When Your Child's Marriage Goes Bad, So Might Your Child's Trust:

Spousal and Child Support Exceptions to Spendthrift Trust Protections

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Although by no means a scientific assessment of the motivations that compel clients to provide for their heirs through continuing spendthrift trusts, in the author's experience, it is often a fear of the client's "in-laws" that compels their use. Significantly, however, under the Restatement (Second) of Trusts, the very first exception set forth to the creditor protection that is generally afforded by such trusts concerns spousal (and child) support claims.

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> Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary . . . by the wife or child of the beneficiary for support, or by the wife for alimony. . .[1]

This rule obviously stands in stark contrast to the almost universal acceptance in the United States of the validity of spendthrift trusts in protecting property from most other classes of creditors.[2] In fact, it is clear that, in most cases, there are few significant limitations on the latitude of the efficacy of spendthrift clauses in protecting trust property from a beneficiary's creditors.[3] The spousal and child support exceptions to the general validity of spendthrift trust protections in the United States should, therefore, raise significant concerns for those who wish to preserve family wealth within their own lineage. An understanding of the scope of the exceptions, as well as the rationale upon which such exceptions rest is, therefore, undeniably important. This article will attempt to give the planner an overview of what a spendthrift trust can (and cannot) do, with proper planning, to protect against the possibility of claims from these unique classes of creditors.[4]

PUBLIC POLICY

Since the United States Supreme Court gave effect to the anti-alienation provisions of the so-called "spendthrift trust" in its 1875 decision in *Nichols v. Eaton*,[5] spendthrift trusts have been an integral part of the landscape of American law. In establishing the modern rule recognizing the effectiveness of

spendthrift trusts in protecting the beneficiary's trust interest from his or her creditors, the Supreme Court in *Nichols* stated:

> We concede that there are limitations which public policy or general statutes impose upon all dispositions of property, such as those designed to prevent perpetuities and accumulations of real estate . . . We also admit that there is a just and sound policy . . . to protect creditors against frauds upon their rights . . . But the doctrine, that the owner of property . . . cannot so dispose of it, but that the object of his bounty . . . must hold it subject to the debts due his creditors . . . is one which we are not prepared to announce as the doctrine of this court.[6]

It has been similarly stated, albeit by lesser courts, that "[t]he doctrine that property may be made inalienable by such declaration of a [spendthrift] trust rests upon the theory that a donor has the right to give his property to another upon any conditions which he sees fit to impose, and that, inasmuch as such a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had the right to look for payment, they cannot complain that the donor has provided that the property or income shall go or be paid personally to the beneficiary and shall not be subject to the claims of creditors."[7] Stated more simply, "[t]he validity of a spendthrift provision in a trust is predicated upon the [public policy] consideration that a person is free to make any desired disposition of his property."[8]

Notwithstanding this strong public policy in favor of giving effect to the settlor's intent in disposing of his property, however, the official commentary to the Restatement (Second) of Trusts advises that the spousal and child support exception to spendthrift trust protections is based on a competing public policy consideration. Specifically, this consideration is that a beneficiary should not be permitted to have the enjoyment of his or her beneficial trust interest while neglecting his or her obligation to support his or her dependents.[9] In fact, *Scott on Trusts* goes so far as to state, "[i]t would be shocking indeed to permit a husband to receive and enjoy the whole of the income from a large trust fund and to make no provision for his needy dependents."[10]

Whether or not it would, in fact, be "shocking" to give legal effect to the settlor's intent that only his or her named beneficiaries enjoy the benefits of his or her largesse, a legal distinction has been made between (i) the beneficiary's dependents, as creditors, on the one hand, and (ii) most other creditors, on the other. That distinction is generally based on the fact that the former class of claimants did not deal with the beneficiary of their own free will, fully cognizant of the limitations on their potential for recovery and with a willingness to submit thereto. Again, according to *Scott on Trusts*:

> The reason why spendthrift trusts are permitted in a majority of the states is that it is felt that it is not unreasonable for the settlor in creating a trust to protect the beneficiary against his own improvidence. For this reason his ordinary contract creditors cannot reach his interest. It has frequently been suggested that they have only themselves to blame if they extend credit to him without first ascertaining the amount of his resources that are available for the discharge of his debts. Whether this line of thought is or is not sufficient to justify the exemption for the interest of the beneficiary from the claims of his creditors, it is not applicable to those who have not voluntarily extended credit to the beneficiary.... It is not applicable to the children of the beneficiary claiming support from him, and is hardly applicable to the claim of his wife for support or alimony.[11]

