaimer as a fraudulent transfer. Some states do as a matter of common law, although most do not.”<sup>63</sup>

Since many state disclaimer statutes codify that “a disclaimer ‘relates back for all purposes’ to the time when the benefactor died . . . state law may deem beneficiaries never to have owned an interest in the property they disclaimed, and ‘a “transfer” cannot occur without “property” or an “interest in property.”’”<sup>64</sup> There are some states that consider an insolvent disclaimer as a fraudulent transfer, and this allows a bankruptcy trustee to avoid insolvent disclaimers as fraudulent transfers under Section 544(b) or 548 of the Bankruptcy Code.<sup>65</sup>

Courts have also held that disclaimers are barred when the disclaimant’s inheritance could have been an “available resource” used to cover medical costs provided by Medicaid.<sup>66</sup> In *In re Estate of Scrivani*, the court held that the disclaimant, an 84-year-old patient and Medicaid recipient, who attempted to disclaim an inheritance from her sister,<sup>67</sup>

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independent power to avoid fraudulent transfers . . . [but] only if creditors could have avoided them under state law.” *Id.*

61. 11 U.S.C. § 101(54)(D) (2012).

62. Hirsch, *Disclaimers and Federalism*, *supra* note 46, at 1912. The Bankruptcy Code, however, fails to define the term “property.” *Id.* The Bankruptcy Code takes its meaning of “property” from state law. *Id.* And in some states’ laws, a disclaimer “relates back for all purposes” to a time prior to when the property or interest in property was ever owned by the disclaimant, thus resulting in varying results. *Id.* at n.236 (quoting Vt. Stat. Ann. tit. 14, § 1954(a) (2011)) (noting that “[t]his or similar language is today codified in nineteen states.”).

63. *Id.* at 1910.

64. *Id.* at 1912 (citations omitted). For a further discussion on court holdings on whether pre-petition disclaimers are deemed transfers for bankruptcy purposes, see *id.* at 1909–28; see also Cline, *supra* note 42, at 167–72.

65. Hirsch, *Disclaimers and Federalism*, *supra* note 46, at 1912–13. The outcome would be different in states that do not have any laws that render inheritance disclaimer a fraudulent transfer; see, e.g., *In re Costas*, 555 F.3d 790, 796 (9th Cir. 2009) (The debtor executed her disclaimer before filing bankruptcy, meaning “the retroactive divestment of property interests occurred *prior* to the bankruptcy estate gaining any interests in the right to disclaim. Therefore, the state law did not operate to defeat any pre-existing interests.”).

66. See *In re Estate of Scrivani*, 455 N.Y.S.2d 505 (Sup. Ct. 1982); see also Hirsch, *The Problem of the Insolvent Heir*, *supra* note 19, at 602–03; LaPiana, *supra* note 46, at 234.

67. *In re Estate of Scrivani*, 455 N.Y.S.2d at 507.

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could not renounce her claim to the inheritance.<sup>68</sup> The Court emphasized the Medicaid program's public policy objective of providing "comprehensive, government-financed medical care for those citizens who would otherwise be unable to afford adequate care"<sup>69</sup> and found that the Medicaid legislation "includes as an 'available resource' the 'uncompensated value of any nonexempt resource transferred within twenty-four months prior to the application for medical assistance.'"<sup>70</sup>

The Court acknowledged that the disclaimant's "renunciation speaks retroactively as of the decedent's death, thus effecting a situation equivalent [where] . . . no gift ever vested in the beneficiary,"<sup>71</sup> but found that the status of the inheritance itself cannot be altered, as "[i]t is an inchoate property interest, which clearly has value and is available to the beneficiary."<sup>72</sup> This "available resource" renounced by the disclaimant "while not itself illegal, is incompatible with other principles of law."<sup>73</sup> The disclaimant was therefore not able to disclaim the inheritance, and the funds had to be utilized for the care of the Medicaid recipient until its exhaustion.<sup>74</sup>

The Court in *Scrivani* expressed its concern about keeping the objectives of the Medicaid program consistent with other government entitlement programs that provided assistance on the basis of need, and that the economic viability of the programs depended on the diligent observation of eligibility requirements.<sup>75</sup> The Court concluded that "while a renunciation is technically not a transfer of specific property in which the beneficiary holds title, it is the transfer of a resource,"<sup>76</sup> and therefore the inheritance cannot be renounced in order to qualify for Medicaid.<sup>77</sup>

Legal scholars are not surprised by the court rulings in several states that have similar holdings to the one in *Scrivani*,<sup>78</sup> especially "[g]iven the enormous financial demands of the Medicaid program . . . ."<sup>79</sup> The most

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68. *Id.* at 511.

69. *Id.* at 509.

70. *Id.* at 510 (citing N.Y. Soc. Serv. Law § 366(5) (2019)).

71. *Id.* at 509.

72. *Id.* at 510.

73. *Id.* at 509.

74. *Id.* at 511.

75. *Id.* at 510.

76. *Id.*

77. *Id.* at 511.

78. See Hirsch, *The Problem of the Insolvent Heir*, *supra* note 19, at 601–03; LaPiana, *supra* note 46, at 234–35.

79. LaPiana, *supra* note 46, at 235.

interesting aspect of this Medicaid exception granted by the courts is that “[t]he same states that refuse to recognize disclaimers in the Medicaid context recognize the relation back doctrine as applied outside of the public assistance context.”<sup>80</sup> This ruling shows that courts are willing to bend the legal fictions established in disclaimer statutes in order to support public policy initiatives.

