# NOTES

## CREDITORS' RIGHTS IN SUPPORT TRUSTS

In the simple trust situation, the beneficiary's interest is subject to being reached by his creditors[1] in satisfaction of their claims.[2] With three kinds of trusts, namely, spendthrift, support, and discretionary trusts, however, the beneficiary's interest is more or less immune to the demands of his creditors, due either to the settlor's having placed a restraint on alienation by the beneficiary, or because the beneficiary's interest is of such a personal or uncertain nature that the courts hesitate to allow creditors to subject it to their claims.[3] The purpose of this note is to examine one of these relatively immune trusts, the support trust, and to ascertain which creditors, if any, can reach the beneficiary's interest, and why other creditors are denied.

In order to analyze with any degree of precision the cases dealing with attempts by creditors to reach the interests of support trust beneficiaries, it is essential first to distinguish carefully between support trusts and other related trusts of a spendthrift or discretionary nature.[4]

The terms of a spendthrift trust provide that the beneficiary cannot assign or otherwise transfer his right to receive trust income or corpus, and that his creditors cannot reach his interest in the trust.[5]

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1. In this note, "creditor" is used in a wider sense than its strict legal meaning. In addition to persons to whom a *debt* is owed, "creditor" here includes persons to whom other obligations are owed, such as the duty of support and maintenance owed one's minor children.

2. RESTATEMENT, TRUSTS § 147 (1935).

3. As a general rule-of-thumb, it is said that the measure of what a beneficiary's creditor can recover from the trust is the amount which the beneficiary can assign. Since the very nature of spendthrift, support, and discretionary trusts forbids any assignment by the beneficiary of his right, creditors cannot reach such trusts, at least insofar as the rule-of-thumb is valid.

4. Courts have often been guilty of the grossest sort of obfuscation by lumping support and discretionary trusts under the title "spendthrift," which has undoubtedly contributed to a good deal of the inconsistency and confusion encountered in this area. See Jones v. Coon, 229 Iowa 756, 762, 295 N.W. 162, 165 (1940).

5. GRISWOLD, SPENDTHRIFT TRUSTS § 1 (2d ed. 1947); RESTATEMENT, TRUSTS §§ 149-53 (1935). Often, spendthrift clauses are found in support and discretionary trusts, where the settler wishes to ensure in a double-barrelled manner that his intention be fulfilled. See, *e.g.*, Guernsey v. Lazear, 51 W. Va. 328, 41 S.E. 405 (1902), a case involving a trust with both support and spendthrift clauses. Since the court held that the spendthrift clause kept creditors from reaching the beneficiary's interest, it was unnecessary to consider what the effect of the support clause was, or would have been, had there been no spendthrift clause.

In general, where there is a spendthrift clause and a support clause in a trust instrument, and creditors are allowed to recover, it is clear that the court must have held that both clauses were invalid as against the creditors. On the other hand, where the creditor is denied recovery, unless the court's language is explicit, it cannot be told whether the spendthrift or the support clause or both presented such a bar. Likewise, where there is a support trust without an ex-

In short, the trust instrument creates a restraint on alienation which operates to keep trust property and income inaccessible to assignees and creditors so long as it remains in the hands of the trustee. Once property is turned over to the beneficiary, however, it can be freely reached by creditors or transferees.[6]

A discretionary trust provides that the trustee in his complete and uncontrolled discretion may turn over property to the beneficiary or may exclude him entirely from all benefit.[7] Since the beneficiary has no enforceable interest in the trust until the trustee chooses to exercise this discretion in his favor, the assignees and creditors of the beneficiary are unable to reach the trust property.[8]

A support trust is created when the terms of the trust instrument provide that the trustee shall pay to or apply for the beneficiary so much of the trust income or of the trust income and principal as is necessary for the support, maintenance, or education of the beneficiary.[9]

The courts have often given the title "support trust" to a wholly different kind of trust: one in which the trustee is directed to pay the entire trust income or a specified sum to the beneficiary for the beneficiary's "support and maintenance."[10] Here the direction to pay such sum for "support and maintenance" is a mere precatory phrase indicating for what the settlor *would wish* the beneficiary to use his income, rather than an explicit command, and clearly distinguishes this type of trust from a true support trust, where the beneficiary's interest is measured by his need.[11] Unless such a pseudo-support trust con-

press spendthrift clause, and the court in refusing the creditor recovery talks in terms of spendthrift trusts, often it cannot be ascertained whether the court is confusing support and spendthrift trusts, or whether it is reading a spendthrift clause into the trust by inferring that in the use of support trust language the settlor actually intended to create a spendthrift trust.

6. GRISWOLD, SPENDTHRIFT TRUSTS § 370 (2d ed. 1947); RESTATEMENT, TRUSTS § 152, comment *j* (1935).

7. GRISWOLD, SPENDTHRIFT TRUSTS § 17 (2d ed. 1947); RESTATEMENT, TRUSTS § 155 (1935). When dealing with discretionary trusts, the courts will normally hesitate to review an exercise of discretion by the trustee, even if allegedly unreasonable. However, when the trustee has exercised his discretion in bad faith, the courts will review his acts. 4 BOGERT, TRUSTS AND TRUSTEES § 815 (1948).

8. Since by definition the beneficiary has no *enforceable* interest in a discretionary trust (RESTATEMENT, TRUSTS § 155, comment *b* (1935)), it may be wondered whether he has *any* interest at all in such a trust. For how can the beneficiary's "interest" here be distinguished from a mere expectancy that a bounty may be bestowed upon the beneficiary—which expectancy may exist as well with a total stranger as with the trustee?

9. GRISWOLD, SPENDTHRIFT TRUSTS §§ 18, 430-34.2 (2d ed. 1947); RESTATEMENT, TRUSTS § 154 (1935). For a further discussion of the nature of support trusts, see text supported by note 14 *infra*.

10. See, *e.g.*, Damhoff v. Shambaugh, 200 Iowa 1155, 206 N.W. 248 (1925); Albergotti v. Summers, 203 S.C. 137, 26 S.E.2d 395 (1943); Garland v. Garland, 87 Va. 758, 13 S.E. 478 (1891). Dean Griswold recognizes this distinction, and indicates that there is no reason for these trusts to be immune to creditors' demands. GRISWOLD, SPENDTHRIFT TRUSTS § 433 (2d ed. 1947).

11. The distinction is recognized pointedly in Maynard v. Cleaves, 149 Mass. 307, 21 N.E. 376 (1889), and Young v. Easley, 94 Va. 193, 26 S.E. 401 (1897).

tains a spendthrift clause, the interest of its beneficiary should be freely available to his creditors.[12] Because courts have often failed to distinguish between true support and pseudo-support trusts, the result in some cases involving attempts by creditors to reach the interest of a beneficiary of a pseudo-support trust may be an indication of what a court would hold were it confronted by a case involving a true support trust. Therefore, cases dealing with pseudo-support trusts will be considered from time to time in this note for purposes of comparison, as may seem helpful.