Although it is clear that such reasoning is applicable to the beneficiary's *minor*

dependents, it is equally clear that the application of such reasoning to the beneficiary's spouse is flawed. Since the beneficiary's spouse could have contracted with the beneficiary on support or alimony issues through a prenuptial agreement, he or she should not be heard to say that he or she did not enter into the marriage fully cognizant of any limitations on the potential for recovery from any spendthrift trusts of which his or her spouse is, or may become, a beneficiary. In fact, some state statutes apparently recognize the validity of this distinction by carving out an exception from spendthrift trust protections for child support claims but none for spousal support claims.[12] In the author's opinion, a failure to distinguish between the beneficiary's spouse, on the one hand, and the beneficiary's minor dependents, on the other, fails to recognize the substantial equalization of the sexes that has occurred in American society over the course of the past century.

Finally, it is important to remember that the obligation of support at issue is on the delinquent spouse and *not* upon the settlor of the trust created for the benefit of the delinquent spouse. Therefore, unless a contrary intention is evidenced in the trust instrument, it would seem patently unfair to subvert the settlor's wishes by diverting trust property from the beneficiary to the beneficiary's dependents. Since the settlor was obviously free to withhold his or her generosity, and might very well have done so if he or she had been sufficiently prescient to know that these claims would ultimately arise and be successful, his or her intent should be respected. This is especially so in light of the fact that to do so would in no way diminish any fund to which there would otherwise have been any right to look for payment.

LEGAL THEORIES FOR RECOVERY

Statutory Law

The competing public policy considerations brought into play when a spousal or child support claim is made against a beneficiary's interest in a spendthrift trust obviously raise a legal issue that is resolved differently in different states. In a number of jurisdictions, the legislature has itself weighed the competing public policy considerations and thereby removed the issue from the courts. New York law, for example, provides that "[t]he beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person is not precluded by anything contained in this section [providing for the inalienability of trust income] from transferring or assigning any part or all of such income to or for the benefit of persons whom the beneficiary is legally obligated to support."[13] Similarly, under Pennsylvania law, the "[i]ncome of a trust subject to spendthrift or similar provisions shall nevertheless be liable for the support of anyone whom the income beneficiary shall be under a legal duty to support."[14]

Another statutory example allowing spousal and child support claimants to access a trust beneficiary's rights to trust income is §456.080 of the Missouri Revised Statutes, which provides:

> All restraints upon the right of the cestui que trust to alienate or anticipate the income of any trust estate in the form of a spendthrift trust, or otherwise, and all attempts to withdraw the income of any trust estate from the claims of creditors of the cestui que trust, whether such restraints be by will or deed, now existing or in force, or which may be hereafter executed in this state, be and the same are hereby declared null and void and of no effect, as against the claims of any wife, child or children, of such cestui que trust for support and maintenance."[15]

In deciding on the effect of this statute, the St. Louis Court of Appeals in *Brant v. Brant*[16] held that under the maxim, *expressio unius esta exclusio alterius*, although the income of a spendthrift trust is not protected under Missouri law against the claims of any [spouse] wife, child, or children of the beneficiary for

support and maintenance, the corpus of the fund *is* so protected.[17]

Obviating any need for resort to the common law, the Oklahoma statute, which also provides that "[a]ll income due or to accrue in the future to the beneficiary shall be subject to enforceable claims under the laws of this state for … support of a husband, wife, or child of the beneficiary,"[18] further provides, apparently irrespective of the nature of the creditor, that "[t]he right of any beneficiary of a trust to receive the principal of the trust or any part of it, presently or in the future, shall not be alienable and shall not be subject to the claims of his creditors."[19] At least two states, however, do not limit the statutory exception to a beneficiary's income interest, but expose the trust's principal as well.[20]

Common Law

Where the legislature has not been so kind as to resolve the issue itself, a number of courts have avoided the difficult weighing of the competing public policy considerations by inventing other rationales to serve as surrogate bases for avoiding giving effect to spendthrift trust protections when they come up against spousal or child support claims. In the first instance, it has been suggested:

> Where the trust is created for the support of the beneficiary . . . the fact that he has dependents is to be taken into consideration in determining the amount to which he is entitled under the trust, that the support of a person includes the support of those whom it is his duty to support. There have been suggestions also that his dependents are entitled to enforce the trust on the ground that they are included as beneficiaries of the trust …The result is much the same as though the trust were created, not solely for the benefit of the beneficiary, but for the benefit of himself and his dependents.[21]

In this regard, according to one court:

> Recognizing the Biblical doctrine that husband and wife are one, it is inconceivable that a testator who expects his beneficiary, to whom he gives a stated income for his support and maintenance, to marry, should expect such beneficiary to enjoy the income alone and that the wife should be supported from some other fund, or not at all. When all the provisions of this will are taken into consideration, it is evident that such was not the intention of the testator, but that appellee, when she married Albert C., acquired an equitable interest in the trust fund to the extent of a right of support and maintenance together with her husband.[22]

In other cases, it is suggested that (i) a dependent (whether such dependent is an ex-spouse or a child) is not really a "creditor" of the beneficiary, and (ii) the beneficiary's liability to support the beneficiary's dependents is not really a "debt." For example, in *Garretson, et al. v. Garretson*,[23] the Supreme Court of Delaware held:

> An action brought by a wife seeking separate maintenance from her husband who has deserted her is an attempt on her part to compel the performance of a duty imposed by law upon the husband to support his wife and dependents . . . A wife under such circumstances, can hardly be a creditor who is defined as "one to whom a debt is owing by another person who is the debtor". . .[24]

Similarly, in *Marsh v. Scott*,[25] the Superior Court of New Jersey, Chancery Division, stated:

> The will under which the trust in the instant case is created contains a spendthrift clause, prohibiting payment to creditors of the cestui, and it is urged that this provision bars the application. The obligation of a parent

> for the support of his child does not arise from a creditor-debtor relationship. It is not a debt within the contemplation of the testatrix or the interpretation of the clause.[26]

Obviously, such rationales can only be applied with great difficulty (if, in fact, they can legitimately be applied at all) where the settlor has expressly provided that the spendthrift clause is intended to cover spousal and/or child support claims.[27] Although in some cases, the courts have still held that spousal and child support claimants are not precluded from reaching the beneficiary's trust interest,[28] other cases have protected the fund under such factual circumstances. In *Schwager v. Schwager*,[29] for example, the United States Court of Appeals for the Seventh Circuit was faced with such a situation and upheld the trust's spendthrift protections in the face of spousal and child support claims. In that case, the testatrix executed a will that provided for a trust for her divorced son. The trust provided that the income therefrom was to be paid to her son, and further provided:

> This provision is made for the personal protection and welfare of said beneficiary and such income shall not be susceptible of assignment, anticipation, hypothecation or seizure by legal process. Whenever and if the trustees shall have notice or shall reasonably apprehend that the interest of such beneficiary has been or is threatened to be diverted from said defined purposes in any manner aforesaid or otherwise, the trustees shall withhold the income and principal which might otherwise be payable to the beneficiary hereof from distribution and shall apply the same in such manner as it shall deem expedient in such beneficiary's interest and/or to the support, maintenance, comfort, welfare and necessities of such beneficiary and the members of his family then dependent upon him for support, not, however, including his first wife or any of his children by her.[30]

The *Schwager* court, noted, "... no decision, other than those predicated upon a statutory provision, has permitted a wife or child to reach a spendthrift trust created by a third party for the benefit of the husband without relying in whole or in part upon an intention express or implied, that the trust fund be thus employed ...,"[31] and further "... the courts have extended themselves at great length to ascertain a favorable intent on the part of the settlor and, in fact, in some of the cases have indulged in a reasoning indicative of the desire sought to be achieved. In such cases the intent has been found because of a failure to express a non-intent."[32]

In the *Schwager* case, of course, an express and unambiguous intent was demonstrated by the testatrix that the beneficiary's ex-spouse and children not be permitted to reach the trust fund. Furthermore, as regarded the competing public policy considerations, the *Schwager* court stated:

> It would serve no good purpose for us to enter into a castigation of the husband for his plain and apparently willful disregard of an obligation imposed upon him by the law of Wisconsin and, in fact, by the laws of all civilized jurisdictions. No doubt there is a thoroughly established public policy which imposes such obligation upon a husband. We are convinced, however, that there is nothing in such policy which requires or, in fact, permits the destruction of a spendthrift trust under the circumstances presented. In the first place, the policy that a person may dispose of his property according to his own wishes, is equally well established. In the instant case, for instance, the testatrix was under no obligation to her son's wife and children. She was under no obligation to bequeath her property to her son in trust or otherwise. She was

> at perfect liberty to give it all to a stranger had she so desired. Being thus empowered, it is difficult to ascertain by any ordinary process of reasoning, how or why she should be precluded from disposing of it as she did. The wife and children were not damaged — they were no worse off than before. They were deprived of no means afforded by the law to enforce the duty imposed upon the husband for alimony and support. It seems to us that this public policy which plaintiffs seek to invoke, and which finds some support in the authorities referred to, has been inaptly applied. It is directed solely at the husband, and may be invoked only against him.[33]