A more recent decision in the Ninth Circuit held that a debtor’s disclaimer of inherited property was a transfer of property subject to the Federal Debt Collection Procedures Act (FDCPA), and therefore void.<sup>81</sup> In this case, the United States Small Business Administration (“SBA”) sought to collect on a default judgment arising from a loan guaranteed by the SBA between a private bank and the Debtor.<sup>82</sup> The Debtor disclaimed an inheritance, as allowed under California statute,<sup>83</sup> in an attempt to avoid payment on the debt.<sup>84</sup>

The California statute provides that “[a] disclaimer is not a voidable transfer.”<sup>85</sup> This law directly conflicted with the FDCPA, which defines “transfer” in a way that included the Debtor’s disclaimer.<sup>86</sup> The court found that the Supremacy Clause applies here to solve the conflict between California law and the FDCPA, with the FDCPA prevailing over the California statute.<sup>87</sup> The court provided further reasoning for voiding the debtor’s disclaimer of inheritance by finding that the FDCPA significantly parallels the federal tax lien statute at issue in the *Drye* case, and accordingly extended the reasoning in *Drye* that “[t]he control rein . . . [the Debtor] held under state law . . . rendered the inheritance ‘property’ or ‘rights to property’ belonging to him within the meaning of [the FDCPA],” to this case.<sup>88</sup>

These holdings illustrate that the courts have been forced to step in and fix the many gaps left open by UDPIA, especially to ensure that the statutory language created by UDPIA does not circumvent certain public policy protections. But these public policy exceptions created by the courts have created a lot of confusion, and recent attempts to amend

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80. *Id.*

81. United States Small Bus. Admin. v. Bensal, 853 F.3d 992, 1000 (9th Cir. 2017).

82. *Id.* at 994.

83. Cal. Prob. Code § 283 (West 2016).

84. *Bensal*, 853 F.3d at 994.

85. Cal. Prob. Code § 283 (West 2016).

86. *Bensal*, 853 F.3d at 997.

87. *Id.* at 997–98.

88. *Id.* at 1000 (citing *Drye v. United States*, 528 U.S. 49, 61 (1999)).

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UDPIA have not solved any of its inherent problems and deficiencies,<sup>89</sup> including providing protections to creditors who are owed domestic support obligations.<sup>90</sup>

## II. PROTECTIONS PROVIDED TO DOMESTIC SUPPORT CREDITORS IN THE UNIFORM TRUST CODE

One section of uniform law that protects domestic support obligations is the Uniform Trust Code (“UTC”), the primary source of statutory law governing the creation and operation of trusts.<sup>91</sup> The UTC contains many provisions that allow settlors of a trust to structure trusts in a way that protects assets from creditors of the beneficiaries.<sup>92</sup> For example, in a discretionary trust, trustees have broad discretion in determining the “amount, timing, and allocation of trust distributions among the beneficiaries.”<sup>93</sup> Creditors are able to obtain a court order attaching its claim to the beneficiary’s interest in the discretionary trust,<sup>94</sup> and such an attachment imposes a requirement on the trustee to pay the creditor any distribution that the beneficiary had a vested right to receive.<sup>95</sup> But the beneficiary only has a vested right to receive trust assets when the trustee exercises discretion in favor of making a distribution,<sup>96</sup> and the UTC does not require a trustee to exercise discretion and distribute

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89. Hirsch, *Disclaimers and Federalism*, *supra* note 46, at 1905 (“Ironically, the uniform acts for inheritance and disclaimer law, first promulgated in 1969, have, if anything, exacerbated the tropism toward diversity. Unlike the Uniform Commercial Code, the Uniform Probate Code and related products have never gained anything close to universal adoption, but they did succeed in stirring things up, encouraging more states to codify and to reexamine and fiddle with statutes already in place.”).

90. Hirsch & Gans, *supra* note 25, at 28 (“[T]he issue of creditors’ rights is nowhere raised, or even mentioned, suggesting that the drafters overlooked it.”).

91. Unif. Trust Code (Unif. Law Comm’n 2010).

92. Reid Weisbord, David Horton & Stephen Urice, *Wills, Trusts, and Estates: The Essentials* 389, 404–10 (2018) (stating discretionary trusts, support trusts, and spendthrift trusts all contain natural asset protections because of its limits on the beneficiary’s right to compel distribution or expressly prohibit the trustee from making distributions directly to a beneficiary’s creditors).

93. *Id.* at 390.

94. Unif. Trust Code § 501 (Unif. Law Comm’n 2005) (“[T]he court may authorize a creditor . . . 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.”).

95. Weisbord, Horton & Urice, *supra* note 92, at 404.

96. *Id.*

assets to the beneficiary, even if the discretion is in the form of a standard of distribution or the trustee has abused the discretion.<sup>97</sup>

The only limitation on the trustee's discretion in the UTC is to protect domestic support creditors.<sup>98</sup> UTC 504(c) allows domestic support creditors to obtain relief from the court through an order compelling the trustee to issue a distribution "to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse."<sup>99</sup>

The legislature drafted this provision specifically for the public policy objective of protecting domestic support creditors<sup>100</sup> because 504(b) "forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion."<sup>101</sup> Furthermore, under Section 504(d) "the power to force a distribution due to an abuse of discretion or a failure to comply with the standards of a trustee belongs solely to the beneficiary [of the trust]" and not to any creditor.<sup>102</sup>

Although the creditor will not be able to recover any more than what is routinely distributed to the beneficiary,<sup>103</sup> the creditor is at least able to satisfy some of the debt and receive a steady stream of income by attaching its domestic support obligation to the future distributions to the beneficiary.<sup>104</sup> Once the claim is made by the domestic support

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97. Unif. Trust Code § 504(b) (Unif. Law Comm'n 2004) ("Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if: (1) the discretion is expressed in the form of a standard of distribution; or (2) the trustee has abused the discretion.").

98. Unif. Trust Code § 504(c) (Unif. Law Comm'n 2004) states "[t]o the extent a trustee has not complied with a standard of distribution or has abused a discretion: (1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and (2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.").

