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DIVORCE AND THIRD-PARTY TRUSTS IN DELAWARE

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I. DIVORCE IN DELAWARE

A. Introduction

The Delaware Divorce and Annulment Act (Divorce Act) is in Chapter 15 of Title 13 of the Delaware Code.[1] Under the Divorce Act, the Family Court must enter a decree of divorce if, "it finds that the marriage is irretrievably broken and that reconciliation is improbable."[2] Delaware is a no-fault state hence, the Family Court may grant a divorce for, inter alia, "separation caused by incompatibility."[3] The Family Court has jurisdiction in a divorce matter where either the petitioner or the respondent resided in Delaware for at least six months immediately before commencement of the action.[4]

B. Property Division

1. Introduction

Delaware is an equitable-distribution state. Thus, the Divorce Act empowers the Family Court to divide, distribute, and assign "marital property" as the court deems just.[5]

2. Identifying the Marital Property

a. Background

The court must identify the marital property before the court can allocate it. "Marital property" is defined as follows:[6]

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[1] 13 Del. C. §§ 1501–1523. I would like to thank Jocelyn M. Borowsky, Esquire, Duane Morris LLP, for her assistance in assembling authorities in this paper.

[2] 13 Del. C. § 1505(a).

[3] 13 Del. C. § 1505(b)(4).

[4] 13 Del. C. § 1504(a).

[5] 13 Del. C. § 1513(a).

[6] 13 Del. C. § 1513(b) (emphasis added).

(b) For purposes of this chapter only, "marital property" means all of the following:

(1) All property acquired by either party subsequent to the marriage, except any of the following:

a. Property acquired by an individual spouse by bequest, devise, or descent or by gift, except gifts between spouses, provided the gifted property is titled and maintained in the sole name of the donee spouse, or a gift tax return is filed reporting the transfer of the gifted property in the sole name of the donee spouse or a notarized document, executed before or contemporaneously with the transfer, is offered demonstrating the nature of the transfer.

b. Property acquired in exchange for property acquired prior to the marriage.

c. Property excluded by valid agreement of the parties.

d. The increase in value of property acquired prior to the marriage.

(2) All jointly-titled real property acquired by the parties prior to their marriage, unless excluded by valid agreement of the parties. For purposes of this paragraph, "jointly-titled real property" includes joint tenancy, tenancy in common, and any other form of co-ownership.

Note: (b)(1)a[7] and (b)(2)[8] were added to the Divorce Act in 1993 and 2016, respectively. Caselaw must be read with that in mind.

[7] 69 Del. Laws 55 (1993).

[8] 80 Del. Laws 237 (2016).

Property given by one spouse to the other during marriage is marital property.[9] All property acquired subsequent to the marriage is presumed to be marital property regardless of how it is titled, but the presumption may be overcome by proof that the property was acquired by a method described in (b)(1), above.[10]

b. Interpreting the Exceptions

The Supreme Court of Delaware interpreted two of the above exceptions in Sayer v. Sayer (1985).[11] At the outset, Justice Moore summarized the issue and the court's conclusion as follows:[12]

> Marvin M. Sayer, the husband in this property division matter heard in the Family Court, appeals the denial of his claim to any part of the trust income to which his former wife, Genevieve duPont Sayer, became entitled during their marriage. The sole issue before us is a matter of first impression in Delaware: When the right to receive trust income vests in one spouse during a marriage, to what extent, if any, is that income considered marital property subject to division between the parties? The Family Court ruled that a right to receive trust income, which vested in the wife during the marriage, was excludable under two exceptions to the statutory definition of marital property. However, we have difficulty with that reasoning. In our view the trust income paid during a marriage, or which a spouse is actually entitled to receive during that period, is not conceptually different from any other marital asset.

Justice Moore first observed:[13]

> In this case the Family Court decided that the wife's lifetime income interest in the testamentary trust, which had vested during

[9] 13 Del. C. § 1513(c).

[10] 13 Del. C. § 1513(c).

[11] Sayer v. Sayer, 492 A.2d 238 (Del. 1985).

[12] Sayer, 492 A.2d at 238.

[13] Sayer, 492 A.2d at 239 (emphasis added).