Spendthrift, discretionary, and support trusts are often regulated to a varying extent by the statutes of the several states. The effect of statutes upon creditors' rights in regard to support trusts will be considered at a later point in this note.[13]

*Nature of the Support Trust Beneficiary's Interest*

In the support trust, two factors combine to make the beneficiary's interest inalienable and beyond the reach of his creditors. First, as with the discretionary trust, the beneficiary's interest is relatively uncertain in amount. But, as distinguished from the discretionary trust, whose beneficiary may receive nothing at all, the support trust beneficiary is bound to receive sums sufficient for his support.[14] Therefore it may be questioned whether the uncertainty of the amount which the beneficiary is to receive, standing alone, is enough to keep the beneficiary's interest beyond the reach of his creditors. At this point the second factor comes into play: the courts' willingness to uphold the intent of the settlor, as expressed in the trust instrument, that the sums to be used for or paid to the beneficiary shall go only for his support. Since payment by the trustee to the beneficiary's general creditors would not, in most instances, provide such support as would fulfill the intent of the settlor, the courts refuse to allow such creditors' claims to be satisfied from the beneficiary's interest.[15]

Certain classes of creditors, however, have on occasion been allowed to reach the beneficiary's interest in a support trust. These preferred creditors fall into three categories, each having a different basis upon which the courts are willing to allow recovery.[16] (1) Often, a member

12. See, *e.g.*, Wenzel v. Powder, 100 Md. 36, 59 Atl. 194 (1904); Young v. Easley, 94 Va. 193, 26 S.E. 401 (1897).

13. See text supported by notes 96-107 *infra*, for a discussion of the various statutes affecting creditors' rights in support trusts.

14. 1A BOGERT, TRUSTS AND TRUSTEES § 226 (1951); RESTATEMENT, TRUSTS §§ 154-55 (1935).

15. See, *e.g.*, Holmes v. Bushnell, 80 Conn. 233, 67 Atl. 479 (1907); Meek v. Briggs, 87 Iowa 610, 54 N.W. 456 (1893); 1A BOGERT, TRUSTS AND TRUSTEES § 226 (1951).

16. RESTATEMENT, TRUSTS § 157 (Supp. 1948), gives a somewhat different arrangement insofar as classes of creditors are concerned:

> Although a trust is a spendthrift trust or a trust for support, the interest

of the beneficiary's family, either the wife or a child, has been allowed to recover sums for support from the beneficiary's interest in a support trust. In reaching this conclusion, the courts have been willing to read into the trust instrument an "intent" of the settlor that the support of the beneficiary include the support of his family as well.[17] (2) Similarly, if the person seeking to reach the beneficiary's interest is one who has performed necessary services to the beneficiary, or supplied him with support, the courts will give his claim preferred status, although he is usually under a burden of showing that the trustee abused his discretion by not paying the claim presented, which burden will make recovery difficult under most circumstances.[18] (3) Finally, if the creditor presents a claim which, in the court's view, is of sufficient merit to override the policy of giving full effect to the settlor's intent, he may be allowed to recover. Such creditors may, for example, include divorced wives seeking alimony or a governmental body attempting to collect arrears in taxes.[19]

As an examination of the cases will show, however, these classes are neither universally accepted by the courts in allowing recovery, nor do they provide even a reasonable means of predicting which creditors may succeed in reaching the beneficiary's interest. In short, there is considerable controversy among the courts as to whether a member of any particular class of claimants—such as a child of the beneficiary in the custody of a divorced or separated wife—will be allowed to recover against the support trust.

Before proceeding to an examination of the cases, it should be pointed out that creditors' rights in support trusts may very well also be affected by the form of the trust. While the ideal support trust would provide that the trustee shall, during the lifetime of the beneficiary, apply such sums out of principal and income as shall be necessary for the reasonable support, maintenance, and education of the beneficiary, with a direction to accumulate unexpended income, and that the trustee shall pay the remainder of principal and accumulated income over to designated individuals upon the beneficiary's death,

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of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,

(a) by the wife or child of the beneficiary for support, or by the wife for alimony;

(b) for necessary services rendered to the beneficiary or necessary supplies furnished to him;

(c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary;

(d) by the United States or a State or subdivision thereof to satisfy a claim against the beneficiary.

For purposes of analysis, however, it is submitted that the *Restatement's* classification could well be improved upon; one possible means is employed in this note.

17. See text supported by note 57 *infra.*

18. See text supported by note 74 *infra.*

19. See text supported by note 87 *infra.*

all support trusts do not so provide. The very mutations among the form of such trusts may well thwart the settlor's intent and allow any and all creditors to reach the beneficiary's interest.

Possible variations from the terms set out above are myriad; four, however, are of particular importance:

(1) When the trust instrument directs that both principal and income may be expended for the support of the beneficiary, but there is no remainder over of unexpended income and principal, it has been held that there is an equitable fee simple in the beneficiary and, on the basis that a restraint on alienation of an equitable fee simple is void, that neither alienation nor subjection to the claims of creditors can be prevented.[20] On the other hand, some courts have been willing to uphold the settlor's intent in such situations because it is insisted that the property passes to the beneficiary's estate free of the trust, and therefore the restraint is imposed only during the life of the beneficiary.[21] A court subscribing to the latter view has described the former as having "harked back to the doctrine of the English courts."[22] Similarly, when the support trust is to last for a specified period of time, at the end of which the principal is to be paid to the beneficiary, it would seem that since the beneficiary is able to convey his remainder interest, that interest may also be reached by his creditors.[23]

(2) Likewise, when the trust instrument directs that the trustee pay so much of the income as is necessary for the beneficiary's support, with remainder of principal over, but with no express provision for the accumulation and subsequent disposal of unexpended income, the court may conclude that the settlor has created a pseudo-support trust, as described earlier,[24] and that the beneficiary therefore has an interest which is liable to the claims of his creditors, since the beneficiary is entitled to all the income.[25]

(3) A further vital distinction may be made between those trusts which provide that an amount sufficient for the beneficiary's support

20. Haley v. Palmer, 107 Me. 311, 78 Atl. 368 (1910). In McCreery v. Johnston, 90 W. Va. 80, 110 S.E. 464 (1922), the beneficiary of such a trust was able to compel its immediate termination.

21. Sheridan v. Krause, 161 Va. 873, 172 S.E. 508 (1934). The Iowa courts, although they have been often confronted by this problem in various shapes, have failed to recognize that a problem even exists. See, *e.g.*, Roorda v. Roorda, 230 Iowa 1103, 300 N.W. 294 (1941), and Meek v. Briggs, 87 Iowa 610, 54 N.W. 456 (1893), where creditors of the beneficiary were denied recovery from the trust, although in addition to a present right to support, the beneficiary in each case also had the remainder interest.

22. Sheridan v. Krause, 161 Va. 873, 898, 172 S.E. 508, 516 (1934).

23. Epstein v. Corning, 91 N.H. 474, 22 A.2d 410 (1941); Seattle First Nat'l Bank v. Crosby, 42 Wash. 2d 234, 254 P.2d 732 (1953); *cf.* Perabo v. Gallagher, 241 Mass. 207, 135 N.E. 113 (1922) (discretionary trust). *But see* the Iowa cases cited in note 21 *supra*.