99. Unif. Trust Code § 504(c)(1) (Unif. Law Comm'n 2004).

100. John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 *Cardozo L. Rev.* 2621, 2645–46 (2006).

101. Unif. Trust Code § 504 cmt. (Unif. Law Comm'n 2004).

102. *Id.*

103. Unif. Trust Code § 504(c)(2) (Unif. Law Comm'n 2004).

104. *Id.*

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creditor, the court must direct the trustee of the trust to pay the amount that is equitable under the circumstances.<sup>105</sup>

Claims made by these creditors are honored by the courts “[r]egardless of whether or not their claims were previously recognized in most states.”<sup>106</sup> This provision has been widely embraced by the courts and states despite contentions by critics who contend that this exception threatens the traditional protections afforded in discretionary trust interests.<sup>107</sup> The position taken by the UTC “simply represents a logical implementation of a public policy choice favoring a class of dependent creditors over a settlor’s protective intentions, as embodied in the chosen discretionary trust structure.”<sup>108</sup> Furthermore, these creditors are not “simply given carte blanche to access the trust for satisfaction of their claims,”<sup>109</sup> but are merely “compel[ling] a distribution where the trustee has failed to comply with some standard guiding distributions, or where the trustee has otherwise abused its discretion.”<sup>110</sup> This ability to compel distributions from a discretionary trust under section 504(b) is only available to domestic support creditors; all other creditors are expressly barred from being able to do so.<sup>111</sup>

Spendthrift trusts provide an even more powerful form of asset protection, prohibiting attachment of creditor claims to the beneficiary’s interest in a trust.<sup>112</sup> Section 502 of the UTC has withstood all types of claims, even tort creditors who have made a public policy argument on the enforceability of their debt.<sup>113</sup> Once again, however, the UTC provides

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105. Unif. Trust Code § 504 cmt. (Unif. Law Comm’n 2004). Before fixing the amount to be paid to the domestic support creditor, the court “should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family.” *Id.*

106. Eason, *supra* note 100, at 2643.

107. *Id.*

108. *Id.*

109. *Id.* at 2644.

110. *Id.* at 2643–44.

111. *Id.* at 2644.

112. Unif. Trust Code § 502(c) (Unif. Law Comm’n 2010) (“[A] creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.”). “[A] creditor of the beneficiary . . . may only attempt to collect directly from the beneficiary after payment is made.” Unif. Trust Code § 502 cmt. (Unif. Law Comm’n 2010). Spendthrift protection arises under state trust law but is enforceable under bankruptcy law. *See* 11 U.S.C. § 541(c)(2) (2019).

113. *See e.g.* Scheffel v. Krueger, 782 A.2d 410 (N.H. 2001) (holding that creditor, a minor, who was sexually assaulted by the beneficiary of a spendthrift trust, could not attach her tort judgment to the beneficiary’s interest in the trust; the Court was not persuaded by this public policy argument and justified its holding by stating that there is no language in

exceptions to the elusive spendthrift trust provisions under Section 503 to just three classes of creditors, one of them being creditors who are owed unpaid family support obligations.<sup>114</sup> This exception allows a beneficiary's child, spouse, or former spouse with a judgment or court order against the beneficiary for support or maintenance to attach their claim to a present or future distribution that would be made to the beneficiary.<sup>115</sup> The only other two creditors provided an exception are the attorney who provided services for the trust and the United States government.<sup>116</sup>

The drafter of the UTC adopted these exceptions to provide domestic support creditors with remedies that are consistent with majority rule, Restatements of Trusts Law,<sup>117</sup> and federal bankruptcy law.<sup>118</sup> The drafters intended "[t]his exception [to] allow[] a beneficiary of modest means to overcome an obstacle preventing the beneficiary's obtaining services essential to the protection or enforcement of the beneficiary's rights under the trust."<sup>119</sup> Courts are also "increasingly reluctant to afford a trust beneficiary the protection of a spendthrift clause in cases

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the statutory provisions that suggest the legislature intended a tort creditor be exempted from a spendthrift provision); *see also* Unif. Trust Code § 503 cmt. (Unif. Law Comm'n 2005) ("The drafters also declined to create an exception for tort claimants."). For a further discussion of the exception for tort claims, see Restatement (Third) of Trusts § 59 rep's notes to cmt. a-a(2) (Am. Law Inst. 2003).

114. Unif. Trust Code § 503(b) (Unif. Law Comm'n 2005) ("A spendthrift provision is unenforceable against: (1) a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance; (2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and (3) a claim of this State or the United States to the extent a statute of this State or federal law so provides.").

115. Unif. Trust Code § 503 cmt. (Unif. Law Comm'n 2005). The comment section further clarifies that unlike Unif. Trust Code § 504, this provision "does not authorize the spousal or child claimant to compel a distribution . . . to the extent the trustee has abused a discretion or failed to comply with a standard for distribution." *Id.* The spousal or child claimant can only attach to distributions that are "required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion." *Id.*

116. *Id.*

117. Restatement (Second) of Trusts § 157 cmt. cl. (a) (Am. Law Inst. 1959) ("The beneficiary should not be permitted to have the enjoyment of his interest under the trust while neglecting to support his dependents."); Restatement (Third) of Trusts § 59(a) cmt. cl. (a) (Am. Law Inst. 2003) ("On public-policy grounds, the beneficiary should not be permitted to enjoy a beneficial interest in a trust while neglecting the support of dependents.").

118. Unif. Trust Code § 503 cmt. (Unif. Law Comm'n 2005).

119. *Id.*



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involving child or spousal support, even where state statutes do not expressly include such an exception.”<sup>120</sup>

These protections provided under UTC 503 and UTC 504 do not solve all issues on collecting such a debt, but they at least create a “marginal benefit to these domestic support creditors because the beneficiary’s ineligibility to receive trust distributions creates an incentive to repay the outstanding debt.”<sup>121</sup>

UDPIA needs to be amended to include protections for domestic support creditors, similar to those provided under the UTC.

