

10-1940

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Recommended Citation

(1940) "Attachment of Income of Spendthrift Trust : Schwager v. Schwager," *Indiana Law Journal*: Vol. 16 :
Iss. 1 , Article 14.

Available at: <https://www.repository.law.indiana.edu/ilj/vol16/iss1/14>

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ATTACHMENT OF INCOME OF SPENDTHRIFT TRUST

Schwager v. Schwager

Defendant is beneficiary of a spend-thrift trust set up by his mother's will subsequent to divorce of son by his first wife. The will provided that if the trustees apprehend that the interest of the beneficiary is threatened to be diverted they shall divert the income and principal from distribution to the defendant and use the same as they deem expedient to support and maintenance of the beneficiary and members of his family then dependent on him for support, not however, including his first wife or any of his children by her. The plaintiffs, divorced wife and children (two of whom are minors), sue to attach the income or corpus of the trust for alimony and support. Held, No recovery allowed; under Wisconsin law a testator may dispose of his property as his judgment may dictate, the courts cannot change or modify a will or substitute in its place one which they deem more equitable or just.¹

Trusts in which the interest of the beneficiary cannot be assigned by him or reached by his creditors have come to be known as "spend-thrift trusts". It is immaterial whether or not the beneficiary is in fact a spendthrift. The purpose of the settlor in creating the trust is to protect the beneficiary against his own folly, inefficiency or misfortune.² Cases upholding the restraint of alienation of trust income

¹⁷ BURNS IND. STAT. ANN. (1933), §§ 48-6506, 6507.

¹⁸ McDonald v. New Haven, 94 Conn. 403, 109 Atl. 176, 10 A. L. R. 193, 201 (1920). See Note (1932), 81 A. L. R. 478; Stene, *Application of State Workmen's Compensation Laws to Public Employees and Officers* (1932), 17 Minn. L. Rev. 162.

¹⁹ City of Peru v. State ex rel. McGuire, 210 Ind. 668, 119 N. E. 151 (1936).

²⁰ SEE Fahler v. City of Minot, 49 N. Dak. 960, 194 N. W. 695 (1923).

²¹ McDowell v. Duer, 78 Ind. App. 440, 133 N. E. 839 (1922); In re Duncan, 73 Ind. App. 270, 127 N. E. 289 (1919).

¹ Schwager v. Schwager, 109 F.(2d) 754 (C.C.A. 7th, 1940).

² SCOTT, LAW OF TRUSTS (1939) 742.

to be good against creditors most often use the rationale that a settlor may dispose of his property as he wishes as long as third persons are not thereby injured. Creditors are not injured by the disposition because it is a windfall to the beneficiary: nothing is taken from creditors on which they relied for payment.³ Some states have by statute permitted creditors of a beneficiary of a spendthrift trust to attach the income accrued in the hands of the trustee.⁴ In absence of statute, however, the majority rule is that the entire income is still exempt.⁵ Indiana has no such statute and there are no cases on the point.

Only ten states have ruled as to whether a divorced wife of a beneficiary may reach the income or corpus of the trust for maintenance and support or in satisfaction of a judgment for alimony. Six states deny the divorced wife the right to recover.⁶ Of the remaining four states, California, Illinois and New York, allow recovery only from the surplus income of the trust above that necessary for support and education of the beneficiary.⁷ The tenth state, Iowa, has allowed the divorced wife to recover because the husband beneficiary

³ *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Amer. Rep. 504 (1882); see *Nichols v. Eaton*, 91 U.S. 716, 23 L. Ed. 254 (1875); *Congress Hotel Co. v. Martin*, 312 Ill. 318, 143 N.E. 838 (1924); *Costigan, Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined* (1934) 32 Calif. L.Rev. 471.

⁴ For a complete discussion of these statutes see SCOTT, *LAW OF TRUSTS* (1939) 750 ff.

⁵ *Broadway National Bank v. Adams*, 133 Mass. 170 (1882); *Congress Hotel Co. v. Martin*, 312 Ill. 318, 143 N.E. 838 (1924); *Cromwell v. Converse*, 108 Conn. 412, 143 Atl. 413 (1928); *Bridgeport City Trust Co. v. Beach*, 119 Conn. 131, 174 Atl. 303 (1934); *Darling v. Dodge*, 200 Iowa 1303, 206 N.W. 266 (1925); *Jourolman v. Massengill*, 86 Tenn. 81, 5 S.W. 719 (1887).