In *Erickson v. Erickson*,[34] the Supreme Court of Minnesota reached a result identical to that in *Schwager* although the actual spendthrift clause at issue in *Erickson* merely provided:

> [N]either the principal nor the income of any such trust estate shall be liable for the debts of any beneficiary, and no beneficiary shall have any power to sell, assign, transfer, encumber, or in any other manner to anticipate or dispose of his or her interest in any such trust estate or the income produced thereby *prior to the actual distribution thereof by the trustees to said beneficiary.*[35]

Nevertheless, the court found an intent that the testator had intended to exclude alimony and child support claims on the basis that the testator's will had been without a spendthrift provision up until the time that the plaintiff announced her intent to divorce the testator's son. According to the Minnesota Supreme Court in *Erickson*, "... it may logically be inferred that [the testator] ... being well advised, anticipated the attempt of plaintiff to endeavor to share in a large estate by a subsequent attempt to enlarge both her alimony and support money. ... It seems clear to us that it was the testator's expressed intent not only to free the bequest from claims for alimony but also for support money."[36] As concerned the public policy conflict, it was further stated:

> When unrestrained by statute, it is the intent of the donor, not the character of the donee's obligation, which controls the availability and disposition of his gift. The donee's obligation to pay alimony or support money, paramount though it may be, should not, in our opinion, transcend the right of the donor to do as he pleases with his own property and to choose the object of his bounty. ... If alimony or support money is to be an exception to the protection offered by spendthrift provisions, it must be by some justifiable interpretation of the donor's language by which such implied exception may be fairly construed into the instrument of trust. It cannot logically arise out of the character of the obligation, though some cases so hold. The obligation for alimony and support money may be of higher rank than other debts, but it is nevertheless an obligation in the nature of a debt, and if, as here, no assignment could be made, if no title could reach the beneficiary until the actual receipt of the funds, then equity may not enforce claims of any nature against it.[37]

CONCLUSION

As an asset protection planner and a stout supporter of individual rights, including individual property rights, the author firmly believes that the public policy considerations that generally favor spendthrift trust protections should be applied with equal vigor to support claims. This is provided, of course, that no statute states otherwise, and provided further that it can be reasonably ascertained that the settlor intended to protect against such claims. The author is moved, most

strongly, by the fact that no matter how distasteful the beneficiary and his or her actions might be (especially in light of the fact that he or she has, most likely intentionally, failed to keep up with support obligations), the obligations at issue were never obligations of the donor. Furthermore, since the settlor is free to withhold his or her gift, to hold that spendthrift trust protections extend to support claims in no way diminishes any fund to which the dependent would otherwise have had any right to look for payment.

Although, there can necessarily be no certainty as to the effectiveness of any particular drafting language in respect of any particular case, the following suggested spendthrift trust language would seem, at a minimum, to clearly set forth the settlor's intent to protect the trust fund against spousal support claims:

> No beneficiary hereof, or any other person with any rights hereunder, shall have any right, power or authority to sell, assign, pledge, mortgage or in any other manner to encumber, alienate or impair all or any part of his or her interest in the trust fund or otherwise under this settlement of trust. The beneficial and legal interest in, and the capital and income of, the trust fund and every part of it shall be free from the interference and control of any creditor of any beneficiary or other such person, and shall not be subject to the claims of any such creditor, including claims for the payment of alimony, nor liable to attachment, execution, bankruptcy, or any other legal or equitable process. No creditor of any beneficiary or any other such person shall be entitled to obtain an order for attachment of the trust fund or any part thereof either by way of execution, in bankruptcy proceedings or otherwise and no benefit devolving on any beneficiary or any other such person under this settlement of trust shall be subject to seizure, attachment or lien by any creditor.

As an ideal, where public policy considerations clash, as they clearly do here, the legislature would act to determine which public policy is more persuasive. By enactment of a statute that provides that spendthrift trust protections apply, or do not apply, to spousal and child support claims, individuals would be able to structure their affairs with the certainty that their intended result would be achieved. In the majority of jurisdictions where the legislature has not yet spoken on the issue, however, the best that a settlor can do is to indicate his or her intent as clearly as possible and hope that the courts will respect it, if challenged.

