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NOTES

TRUST DEVICES PREVENTING ALIENATION OF THE BENEFICIARY'S EQUITABLE INTEREST

Generally speaking, for every legal interest that can be created in personalty or realty, a corresponding equitable interest can be created.¹ However, there are certain equitable interests which can be created for a trust beneficiary but which cannot be created as corresponding legal interests. The distinction lies in the fact that restraints on alienation are valid if attached to certain equitable interests, but are invalid if attached to corresponding legal interests. The trust devices which give rise to the inalienability of certain equitable interests will be set forth herein. However, to fully appreciate the significance of these special trust devices, it is first advisable to consider the attributes of equitable interests under an ordinary trust. Whether the equitable interest of the beneficiary of a trust is a property right, which the beneficiary holds as an equitable owner of the trust property, or merely a personal right, which the beneficiary holds as a claimant against the trustee to have the trust carried out, has been the subject of much controversy. Although the beneficiary's interest was originally treated as a personal right against the trustee, it has become increasingly recognized in many jurisdictions as a property right, the beneficiary also retaining his personal claim against the trustee.² Section 130 of the Restatement of Trusts defines the nature of the beneficiary's interest as "personal property" if the trust property is personal property, and as "real property" if the trust property is real property unless the interest of the beneficiary is so limited in duration that if it were a legal interest it would be personal property. Pennsylvania is in accord with the latter realistic view that the equitable interest of the beneficiary of a trust is personal or real property, depending on the nature of the trust property,³ and the interest also includes a personal right against the trustee. Although case terminology is by no means conclusive it is interesting to note that in *Fowler v. Fidelity Co.*⁴ the Pennsylvania Supreme Court labeled the beneficiary's interest in the income from a trust estate consisting of corporation bonds as an "equitable estate for life."

¹ Bogert on Trusts (1935), Sec. 181.

² Bogert, op. cit., Sec. 183.

³ Foulke, Rules Against Perpetuities, Restraints on Alienation and Restraints on Enjoyment in Pennsylvania (1909), Sec. 161.

⁴ 125 Pa. 338, 393 (1889).

In *McCullough v. Seitz*,⁵ where land was conveyed to a trustee to pay the income to the beneficiary, the Pennsylvania Supreme Court designated the beneficiary's interest as "an equitable estate in land." In *Commonwealth v. Stewart*⁶ the Supreme Court defined the beneficiary's interest as, ". . . in addition to rights against the trustee, the beneficiary also has rights in rem, an actual property interest in the subject matter of the trust, an equitable ownership of the trust res." This is also the view adopted by the United States Supreme Court.⁷

Therefore, in view of the property nature of the beneficiary's interest, in the absence of provisions in the trust instrument or statutes to the contrary, the beneficiary can alienate his equitable interest as freely as he could a legal interest.⁸ By the decisions of the Pennsylvania courts the beneficiary's interest in assignable,⁹ devisable,¹⁰ descends according to intestate law,¹¹ and is subject to involuntary alienation by creditors to the same extent as a corresponding legal interest.¹² In *Inlow v. Christy*¹³ the Supreme Court described the beneficiary's interest as, ". . . the subject of contract, conveyance and seizure on execution, the same as the legal title."

Thus, it can be stated as a general rule that, except for those certain types of trusts which prevent alienation of the beneficiary's interest and which will be set forth herein, the beneficiary can transfer his interest or his creditors can by appropriate proceedings reach his interest and thereby subject it to the satisfaction of their claims against him.¹⁴ The creditors can, of course, reach only the equitable interest of the debtor. For example, where the debtor is the life beneficiary of an income from the trust estate, the principal of the trust estate being a gift over to a third person on the life beneficiary's death, a creditor of the beneficiary can reach only the income and not the principal of the trust.¹⁵ However, if the beneficiary's interest is such that he is entitled to a share of the principal of the trust estate, his creditor can reach the principal to the extent of the beneficiary's interest.¹⁶ In many jurisdictions the creditor must go into equity to have the beneficiary's interest applied to the satisfaction of the debt, and in some jurisdictions the equitable remedy is the only form of relief.¹⁷ However, the normal remedy in Pennsylvania is by execution at law whereby the creditor who has obtained a judgment against the beneficiary has an attachment execution issued thereon,

⁵28 Pa. Super. 458, 465 (1905).

⁶338 Pa. 9, 14 (1940).

⁷*Brown v. Fletcher*, 235 U. S. 589, 35 S. Ct. 154 (1915); *Blair v. Commissioner of Internal Revenue*, 300 U. S. 5, 57 S. Ct. 330 (1936).

⁸Restatement of Trusts, Secs. 132, 133.