### III. PROTECTIONS PROVIDED TO DOMESTIC SUPPORT CREDITORS IN THE UNITED STATES BANKRUPTCY CODE

Bankruptcy law is another area of federal law that protects creditors owed alimony and child support payments. Protections for this vulnerable class of creditor were first passed by Congress in the Bankruptcy Reform Act of 1994 “pertaining to consumer bankruptcies, including . . . ensuring that the bankruptcy process cannot be utilized to avoid alimony and child support obligations.”<sup>122</sup> These protections for domestic support creditors were further strengthened in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).<sup>123</sup> Perceived deficiencies in domestic support creditor protections in bankruptcy motivated “[d]omestic support enforcement agencies and other state and federal governmental agencies [to be] at the forefront supporting these domestic creditor amendments.”<sup>124</sup> Both the 1994 amendments and BAPCPA have significantly elevated the status of

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120. Howard M. Zaritsky, *Transferees with Creditor or Marital Problems*, in *Tax Planning for Family Wealth Transfers: Analysis with Forms* ¶ 7.05, at 24 (Thomson Reuters Tax and Accounting, 2019), 1999 WL 1032107. For a further discussion of case law favoring protection of child or spousal support creditors, see *id.* at 23–30.

121. Weisbord, Horton & Urice, *supra* note 92, at 405.

122. H.R. Rep. No. 103–835, at 34 (1994). The Congressional Committee stated “[t]his subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts.” *Id.* at 54. Before the passage of this legislation in 1994, protections to non-debtor spouses and dependents in bankruptcy proceedings were limited. Lynne F. Riley, *BAPCPA at Ten: Enhanced Domestic Creditor Protections and Enforcement Rights*, 90 Am. Bankr. L.J. 267, 268 (2016).

123. Riley, *supra* note 122, at 267. (“Prominent among these [BAPCPA] amendments were provisions for increasing protections and enhancing enforcement rights for domestic creditors in bankruptcy cases.”).

124. *Id.*

domestic support creditors in bankruptcy and provide enhanced protections and enforcement rights that include:

(1) elevation of domestic support priority status; (2) shrinking of the automatic stay through added domestic support creditor exceptions; (3) expansion and ease of establishing nondischargeability of domestic support and other divorce-related domestic debts; (4) enhanced jurisdiction of family courts to adjudicate the rights of domestic creditors in concurrent and sequential divorce and bankruptcy cases; and (5) mandatory noticing of collection and enforcement rights to domestic support creditors and state enforcement agencies by trustees in all chapters where individuals seek bankruptcy relief.<sup>125</sup>

Debtors who file bankruptcy petitions with the court to discharge debts have a general right to a “fresh start” upon completion of the case.<sup>126</sup> But there are a few exceptions to the types of debts that may be discharged in a bankruptcy case, and domestic support obligations are one of nineteen exceptions to a bankruptcy debtor’s discharge.<sup>127</sup> This exception to a discharge of debt is one amongst few public policy exceptions granted by the Bankruptcy Code.<sup>128</sup>

Once a debtor files for bankruptcy and lists the alimony and child support obligation, the creditor (spouse) is notified and is required to file an objection with the bankruptcy court as to the dischargeability of the debt.<sup>129</sup> The burden of proof lies with the objecting creditor to prove that the debt was established by the court for support and therefore nondischargeable.<sup>130</sup> The analysis used by the courts in making this determination “focuses on the intent of the parties and whether the debtor’s obligation to pay marital debts is in the nature of support.”<sup>131</sup>

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125. *Id.* at 269.

126. 11 U.S.C.A. § 727 (2005) (Historical and Revision Notes) (“This section is the heart of fresh start provisions of the bankruptcy laws.”).

127. 11 U.S.C.A. § 523(a)(5) (2012).

128. Taxes are generally not dischargeable, 11 U.S.C.A. § 523(a)(1), nor debts incurred through fraud or misrepresentation, § 523(a)(2)(A), student loan debt, § 523(a)(8)(A)(ii), nor intentional torts, § 523(a)(6).

129. Robert D. Berger, *Bankruptcy & Divorce: A Marriage of Inconvenience*, 83 J. Kan. B. Ass’n. 30, 34 (2014).

130. *Id.* at 32 (“The burden for the objecting creditor is both to establish the existence of the underlying debt and to demonstrate that the debt is of a kind contemplated under the exceptions to discharge.”).

131. *Id.* at 33.

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Only if the obligation to pay marital debts is not in the nature of support, is it not excepted from discharge as a domestic support obligation under § 523(a)(5).<sup>132</sup> If the objecting domestic support creditor's claim meets this standard and the creditor files a timely adversary complaint in the bankruptcy case, the domestic support obligation survives bankruptcy and is excepted from the debts discharged in the process.<sup>133</sup>

Typically, all of the exceptions listed in § 523(a)(5) of the bankruptcy code are weighted in favor of the debtor.<sup>134</sup> When considering whether a certain debt falls within the § 523 exception, courts will “generally construe the statute strictly against the objecting creditor and liberally in favor of the debtor in order to give the debtor a better chance at a fresh start.”<sup>135</sup> Congress has limited this policy of favoring the debtor, however, when the debt arises from a divorce or separation agreement.<sup>136</sup> Domestic support obligations are given special consideration and are weighted in favor of the objecting creditor spouse, not the debtor.<sup>137</sup> This provision under the BAPCPA is so broadly construed and strictly adhered to by the courts that “if the debt is ‘owed to or recoverable by’ a spouse, former spouse, or child (and, for § 523(a)(5), a qualified relative or guardian), then the debtor can be assured in advance that discharge of the obligation is almost certainly going to be denied.”<sup>138</sup>

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132. *Id.*

133. *Id.* at 33–34.

134. Burden of Proof as Regards Discharge in Bankruptcy, 2 A.L.R. 1672, at 22 (2017) (“Bankruptcy Code favors discharge, and thus Bankr. Code, 11 U.S.C.A. § 523 providing for exceptions to discharge will be construed strictly against creditor objection and liberally in favor of the debtor.”).