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ENDNOTES

1. RESTATEMENT (SECOND) OF TRUSTS § 157 (1959).
2. It is interesting to note that although today we take for granted the validity of spendthrift trusts, it was actually not until the Supreme Court's decision in *Nichols v. Eaton*, 91 U.S. 716 (1875), that a break with the English common law on spendthrift trusts was effected and their validity became generally accepted throughout the United States.
3. A spendthrift trust that is valid under state law will even be recognized under federal law as excluded from the almost all-encompassing estate in bankruptcy. See 11 U.S.C. § 541(c)(2), which provides, "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title."
4. Related matters that the author has generally deemed to be beyond the scope of this article, but which the reader also may wish to consider, include (i) the independent protections that a *discretionary* trust might provide against

spousal and child support claims, and (ii) the independent protections that a spendthrift trust might provide in a property settlement incident to a divorce.

5. *Supra* at note 2.
6. *Nichols*, *supra*, at note 2 at 725.
7. *Parscal v. Parscal*, 148 Cal. App. 3d 1098, 1102-1103.
8. *Estate of Johnson*, 252 Cal. App.2d 923, 925 (1967).
9. Comment *b* to the Restatement (Second) of Trusts §157 (1959). See also, *Wife v. Husband*, 286 A.2d 256, 259 (Del. Ch. 1971) ("... even if the language in the will were considered to bar a claim by [the beneficiary's spouse], it is against public policy to give effect to the provision [as regards the beneficiary's spouse]").
10. 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 157.1, at 192 (4th ed. 1989).
11. 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 157, at 186 (4th ed. 1989).
12. See, e.g., *Miller v. Miller*, 268 Ill. App. 3d 132 (1994), interpreting Ill. 735 ILCS 5/12-1403 (West 1992); Wash Rev. Stat. § 11.96A.190 (2001); Wis. Stat. § 706.06(4) (2000).
13. N.Y. Est., Powers and Trusts § 7-1.5(d) (McKinney 1999).
14. 20 Penn. Con. Stat. § 6112 (2001).
15. R.S. Mo. § 456.080.
16. 273 S.W.2d 734 (1954).
17. *Brant*, *supra* at note 16 at 736.
18. 60 Okl. St. § 175.25(B)(1)(a) (2000).
19. 60 Okl. St. § 175.25(E) (2000).
20. Kentucky Rev. Stat. § 381.180(6)(a) (2001) ("Although a trust is a spendthrift trust, the interest of the beneficiary shall be subject to the satisfaction of an enforceable claim against the beneficiary ... [b]y the spouse or child of the beneficiary for support, or by the spouse for maintenance."); Louisiana Rev. Stat. 9:2005(a) (2001) ("Notwithstanding any stipulation in the trust instrument to the contrary, the proper court, in summary proceedings to which the trustee, the beneficiary, and the beneficiary's creditor shall be parties, may permit seizure of any portion of the beneficiary's interest in trust income and principal in its discretion and as may be just under the circumstances if the claim is based upon a judgment for … [a]limony, or maintenance of a person whom the beneficiary is obligated to support.").
21. 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 157.1, at 190-191 (4th ed. 1989).
22. *England v. England*, 223 Ill. App. 549, 554 (1922); see also, *In re Moorehead's Estate*, 137 A 802 (1927).
23. 306 A.2d 737 (1973).
24. *Id.* at 740-741; See also, *England v. England*, *supra*, at note 22 at 555 ("In this State alimony is not a debt. It is a social obligation as well as a pecuniary liability; it is founded on public policy and is for the good of society.").
25. 63 A.2d 275 (1949).
26. *Id.* at 279; See also, *Wife v. Husband*, *supra*, at note 9 at 258, ("... [a] wife suing for support or on a court order directing that her husband pay support to her is not a 'creditor' as that term is commonly defined.").
27. See, e.g., 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 157.1, at 191 (4th ed. 1989).
28. See, e.g., *Dwight v. Dwight,* 52 Mass. App. Ct. 739 (2001).
29. 109 F.2d 754 (7th Cir. 1940).
30. *Id.* at 756.
31. *Id.* at 757.
32. *Id.*
33. *Id.* at 759-760. Contrast, *Dillon v. Dillon*, 11 N.W.2d 628 (1943), decided by the Wisconsin Supreme Court three years after *Schwager*, wherein the spendthrift clause merely provided that "[n]o beneficiary receiving under this trust shall have the power of anticipation, alienation, or assignment of any principal or income accruing to such beneficiary from this trust."
34. 266 N.W. 161 (1936).
35. *Id.* at 162.
36. *Id.* at 163-164.
37. *Id.* at 164.