⁹*Phillip's Estate* (No. 3), 205 Pa. 515 (1903).

¹⁰*Wilhelm v. Folmer*, 6 Pa. 294 (1847).

¹¹*Ibid*; *Wylie v. Mansley*, 132 Pa. 65 (1890).

¹²*McCurdy v. Bellefonte Trust Co.*, 292 Pa. 407 (1928).

¹³187 Pa. 186, 192 (1898).

¹⁴Restatement of Trusts, Secs. 132, 133, 147.

¹⁵*Osborne v. Soley*, 81* Pa. 312 (1876); *Egbert v. de Solms*, 218 Pa. 207 (1907).

¹⁶*Trask v. Shaffer*, 140 Pa. Super. 505 (1940).

¹⁷*Ibogert*, op. cit., Sec. 193.

naming the trustee as garnishee.¹⁸ It has been held that a creditor of the income-beneficiary of a trust can attach the income and receive from the trustee what the beneficiary would otherwise be entitled to receive;¹⁹ that where the beneficiary's income from the trust is to begin after the death of a third person beneficiary, the beneficiary's interest in the future income can be attached by his creditor, although nothing will be realized on it by payments from the trustee until the third person beneficiary dies;²⁰ that where the beneficiary is entitled to payments of principal from the trust estate his creditor can attach principal payments held for the beneficiary by the trustee;²¹ that where the beneficiary holds a vested interest of trust income or principal in remainder, the court may direct a seizure and sale or mortgage of his interest to satisfy a creditor's claim.²²

From the above discussion it is evident that an equitable interest is as freely alienable as a corresponding legal interest, with particular emphasis on the fact that such equitable interest can be involuntarily alienated by creditors of the beneficiary. This concept of freedom of alienation is an application of the general policy of the English and American common law forbidding restraints on alienation of interests in personality or realty, premised on the idea that freedom of transfer is essential to a healthy society and that creditors should have access to whatever their debtors may own.²³ In *Overmans Appeal*²⁴ the Pennsylvania Supreme Court speaks of the ". . . general policy which forbids restraints on alienation and the non-payment of honest debts." Although this general policy is vigorously applied by the courts to absolute legal interests,²⁵ and to legal life interests²⁶ with few exceptions, it is interesting and startling to observe that certain trust devices which *restrain freedom of alienation of the equitable interest* can be created, and that such trust devices will be held valid by the courts. This result is accomplished by the settlor (creator) of the trust either by expressing in the terms of the trust instrument an intention that the equitable interest shall not be alienable or an intention to create a certain type of trust the very nature and purpose of which would be defeated if the equitable interest were alienable. These trust devices which prevent alienation of the equitable interest will be discussed in the light of Pennsylvania law in the following order: (1) Spendthrift Trust, (2) Partial Spendthrift Trust, (3) Support Trust, (4) Discretionary Trust, (5) Sole and Separate Use Trust, (6) Blended Trust, (7) Other Possible Trusts.

¹⁸McCurdy v. Bellefonte Trust Co., 292 Pa. 407 (1928); Ellwanger v. Moore, 206 Pa. 234 (1903).

¹⁹Girard Life Insurance and Trust Co. v. Chambers, 46 Pa. 485 (1864).

²⁰Riverside Trust Co. v. Twitchell, 342 Pa. 558 (1941).

²¹See note 16.

²²Jones v. Jones, 344 Pa. 310 (1942).

²³1 Bogert, op. cit., Sec. 220; Foulke, op. cit., Secs. 11 & 12.

²⁴282 Pa. 276, 281, (1878).

²⁵1 Bogert, op. cit., Sec. 220.

²⁶Ibid.

SPENDTHRIFT TRUST

The typical spendthrift trust is one which by the terms of the trust the beneficiary's interest in the income from the trust property for life or for a term of years is not transferable by him and is not subject to claims of his creditors, i.e., there is a provision restraining voluntary and involuntary alienation of the equitable interest.²⁷ In the words of the Pennsylvania Supreme Court: "A spendthrift trust . . . exists where there is an express provision forbidding anticipatory alienations, and attachment by creditors."²⁸

The spendthrift trust is said to have been originated in Pennsylvania by dictum in *Fisher v. Taylor* (1829).²⁹ In that case the testator directed his executors to purchase a tract of land to be conveyed to them in trust for his son who was to have the rents, issues, and profits, but the same were not to be liable for any debts contracted or which might be contracted by his son, at whose death the land was to vest in the heirs of his body, but if he should die without heirs of his body then to vest in the right heirs of the testator. The Supreme Court held that the son did not have such an interest in the land as could be taken on execution and sold for his debts, and found that the testator, "manifestly designed to secure to his son, . . ., the enjoyment of the rents, issues, and profits of the land, during his life, in such a manner that they should not be subject to be sold for the payment of his debts, and he constituted his executors special trustees to carry that intention into effect." Justifying this viewpoint, the Court said, "A man may, undoubtedly, so dispose of his land, as to secure to the object of his bounty, and to him exclusively, the annual profits . . . Nor is such a provision contrary to the policy of the law, or to any act of assembly."