135. *In Re Crosswhite*, 148 F.3d 879, 881 (7th Cir. 1998) (citing *In Re Reines*, 142 F.3d 970, 972–73 (7th Cir. 1998)).

136. *Id.* at 882 (citing 4 Lawrence P. King, *Collier on Bankruptcy* ¶¶ 523.05, 523.11[2] (15th ed. rev. 1998)).

137. Daniel A. Austin, *For Debtor or Worse: Discharge of Marital Debt Obligations Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 51 Wayne L. Rev. 1369, 1388 (2005) (“Pre-BAPCPA, §§ 523(a)(5) and (15) were generally interpreted to reflect a congressional preference for the rights of spouses to alimony, maintenance or support over the rights of debtors to a fresh start. Thus, most bankruptcy courts construed the § 523(a)(5) exception liberally in favor of the creditor spouse.”).

138. *Id.* at 1413; *see also* Alyson F. Finkelstein, *A Tug of War: State Divorce Courts Versus Federal Bankruptcy Courts Regarding Debts Resulting From Divorce*, 18 Bankr. Dev. J. 169, 180 (2001) (“[S]tate classifications of what obligations constitute alimony, maintenance, and support do not bind bankruptcy courts. Federal bankruptcy law controls what constitutes alimony, maintenance, and support for the purposes of determining dischargeability.”) (internal citations omitted).

Another form of protection granted to domestic support creditors in the bankruptcy courts is priority status for their domestic support claim, which ranks the debt over other claims made against the debtor's estate in bankruptcy.<sup>139</sup> Where payments to creditors are facilitated through the Bankruptcy Court, debts for alimony and child support are given the highest Administrative Priority amongst creditors under § 507(a)(1).<sup>140</sup>

Before the 1994 Bankruptcy Reform Act, claims for child support and alimony were nondischargeable, but held no priority status.<sup>141</sup> Congress first enacted this provision with the Bankruptcy Reform Act of 1994 when it “sense[d] that bankruptcy was dealing too liberally with ‘deadbeat’ parents and ex-spouses.”<sup>142</sup> Under the 1994 amendments, alimony and child support claims were ranked seventh out of nine priority categories.<sup>143</sup> With the 2005 passage of the BAPCPA, the Bankruptcy courts continued to recognize the “congressional preference for the rights of spouses to alimony, maintenance or support over the rights of debtors to a fresh start.”<sup>144</sup>

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139. 11 U.S.C.A. § 507(a)(1) (West 2019).

140. 11 U.S.C.A. § 507(a)

(“The following expenses and claims have priority in the following order: (1) First: (A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.”);

*see also* Berger, *supra* note 129, at 33 (“DSOs are categorized as first priority claims, entitling those claims to be paid first from funds received by a Chapter 7 Trustee after satisfaction of administrative expense claims. Also, a Chapter 13 plan, in order to be confirmed, must generally provide for payment in full of DSOs.”).

141. Riley, *supra* note 122, at 270–71 (citing to 11 U.S.C. § 34(a)(7)).

142. Timothy D. Kline, *The Present Interplay between Family Law and Bankruptcy Law*, 1996 Norton Ann. Surv. of Bankr. L. 5 (1996) (“The plight of vast numbers of American children entitled to but not receiving adequate support by noncustodial parents has not failed to attract the attention of Congress. The economic disadvantage experienced by some former spouses of bankruptcy debtors has likewise created an impetus for change. Congress's response to these perceived inequities was part of the Bankruptcy Reform Act of 1994.”) (citing Margaret Dee McGarity, *Family Law Provisions in the Bankruptcy Reform Act of 1994*, Bankr. Ct. Decisions Wkly. News & Comment, May 16, 1995.).

143. Lynne F. Riley & Maria C. Furlong, *Intersection of Divorce and Bankruptcy: BAPCPA and Other Developments*, 2010 Norton Ann. Surv. Bankr. L. 15, 5 (2010).

144. Austin, *supra* note 137, at 1388.

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Under the 2005 BAPCPA amendment to the Bankruptcy Code, these domestic support obligations got elevated from seventh to first in the priority category.<sup>145</sup> The BAPCPA also struck all references to “alimony, maintenance or support” and referred to all such claims as “domestic support obligations” (“DSOs”), a term that is broadly defined under the United States Bankruptcy Code 11 U.S.C.A. § 101(14A).<sup>146</sup> Another noteworthy improvement to this section under the BAPCPA was that the first priority status now includes support claims owed to or assigned to governmental units, which in the past was relegated to a general unsecured status.<sup>147</sup> “The priority status afforded to DSOs in § 507, and their nondischargeability pursuant to § 523(a)(5), is a result of public policy which, in general, dictates that enforcement of familial support obligations should be favored over a debtor's fresh start.”<sup>148</sup> Similarly, UDPIA should emulate the public policy initiatives adopted by the Bankruptcy Code to favor domestic support obligations over the beneficiary’s right to disclaim property that was to be inherited by them.

#### IV. EVALUATION OF UDPIA AND ARGUMENT FOR IMPROVING THE STATUTE

Federal statute UDPIA should be amended to include provisions similar to those present in the Uniform Trust Code and Bankruptcy Code, especially pertaining to alimony and child support creditors. Domestic support creditors fall under the category of “involuntary

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145. See 11 U.S.C. § 507(a). However, administrative expenses of the trustee, necessary costs and expenses of preserving the bankruptcy estate, and compensation of officers under § 330(a) do get paid before the domestic support creditor is entitled to payment. Edward W. Vopat, *Domestic Support Obligations Under the Revised Bankruptcy Code*, 17 J. Bankr. L. & Prac. 3 Art. 1, pt. C (2008).

