# Irrevocable Trusts – Vehicles for Asset Protection?

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Third party irrevocable spendthrift trusts are considered a means of asset protection for the beneficiaries; however, California already allows for many exceptions to the general rule that a creditor of a beneficiary cannot access the assets of such a trust.

Recently, in *United States v. Harris*, the Ninth Circuit held that any current or future distributions from an irrevocable trust to the beneficiary were subject to a continuing writ of garnishment payable to the United States as a result of a $646,000 restitution judgment owed by the beneficiary for a felony conviction.

In *Harris*, the defendant was the beneficiary of two California irrevocable trusts. By the terms of the trusts, the defendant could not assign his interest in the trusts and the trustee had the sole discretion to make or withhold distributions of principal and income.

The key issue was whether the garnishment statute in the Federal Debt Collection Procedures Act could be used to attach defendant's interest in an irrevocable trust. In order to determine whether the asset fits within the definition of property, and are subject to attachment, the court looks at the asset and the laws of the state governing the asset.

The decision of the Ninth Circuit to allow a continuing writ of garnishment is generally consistent with California law and policy. California Probate Code Section 15305.5 discusses the availability of trust assets to satisfy a restitution judgment and subparagraph (c) specifically provides that "Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the restitution judgment out of all or part of future payments that the trustee, pursuant to the exercise of the trustees discretion, determines to make to or for the benefit of the beneficiary."

However, in its analysis of California law, the Ninth Circuit did not focus on California Probate Code Section 15305.5 and instead based its decision on its finding that despite distributions being subject to the sole discretion of the trustee, the defendant had a right to compel distributions from the trust to fulfill the trust purpose. *Empire Props. v. Cty. Of Los Angeles*, 44 Cal. App. 4th 781 (1996), provides that a beneficiary of an irrevocable trust has a "vested and present beneficial interest in the trust property." The Ninth Circuit found that under California law, a beneficiary has a right to compel a trustee to make a distribution using California Probate Code Section 17200. On that basis, the Ninth Circuit found that California state law creates a sufficient interest in a beneficiary of an irrevocable trust to satisfy the requirements of the federal lien provisions.

As a matter of California law, the discussion in the case regarding a beneficiary's ability to compel distributions from an irrevocable discretionary trust, opens the door for an increase in the amount of petitions by beneficiaries to compel distributions despite specific language in the trust giving the trustee the sole discretion over distributions.

While the decision in *Harris* mentions that "the government is not attempting to compel distributions from the trusts" without any further discussion of whether such an action would be available, it leaves the question of whether a creditor of a beneficiary, including one with a federal lien, can seek to compel a trustee to make a distribution to a beneficiary if the creditor believes that the failure to make such a distribution is inconsistent with the terms of the trust. In *Young v. McCoy*, 147 Cal. App. 4th 1078 (2007), a creditor, holding a restitution judgment against the beneficiary of an irrevocable trust, sought to compel the trustee to make a discretionary distribution to the beneficiary. The decision in *Young* did not address whether a creditor had the standing to seek the relief, but decided that the trustee had not abused her discretion because the beneficiary was receiving adequate support from the state while in jail.