The Pennsylvania courts and the courts of other jurisdictions seized upon *Fisher v. Taylor*, supra, as the foundation for validation of the spendthrift trust device. The courts justify the spendthrift trust on the theory that the owner of property has a right to dispose of his property as he pleases. Consequently, the spendthrift trust has become well entrenched in decisional law of Pennsylvania. In *Overman's Appeal* (1878)³⁰ the Court gave full recognition to this unique device by the following words:

"That a trust for a spendthrift, as it is termed, will be upheld in equity, is a settled doctrine of this state, and rests on the donor's right of dominion over his own property for a reasonable time. But it is exceptional in its very nature, because it contravenes that general policy, which forbids restraints on alienation and the non-payment of honest debts. In order to support it resort is had to a *trust*, which equity will enforce, and equity necessarily regards its reasonableness and the clearly defined intent of the donor."

²⁷Restatement of Trusts, Sec. 152; 1 Bogert, op. cit., Sec. 222.

²⁸Keeler's Estate, 334 Pa. 225, 229 (1939).

²⁹2 Rawle 33, 36-37 (1829).

³⁰See note 24.

An examination of spendthrift trust cases in Pennsylvania discloses that specific words need not be employed by the settlor in the terms of the trust instrument in order to create a spendthrift trust so long as the terms manifest, expressly or impliedly, an intention of a prohibition against voluntary and involuntary alienation of the beneficiary's interest. The courts have been liberal in finding an intention to create a spendthrift trust by very slight language in the trust instrument.⁸¹

In the early Pennsylvania cases the courts were strict in the requirement that an intention to create a spendthrift trust had to be manifested *within* the trust instrument.⁸² However, a departure from this strict requirement occurred in 1890 in *Stambaugh's Estate*⁸³ when the Supreme Court went outside of the trust instrument, which lacked the usual provisions for creation of a spendthrift trust, and inquired into the surrounding circumstances to find that a spendthrift trust was the object of the testator, the main circumstance being the insolvency of the beneficiary at the time the trust was created. However, in later cases,⁸⁴ particularly in *McCurdy v. Bellefonte Trust Co.* (1928)⁸⁵ and *Trask v. Shaffer* (1940),⁸⁶ the Court denied admission of similar extrinsic evidence. The effect of these later cases was an over-ruling of the *Stambaugh* case, and a clear enunciation of the requirement that a trust will not be construed a spendthrift type unless the language of the *trust instrument* warrants that construction.

The Pennsylvania cases illustrate that to be a valid spendthrift trust the beneficiary need not be a "spendthrift" or lack any particular capacity, but may be a legally competent person able to manage his own affairs. Also, a spendthrift trust may be created by will or inter vivos transaction and may consist of real or personal property or a combination of both, there being no limit on the size of the beneficiary's interest.

Inasmuch as the settlor's purpose in creating a spendthrift trust is to prevent the beneficiary's interest from passing to another person either by transfer or by

⁸¹In *Vaux v. Parke*, 7 Watts and Sergeant 19 (1844), the will provided for payment "into the proper hands" of the son. Held, a spendthrift trust. In *Shower's Estate*, 211 Pa. 297 (1905), the will provided for the "trustee so to control the shares of my three above-named children and the investments thereof that they, my sons and my daughters may enjoy the interest thereof . . ." Held, a spendthrift trust.

⁸²*Girard v. Chambers*, 46 Pa. 485 (1864).

⁸³135 Pa. 585 (1890). The court said at 597: "It is said, however, that we must search only for the intent of the testator within the four corners of the will. This is true, but, when we come to consider the will and interpret its meaning, we must do so in the light of all the circumstances by which the testator was surrounded when he made it, and by which he was probably influenced."

⁸⁴In *re Shoup's Estate*, 31 Pa. Super. 162 (1906); *Butler County Nat'l. Bank v. MacMullen*, 292 Pa. 556 (1928).

⁸⁵292 Pa. 407 (1928).