146. Riley & Furlong, *supra* note 143, at 5 (“The definition of ‘domestic support obligation’ expands the scope of protected obligations, now including such items as interest that accrues on a debt under nonbankruptcy law, and support debts owed to or recoverable by a governmental unit. It also limits the parties who may recover a ‘domestic support obligation’ by requiring that it be ‘owed and recoverable by a spouse, former spouse, or child of the debtor or such child's parent, legal guardian or responsible relative; or a governmental unit.’”).

147. Michaela M. White & James P. Caher, *The Dog That Didn't Bark: Domestic Support Obligations and Exempt Property After BAPCPA*, 41 Fam. L.Q. 299, 303 (2007).

148. Cheng-Yu Hou, *Domestic Support Obligations: Why a Totality of the Circumstances Analysis Should be the Prevailing Test to Determine Whether a Claim is “In the Nature of Alimony, Maintenance, or Support” under Section 101(14A)(B) of the Bankruptcy Code*, 33 Cal. Bankr. J. 171, 174 (2015).

creditors.”<sup>149</sup> Involuntary creditors’ debts are born out of some form of harm by the debtor, such as tort claims, fraudulent transactions, and domestic support obligations.<sup>150</sup> This particular group of creditors has “not bargained with the debtor; they are the victims of negligence or circumstances, who take the debtor as they find him.”<sup>151</sup>

The debtor has an equitable obligation in this situation to restore the creditor to the status quo with every means available to it.<sup>152</sup> In a divorce, costs are “borne by the deeper pocket,” and alimony and child support are awarded on the “basis of need and ability to pay.”<sup>153</sup> If these creditors are not protected, the costs associated with their risks and burdens are spread to the taxpayer.<sup>154</sup> Chances of their reliance on public assistance programs for housing, food, and health care are inevitably increased.<sup>155</sup> This is exactly why UDPIA needs to protect the interests of domestic support creditors over the individual’s right to disclaim. There is “a moral hazard of insolvency . . . [that the law] should strive to reduce for the sake of social cost efficiency.”<sup>156</sup>

“Family courts seek to equitably distribute marital assets in order to provide a fair start to both spouses and ensure adequate support for the family unit,”<sup>157</sup> while “[b]ankruptcy courts seek to give debtors a “fresh start” while distributing assets to all creditors in accordance with the Bankruptcy Code’s priority scheme.”<sup>158</sup> A conflict exists between “the

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149. See Hirsch, *The Problem of the Insolvent Heir*, *supra* note 19, at 617–18 n.148 (“The morality of the debtor-creditor relationship . . . re-emerges when we consider persons who have become creditors against their will.”).

150. *Id.* at 618–19.

151. *Id.* at 618.

152. *Id.*

153. *Id.* at 619–20 (arguing that “the debtor who receives an inheritance finds his pocket deepened further,” and is therefore “better equipped to bear the cost of marital dissolution.” This ability to bear the cost of the marital dissolution would be shifted to the creditor when an inheritance disclaimer is utilized. “Thus, from the standpoint of efficient cost distribution, a rule barring disclaimer against alimony and child support creditors appears appropriate.”).

154. See *id.* at 622.

155. See *id.* (“On the one hand, it would be relatively simple to factor the risk of disclaimer into the ‘cost’ of taxation or welfare. With a universal pool of taxpayers to draw upon, government is the ideal risk spreader. On the other hand, as a matter of social policy, it might well be deemed inequitable to relieve a disclaimant of his share of the tax burden or to permit him to receive welfare benefits.”).

156. *Id.* at 619.

157. Riley, *supra* note 122, at 267–68.

158. *Id.* (quoting Alyson F. Finkelstein, *A Tug of War: State Divorce Courts Versus Federal Bankruptcy Courts Regarding Debts Resulting From Divorce*, 18 *Bankr. Dev. J.* 169, 175–76 (2001)) (internal quotation marks omitted).

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bankruptcy court's policies of providing a fresh start and distributing the debtor's assets equally among . . . creditors and the family court's interest" in dividing property between spouses.<sup>159</sup> Despite contrasting interests between these courts, "Congress enacted the 1994 Bankruptcy Code amendments" to "ease the impact of competing interests of families and creditors."<sup>160</sup> The same effort should be advanced by UDPIA to resolve the conflict between the interests of a benefactor's right to disclaimer and a domestic support creditor, with the prevailing protections to favor the domestic support creditor.

The alimony and child support debtor "is better equipped to bear the cost of marital dissolution after inheritance . . . . Thus, from the standpoint of efficient cost distribution, a rule barring disclaimer against alimony and child support creditors appears appropriate."<sup>161</sup> In addressing the critics who assert that one should not be able to tamper with the beneficiary's absolute right to refuse an inheritance, scholars have argued that "[a]bsolute rights . . . are not the stuff of law."<sup>162</sup> There is no support for the notion that anyone "must enjoy complete transactional liberty,"<sup>163</sup> and these valid policy concerns of the beneficiary "do not exist in a vacuum."<sup>164</sup> These concerns need to "be balanced against competing policy concerns underlying creditor's rights,"<sup>165</sup> especially the rights of domestic support creditors. "[T]he balance between the creditor's rights and personal autonomy has always been, and always must be, weighed heavily in favor of the creditor's rights."<sup>166</sup> Therefore, "obligating a beneficiary to accept the offer of a gratuity due to his own conduct of having incurred debts beyond his ability to satisfy creditors would not contravene hallowed principles of transactional autonomy."<sup>167</sup> And finally, to counter the argument that a beneficiary should have an unfettered ability to turn down property that they find undesirable or worthless, "[c]reditors will gladly unburden the beneficiary of the gratuity directly; he need not suffer the imposition any

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159. Finkelstein, *supra* note 138, at 176.

160. Riley, *supra* note 122, at 268.

161. Hirsch, *The Problem of the Insolvent Heir*, *supra* note 19, at 620.

162. *Id.* at 627.