24. See text supported by notes 10-12 *supra*.

25. *Cf.* Seattle First Nat'l Bank v. Crosby, 42 Wash. 2d 234, 254 P.2d 732 (1953).

shall be paid *to* the beneficiary, and those which direct that such amount shall be applied *for* the beneficiary. Thus, in the Connecticut case of *Foley v. Hastings*,[26] the trust income was, at the trustee's discretion, either to be paid to the beneficiary, or to be applied for the beneficiary by the trustee. The Connecticut statute provided that when the trustee had power to *withhold* the trust income, the beneficiary's interest in the trust was inaccessible to his creditors.[27] In the *Foley* case, because the trustee could pay nothing to the beneficiary, but rather *withhold* the income and apply it for him, the court concluded that the trust fell within the terms of the statute and was immune to creditors. In so ruling, the court disregarded the fact that the clear purpose of the statute was to keep creditors from reaching discretionary trusts, and that this trust was clearly not discretionary, since the beneficiary received the same certain amount of benefit whether the trustee chose to pay the income to him or for him.[28]

(4) Varying amounts of discretion may be reposed in the trustee by the terms of the trust instrument. Thus, the trustee may be directed to pay such sums as necessary for the beneficiary's support and maintenance, or the trust may direct that "any or all" of income or principal, in the trustee's discretion, be paid for the beneficiary's support and maintenance. Creditors have often been denied recovery from the latter type of trusts on the basis that the trusts are of a discretionary nature.[29] It is true that by the terms of the trust instrument more discretion is given the trustee in such a trust. However, it is doubtful whether these trusts should be treated differently from other support trusts; a test to determine what treatment they should receive would be to inquire whether the beneficiary, if he were starving and destitute, could compel the trustee to pay him anything. Although courts are willing to deny recovery to a creditor of the beneficiary under such a trust, it is seriously to be doubted whether the beneficiary would receive the same treatment.[30]

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26. 107 Conn. 9, 139 Atl. 305 (1927).

27. CONN. GEN. STAT. § 8034 (1949).

28. There is also a practical distinction between providing that the trustees shall apply trust income or corpus for the beneficiary's support and providing that he shall pay such sums to the beneficiary: in the former circumstance, it is a certainty that moneys expended will go to the beneficiary's support; in the latter case, reliance must be placed upon the beneficiary to expend the funds for his support. If he fails to do so, the purpose of the settlor is clearly thwarted.

29. See, *e.g.*, Louisville Tobacco Warehouse Co. v. Thompson, 172 Ky. 350, 189 S.W. 245 (1916), and Davidson's Ex'rs v. Kemper, 79 Ky. 5 (1880), both of which are discussed in the text supported by notes 49-53 *infra*.

30. In First Nat'l Bank v. Howard, 149 Tex. 130, 135, 229 S.W.2d 781, 784-85 (1950), the court said,

> Despite [testator's] language that the discretion of the trustee in determining whether payments shall be made out of the corpus shall be final and conclusive, its discretion is not absolute. It remains both the province and duty of the courts to interfere if the trustee acts "outside the bounds of a reasonable judgment." And to determine whether it has so acted the test

One final point should be considered briefly: the matter of a beneficiary with an inseparable interest. When a trust is created with a number of beneficiaries, whose interests in the trust are inseparable one from the other, it is usually held that a creditor of one of the beneficiaries is unable to subject the trust to his claim.[31] This is true even though the trust is neither spendthrift, support, nor discretionary. Thus, where a trust is created for the benefit of a man and his family, the man's creditors cannot reach the trust in satisfaction of their claims.[32] A few cases involving support trusts have arisen in which the beneficiary has been found to have such an inseparable interest that his creditors cannot reach it; as a whole, they follow the rule in regard to trusts in general where there are multiple beneficiaries with inseparable interests.[33] In addition, the beneficiary's interest is beyond the reach of creditors if it is of a personal character or is so indefinite or contingent that it cannot be valued with fairness to the creditors and the beneficiary.[34]

*Classes of Creditors*

The cases in which creditors have sought to reach the interest of the beneficiary of a support trust to satisfy their claims may be classified under two broad headings, termed "general" creditors and "special" creditors. Special creditors include those discussed above,[35] who possess claims of unusual merit. General creditors consist of all others, whose claims have no such exceptional quality. The general creditors, whose claims are considered by the courts to be of equal merit and appeal, will be considered as a group; each class of special creditors will be surveyed singly.

*A. General Creditors*

As a general rule, which is not, however, without exceptions, it can be stated that the very nature of the support trust and the willingness of the courts to uphold what they feel to be the settlor's intent prevent

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is: In making or declining to make payments . . . out of the corpus of the estate would the trustee be *"acting in that state of mind in which the settlor contemplated that it should act."*

In the *Howard* case the court was confronted with an impoverished beneficiary and a trustee who asserted that the trust gave him complete discretion; the court allowed the beneficiary to succeed, holding that the trustee had abused his discretion.

31. GRISWOLD, SPENDTHRIFT TRUSTS §§ 435-45 (2d ed. 1947).

32. Russell v. Meyers, 202 Ky. 593, 260 S.W. 377 (1924); Brown v. Postell, 4 Rich. Eq. 71 (S.C. 1851).

33. See, *e.g.*, Harned v. Dorman, 252 Ky. 237, 67 S.W.2d 5 (1934); Shawler v. Hart's Adm'x, 205 Ky. 93, 265 S.W. 485 (1924); Hackett's Trustee v. Hackett, 146 Ky. 408, 142 S.W. 673 (1912).

34. RESTATEMENT, TRUSTS §§ 160, 162 (1935).

35. See text supported by notes 17-19 *supra*.

the beneficiary's interest from being subjected to the claims of his general creditors.[36]

Two reasons have been supplied by the courts in denying general creditors access to the support trust beneficiary's interest. Some courts have denied such creditors' claims by referring to the general rule-of-thumb that the right of the creditor against the trust is the same as the beneficiary's right would be if the beneficiary were suing the trustee, and concluding that since the beneficiary could not compel the trustee to pay him anything, neither can the creditor.[37] Thus, in the Iowa case of *Meek v. Briggs*,[38] the trustee was directed to apply the income for the beneficiary's "support, comfort, and education, so far as shall be required for such purposes." In an action by a general creditor to reach the beneficiary's interest, the court, after setting out the above-mentioned "rule," insisted that the beneficiary

> could not maintain an action against the trustees for any part of this property. . . . As the right of the *cestui que trust*, against the trustee, to recover the property, is the measure of the rights of the creditor as against the property in the hands of the garnishee, and as the *cestui que trust* has no right to the property which she can enforce [the creditor cannot recover].[39]

Some question arises as to how this "rule" should be applied in other cases. It may mean that if the beneficiary can, under any circumstances, go to court and compel the trustee to pay over any trust property to the beneficiary, then the creditor can do the same. Such an interpretation of the rule would clearly be applicable in the *Meek* case, since the trustees were to *apply* the income for the beneficiary, and not *pay* it to her; thus while the beneficiary might have successfully compelled the trustees to make such an application for her benefit, she could not have compelled them to pay her anything.[40] But if this interpretation is applied to a support trust where the trustee is to pay the beneficiary a sum sufficient for his support, the rule would compel a conclusion that a general creditor could recover against the trust, since the beneficiary could compel the trustee to pay him a reasonable sum for such support. This result, however, would be wholly inconsistent with the tenor of the court's opinion in the *Meek* case.

On the other hand, if the "rule" is interpreted to mean that if the beneficiary could compel the trustee to convey the beneficiary's interest

36. See, *e.g.*, Barnett v. Montgomery & Co., 79 Ga. 726, 4 S.E. 874 (1888); Levi v. Bergman, 94 Md. 204, 50 Atl. 515 (1901); Nickerson v. Van Horn, 181 Mass. 562, 64 N.E. 204 (1902); Baker v. Brown, 146 Mass. 369, 15 N.E. 783 (1888).