⁸⁶140 Pa. Super. 505 (1940). The court said at 509-10: "A rule of excessive liberality in favor of a spendthrift trust was applied in *Stambaugh's Estate*. . . In *McCurdy v. Bellefonte Trust Co.*, supra, however, the Supreme Court referred to *Stambaugh's Estate* as an 'extreme case', repudiated its doctrine and arrested the trend in the direction of liberality, retraced its steps and established the applicable rule firmly on conservative grounds. . . That case (*Stambaugh's Estate*) is no longer a reliable authority in Pennsylvania."

attachment of creditors, such purpose can be accomplished.³⁷ However, the tendency is to create exceptions, by judicial decisions and statutes, in favor of creditors having claims with a high equity. The most important exception is the claim for support and maintenance of the wife and children of the husband-beneficiary of a spendthrift trust. This exception did not prevail until recently, however. Although a duty was imposed on a husband to support his wife and children by the Support Act of 1867, the turn of the century found a wife who obtained a support order unable to attach the income of a husband-beneficiary of a spendthrift trust.³⁸ However, by statutes enacted in 1917³⁹ and 1921,⁴⁰ and by court decisions over-ruling prior case law,⁴¹ a spendthrift trust is now treated as an ordinary trust in so far as claims of support for the wife and children against the husband-beneficiary are concerned. The reasons for this exception were expressed by the Supreme Court in *Lippencott v. Lippencott* (1944):⁴² "The Commonwealth is vitally interested not only in the moral and social factors, but also in preventing wives from becoming public charges." In addition, other claimants who have been excepted from the general rule and allowed to reach the beneficiary's interest have been the Commonwealth—for support furnished to the beneficiary,⁴³ the trustee—for expenses incurred for the aid of the beneficiary⁴⁴ and for advances of income to the beneficiary,⁴⁵ and the settlor—for debts owed to him by the beneficiary.⁴⁶

It has also been clearly established that if the settlor attempts to create a spendthrift trust for his own benefit the restraint against alienation of the equitable interest will be held invalid, and his creditors can reach his interest.⁴⁷ The reason for this ruling is that a person cannot settle his property for his own use in such a manner as to enjoy all the benefits and share none of the burdens.

A review of the cases on spendthrift trusts discloses that the Pennsylvania courts have been liberal in validating this device, and although the device as outlined above is the typical spendthrift trust, many variations thereof have been held to be spendthrift trusts by the courts. Also, particularly in the early cases, the label *spendthrift trust* has sometimes been applied to what are actually support or discretionary trusts, possibly because all three devices result in a restraint against alienation of the equitable interest. But some trust instruments do combine the language of the spendthrift trust with that of the support or discretionary

³⁷*Seitzinger's Estate*, 170 Pa. 500 (1895); *Thackara v. Mentzer*, 100 Pa. 151 (1882).

³⁸*Board of Charities v. Lockard*, 198 Pa. 572 (1901).

³⁹The Wills Act of June 7, 1917, P. L. 403, Sec. 19 (20 PS 243).

⁴⁰Act of May 10, 1921, P. L. 434, Sec. 1 (48 PS 136).

⁴¹*Thomas v. Thomas*, 112 Pa. Super. 578 (1934).

⁴²349 Pa. 501, 504 (1944). For a thorough discussion of support claims of the wife of the husband-beneficiary of a spendthrift trust, see 51 Dick. LR (1946) 1.

⁴³*Walters' Case*, 278 Pa. 421 (1924).

⁴⁴*In re Thaw's Estate*, 252 Pa. 99 (1916).

⁴⁵*King's Estate*, 147 Pa. 410 (1892).

⁴⁶*Neel's Estate* (No. 1), 207 Pa. 443 (1904).

⁴⁷*Philadelphia v. Meredith*, 49 Pa. Super. 600 (1912); *Nolan v. Nolan*, 218 Pa. 135 (1907); *Restatement of Trusts*, Sec. 136 (1).

trust.⁴⁸ However, since the nature, operation, and purposes of the support and discretionary trusts are different from the spendthrift trust, they should be understood to be and treated as three distinct trust devices.⁴⁹

PARTIAL SPENDTHRIFT TRUST

A partial spendthrift trust may be defined as a trust which by its terms a restraint is imposed against voluntary alienation or against involuntary alienation of the beneficiary's interest, i.e., only one of the two restraints essential to a complete spendthrift trust is provided for by the settlor.⁵⁰

The Pennsylvania cases involving this problem are few in number and the results are not conclusive.