163. *Id.*

164. Bender, *supra* note 16, at 898.

165. *Id.* at 898–99.

166. *Id.* at 899.

167. Hirsch, *The Problem of the Insolvent Heir*, *supra* note 19, at 627.

longer than the time needed to deliver the property to his creditors' doorsteps."<sup>168</sup>

Federal legislation that allows a disclaimant to avoid paying its alimony and child support obligations from inherited assets runs contrary to all child support laws designed to protect this particular class of creditor in the Uniform Trust Code and Bankruptcy Code.<sup>169</sup> And although the courts have stepped in to curb some of the negative impacts UDPIA has had on public policy initiatives, it has yet to and should not be expected to provide solutions to protect the domestic support creditor, as it would only provide fragmented results based on the facts of the individual cases.<sup>170</sup> The UDPIA should, therefore, be amended to provide statutory protections for alimony and child support creditors.

V. NEW JERSEY SHOULD AMEND ITS DISCLAIMER STATUTE TO  
INCLUDE SPECIFIC PROVISIONS PROHIBITING DISCLAIMER OF  
INHERITANCES BY BENEFICIARIES WHO OWE ALIMONY AND CHILD  
SUPPORT

If UDPIA is not amended to specifically protect this particular class of involuntary creditor who is owed alimony and child support, then the State of New Jersey should amend its disclaimer statute to provide direct protections to them.

Few states have already included specific language in their disclaimer statutes barring a beneficiary from disclaiming interest in property when that property can be used to satisfy the beneficiary's child support obligations.<sup>171</sup> These statutes provide immediate protection to

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168. *Id.* at 629.

169. *Id.* at 620, 621 n.165.

170. Bender, *supra* note 16, at 910 (“[J]udicial solutions are not a proper method of dealing with this problem as they only serve to confuse issues involved.”).

171. Alaska Stat. § 13.70.110(f) (West 2010)

(“A disclaimer of an interest in or power over property under this chapter is barred and is not effective (1) to the extent the disclaimant is in arrears in child support payments; or (2) if the disclaimant is involved in a pending court or administrative proceeding to establish or modify the disclaimant’s child support obligation or to establish whether the disclaimant is the biological father or mother of a child.”); Ind. Code Ann. § 32.17.5–8–2.5(b) (West 2010) (“A disclaimer of an interest in property is barred up to the amount of the disclaimant’s child support arrearage.”); N.D. Cent. Code Ann. § 14–09–08.17 (West 2007)

(“An obligor whose child support obligation is delinquent may not renounce, waive, assign, transfer, or disclaim any interest that obligor might otherwise claim



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these domestic support creditors, as it allows them to utilize the proceeds from the inheritance to satisfy all outstanding domestic support obligations.<sup>172</sup> These state statutes would be effective even if that state has adopted the UDPIA, because UDPIA allows its provisions to be supplemented by other law.<sup>173</sup>

Analysis of the legislative bills from these states indicates a concern for the adverse effects a disclaimer can have on the ability to collect child support, especially because a disclaimer prevents the child support obligor from ever having legal ownership of the inheritance.<sup>174</sup> These statutes also acknowledge the reality that disclaimed inheritances are usually passed to the next eligible beneficiary, who will then hold the funds in trust for the benefit of the disclaimant.<sup>175</sup> This strategy easily defeats the purpose and protections provided by federal and state child support laws.<sup>176</sup> Some other states have statutory language that bar disclaimer of inheritance if the beneficiary is insolvent at the time of the attempted disclaimer.<sup>177</sup>

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in a decedent's estate, a trust, or a similar device, to the extent necessary to satisfy the delinquency. Any attempt to renounce, waive, assign, transfer, or disclaim such an interest is void if attempted after notice of the delinquency is furnished to the person administering the estate, trust, or similar device, and is otherwise voidable.");

Tex. Prop. Code Ann. § 240.151(g) (West 2017) ("A disclaimer by a child support obligor is barred as to disclaimed property that could be applied to satisfy the disclaimant's child support obligations.").

172. See statutes cited *supra* note 171.

173. Unif. Prob. Code § 2-1104 (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2010).

174. Legis. B. History H.B. 2621 (Tex. 2013) (allowing the "inheritance to pass to the next eligible beneficiary who can then hold the inheritance in trust for the benefit of the child support obligor, thereby defeating the intent of child support laws"); Legis. B. History H.B. 599 (Fla. 2009) ("This bill clarifies that a person is insolvent for purposes of ch. 739, F.S., when the sum of a person's debts is greater than his or her assets at fair valuation and the person is generally not paying his or her debts as they become due.").

175. Legis. B. History H.B. 2621 (Tex. 2013).

176. *Id.*

177. Fla. Stat. Ann. § 739.402 (West 2009) ("A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective: . . . [t]he disclaimant is insolvent when the disclaimer becomes irrevocable."); La. Civ. Code Ann. art. 967 (1999)

("A creditor of a successor may, with judicial authorization, accept succession rights in the successor's name if the successor has renounced them in whole or in part to the prejudice of his creditor's rights. In such a case, the renunciation may be annulled in favor of the creditor to the extent of his claim against the successor, but it remains effective against the successor.");

Although at first glance it may seem as though these statutes benefit and protect creditors, the unintended drafting errors in the UDPIA actually allow a disclaimant from circumventing state law if the local common law grants the right of insolvent disclaimer.<sup>178</sup> Only if the state properly identifies and closes these traps, would it effectively bar insolvent disclaimers and provide some relief to creditors to collect on their debt.<sup>179</sup>

Although New Jersey's current statute barring disclaimer includes some of the same elements as proposed in the UDPIA, it has none of the statutory protections to creditors as afforded to the other states discussed above.<sup>180</sup> The only protection provided to creditors in the New Jersey disclaimer statute is that it bars disclaimers where an interest in property is judicially seized before the disclaimer is made and where a fraud would be committed upon the beneficiary's creditors as set forth in the "Uniform Fraudulent Transfer Act."<sup>181</sup> These provisions do not provide much help to creditors as the beneficiary could defeat the judicial

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Mass. Gen. Laws Ann. ch. 190B § 2-801(h) (West 2012) ("The right to disclaim an interest in property shall be barred by: . . . 2. insolvency of the beneficiary at the time of the attempted disclaimer."); Minn. Stat. Ann. § 524.2-1106(b)(4) (West 2014) ("A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective: . . . the disclaimant is insolvent when the disclaimer becomes irrevocable.").