37. Roorda v. Roorda, 230 Iowa 1103, 300 N.W. 294 (1941); Meek v. Briggs, 87 Iowa 610, 54 N.W. 456 (1893). This rule is quite similar to that in regard to assignability, as set out in note 3 *supra*. *Cf.* Meyer v. Reif, 217 Wis. 11, 258 N.W. 391 (1935).

38. 87 Iowa 610, 54 N.W. 456 (1893).

39. *Id.* at 622, 54 N.W. at 459.

40. See, *e.g.*, McCreary v. Robinson, 94 Tex. 221, 59 S.W. 536 (1900).

in its entirety, the creditor could likewise reach the beneficiary's interest, the result and the interpretation are eminently acceptable. Under such circumstances, *all* support trusts would be immune to the claims of general creditors, since it is clear that the beneficiary is unable to convey his interest.[41]

A reason other courts have given for denying general creditors access to the beneficiary's interest is closely connected with the desire of the courts to effectuate the settlor's intent: to satisfy the claims of general creditors from the trust income or corpus would not be applying such property to the beneficiary's support, but would rather be clearly subverting the settlor's intent.[42] For example, in *Holmes v. Bushnell,*[43] the trustee was directed to expend income and corpus for the beneficiary "as he may need from time to time." The beneficiary became indebted in the sum of $350 for the purchase of shoes to sell in his business; as the beneficiary had promised to pay the trust income on the creditor's account but had failed to do so, the creditor brought action against the trustee to subject the income to his claims. The Supreme Court of Errors of Connecticut held that the trust was one for support, and therefore the income and corpus could go only for the personal support and comfort of the beneficiary. The beneficiary's pledge of future income was void, and the creditor could not recover from the trust in an action based on debt.

Other courts have refused to allow general creditors to reach the beneficiary's interest by calling the trust a "spendthrift" trust.[44] In some cases of this kind, it is difficult to distinguish whether the court is mistakenly calling the support trust a spendthrift trust, in which case the court would actually be extending spendthrift trust doctrine to cover support trusts, or whether the court is reading into the trust instrument a spendthrift clause, based upon the settlor's "intent," and therefore truly deciding a spendthrift trust question.

There are cases from two states, on the other hand, holding that the beneficiary's interest in a support trust can be reached by his general creditors. In the Virginia case of *Hutchinson v. Maxwell,*[45] a general creditor was allowed to reach the interest of the beneficiary in a support trust with a spendthrift clause, the court holding that a trust was opposed to public policy if creditors could not reach it, and further

41. See text supported by notes 20-23 *supra.*

42. See, *e.g.,* Seymour v. McAvoy, 121 Cal. 438, 53 Pac. 946 (1898); Holmes v. Bushnell, 80 Conn. 233, 67 Atl. 479 (1907); *cf.* Meek v. Briggs, 87 Iowa 610, 54 N.W. 456 (1893).

43. 80 Conn. 233, 67 Atl. 479 (1907).

44. Everitt v. Haskins, 102 Kan. 546, 171 Pac. 632 (1918); Hoffman v. Beltzhoover, 71 W. Va. 72, 76 S.E. 968 (1912); *cf.* Albergotti v. Summers, 203 S.C. 137, 26 S.E.2d 395 (1943).

45. 100 Va. 169, 40 S.E. 655 (1902).

that the Virginia statute[46] applied to allow this creditor to reach the beneficiary's interest. Nor did the court encounter any difficulty with the fact that the amount of the beneficiary's interest was uncertain; the creditor, said the court, "can claim from the trustee the amount which the [beneficiary] could have claimed should have been applied to his benefit." The *Hutchinson* case was short-lived, however; only a few years after it was decided the Virginia legislature amended the statute and legislatively overruled the case.[47]

The situation in Kentucky is singular. The Kentucky statute, passed in 1796, clearly subjects the trust beneficiary's interest to the claims of his creditors:

> Estates of every kind held or possessed in trust are subject to the debts and charges of the beneficiaries thereof the same as if the beneficiaries also owned the similar legal interest in the property.[48]

In accordance with the terms of the statute, the Kentucky courts have held that the interest of a beneficiary of a trust, whether a spendthrift or a support trust, is liable to the claims of his creditors unless the trustee has an absolute discretion whether or not to pay anything to the beneficiary.[49] Since such a trust by definition is not a support trust, but a discretionary trust,[50] it would seem that in Kentucky any creditor of a support trust beneficiary could reach his interest.

This, however, is not strictly the case. Although the Kentucky courts apply their rule without deviation, they occasionally appear very lax in the determination of whether a trustee has absolute discretion under a particular trust instrument. Thus, in *Davidson's Ex'rs v. Kemper*,[51] the trust instrument recited that the trustee "shall pay to each of my said three children, or for their use and benefit, quarterly, half-yearly, or annually, as they may deem most expedient, a sum or sums suitable and proper for the support of each. . . ." A general creditor of one of the beneficiaries was denied access to the trust on the ground that the words "as they may deem most expedient" put an absolute discretion in the trustee. Similarly, in *Louisville Tobacco Warehouse Co. v.*

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46. VA. CODE § 2428 (1887).

47. The statute as amended is now found in VA. CODE § 55-19 (1950).

48. KY. REV. STAT. § 381.180 (1953).

49. Louisville Tobacco Warehouse Co. v. Thompson, 172 Ky. 350, 189 S.W. 245 (1916); Davidson's Ex'rs v. Kemper, 79 Ky. 5 (1880); Samuel v. Salter, 60 Ky. (3 Metc.) *259 (1860). In Cecil's Trustee v. Robertson, 32 Ky. L. Rep. 357, 359, 105 S.W. 926, 927 (Ct. App. 1907), the court said:

> The rule is, that when the trustee has the discretion to withhold from the beneficiary all interest in the trust fund, then the fund may not be subjected to the debts of the beneficiary, but that if the beneficiary may in equity compel the trustee to pay her a certain part of the estate or income, the creditors may do the same.

50. RESTATEMENT, TRUSTS § 155 (1935).

51. 79 Ky. 5 (1880).

*Thompson*,[52] the trust instrument provided that the trustee "may pay for the support and maintenance [of the beneficiary] whatever amount, if any, my said executor may deem reasonably necessary and proper for that purpose, in the discretion of my said executor." It was held that the trustee had absolute discretion whether or not to give anything to the beneficiary. Query: would the result in the two above cases have been the same if the beneficiary, starving and destitute, had been bringing the action against the trustee instead of one of the beneficiary's creditors bringing such action?