First, if the settlor provides in the trust instrument for a restraint against involuntary alienation of the beneficiary's interest by his creditors, but makes no mention of a restraint against voluntary alienation by the beneficiary, it would seem by analogy of cases of testamentary devises and bequests wherein such singular provision was included that the beneficiary's creditors should not be able to reach his equitable interest.⁵¹ There is also the possibility that where the trust terms provide for a restraint against involuntary alienation but make no mention of a restraint against voluntary alienation the court will imply the latter restraint, resulting in a complete spendthrift trust. Such a result was arrived at in *Shankland's Appeal*.⁵² However, if the trust terms provide for a restraint against involuntary alienation but expressly permit voluntary alienation, the cases indicate that the singular restraint would be held invalid, resulting in an ordinary trust wherein the beneficiary's interest could be reached by his creditors and transferred by the beneficiary.⁵³

Second, if the settlor provides in the trust instrument for a restraint against voluntary alienation of the beneficiary's interest, but makes no mention of a restraint against involuntary alienation, it would seem that the prohibition against voluntary transfer should be enforced. Since a complete spendthrift trust is valid in Pennsylvania, the greater should justify the lesser restraint, and since a restraint against voluntary transfer is less harmful to third persons dealing with the beneficiary than a restraint against attachment of the equitable interest by creditors, the singular restraint against voluntary alienation should be held valid. There is also the possibility that where the trust terms provide for a restraint

⁴⁸Huber's Appeal, 80 Pa. 348 (1876); Hibb's Estate, 143 Pa. 217 (1891).

⁴⁹For discussions of spendthrift trusts in Pennsylvania, see 36 Dick. LR (1931) 45, and 5 Temple LQ (1931) 626.

⁵⁰1 Bogert, op. cit., Sec. 222.

⁵¹See the following cases: Holmesburg Building Association v. Badger et Ux., 144 Pa. Super. 65 (1941); Goe's Estate, 146 Pa. 431 (1892); Berk's Estate, 133 Pa. 51 (1890).

⁵²47 Pa. 113 (1864). Also see Restatement of Trusts, Sec. 152, Comment e.

⁵³Keyser's Appeal, 57 Pa. 236 (1868); Morgan's Estate (No. 1), 223 Pa. 228 (1909).

against voluntary alienation but make no mention of a restraint against involuntary alienation the court might imply the latter restraint, resulting in a complete spendthrift trust. *Winthrop Co. v. Clinton*⁵⁴ has frequently been cited by writers as supporting this view, but a close examination of the case will disclose that the Court found that the settlor intended a spendthrift trust, as evidenced by the terms of the will and all the surrounding circumstances, citing *Stambaugh's Estate*, supra. Thus, the *Winthrop* case is not a reliable authority for the last proposition. Continuing, if the trust terms provide for a restraint against voluntary alienation but expressly permit involuntary alienation, it can be strongly argued that such a singular restraint should be held valid on the same theory as discussed above where the trust terms provide for a restraint against voluntary alienation but make no mention of involuntary alienation.

The same exceptions as to claims of creditors with a high equity applicable to complete spendthrift trusts should also apply to any of the above mentioned variations of the partial spendthrift trust in which a restraint against involuntary alienation is held to be valid.

Inasmuch as the cases involving partial spendthrift trusts are few in number and inconclusive in results, it is obviously advisable for a settlor to create a complete spendthrift trust rather than chance an invalidation by the courts of a singular restraint under a partial spendthrift trust.⁵⁵

SUPPORT TRUST

The trust for support is a trust which by its terms provides that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the support or education of the beneficiary, with the result that the beneficiary cannot transfer his interest and creditors cannot reach it.⁵⁶

Although some of the cases, particularly the earlier cases, combine the language of trusts for support with that of spendthrift and/or discretionary trusts,⁵⁷ the Pennsylvania Supreme Court, in *Keeler's Estate* (1939),⁵⁸ distinguished the support trust as a separate device by the following words:

"The present trust is a so-called 'trust for support,' and, although sometimes loosely referred to as a spendthrift trust, differs from it in essential features which must not be overlooked if confusion as to its legal attributes and qualities is to be avoided. In a trust for support

⁵⁴196 Pa. 472 (1900). The testator provided for income to his son "for his use and support for and during all the term of his natural life, and not to be liable to anticipation, and his receipt alone to be the sole discharge" to the trustees. The court considered the will and surrounding circumstances. Held a spendthrift trust. Also see Restatement of Trusts, Sec. 152, Comment d.

⁵⁵For discussion of partial spendthrift trusts see 50 Dick. LR (1946) 79, and 81 Univ. of Pa. LR (1933) 480.

⁵⁶Restatement of Trusts, Sec. 154; *Keeler's Estate*, 334 Pa. 225 (1939).

⁵⁷Huber's Appeal, 80 Pa. 348 (1876).