> the parties' marriage, was not marital property because it fell within the exceptions of 13 Del. C. § 1513(b)(1) [now 1513(b)(1)b] and (2) [now 1513(b)(1)d]. However, the post-marital vesting of a pre-marital contingent right to trust income is not an "exchange for property acquired prior to the marriage". 13 Del. C. § 1513(b)(1). The "exchange" provision is intended to exclude from marital property only that which is "swapped" for pre-marital assets.

He continued:[14]

> The Family Court's alternative reasoning, that the vesting during marriage of a pre-marital contingency came within the "increase in value" exception, is also inappropriate. As this Court has recognized, the enhanced value provision is clearly directed to increases occurring from a price rise in pre-maritally owned assets. The value of a vested interest in a trust is qualitatively as well as quantitatively different from the contingency that the wife possessed prior to the marriage. Under such circumstances the exclusion of this trust interest by reliance upon the increase in value exception is not appropriate.

c. Defining Marital Property

(1) Introduction

The word "trust" does not appear in the statute. Nevertheless, courts have considered when trust interests constitute marital property. The below cases are instructive.

(2) A.I.D. v. P.M.D.

In A.I.D. v. P.M.D. (1979),[15] Chief Justice Herrmann of the Supreme Court of Delaware considered the availability of

[14] Sayer, 492 A.2d at 240 (emphasis added; citations and some internal quotation marks omitted).

[15] A.I.D. v. P.M.D., 408 A.2d 940 (Del. 1979).

income that the husband received during marriage from an inter vivos trust that became irrevocable prior to marriage. He concluded that, "we need not, and therefore do not, reach the issue of whether the trust income constituted marital property,"[16] but that, "we find no abuse of discretion in the award of $40,000 to the wife under all of the circumstances of this case, payable out of future trust income, if necessary."[17]

(3) Frank G.W. v. Carol M.W.

In Frank G.W. v. Carol M.W. (1983),[18] Justice Quillen of the Supreme Court of Delaware described the controversy as follows:[19]

> Husband and wife were married on July 29, 1967 and divorced on July 29, 1979. Husband's grandmother died on September 24, 1953. She created a testamentary trust which provided that upon the death of husband's mother, the trustee was to assign and pay over the corpus and accrued unpaid income of the trust to the mother's lineal descendants. When the husband's mother died on February 15, 1973, while the parties hereto were married, husband's share of the trust property was distributed to him.
>
> A second trust, an irrevocable inter vivo*s* trust, was established in 1956 by husband's mother for his benefit. The trustee, "in his absolute and sole discretion", was authorized to apply the net income of the trust to husband's benefit. Further, upon reaching the age of 25, husband was to receive the unexpended income and principal of the trust. Husband

[16] A.I.D., 408 A.2d at 942.

[17] A.I.D., 408 A.2d at 943.

[18] Frank G.W. v. Carol M.W., 457 A.2d 715 (Del. 1983).

[19] Frank G.W., 457 A.2d at 717.

> turned 25 on June 14, 1970, after he had been married for three years, and, pursuant to the trust provisions, received the corpus and accrued income from the 1956 trust at that time.
>
> A third trust, a testamentary trust, created by the husband's mother in 1957, vested in the husband at her death in 1973. This trust was subject to postponement of enjoyment. Partial distribution of this trust took place in 1975 and the final distribution of $106,630 took place in 1980, following the 1979 divorce.

Justice Quillen summarized the parties' positions as follows:[20]

> During ancillary proceedings, subsequent to Family Court's grant of husband's petition for divorce, a question arose as to whether the funds received from the trust constituted marital property or non-marital property. It appears from the start of the ancillary proceedings, wife conceded that the "rights" to the trusts were "vested" in the husband when the trusts were created prior to parties' marriage. But the wife argued that the "classical" future interest concept of "vesting" was not determinative of the issue of whether the property received by husband during marriage constituted non-marital or marital property. Instead, she argued, equitable principles required the Court to look to when the husband actually received the possessory interest in the property. When the trusts were dissolved, the parties were married; therefore, the

[20] Frank G.W., 457 A.2d at 717–18 (footnote omitted).

> wife argued, the property was subject to equitable distribution during ancillary proceedings. The husband took the position that, since the property was vested properly in him prior to marriage, there could be no argument that the property constituted marital property.

He noted:[21]

> These conflicting positions as to when the trust properties were "acquired" stem from the nature of the gift. The trusts were divided into multiple parts: present gifts of income and deferred gifts of enjoyment of the corpus.