⁶ *Todd v. Todd*, 260 Ky. 611, 86 S.W.(2d) 168 (1935) (Beneficiary has no interest in income which can be attached previous to actual payment to him); *Bucknam v. Bucknam*, 294 Mass. 214, 200 N.E. 918 (1936) (Alimony is of the nature of debt, the wife stands in no better position than a creditor, also the settlor did not intend that the wife participate in the trust fund); *Burrage v. Bucknam*, 16 N.E. (2d) 705 (Mass. 1938); *Gilkey v. Gilkey*, 162 Mich. 664, 127 N.W. 715 (1910) (Payment of alimony is not within uses to which trustee was authorized to apply trust property); *Note* (1936) 34 Mich. L.R. 1269; *Erickson v. Erickson*, 197 Minn. 71, 266 N.W. 161 (1936) (Wife no better than a creditor; settlor did not intend that wife participate); *Eaton v. Eaton*, 82 N.H. 216, 132 Atl. 10 (1926) (Wife no better than a creditor; beneficiary's needs include his family's but his family does not include his wife after divorce); *Thackara v. Mintzer*, 100 Pa. 151 (1882) (Wife no better than a creditor), cf. *Moorehead's Estate*, 137 Atl. 802, 289 Pa. 542 (1927); *Thomas v. Thomas*, 112 Pa. Super. 578, 172 Atl. 36 (1934). *Note* (1928) 41 Har. L.Rev. 409.

⁷ *Canfield v. Security First National Bank of Los Angeles*, 8 Cal. App.(2d) 277, 48 P.(2d) 133 (1933) (Surplus income subject to claims of beneficiary's creditors under Calif. Civ. Code, §§ 859, 867) approved in *Canfield v. Security First National Bank of Los Angeles*, 13 Cal.(2d) 1, 87 P(2d) 830 (1938); *England v. England*, 223 Ill. App. 549 (1922); *Tuttle v. Gunderson*, 254 Ill. App. 552 (1929); *Wetmore v. Wetmore*, 149 N.Y. 520, 33 L.R.A. 708 (1896); *Fink v. Fink*, 248 N.Y.S. 129, 139 Misc. 630 (1931).

had paid a consideration for the trust. The court in this Iowa case specifically states that if there is nothing present to avoid a spendthrift trust the divorced wife cannot recover.⁸ Thus on numerical weight of authority seven states deny the divorced wife any recovery and three give her only a limited recovery. Consequently as pointed out in the majority opinion of the principal case,⁹ the position of the Restatement of the Law Trusts¹⁰ that a wife may reach the income from a spendthrift trust for satisfaction of a claim for alimony is not supported by the cases at the present time.

At least two states have enacted specific statutes allowing the divorced wife to reach the trust income.¹¹ Under provisions of creditor statutes, which a number of states have enacted,¹² the California and New York courts treat the divorced wife as a creditor and allow her to reach the trust.¹³

A wife living apart from the husband, but not divorced, has been successful in subjecting the trust income of the husband beneficiary to attachment for support and maintenance.¹⁴ This is done on the theory that a husband has a moral and legal obligation to support his family and the wife is a member of the family until divorce. Children

⁸ *De Rouse v. Williams*, 164 N.W. 896, 897, 181 Iowa 379 (1917); *cf. Kiffner v. Kiffner*, 185 Iowa 1064, 171 N.W. 590 (1919) (Wife is no better than a creditor; testator may dispose of his property as he desires).

⁹ 109 F.(2d) 754, 760.

¹⁰ RESTATEMENT, TRUSTS (1935) § 157.

¹¹ Louisiana Act 81, Laws of 1938, § 28. Income may be reached for support of wife or child in certain amounts and in addition, according to what shall be just under the circumstances. MISSOURI REVISED STATUTES (1929) § 569. All spendthrift trust provisions shall be void "against the claims of any wife child or children of cestui que trust for support and maintenance, or, as against the claim of any said wife for alimony."