⁵⁸334 Pa. 225, 229-30 (1939).

the limitation of the power of alienation arises only by implication from the nature of the beneficiary's interest and the indicated purpose of the trust . . . The purpose of this type of trust being to furnish to the beneficiary the means necessary for his personal subsistence, education and physical comfort, that object might be frustrated if the income were to be dissipated among creditors or anticipated by the beneficiary. If, therefore, an assignment of the beneficiary's interest would be incompatible with the purpose of the trust by diverting the income from the use stipulated by the testator, the court will, in order to enforce his dispositive intent, prevent such diversion even though there be in the trust instrument no express restriction on alienation. While, therefore, in a spendthrift trust the interdiction against alienation, voluntary or involuntary, is express and absolute, and will be enforced accordingly, in the case of a trust for support the law implies and enforces restrictions only to the extent necessary to consummate the purpose of the testator."

Thus, the restraints against alienation are implied by law to the extent necessary to provide for support and education of the beneficiary as was intended by the settlor by the terms of the trust instrument. Since the trustee, and not the beneficiary, pays over or applies such amounts as are necessary to accomplish the purpose of the trust for support, any benefits awarded to a person other than the person designated as beneficiary by the settlor would defeat the purpose of the trust. Consequently, the cases hold that the beneficiary's interest cannot be assigned by him,⁵⁹ nor can it be attached by his creditors.⁶⁰

DISCRETIONARY TRUST

A discretionary trust is a trust which by its terms provides that the trustee shall pay to or apply for the beneficiary only so much of the income or principal as the trustee in his absolute and uncontrolled discretion shall see fit to pay or apply, with the result that a transferee or creditor of the beneficiary cannot compel payments of any part of the income or principal by the trustee.⁶¹

Here again the language of the discretionary trust is oftentimes combined with the language of spendthrift and support trusts.⁶² Frequently the result is a spendthrift trust because of an express provision against alienation, in addition to the provision vesting discretionary powers in the trustees.⁶³ However, the discretionary trust is a device of a separate nature and can withstand the assault of creditors of the beneficiary without the aid of spendthrift provisions. In *Keyser v. Mitchell* (1871)⁶⁴ the Court explained the nature of the discretionary trust by the following words:

⁵⁹Appeal of Forcey v. Mitchell, 106 Pa. 508 (1884).

⁶⁰Holdship v. Patterson, 7 Watts 547 (1836).

⁶¹Restatement of Trusts, Sec. 155 (1); 1 Bogert, op. cit., Sec. 226.

⁶²Barker's Estate, 159 Pa. 518 (1894).

⁶³Hibb's Estate, 143 Pa. 217 (1891).

⁶⁴67 Pa. 473, 477 (1871).

"But here nothing is given to the *cestui que trust* [beneficiary], excepting at the *discretion* of the trustee. It was no doubt intended by the testator that a comfortable maintenance should be provided from the trust estate for her son; but that was to be both in the amount and mode, 'at the sole and absolute discretion of the trustee.' This is an express condition of trust, and until that discretion has been exercised the *cestui que trust* has nothing . . . In such case, chancery will not interfere to control the trustee's discretion: . . . To subject the income to execution of a creditor, would end all discretion of the trustee over the income, and in effect, utterly defeat the intent of the testator in creating it. We cannot but regard this form of trust to be as effectual in guarding a trust and its income against the prodigality of its beneficiary, as would be a positive exclusion of creditors in the will of the donor. Where the amount results from the discretion of the trustee, and that discretion is personal, no sum, *eo nomine*, exists to be attached: It only belongs to the *cestui que trust* when it is paid, or in some other way made over, or set apart to him."

In effect, the beneficiary has a mere expectancy and cannot compel the trustee to make payments to him,⁶⁵ so that a transferee or creditor of the beneficiary stands in no better position than the beneficiary. Thus, it is the very nature of the discretionary trust that prevents the beneficiary's transferee or creditor from compelling a payment of income or principal by the trustee.⁶⁶

SOLE AND SEPARATE USE TRUST

A sole and separate use trust is a trust which by its terms provides that the benefits are for the sole and separate use of a married woman, free from control or interference by her husband, with the result that the beneficiary's interest cannot be transferred nor can it be reached by creditors of the beneficiary or her husband unless such power of alienation is authorized by the settlor in the terms of the trust.⁶⁷

Under the rules of common law the married woman had serious legal disabilities. She lacked power to take and hold property and had no separate power to contract and convey. Her ownership of personalty and realty at marriage was merged with that of her husband, who exercised ownership and control thereafter. As a result the sole and separate use trust was devised to permit her to enjoy the benefits of property free from her husband's interference and control, the trustee being a third person or frequently her husband.⁶⁸

Notwithstanding the enactment of the Married Women Property Acts, placing a married woman on virtually the same footing as a single woman concerning independent contractual and property rights, the sole and separate use trust has con-

⁶⁵Spring's Estate, 216 Pa. 529 (1907).