178. Hirsch, *Disclaimer Law and UDPIA's Unintended Consequences*, *supra* note 18, at 39 ("[T]he disclaimant can simply execute a common-law disclaimer, which UDPIA allows, circumventing the Act along with its bar on insolvent disclaimer.") (citing to UDPIA 1999 § 4 which provides that "the principles of law and equity supplement this [Act].").

179. For a more thorough discussion of UDPIA's drafting errors and unintended traps set by it, see *id.* at 39-40.

180. N.J. Stat. Ann. § 3B:9-9 (West 2005)

("Bar of right to disclaim[:] a. The right of an individual to disclaim property or any interest therein is barred by: (1) an assignment, conveyance, encumbrance, pledge or transfer of the property or interest or a contract therefor; or (2) a written waiver of the right to disclaim; or (3) an acceptance of the property or interest or a benefit under it after actual knowledge that a property right has been conferred; or (4) a sale of the property or interest that was seized under judicial process before the disclaimer is made; or (5) the expiration of the permitted applicable perpetuities period; or (6) a fraud on the individual's creditors as set forth in the "Uniform Fraudulent Transfer Act" (R.S.25:2-20 et seq.).")

181. N.J. Stat. Ann. § 3B:9-9(a)(6).

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process seizure provision by filing its disclaimer before any creditor can make a claim to it.<sup>182</sup>

As it relates to the fraudulent transfer provision, a close look at New Jersey's Uniform Fraudulent Transfer Act shows that in order for the bar on disclaimer to be effective, the disclaimant is required to "transfer" the "asset."<sup>183</sup> The statute defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance"<sup>184</sup> and defines "asset" as "property of a debtor."<sup>185</sup> Finally, and most importantly, this fraudulent transfer act provides that "[a] transfer is not made until the debtor has acquired rights in the asset transferred."<sup>186</sup>

Under UDPIA provisions, the disclaimant cannot have rights to the asset as defined in this New Jersey statute because the disclaimant's interest is considered disposed of before it is considered that the disclaimant possessed property.<sup>187</sup> As long as the disclaimant files a disclaimer of the inherited asset properly and in a timely manner, he or she will never have acquired any rights to the disclaimed property.<sup>188</sup> The New Jersey statute barring the right to disclaim includes a provision that allows the statute to be supplemented by other applicable statutory law, but there are no other statutory laws that could be supplemented to protect the rights of domestic support creditors in New Jersey.<sup>189</sup> Thus, these provisions provide little to no protection to a domestic support obligee. New Jersey needs more specific protections to bar a disclaimant from waiving their right to an inheritance when alimony or child support debts are owed.

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182. Hirsch, *The Problem of the Insolvent Heir*, *supra* note 19, at 597 n.54 ("Thus, in many states debtors participate in the 'race of diligence' that is ordinarily restricted to creditors: debtors will rush to disclaim before creditors levy against their inheritance.")

183. N.J. Stat. Ann. § 25:2-26 (West 1989).

184. N.J. Stat. Ann. § 25:2-22(e).

185. N.J. Stat. Ann. § 25:2-21(d).

186. N.J. Stat. Ann. § 25:2-28(d).

187. Unif. Prob. Code § 2-1106(b)(3)(B) (Nat'l Conference of Comm'rs on Unif. State Laws, amended 2010) ("If the disclaimant is an individual . . . the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.")

188. *See* Unif. Prob. Code § 2-1102(2) Nat'l Conference of Comm'rs on Unif. State Laws, amended 2010).

189. *See* N.J. Stat. Ann. § 3B:9-9(d) (West 2005).

## CONCLUSION

UDPIA needs to be amended so that its protections to alimony and child support creditors are consistent with the statutory provisions in the UTC and Bankruptcy Code. Both the UTC and Bankruptcy Code have recognized the public policy arguments of protecting the interests of this vulnerable class of creditor, and UDPIA should promptly follow suit. An inheritance is definitely not the first place an ex-spouse or child of the obligor would seek to collect from to satisfy the obligations owed to them, but it can certainly have a significant impact if attempts to collect on the debt have otherwise been unsuccessful.

It is not uncommon for domestic support obligors to evade payment of their obligations, and as it stands at the moment, UDPIA allows these obligors to freely disclaim their inheritances and avoid their obligations to their ex-spouses and children. The inheritance is then redirected to the next person in line and is invariably held in trust by family members for the benefit of the domestic support obligor, thus thwarting the ability of the ex-spouse or child from being able to collect on the obligation owed to them. This lack of protection for domestic support creditors is inconsistent with other laws, such as those provided in the Bankruptcy Code and Uniform Trust Code, and need to be amended immediately. This note opines, however, that UDPIA need not be amended to provide protection to all creditors.

Furthermore, New Jersey should not wait for UDPIA to pass these amendments, but it should immediately pass its own legislation to protect this class of creditor, as some other states have already done. As it stands, New Jersey's disclaimer statute does not protect these vulnerable creditors, and easily allows disclaimants to avoid payment on their domestic support obligations and divert inheritances to their own side of the family. As discussed, UDPIA allows state laws to supplement its provisions, and thus legislation passed by New Jersey would protect dependent spouses and children who are owed alimony and child support. To protect these vulnerable creditors, immediate action is necessary by UDPIA, or at a minimum by the State of New Jersey.