On the other side of the coin, however, the Kentucky courts have properly construed most support trust instruments as giving the trustee a certain amount of discretion within reasonable limits, but not as bestowing upon him an absolute power to exclude the beneficiary entirely.[53]

In several other states it is provided by statute that creditors may recover a certain amount—either a percentage, or everything above a certain sum—from the interests of debtor-beneficiaries in support trusts.[54] Since there are no cases decided under these statutes dealing with support trusts, the statutes are discussed in the section of this note dealing with the statutory requirements of the various states.[55]

*B. Special Creditors*

There are three classes of creditors whose claims against the beneficiary's interest in a support trust may be considered to have a preferred standing: (1) members of the beneficiary's family, whose support the settlor may have intended to be furnished from the trust; (2) those persons who have contributed to the purpose for which the trust was established, namely, the furnishing of support and necessary services to the beneficiary; (3) those persons whose claims, for social, moral, or legal reasons, the courts may feel should be satisfied from the beneficiary's interest in the trust.[56]

52. 172 Ky. 350, 189 S.W. 245 (1916). In Todd's Ex'rs v. Todd, 260 Ky. 611, 86 S.W.2d 168 (1935), a divorced wife of the beneficiary brought action for alimony payments against a support trust. The trust instrument provided that if the trust were successfully attacked in the courts, it should immediately end, and beneficial interest should vest in the remaindermen. Thus, no one could hope to maintain a successful action against the beneficiary's trust interest—either the beneficiary would win in the courts, or the trust would terminate and the beneficiary's interest would be divested. The action of the divorced wife, then, may have been clearly spiteful, in order to attempt to divest the beneficiary. The court held the trust to be discretionary in nature, although in doing so it had to stretch matters considerably, as in the *Davidson* and *Louisville* cases; being discretionary, of course, it was beyond the reach of creditors. The result seems just, although the court's reasoning seems artificial.

53. See, *e.g.*, Akers v. Fidelity & Columbia Trust Co., 192 Ky. 850, 234 S.W. 725 (1921); Cecil's Trustee v. Robertson, 32 Ky. L. Rep. 357, 105 S.W. 926 (Ct. App. 1907); Samuel v. Salter, 60 Ky. (3 Metc.) *259 (1860).

54. See, *e.g.*, Dean Griswold's model spendthrift trust statute, as adopted by Louisiana. LA. REV. STAT. ANN. § 9.1923 (Supp. 1955).

55. See text supported by notes 96-107 *infra*.

56. See text supported by notes 17-19 *supra*.

(1) *Members of the beneficiary's family*

*a. The beneficiary's wife*

Since the support of the beneficiary is usually interpreted to include the support of the beneficiary's family as well as the beneficiary himself, it would seem to be the duty of the trustee to furnish the beneficiary sufficient amounts to support not only himself, but his family as well.[57] As long as the family relationship of the beneficiary and his wife continues, then, no question arises as to the right of the wife to support from the trust.

It is only when the family relationship is disrupted, whether voluntarily or involuntarily, that cases are found dealing with the wife's right to support from the trust. Where the amicable relations between the beneficiary and his wife have not been ruptured, but uncontrollable circumstances force their separation, it is usually held that the wife may continue to receive her support from the trust.[58] Thus, where the beneficiary is an invalid confined to a hospital,[59] or where he has become insane and has been committed to a mental institution,[60] courts have directed the trustee of the support trust to pay the wife a reasonable sum for her support.

On the other hand, where marital difficulties have caused the severing of family relations, leading to separation or divorce, the wife or ex-wife no longer has a right to support from the trust.[61] This is true, it is said, because she no longer is a member of the beneficiary's family.[62]

*b. The beneficiary's children*

Where the beneficiary's children are living in a family relationship with the beneficiary, it would seem that the support of the beneficiary includes support of the children. Thus, in *Fowler v. Hancock*,[63] the New Hampshire court concluded that benefit to the beneficiary's children was included within the trust purposes, and ordered the trustee to pay for the children's support if the beneficiary himself was unable to do so. Likewise, where the illness or insanity of the beneficiary takes him from his children to a place of confinement, it is not considered that the family relationship is broken, and the children are

57. *Cf.* Eaton v. Eaton, 82 N.H. 216, 132 Atl. 10 (1926).

58. *In re* Sullivan's Will, 144 Neb. 36, 12 N.W.2d 148 (1943); Reynolds v. Reynolds, 208 N.C. 254, 180 S.E. 70 (1935).

59. *In re* Sullivan's Will, 144 Neb. 36, 12 N.W.2d 148 (1943).

60. Reynolds v. Reynolds, 208 N.C. 254, 180 S.E. 70 (1935).

61. Burrage v. Bucknam, 301 Mass. 235, 16 N.E.2d 705 (1938); Eaton v. Eaton, 82 N.H. 216, 132 Atl. 10 (1926). *Contra*, RESTATEMENT, TRUSTS § 157(a) (1935). *Cf.* Seattle First Nat'l Bank v. Crosby, 42 Wash. 2d 234, 254 P.2d 732 (1953).

62. Eaton v. Eaton, 82 N.H. 216, 132 Atl. 10 (1926).

63. 89 N.H. 301, 197 Atl. 715 (1938).

entitled to support from the beneficiary's interest in the support trust.[64]

When the children are not in the custody of the beneficiary, but instead are in the custody of the beneficiary's separated or divorced wife, most courts will allow the children to continue to enjoy a right to support against the support trust.[65] Although various other reasons for allowing recovery to the children have been supplied, that given by the New Hampshire court in *Eaton v. Eaton*[66] is perhaps the most satisfying:

> The divorce did not affect the relationship of the minor child as belonging to her father's family, within the application of the term in the testator's contemplation. Nor did the decree granting the child's custody to her mother remove her from the family within such contemplation.[67]

Often, where a child in the custody of a divorced mother is denied support from the beneficiary's trust interest, it appears on first glance that justice has miscarried.[68] However, a perusal of such cases reveals that the action is usually not one asserting that under the trust instrument the child is entitled to support because it was so intended by the settlor; rather, it is usually an action to enforce a support decree, and often it is coupled with an action to enforce a decree for alimony.[69] In such a situation, the child is usually treated as a judgment debtor and denied recovery.

The recent Missouri case of *Brant v. Brant*[70] illustrates some of the difficulties present when the child asserts a right to support from the trust based upon a decree. There, a support trust was established for *B*, with power in the trustee to disburse income and, if necessary, principal, for *B's* support. *B's* divorced wife brought an action to reach the trust for arrears in child support payments, as provided in a Missouri statute.[71] The wife gained a judgment in the lower court,

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64. *In re* Sullivan's Will, 144 Neb. 36, 12 N.W.2d 148 (1943) (illness); Reynolds v. Reynolds, 208 N.C. 254, 180 S.E. 70 (1935) (insanity).

65. Ford v. Ford, 230 Ky. 56, 18 S.W.2d 859 (1929); Eaton v. Eaton, 82 N.H. 216, 132 Atl. 10 (1926); Seattle First Nat'l Bank v. Crosby, 42 Wash. 2d 234, 254 P.2d 732 (1953); *cf.* England v. England, 223 Ill. App. 549 (1922); Kirsten v. Czysz, (Milwaukee County Ct. 1940), as reported in 1942 WIS. L. REV. 148. *Contra*, Todd's Ex'rs v. Todd, 260 Ky. 611, 86 S.W.2d 168 (1935); Burrage v. Bucknam, 301 Mass. 235, 16 N.E.2d 705 (1938); Brant v. Brant, 273 S.W.2d 734 (Mo. App. 1954).

66. 82 N.H. 216, 132 Atl. 10 (1926).

67. *Id.* at 218, 132 Atl. at 11.

68. See, *e.g.*, Todd's Ex'rs v. Todd, 260 Ky. 611, 86 S.W.2d 168 (1935); Bucknam v. Bucknam, 294 Mass. 214, 200 N.E. 918 (1936); Brant v. Brant, 273 S.W.2d 734 (Mo. App. 1954).