The court held:[22]

> [W]e find that the meaning of "acquired" in our statute signifies the actual receipt or the right to receive the corpus of a trust. Thus, the assets of the corpus of the 1953 testamentary trust, the assets of the corpus of the 1956 inter vivos trust and the first distribution of the 1957 testamentary trust are marital property. The final $106,630.00 distribution of the 1957 testamentary trust which occurred after divorce, is non-marital property.

Following Frank G.W., it was not clear whether a future interest in a trust or in some other kind of property constituted marital property. The Delaware Supreme Court resolved this uncertainty in Gregg v. Gregg (1986).[23] There, the court held:[24]

[21] Frank G.W., 457 A.2d at 720 (citation omitted).

[22] Frank G.W., 457 A.2d at 727.

[23] Gregg v. Gregg, 510 A.2d 474 (Del. 1986).

[24] Gregg, 510 A.2d at 480 (citations omitted).

> Property interests not yet reduced to possession can be acquired during marriage within the meaning of § 1513, and if such an interest still exists at the time of a divorce, the interest is to be regarded as marital property. . . .
>
> In the case at bar, the husband acquired a future interest in the farm during the marriage. This future interest has a present value and will continue to have value until Mr. Gregg comes into actual possession of the land. Under the circumstances, we hold that the value of this existing future interest must be treated as marital property.

(4) Sayer v. Sayer

In the Sayer case mentioned above, Justice Moore said:[25]

> While we conclude that the Family Court erred in its judgment interpreting 13 Del. C. § 1513(b), it does not follow that Mrs. Sayer's entire lifetime interest in the trust income is marital property. As this Court has previously stated, "vesting, in and of itself, cannot determine proper characterization of property as marital or non-marital property."
>
> The question of what portion of trust income is marital property, when the right to receive the income vests during the marriage, has not previously been addressed in Delaware. However, this Court has considered a related aspect in Frank G.W. v. Carol M.W. The main issue there was whether property held in several trusts created before the

[25] Sayer, 492 A.2d at 240 (footnote, citations, and some internal quotation marks omitted).

> marriage, but distributed to the husband during marriage, was part of the marital estate. The Court held that the corpora of pre-marital trusts distributed during the marriage were marital property, while the assets dispersed after the divorce were not.
>
> After an extensive discussion of several approaches to the characterization of non-marital versus marital trust assets, this Court chose to adopt a possessory definition of the term "acquired". We stated that:
>
> > "Acquired" in 13 Del. C. § 1513(b) is to be defined to reflect the reality presented to our Courts—assets are to be characterized in regard to the actual or constructive possession by the parties. This definition reflects the statutory purpose of allocating available resources fairly between the parties in consideration of both monetary and non-monetary contributions made to the well-being of the family. Such a definition also enables our Courts to value trust assets in a logical and workable manner based on values which were subject to the control and enjoyment of the marital unit.

Turning to the present case, he wrote:[26]

> Applying this same rationale to a spouse's interest in trust income, we conclude that the term "acquired" in 13 Del. C. § 1513(b)

[26] Sayer, 492 A.2d at 240.

> means the actual receipt or the right to presently receive the trust income. That rationale is particularly compelling here in light of the spendthrift provision applicable to Mrs. Sayer's trust.

Although the court held that trust income received during marriage might be marital property, Justice Moore's opinion contains three caveats.

First, he noted that, "It is certain that the wife had no right whatever to receive any part of the corpus during the marriage."[27]

Second, he specified:[28]

> [I]t is apparent that the extent of the marital property derived from this trust could only be that which was paid or actually due Mrs. Sayer while she was married. The money that the wife receives after the divorce is non-marital property.

Finally, in remanding the case to the Family Court, Justice Moore noted:[29]

> [W]e do not imply that the husband is entitled to any distribution of Mrs. Sayer's trust income. That remains a question within the Family Court's sound discretion.

(5) Brady v. Tigue

In Brady v. Tigue (1988),[30] Judge Conner of the Delaware Family Court described a matter to be addressed as follows:[31]

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[27] Sayer, 492 A.2d at 239 n.1.

[28] Sayer, 492 A.2d at 241.

[29] Sayer, 492 A.2d at 241.

[30] Brady v. Tigue, 1988 Del. Fam. Ct. Lexis 6 (Del. Fam. Ct. June 23, 1988).

[31] Brady, 1988 Del. Fam. Ct. Lexis 6, at *2–3.