⁶⁶See note 64; Kelley's Estate (No. 1), 253 Pa. 466 (1916).

⁶⁷Holliday v. Hively, 198 Pa. 335 (1901); McConnel v. Lindsay, 131 Pa. 447 (1890).

⁶⁸2 Bogert on Trusts (1935), Sec. 234.

tinued in use in Pennsylvania. The courts have held that these Acts neither invalidated the creation nor affect the operation of the sole and separate use trust.⁶⁹

A settlor can create a sole and separate use trust only if the beneficiary is a married woman or if such trust is created in contemplation of an immediate marriage of the woman beneficiary.⁷⁰ The normal method of creating such a trust is by provision in the trust terms that the property is for the sole and separate use of a particular married woman without interference or control by her husband.⁷¹ The result is a sole and separate use trust, the very nature and purpose of which would be defeated if the beneficiary's interest were alienable. Therefore, neither the married woman beneficiary nor her husband can transfer nor can his or her creditors attach her interest unless the terms of the trust expressly authorize such powers of alienation.⁷² In *Holliday v. Hively*⁷³ the Court quotes Chief Justice Gibson from an earlier case, as follows:

"We therefore hold it to be the settled law of Pennsylvania that, instead of her having every power for which she is not negatively debarred in the conveyance, she shall be deemed to have none except what is positively given or reserved to her."

In the *Holliday* case the Court gives the reasons behind this rule by pointing out (at 340) that, ". . . in Pennsylvania, this estate in equity was intended, through her disabilities, to protect the feme covert not only from her own improvidence, but also from the improvidence and importunity of her husband." Thus, although the trust originated under conditions and for reasons which do not necessarily exist today, it is nevertheless one of the recognized devices by which voluntary and involuntary alienation of the beneficiary's interest is prohibited.

It should be noted that the trust remains in effect only so long as the coverture exists,⁷⁴ being terminated by the death of either spouse. It has been held that divorce terminates the trust when consistent with the intent of the settlor.⁷⁵ Once terminated by divorce or by death of the husband, the trust does not reattach on second marriage.⁷⁶

⁶⁹*Di Carlo v. Licini*, 156 Pa. Super. 363 (1944); *Holliday v. Hively*, 198 Pa. 335 (1901).

⁷⁰*Carman v. Bumpas*, 244 Pa. 136 (1914).

⁷¹See note 69.

⁷²*McConnell v. Lindsay*, 131 Pa. 476 (1890).

⁷³198 Pa. 335, 341 (1901).

⁷⁴*Wells v. McCall*, 64 Pa. 207 (1870).

⁷⁵*Frey's Estate*, 24 Pa. D & C Rep. 114 (1935).

⁷⁶*Hammersley v. Smith*, 4 Whart. 125 (1839).

BLENDED TRUST

A blended trust may be defined as a trust which by its terms provides for benefits to a group of persons so that the interest of one beneficiary is inseparable from the interests of the others, with the result that a beneficiary cannot transfer his interest nor can it be reached by his creditors.⁷⁷

Thus, the very nature of a beneficiary's interest prevents its alienation because it cannot be separated from the interests of the other beneficiaries in the group. Also, the interest might be considered to be too indefinite to be the subject of transfer by the beneficiary or attachment by creditors. But there seems to be no reason why the entire beneficial interest cannot be alienated by group transfer or for group debts.

Frequently when the settlor provides for a blending of the equitable interests, he also combines the language of a support or discretionary trust,⁷⁸ the result being that the equitable interest is inalienable not only because it is inseparable but also for reasons discussed above under support and discretionary trust headings.

OTHER POSSIBLE TRUST DEVICES

Personal Trust: This is a trust which by its terms provides that the beneficiary's interest is of a personal character peculiar to the beneficiary, with the result that the nature of the interest prevents it from being transferred by the beneficiary or attached by his creditors.⁷⁹

Since the Pennsylvania courts give liberal support and recognition to the spendthrift trust and its variations and to the other trust devices discussed above, certain other types of trusts frequently employed in other jurisdictions are apparently infrequently employed in Pennsylvania because the desired results can be accomplished by other means. These trusts will be discussed briefly.