69. See the cases cited in note 68 *supra*. However, Burrage v. Bucknam, 301 Mass. 235, 16 N.E.2d 705 (1938), a sequel to *Bucknam v. Bucknam*, held squarely that the settlor had not intended the beneficiary's child to be supported from the trust property.

70. 273 S.W.2d 734 (Mo. App. 1954).

71. MO. REV. STAT. § 456.080 (1949).

but it was reversed, the upper court pointing out that under the statute only trust *income* could be reached to satisfy the decree, and since it was shown that the trust had no income, there could be no recovery.

An emancipated child of the beneficiary, no longer a minor, may be allowed to recover from the trust if it can be shown that the settlor intended the child, as well as its parent, to receive support from the trust.[72] In such a case, however, it would seem that the court would read the trust instrument far more critically than it would if the action were brought to gain support for a minor child of the beneficiary; in the case of an adult, emancipated child the court is willing to infer very little, while if a minor child is seeking support, the court often seems willing to apply its imagination to discover an "intent" in the trust instrument which will allow the child to reach the trust.[73]

*(2) Suppliers of support and necessary services*

It is the duty of the trustee of a support trust to furnish the beneficiary with the necessaries of living, at least to the extent that trust trustee if he is able to demonstrate that the trustee should have furnish such support, the beneficiary may maintain an action to require him to provide support.[74] Similarly, a third person who has supplied necessary support or services to the beneficiary may recover from the trustee if he is able to demonstrate that the trustee should have furnished such support or services, but failed to do so. In other words, one seeking to recover for having supplied the beneficiary with necessary support or services must show that the trustee abused his discretion in not providing such support or services.[75]

In order to determine whether there has been such an abuse of discretion, the court will take into account: the dictates of the trust instrument;[76] the resources of the trust, the needs of the beneficiary, and

72. Clarke v. Clarke, 246 Ala. 170, 19 So. 2d 526 (1944).

73. In the *Clarke* case, note 72 *supra*, the words of the trust instrument explicitly gave an interest to the child; in such cases as Eaton v. Eaton, 82 N.H. 216, 132 Atl. 10 (1926), and Seattle First Nat'l Bank v. Crosby, 42 Wash. 2d 234, 254 P.2d 732 (1953), the court was forced to read into the trust instrument a fictitious intent of the settlor to include the beneficiary's children in his bounty.

74. 4 BOGERT, TRUSTS AND TRUSTEES § 815 (1948).

75. See, *e.g.*, Pole v. Pietsch, 61 Md. 570 (1884); Hanford v. Clancy, 87 N.H. 458, 183 Atl. 271 (1936).

76. City of Bridgeport v. Reilly, 133 Conn. 31, 47 A.2d 865 (1946); Reilly v. State, 119 Conn. 508, 177 Atl. 528 (1935). In Walters' Case, 278 Pa. 421, 123 Atl. 408 (1924), the Commonwealth of Pennsylvania was allowed to recover from a support trust for the cost of caring for the beneficiary in a state mental institution, on the basis that the trust was meant for the purpose of providing the beneficiary's support, and reimbursement of the state would merely be carrying out the testatrix' intent. In Swinson Estate, 167 Pa. Super. 293, 74 A.2d 485 (1950), it was held that a testamentary trust to provide for the beneficiary's support and maintenance during his lifetime should be interpreted to provide for payment of $929 in funeral expenses for the beneficiary.

the amount which the trustee has furnished the beneficiary;[77] and whether the trustee had knowledge that the support or services were being furnished.[78] A consideration of all these factors together is necessary in order to adjudge whether the trustee has, in fact, abused his discretion, although in a given case one of the factors alone may appear determinative.[79]

That the wording of the trust instrument may resolve whether the trustee has abused his discretion is illustrated by *City of Bridgeport v. Reilly*,[80] in which the city sought reimbursement from the trust of three dollars a week paid to the State of Connecticut for the care of the beneficiary in a state mental institution. The trust instrument, a will, directed that the trustee might "in her discretion expend or appropriate any or all of the income or principal . . . for the comfortable support" of the beneficiary, and provided for termination of the trust and payment of remaining income and principal to the beneficiary if he recovered from his mental illness. The court looked to the fact that the beneficiary was confined in the mental institution when the trust was created, combined this with the "any or all" language of the will, and concluded that the testator had taken into account the aid the state was furnishing, and had intended that the trust merely supplement such general support furnished by the state.

77. Pole v. Pietsch, 61 Md. 570 (1884); Hanford v. Clancy, 87 N.H. 458, 183 Atl. 271 (1936). In Cooper v. Carter, 145 Mo. App. 387, 129 S.W. 224 (1910), which involved a pseudo-support trust which the court treated as a true support trust, the trustee was to pay a designated amount for his mentally incompetent brother. The trustee, undoubtedly an heir-at-law of the beneficiary, failed to appropriate any sums at all for the beneficiary's support, and such support was supplied by another member of the family with whom the beneficiary lived. When the trustee had accumulated some $3,000 of unexpended income, the action was initiated by the person who had supplied the beneficiary's support; recovery was allowed, the court saying that the trustee "will not be permitted to stand by and neglect to support and care for his ward, all the while suffering others to do so, and shield himself on the ground that plaintiff was acting without his direct authority." *Id.* at 391, 129 S.W. at 225.

78. Wright v. Blinn, 225 Mass. 146, 114 N.E. 79 (1916); Will of Razall, 243 Wis. 152, 9 N.W.2d 639 (1943); Estate of Ray, 221 Wis. 18, 265 N.W. 89 (1936). In Will of Walker, 266 Wis. 134, 63 N.W.2d 78 (1954), the court looked to the relationship between the beneficiary and the claimant, as well as the fact that the claimant had not notified the trustee although she clearly had the opportunity to do so, in denying a claim for $50 a week nursing fees for the years preceding the beneficiary's death. The trustee had paid the beneficiary a total of over $30,000 during the last three years of his life, and had been led to believe that the beneficiary was paying the claimant for her nursing services. The court further noted that the beneficiary had conveyed to the claimant all of his personal property, including his car and the furniture in his house, had made the claimant the sole beneficiary of his will, and had given the claimant a promissory note for $8,500. This, the court felt, was somehow compensation enough for anything she could have done for the beneficiary.

79. See, *e.g.*, Will of Razall, 243 Wis. 152, 9 N.W.2d 639 (1943) (failure to notify trustee of the hiring of an attorney).

80. 133 Conn. 31, 47 A.2d 865 (1946). In Reilly v. State, 119 Conn. 508, 177 Atl. 528 (1935), an earlier case involving the same trust, the State of Connecticut was unsuccessful in its attempt to reach the trust property to satisfy its claim for supporting the beneficiary in a state mental institution.