> Marion D. Tigue, Wife's mother, departed this life on June 30, 1985 having executed her last Will on August 1, 1983 in which she established a trust (designated as the "Brady Trust") for the benefit of Wife's children from her first marriage. Under this trust in her mother's Will, Wife is to receive income for her life and has the right to request the trustee to invade the principal to provide properly for the support, suitable recreation, and education of herself and her children. . . .
>
> Husband requests that the "Brady Trust" corpus be considered a marital asset, included in the marital estate, and that he be awarded 15% of its current value.

Judge Conner rejected the husband's request as follows:[32]

> Since the Supreme Court has held that the corpus of premarital trusts, distributed during the marriage are marital property, it follows that the corpus of a post-marital trust that would be distributed during the marriage would also constitute marital property. However, the corpus of this particular trust was not distributed to Wife during this marriage and may never be distributed to Wife. Whether Wife will ever receive any portion of this trust principal rests upon the sole discretion of the trustee. Husband's attempt to receive a share of this trust corpus can only be characterized as ridiculous. He requests that he be awarded 15% of an asset that Wife has no legal right

[32] Brady, 1988 Del. Fam. Ct. Lexis 6, at *3–4 (emphasis added; footnote and citation omitted).

> to enjoy any percentage of and may never receive any portion thereof. Without addressing the question of whether the right to invade the principal qualifies the trust corpus as marital property, Husband's request is rejected as totally inequitable, and in recognition of the testator's clear intent to protect her estate from her daughter's second husband for the benefit of her grandchildren.

Husband was not entitled to share in trust income either:[33]

> It also is academic whether Husband should be barred from sharing in the trust income paid to Wife during the marriage by the spendthrift provision set forth in paragraph 8 of Marion Tigue's Will. Husband made no request to share in any of the trust income that was paid during the marriage. The Supreme Court in Sayer v. Sayer, held that trust income received during the marriage constituted marital property. The Supreme Court, however, stopped short of ruling that the former spouse was entitled to any distribution of that trust income and left that question within the sound discretion of the trial Court. In this case, had Husband made a request to share, it most likely would have been rejected due to Wife's need for all this income to meet her own expenses, in the absence of interim alimony or spousal support.

(6) Continued Relevance of Precedents Questionable

The continued relevance of the cases summarized in (2)–(5), which were decided between 1979 and 1988, is questionable. This is because, as noted above, a new

[33] Brady, 1988 Del. Fam. Ct. Lexis 6, at *5–6.

exception was added to the statute in 1993. Under that exception,[34] property is not marital property if an individual spouse acquired the property from someone except the other spouse by bequest, devise, descent, or by gift and can confirm that by title, gift tax return, or contemporaneous affidavit. Most trust interests—principal and income—should be covered by that exception. To date, though, there is no pertinent caselaw.

(7) Discretionary Trust Interest Might Not Be "Property"

The above authorities have focused on distinguishing between marital property and nonmarital property. Nevertheless, as recognized by the Brady decision, a discretionary trust interest might not constitute "property" of any kind. It might be an "expectancy" that is not subject to division at all.

3. Allocating the Marital Property

Once the marital property is identified the court must allocate it. Marital misconduct is irrelevant.[35] In allocating marital property, the court is to consider factors including:[36]

(1) The length of the marriage;

(2) Any prior marriage of the party;

(3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties;

(4) Whether the property award is in lieu of or in addition to alimony;

(5) The opportunity of each for future acquisitions of capital assets and income;

(6) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property,

[34] 13 Del. C. § 1513(b)(1)a.

[35] 13 Del. C. § 1513(a).

[36] 13 Del. C. § 1513(a)(1)–(11).

including the contribution of a party as homemaker, husband, or wife;

(7) The value of the property set apart to each party;

(8) The economic circumstances of each party at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the party with whom any children of the marriage will live;

(9) Whether the property was acquired by gift, except those gifts excluded by paragraph (b)(1) of this section;

(10) The debts of the parties; and

(11) Tax consequences.

