Spendthrift Trust Subject to Claim of Former Spouse Seeking to Enforce Alimony Judgment

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Spendthrift trusts are said to have originated in Pennsylvania more than 165 years ago in the case of *Fisher v. Taylor*, 2 Rawle 33, 37 (1829), wherein the Pennsylvania Supreme Court held:

> Nor is such a provision contrary to the policy of the law, or to any act of assembly. Creditors cannot complain, because they are bound to know the foundation upon which they extend their credit.

Fisher v. Taylor was thereafter cited in numerous cases in Pennsylvania and other jurisdictions and, in part, formed the basis for the recognition of spendthrift trusts by the United States Supreme Court in *Nichols v. Eaton*, 91 U.S. 716, 726 (1875).

No particular language is necessary to create a spendthrift trust. It is sufficient for a testator to manifest an intention to create such a trust. *See Restatement (Second) of Trusts §* 152, comment c. Moreover, Pennsylvania law is clear that the protection afforded spendthrift trusts is based solely upon the principle that the donor of the gift can subject it to such legal conditions as he deems appropriate:

> The law rests its protection of what is known as a spendthrift trust fundamentally on the principle of *cujus est dare, ejus est disponere*. It allows the donor to condition his bounty as suits himself so long as he violates no law in so doing. When a trust of this kind has been created, the law holds that the donor has an individual right of property in the execution of the trust; and to deprive him of it would be a fraud on his generosity. . . . It is always to be remembered that consideration for the beneficiary does not even in the remotest way enter into the policy of the law. It has regard solely to the rights of the donor. Spendthrift trusts can have no other justification than is to be found in considerations affecting the donor alone. They allow the donor to so control his bounty, through the creation of a trust, that it may be exempt from liability for the donee's debts, not because the law is concerned to keep the donee from wasting it, but because it is concerned to protect the donor's right of property.

Morgan's Estate, 72 A. 498, 499, 223 Pa. 228, 230 (1909).

In *Widener and Bigelow Trusts*, 16 Fiduc. Rep. 2d 159 (O.C. Montg. 1996), Judge Ott of the Montgomery County Orphans' Court discussed much of this historical background and held that a judgment creditor could not execute on an income beneficiary's interest in two spendthrift trusts, even if the beneficiary resides outside the United States and his other assets could not be reached.

Judge Ott recently decided another spendthrift trust case, this time holding that a spendthrift trust can be reached by a former spouse seeking to enforce an alimony judgment against a trust beneficiary. In *Butcher Trusts* (Montg. O.C. Nos. 71548, 96-1368 and 74090) (February 9, 2000), Mary Ann Butcher reduced to judgment against her former husband, Jonathan Butcher, arrearages and delinquencies in alimony and equitable distribution. Thereafter, Mrs. Butcher sought to execute against several family trusts in which Mr. Butcher has an interest. Mr. Butcher and the trustees filed preliminary objections to the writs of execution arguing, among other things, that the trusts in question were spendthrift trusts and could not be reached to satisfy a judgment for alimony arrearages under *Lippincott v. Lippincott*, 349 Pa. 501, 37 A.2d 741 (1944). In *Lippincott*, the Supreme Court held that a judgment for alimony "has only the same standing, so far as reaching the interests of a former husband in a spendthrift trust, as has any judgment obtained by an ordinary creditor." 349 Pa. at 506, 37 A.2d at 744.

Judge Ott first looked to Section 6112 of the Probate, Estates and Fiduciaries Code, which states:

> Income 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.

Judge Ott noted that predecessor to Section 6112, in effect when *Lippincott* was decided, limited the exception to claims of "the wife or children", whereas the current statute has no such restriction. In addition, Judge Ott noted that the definitional section of Pennsylvania's Divorce Code defined "alimony" as "an order for support granted by this Commonwealth or any

other state to a spouse or former spouse in conjunction with a decree granting a divorce or annulment." 23 Pa. C.S.A. § 3103. In Judge Ott's view, the legislature's expanding Section 6112, and defining alimony as support under the Divorce Code, "remove[d] the ancient distinction between the enforceability of support obligations to an existing spouse and alimony due a former spouse, at least for spendthrift trust purposes." Slip. Op. at 6.

Judge Ott also ruled that Pennsylvania "should and will" adopt Section 157(a) of the Restatement (Second) of Trusts, which allows a beneficiary's interest in a spendthrift trust to be reached by a "wife for alimony". In large part, Judge Ott relied upon the Third Circuit's analysis of spendthrift trusts and Section 157 in *Schreiber v. Kellogg*, 50 F.3d 264 (3d Cir. 1995). There, the court ruled that the Pennsylvania Supreme Court would adopt Section 157(c), thereby subjecting a spendthrift trust to the claims of one (such as an attorney) who rendered services or furnished materials to a beneficiary which preserved or benefited his interest in the trust. Slip Op. at 6-8.

Section 157(a) of the Restatement, however, is broader than Section 6112 of the Probate, Estates and Fiduciaries Code. Specifically, Section 6112 limits the exception to spendthrift trusts to "income" of the trust, whereas Section 157(a) refers to the "interest of the beneficiary", without distinction between income and principal. Mr. Butcher's interests in the trusts were not identified in the opinion and therefore it is unclear whether Judge Ott's pronouncement regarding Section 157(a) had an impact on the decision in the case. However, one can easily imagine a case where a beneficiary has in interest in principal which is sought to be attached for alimony arrearages, thereby calling into question whether Pennsylvania "should and will" adopt Section 157(a) with respect to the principal, as opposed to income.