Account was taken of the trust resources in the light of the past, present, and probable future needs of the beneficiary in the New Hampshire case of *Hanford v. Clancy*.[81] There a judgment against the beneficiary's interest in the trust for $2,410 in favor of a plaintiff who was "really in effect representing the Commonwealth of Massachusetts" to recover for the beneficiary's care in a state mental hospital, was reversed by the upper court, which found the judgment to be unreasonable because it would have exhausted the trust without making any provision for the future care of the beneficiary. There were other possible uses, said the court, for the trust income and corpus than the reimbursement of the Commonwealth of Massachusetts, which other uses the lower court should have considered in the light of the trustee's ability to carry them out through the exercise of reasonable discretion. The upper court concluded, "Affirmative orders of disposition, such as the court made in this case, may only be sustained if, under the circumstances, there is but one reasonable disposition possible."[82] Here such other possibilities had been arbitrarily excluded. Similarly, the amount the trustee has paid to the beneficiary, when considered together with the beneficiary's needs and the amount available for the beneficiary, will often be the determining factor. Thus, in *Pole v. Pietsch*,[83] where trust income over a period of five years was $3,000, and the beneficiary, in his last illness and in dire need had been provided with only $200 of the amount, a physician who had attended the beneficiary regularly through the illness was allowed to recover a reasonable sum for his services. In this case the court found a clear abuse of discretion.

A further factor is whether the trustee had knowledge that the support or services were being furnished by the third party seeking recovery, at least to the extent of a request having been made of the trustee to furnish such support or services. It has been held that where the beneficiary employed an attorney without making any request whatever of the trustee for legal services, the attorney so retained could not recover his fee from the trustee.[84] Similarly, where the trustee had paid weekly statements of the sanitarium in which the beneficiary was confined, reasonably believing them to include all services furnished, a $2,500 bill for medical services, sent by the sanitarium to the trustee after the beneficiary's death and purportedly covering the period of her confinement, could not be recovered from the trust.[85] Where a request is made, but the trustee refuses to assent to the desired support or services being supplied by the third person, it

81. 87 N.H. 458, 183 Atl. 271 (1936).
82. *Id.* at 461, 183 Atl. at 272-73.
83. 61 Md. 570 (1884).
84. Will of Razall, 243 Wis. 152, 9 N.W.2d 639 (1943).
85. Estate of Ray, 221 Wis. 18, 265 N.W. 89 (1936).

is clear that unless such refusal constitutes an abuse of discretion by the trustee, the third person who supplies the beneficiary in disregard of the trustee's refusal cannot recover from the trust.[86]

(3) *Other persons with claims of especial merit*

When a plaintiff presents a claim of a compelling quality against the beneficiary of a support trust, which claim would not be satisfied but for access to the beneficiary's trust interest, the courts have sometimes allowed him to satisfy his claim from the trust property. *How* compelling the claim must be is apparently a matter for the individual court to determine. Certainly, it is well above the level of the claim of the general creditor.

Most cases which have arisen within this category deal with attempts by divorced wives to satisfy their alimony decrees from the trust property. Although the *Restatement of Trusts* states flatly that this can be done,[87] case authority is directly opposed to allowing the wife to satisfy an alimony claim from the beneficiary's interest in a support trust.[88] In only two support trust cases has the alimony-seeking ex-wife been successful; of these the Illinois case of *England v. England*[89] is of special significance. There the court, after pointing out that general creditors could not gain execution from the trust income, went on to say, however, that the trust instrument

> did not provide that such income could not be used in accordance with a decree of a court of equity to keep Albert C. out of jail for contempt of court for a failure to comply with the court's decree to pay alimony for the support of his wife.
>
> 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.[90]

Other courts have not so felt the inner urgings of "public policy" and the "good of society" in alimony cases. It is true that in several

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86. Wright v. Blinn, 225 Mass. 146, 114 N.E. 79 (1916).

87. RESTATEMENT, TRUSTS § 157(a) (1935).

88. Kiffner v. Kiffner, 185 Iowa 1064, 171 N.W. 590 (1919); Bucknam v. Bucknam, 294 Mass. 214, 200 N.E. 918 (1936) (support trust with spendthrift clause); Foster v. Foster, 133 Mass. 179 (1882); Gilkey v. Gilkey, 162 Mich. 664, 127 N.W. 715 (1910); Eaton v. Eaton, 82 N.H. 216, 132 Atl. 10 (1926); *cf.* Roorda v. Roorda, 230 Iowa 1103, 300 N.W. 294 (1941) (divorced wife seeking alimony sought to have the support trust upset on the sole ground that it was collusive and against public policy); Lamberton v. Lamberton, 229 Minn. 29, 38 N.W.2d 72 (1949) (divorced wife not allowed to show the size alone of the support trust corpus in order to increase her alimony payments from the beneficiary; the court concluded that only when it was shown that the beneficiary was actually receiving additional income from the support trust could the alimony award be affected).

89. 223 Ill. App. 549 (1922). The only other case involving a support trust in which the alimony-seeking wife has been succesful is Ford v. Ford, 230 Ky. 56, 18 S.W.2d 859 (1929), decided under the Kentucky statute which allows all creditors, general as well as special, to reach the beneficiary's interest.

90. 223 Ill. App. at 555.

cases the issue has not been squarely presented to the courts;[91] but in others, where the divorced wife's counsel did a more able job in presenting the issue, the court has flatly stated that the divorced wife "stands no better than any other creditor."[92]

Although much has been said of the rights of tort creditors, and of the federal and state governments in regard to unpaid taxes, no cases seem to have arisen in these areas in which support trusts have been involved.[93] Nor, in view of the wide disparity among the courts in other cases dealing with support trusts, would it be wise to venture any kind of prediction as to how courts will hold when and if such questions do arise.

At first glance the Kentucky case of *Ratliff's Ex'rs v. Commonwealth*[94] might appear to be of some importance here. In that case, taxpayers who had paid an unconstitutional tax to the sheriff of Nicholas County were allowed to recover against a support trust of which the sheriff was beneficiary. However, the case is of little value except to pose a problem, for under the Kentucky statute[95] even the general creditors of the sheriff would have been able to recover from his interest in the support trust.

*Statutes Affecting Creditors' Rights in Support Trusts*

Statutes in virtually every state affect to some degree the ability of creditors to subject a debtor-beneficiary's interest in a support trust to their claims. Because of their great number and variety, it is not within the scope of this note to describe them all, or even an appreciable number of them. Rather, it is proposed to describe briefly some of the terms of such statutes, as illustrative of the form they may take.[96]

The Kentucky statute,[97] to which reference has been made through-

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91. See Roorda v. Roorda, 230 Iowa 1103, 300 N.W. 294 (1941), in which the divorced wife sought a declaration from the court that the trust was void as against her, because collusive and opposed to public policy; Lamberton v. Lamberton, 229 Minn. 29, 38 N.W.2d 72 (1949), where the wife sought to increase her alimony payments by showing that the trust from which the beneficiary received his support was worth some $700,000.

92. Bucknam v. Bucknam, 294 Mass. 214, 220, 200 N.E. 918, 921 (1936). Statements to the same effect are found in Foster v. Foster, 133 Mass. 179 (1882), and Eaton v. Eaton, 82 N.H. 216, 132 Atl. 10 (1926).

93. See, *e.g.*, RESTATEMENT, TRUSTS § 157(d) (Supp. 1948), and the *Caveat* to § 157 (1935).

94. 139 Ky. 533, 101 S.W. 978 (1907).

95. KY. REV. STAT. § 381.180 (1953).

96. For a complete survey of the various state statutes as they affect spendthrift trusts, and incidentally, support trusts, see GRISWOLD, SPENDTHRIFT TRUSTS §§ 153-236 (2d ed. 1947).