Although "trust" doesn't appear in the factors, courts have considered trust interests—whether marital property or nonmarital property—under factors (3),[37] (5),[38] and (7).[39] The Family Court has powers to ensure that orders are implemented.[40]

C. Alimony

1. Introduction

The Family Court may award interim alimony to a dependent party during a divorce proceeding.[41] If a marriage has lasted less than 20 years, a person is eligible for alimony for up to 50% of the term of the marriage.[42] If a marriage has lasted at least 20 years, a person is eligible for alimony for an unlimited time period.[43] Any person awarded alimony generally

[37] See In re Marriage of Tweedale v. Tweedale, 1996 WL 861492, at *7 (Del. Fam. Ct. Dec. 17, 1996); Preston v. Preston, 1999 WL 689292 (Del. Fam. Ct. May 11, 1999).

[38] See Gibson v. Gibson, 1986 Del. Fam. Ct. Lexis 226, at *11 (Del. Fam. Ct. Oct. 31, 1986); Brady, 1988 Del. Fam. Ct. Lexis 6, at *17–18.

[39] See Gibson, 1986 Del. Fam. Ct. Lexis 226, at *36–37.

[40] 13 Del. C. § 1513(d)–(f).

[41] 13 Del. C. § 1512(a).

[42] 13 Del. C. § 1512(d).

[43] 13 Del. C. § 1512(d).

has an ongoing duty to seek vocational training or employment.[44] A written waiver of the right to alimony before, during, or after marriage is binding.[45]

Unless otherwise agreed in writing, the obligation to pay alimony ceases upon the death, remarriage, or cohabitation of the receiving party.[46] A person receiving alimony must notify the other party of remarriage or cohabitation.[47]

In Du Pont v. Du Pont (1960),[48] Chancellor Seitz of the Delaware Court of Chancery considered:[49]

> [W]hether the defendant-husband's remainder interests under the three spendthrift trusts involved would be available either through action by the defendant or by judicial process to meet any separate maintenance order which might be entered for the plaintiffs.

The chancellor observed:[50]

> I do not believe the court has the right to strike down the spendthrift provisions at this stage at least under the present circumstances. Moreover, no implication concerning the result which might be reached at a later stage is to be drawn from the language employed.

He concluded:[51]

> The court rules that if plaintiffs prove their right to and need for support, in fixing the amount thereof the court will assume that no

[44] 13 Del. C. § 1512(e).

[45] 13 Del. C. § 1512(f).

[46] 13 Del. C. § 1512(g).

[47] 13 Del. C. § 1512(g).

[48] Du Pont v. Du Pont, 160 A.2d 586 (Del. Ch. 1960).

[49] Du Pont, 160 A.2d at 587.

[50] Du Pont, 160 A.2d at 588–89.

[51] Du Pont, 160 A.2d at 590.

> money is available through execution process or lien against defendant's interests in the trusts involved.

2. Determining Who is Entitled to Alimony

The Family Court may award alimony in the following circumstances:[52]

> (b) A party may be awarded alimony only if he or she is a dependent party after consideration of all relevant factors contained in subsection (c) of this section in that he or she:
>
> (1) Is dependent upon the other party for support and the other party is not contractually or otherwise obligated to provide that support after the entry of a decree of divorce or annulment;
>
> (2) Lacks sufficient property, including any award of marital property made by the Court, to provide for his or her reasonable needs; and
>
> (3) Is unable to support himself or herself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that he or she not be required to seek employment.

In Preston v. Preston (1999),[53] Judge Buckworth of the Delaware Family Court wrote:[54]

> As the Supreme Court of Delaware noted in Gregory J.M. v. Carolyn A.M., Dependency, while not defined by the Statute, means more than a minimal existence or subsistence level. Its meaning is to be measured against the standard of living established by the parties during their marriage.

[52] 13 Del. C. § 1512(b).

[53] Preston v. Preston, 1999 WL 689292 (Del. Fam. Ct. May 11, 1999).

[54] Preston, 1999 WL 689292, at *8 n.3 (citations omitted).

In denying alimony to Wife in In re Marriage of Tweedale v. Tweedale (1996),[55] Judge Tumas of the Delaware Family Court had to resolve the following issue:[56]

> [T]he court must determine whether the principal distribution of $1,000 per month that Wife receives from the trust created by her mother should be considered in determining her dependency upon Husband. Husband argues that it should, relying upon § 1512(b)(2) and (c)(1), and Grant v. Grant. Wife argues that it should not, relying upon the definition of "income" in 13 Del. C. § 513(b)(5).