¹² MONTANA REVISED CODE (1921) § 6788; NORTH DAKOTA COMPILED LAWS (1913) § 5369; OKLAHOMA STATUTES (1931) § 11825; SOUTH DAKOTA COMPILED LAWS (1929) § 376.

¹³ *Wetmore v. Wetmore*, 149 N.Y. 520, 33 L.R.A. 708 (1896); *Fink v. Fink*, 248 N.Y.S. 129, 139 Misc. Rep. 630 (1931); the wife even takes precedence over judgment creditors, *Demuth v. Kemp*, 144 N.Y.S. 690, 159 App. Div. 422 (1913), affirmed, 216 N.Y. 757, 111 N.E. 1086 (1916). *Canfield v. Security First National Bank of Los Angeles*, 8 Cal. App.(2d) 277, 48 P.(2d) 133 (1935).

¹⁴ *Moorehead's Estate*, 289 Pa. 542, 137 Atl. 802 (1927); *Thomas v. Thomas*, 112 Pa. Super. 578, 172 Atl. 36 (1934); *Pruyn v. Sears*, 161 N.Y.S. 58, 96 Misc. 200 (1916); Wife allowed support up to time of divorce but not afterwards, *Eaton v. Eaton*, 82 N.H. 216, 132 Atl. 10 (1926); Wife and children allowed to reach income for support upon beneficiary becoming insane, *Gardner v. O'Laughlin*, 76 N.H. 481, 84 Atl. 935 (1912).

¹⁵ *Eaton v. Eaton*, 82 N.H. 216, 132 Atl. 10 (1926); *Thomas v. Thomas*, 112 Pa. Super. 578, 172 Atl. 36 (1934); *Gardner v. O'Laughlin*, 76 N.H. 481, 84 Atl. 935 (1912); *Pruyn v. Sears*, 161, N.Y.S. 58, 96 Misc. 200 (1916).

of the beneficiary have also been successful in reaching the trust income for support.¹⁵ The decisions are not without conflict however.¹⁶

In the absence of a statute allowing the divorced wife to reach the trust income, the principal case follows the correct rule in regard to alimony. If the trust is created previous to the marriage the wife has notice that she will not be able to attach the income for payment of alimony should they ever be divorced. Even if the trust is created following the marriage she is in no worse position than if the trust had never been created, there could have been no reliance on the trust income at the time of the marriage. Her solution is to sue for separate maintenance and support; or, if she desires a divorce, to get a lump sum settlement instead of alimony before the divorce is made final.

In Indiana, alimony in the form of periodic payments has been replaced by statute providing for a decree of a lump sum.¹⁷ For this lump sum a judgment could be given which would seem to be a debt for which no levy on the income of the spendthrift trust could be made. As for the children, however, an Indiana court may under the divorce statute make provision for the support and education of the minor children.¹⁸ Moreover, the court has power to compel fathers to support their minor children without regard to the divorce statute¹⁹ and a husband has a legal duty to support his wife.²⁰ When the husband or father is the beneficiary of a spendthrift trust, an equity decree ordering him to pay might be made. With an evident source of income he could not on grounds of inability to pay, avoid being in contempt for non payment. Thus the status of the Indiana law would indicate that an undivorced wife or a minor child could reach the trust income for support.

¹⁶ *Erickson v. Erickson*, 197 Minn. 71, 266 N.W. 161 (1936), *Todd v. Todd*, 260 Ky 611, 86 S.W. (2d) 168 (1935); *Keller v. Keller*, 284 Ill. App. 198, 1 N.E. (2d) 773 (1936), Note (1936) 30 Ill. L.Rev.1067.

¹⁷ BURN'S IND. STAT. ANN. (1933) § 3-1218. This provision does not apply where there is only a limited divorce, see § 3-1232. *Goldberg v. Goldberg*, 72 Ind. App. 477, 126 N.E. 36, (1920)

¹⁸ BURN'S IND. STAT. ANN. (1933) Sec. 3-1219.

¹⁹ *Leibold v. Leibold*, 158 Ind. 60, 62 N.E. 627 (1902)

²⁰ BURN'S IND. STAT. ANN. (1933) § 10-1405, 38-116.