97. KY. REV. STAT. § 381.180 (1953). Although Maryland, Mississippi, and Ohio have statutes worded similarly, the courts of those states have not given to them the sweeping effect that the Kentucky courts have given its statute; in those three states, support trusts would apparently be unreachable by creditors. MD. ANN. CODE art. 9, § 10 (1951); MISS. CODE ANN. § 849 (1942); OHIO GEN. CODE ANN. § 11760 (1940).

out the course of this note, clearly allows all trusts, with the exception of discretionary trusts where the trustee can withhold *all* benefit from the beneficiary, to be subjected to the claims of creditors. Two other states have statutes which were originally similar to Kentucky's, but which have been amended rather considerably by allowing trusts to be created of a particular maximum size,[98] or without any size limitation at all,[99] in which the beneficiary's interest is held beyond the reach of his creditors.

The statutes of some states allow creditors of any trust beneficiary to reach a percentage of trust income when such income exceeds a minimum amount.[100] The Louisiana statute, for example, modeled upon Dean Griswold's model trust statute, allows creditors to reach by attachment ten per cent of income if the income exceeds twelve dollars a week; general creditors may also reach any income in excess of $5,000 a year.[101] Although this statute is designedly aimed at spendthrift trusts, it would appear to affect support trusts as well.

On the other hand, there are a number of statutes which expressly provide for the immunity of support trusts. In two states these statutes apply to a limited class of persons, such as close relatives of the settlor, or minors and persons non compos mentis.[102] The statutes of other states of this group, however, do not so limit the beneficiary.[103] The California statute, for example, provides that where there is no provision for accumulation of income, creditors may reach such income only to the extent that it is not necessary to the support of the beneficiary, thus removing the amount necessary for support from the reach of creditors.[104]

The Connecticut statute is singular in that it allows a court of equity to order payment of surplus to creditors "as justice and equity may require."[105] Other statutes allow a particular class of creditors to reach the beneficiary's interest.[106] Thus, the Missouri statute allows the wife and child of the beneficiary to reach trust income for either support or alimony.[107]

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98. VA. CODE § 55-19 (1950).

99. W. VA. CODE ANN. § 3538 (1955).

100. LA. REV. STAT. ANN. § 9:1923 (1950); N.J. STAT. ANN. §§ 2:26-182 to 2:26-184 (1937); N.Y. CIV. PRAC. ACT § 684; OKLA. STAT. tit. 60, § 175.25 (1941).

101. LA. REV. STAT. ANN. § 9:1923 (1950). The Oklahoma statute is similarly modeled upon Dean Griswold's draft. OKLA. STAT. tit. 60, § 175.25 (1941).

102. GA. CODE ANN. § 108-114 (1935); N.C. GEN. STAT. § 41-9 (1950).

103. CAL. CIV. CODE §§ 859, 867 (1949); MICH. STAT. ANN. §§ 26.63, 26.69 (1937); N.D. REV. CODE §§ 59-0310, 59-0318 (1943).

104. CAL. CIV. CODE §§ 859, 867 (1949).

105. CONN. GEN. STAT. § 8034 (1949).

106. LA. REV. STAT. ANN. § 9:1923 (1950); MO. REV. STAT. § 456.080 (1949).

107. MO. REV. STAT. § 456.080 (1949).

## CONCLUSION

In summation, some general statements concerning the ability of creditors to reach the interest of the beneficiary of a support trust may be ventured. General creditors, unless allowed to do so by a statutory provision, cannot subject the beneficiary's interest to their claims. On the other hand, courts will usually look favorably upon members of the beneficiary's immediate family, often reading into the trust instrument an "intent" of the settlor to provide for the beneficiary's family. When the family group is broken by divorce or separation, however, the wife will not be allowed to claim support from the trust; in such a situation recovery for the children in the wife's custody becomes more difficult, although it is usually allowed where the child claims that the settlor intended him to be a beneficiary. Where persons have supplied the beneficiary with services or support without the concurrence of the trustee, in order to recover from the trust it is incumbent upon them to prove that the trustee, in refusing to pay, has abused his discretion. Finally, although many arguments have been advanced for allowing the wife to reach the beneficiary's interest for alimony, only one case, exclusive of statute, has done so.

There is clearly a case for allowing any bona fide creditor of the beneficiary of a support trust to reach the beneficiary's interest in satisfaction of his claims. The injustice in allowing a support trust beneficiary to live comfortably upon what the trust provides, while barring those to whom the beneficiary is indebted or to whom he owes a duty of support, is quite evident. Persons not so fortunate as to be supported by property placed in trust for them must live within their means; is it inconsistent to require that such a trust beneficiary live within his means?

If the beneficiary's creditors are to be allowed to recover, some standard must be applied in order to gauge the manner and amount of their recovery. To allow a creditor to take everything which the beneficiary would otherwise receive from the trust is too extreme; it would reduce to poverty the beneficiary wholly dependent upon the trust for sustenance. Similarly, to give effect to the settlor's intent as the criterion for allowing creditors to recover is at the other extreme; to say that the settlor could do what he liked with his property, and therefore he could give it to the beneficiary but keep it from the beneficiary's creditors, is absurd.[108]

108. Although the "rule" that the settlor might do as he liked with his property, and therefore could give it to the beneficiary free of the claims of the beneficiary's creditors represents the basis for the modern spendthrift trust doctrine, and is doubtless here to stay, nonetheless, it appears to be a rule peculiarly indigenous to the spendthrift trust notion, and has no other basis in law. The bitter attack made by the late John Chipman Gray upon the spendthrift trust notion was but a voice in the wilderness. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY *iii-xii* (2d ed. 1895).

A judicially created and interpreted "public policy" standard is too dependent upon the very human whim of judges to be a satisfactory basis for determining what rights, if any, a creditor is to have. A proper standard, it would seem, should come out of the legislature. As has been shown, however, the legislative dictate as to creditors' rights against support trusts has by no means been consistent. Some states allow all creditors to reach the trust, with the value of the beneficiary's interest the only limit upon their recovery; others protect the beneficiary completely. Neither is satisfactory; some means must be found for striking a balance between beneficiary and creditor. Further, some means must be provided for giving certain creditors preference over others—the beneficiary's children should be provided for first, for example, whether or not the court is able to read into the trust instrument some nebulous "intent" of the settlor.

Dean Griswold's model spendthrift trust statute is a notable step in what appears to be the proper direction. In terms broad enough to include support trusts as well as spendthrift trusts, it provides that when the amount paid to or for the beneficiary exceeds twelve dollars a week, the beneficiary's creditors may reach by attachment ten per cent of such income; that creditors may reach all such amounts when they exceed $5,000 a year; and that certain claimants, such as a member of the beneficiary's family, or an alimony claimant, or a supplier of necessary services or support, or a tort claimant, may be allowed by the court to reach whatever amount is consistent with justice "under the circumstances."[109]

Although no model statute can represent the last word in the expression of legislative policy, nevertheless the model statute outlined above does point out unmistakably the direction in which any legislature must work to end the inequity and achieve a just balance between the support trust beneficiary and his creditors.

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109. GRISWOLD, SPENDTHRIFT TRUSTS § 565 (2d ed. 1947). See text supported by notes 100-01 *supra*. In the same section of his treatise, Dean Griswold also sets out a "short form" of his proposed statute which would allow the courts to determine on an equitable basis what portion, if any, the creditor could take. 1 SCOTT, TRUSTS 791 (1939), also discusses allowing the courts to determine what portion the creditor should be allowed to take. It would seem, however, that a statute to this effect would be at least a partial abdication of the legislative function.