Solvency on Condition Precedent Trust: This is a trust which by its terms provides that the beneficiary shall be entitled to receive the principal of the trust property only upon his becoming financially solvent, with the result that his contingent interest cannot be reached by his creditors or trustee in bankruptcy.⁸⁰ This restraint occurs because an involuntary alienation of the beneficiary's interest would prevent a happening of the very condition upon which the beneficiary becomes entitled to receive the benefit of the trust. However, this trust provision should not prevent the beneficiary from voluntarily transferring his contingent interest. The cases hold that after the beneficiary's debts are extinguished by a discharge in bankruptcy his former creditors or trustee in bankruptcy cannot reach his interest.⁸¹

⁷⁷Restatement of Trusts, Sec. 161; 1 Bogert, op. cit., Sec. 226.

⁷⁸Foster's Estate, 179 Pa. 610 (1897).

⁷⁹Restatement of Trusts, Sec. 160; Slemmon's Estate, 173 Pa. 156 (1895).

⁸⁰Restatement of Trusts, Sec. 159; 1 Bogert, op. cit., Sec. 220.

⁸¹Hull v. Farmers' Loan and Trust Co., 245 U. S. 312, 38 S. Ct. 103 (1917); In re Manley's Estate, 112 Vt. 314, 24 A2d 357 (1942).

Divesting Trust: This is a trust which by its terms provides that the interest of the beneficiary shall terminate upon an attempt by him to transfer it or by his creditors to reach it or by his bankruptcy, with the result that the beneficiary's interest will be divested upon any attempt of voluntary or involuntary alienation.⁸² Such provision for a divesting of the equitable interest is held valid by analogy to a similar provision sometimes attached to legal life estates. Thus, courts have held valid a trust provision for a gift over to occur on the attempted alienation of the equitable interest of a life beneficiary,⁸³ or a provision that the interest of the beneficiary shall terminate on his being adjudged a bankrupt.⁸⁴

Protective Trust: This is a trust which by its term provides that the interest of the beneficiary shall terminate upon an attempt by him to transfer it or by his creditors to reach it or by his bankruptcy, and another type trust such as a discretionary, support, blended, or combination thereof shall commence, the result being that the beneficiary's interest will be divested upon any attempt of voluntary or involuntary alienation and another trust substituted in the place of the original trust.⁸⁵ In England the strong policy against restraints on alienations prevents the use of most of the various trust devices discussed above. However, the protective trust is sanctioned in England by statute which provides in effect that an attempt to alienate the beneficiary's interest results in the creation of a discretionary blended trust for the beneficiary and his family or other near relatives.⁸⁶ Protective trusts are also occasionally found in the United States.⁸⁷

CONCLUSION

All through the law of property, including its ramifications into other branches of the law such as trusts, the English and American courts have repeated the general policy against restraints on alienation of real and personal property. But there is also another principle which has been enunciated by the courts, that of upholding the donor's right of dominion over his property to dispose of it in any manner he pleases, within reason. In England the policy against restraints on alienation prevails over the latter principle in both courts of law and equity and most of the various trust devices discussed above are held to be invalid. In America, for the most part, the policy against restraints on alienation prevails in courts of law but gives way in equity to the principle of upholding the donor's right of dominion over his property to dispose of it in the manner he pleases, to the extent of validating various trust devices which restrain alienation of the equitable in-

⁸²Restatement of Trusts, Sec. 150; 1 Bogert, op. cit., Sec. 220.

⁸³Garrison v. Garrison, (Mo.) 188 SW 2d 644 (1945).

⁸⁴Miller v. Miller, (W. Va.) 31 SE 2d 844 (1944).

⁸⁵1 Bogert, op. cit., Sec. 227.

⁸⁶1 Bogert, op. cit., Sec. 221; English Trustee Act 1925, Sec. 33.

⁸⁷Morel v. Cornell, 234 Mass. 563, 125 NE 575 (1920).

terest. This is particularly true in Pennsylvania where the spendthrift trust is said to have been originated. The Pennsylvania cases repeatedly stress the view that various trust devices preventing alienation of the beneficiary's interest are held valid because of the court's desire to carry out the intent of the settlor of the trust and not because of consideration for the beneficiary, with the possible exception of the sole and separate use trust. This view is obviously premised on the principle of upholding the donor's right of dominion over his property to dispose of it in the manner he pleases.

It should be noted, however, that the trust devices preventing alienation of the beneficiary's interest are not completely effective against claims of all creditors, as was pointed out by mention of the important exceptions to the invulnerability of the spendthrift trust. It can be strongly argued that these enumerated spendthrift trust exceptions are also applicable to some of the other trust devices, and cases can probably be found that have so held. Thus, judging by the past, the tendency in the future undoubtedly will be to extend these exceptions to the other trust devices wherever feasible, as well as to enlarge the number of exceptions to include more types of creditors deemed to have a highly equitable claim against the beneficiary.

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