The court held:[57]

> Under both § 1512(b)(2) and (c)(1), the court must consider the principal distribution that Wife receives each month from her mother's trust. In contrast to § 513(b)(5), which arguably draws a distinction between principal and income, § 1512(b)(2) and (c)(1) do not, and Wife's reliance upon the definition of "income" set forth in Chapter 5 (which addresses child and spousal support) therefore is misplaced.

In F.S. v. L.R.S. (2003),[58] Judge Kuhn of the Delaware Family Court gave the following guidance:[59]

> The Court notes the standards it abides by in determining a party's income. A party's income includes salaries, wages, commissions, and bonuses; and income from self-employment. The Court must also include dividends pensions, interest, trust income, annuities and capital gains.

[55] In re Marriage of Tweedale v. Tweedale, 1996 WL 861492 (Del. Fam. Ct. Dec. 17, 1996).

[56] Tweedale, 1996 WL 861492, at *10 (citation omitted).

[57] Tweedale, 1996 WL 861492, at *10.

[58] F.S. v. L.R.S., 2003 WL 22263037 (Del. Fam. Ct. Apr. 30, 2003).

[59] FS., 2003 WL 22263037, at *4 (emphasis added; footnote and internal quotation marks omitted).

3. Determining the Amount of Alimony

In awarding alimony, the court must consider factors including:[60]

> (1) The financial resources of the party seeking alimony, including the marital or separate property apportioned to him or her, and his or her ability to meet all or part of his or her reasonable needs independently;
>
> (2) The time necessary and expense required to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment;
>
> (3) The standard of living established during the marriage;
>
> (4) The duration of the marriage;
>
> (5) The age, physical and emotional condition of both parties;
>
> (6) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party;
>
> (7) The ability of the other party to meet his or her needs while paying alimony;
>
> (8) Tax consequences;
>
> (9) Whether either party has foregone or postponed economic, education or other employment opportunities during the course of the marriage; and
>
> (10) Any other factor which the Court expressly finds is just and appropriate to consider.

In Preston v. Preston (1999),[61] Judge Buckworth took Wife's trust income into account under factor (1).[62]

[60] 13 Del. C. § 1512(c).

[61] Preston v. Preston, 1999 WL 689292 (Del. Fam. Ct. May 11, 1999).

[62] 13 Del. C. § 1512(c)(1).

D. Child Support

In Delaware, parents have an equal duty to support a child under age 18 whether born in or out of wedlock.[63] Parents also have a duty to support a child until he or she receives a high school diploma or attains age 19, whichever first occurs.[64] The Family Court has jurisdiction to resolve issues of child support.[65]

The availability of trust resources arose in calculating child support in Hobbs v. Koly (1998).[66] Regarding Father's duty to contribute to private school tuition, Judge Crowell of the Delaware Family Court said:[67]

> Father has limited means with which to contribute to private school tuition and usually the Court would not expect him to contribute to private school expenses with such a limited income. Father's support obligation, however, is nominal in this case primarily because of Mother's substantial trust income. If Mother's income were similar to Father's, his support obligation, without the private school expense, would be considerably greater, actually more than twice what his present obligation would be even including the private school expense.

E. Premarital Agreements

Premarital agreements are enforceable in Delaware. Delaware's version of the Uniform Premarital Agreement Act (Premarital Agreement Act) is in Subchapter II of Chapter 3 of Title 13 of the Delaware Code.[68] Under the Premarital Agreement Act, a premarital agreement must be in writing and signed by both parties but need not be for consideration.[69] Such an agreement may cover specified matters[70] and takes effect upon marriage.[71] A premarital agreement is unenforceable in the following circumstances:[72]

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[63] 13 Del. C. § 501(a), (c). See Del. Fam. Ct. C.P.R. 500–507.

[64] 13 Del. C. § 501(d).

[65] 13 Del. C. §§ 507–508.

[66] Hobbs v. Koly, 1998 WL 915866 (Del. Fam. Ct. July 9, 1998).

[67] Hobbs, 1998 WL 915866, at *6.

[68] 13 Del. C. §§ 321–328.

[69] 13 Del. C. § 322.

[70] 13 Del. C. § 323.

[71] 13 Del. C. § 324.

[72] 13 Del. C. § 326(a).

> A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> (1) Such party did not execute the agreement voluntarily; or
>
> (2) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

The Family Court may resolve any question of unconscionability.[73]

The below cases are illustrative.

In James v. James (1995),[74] which predated adoption of the Premarital Agreement Act, the Family Court of Delaware sustained a premarital agreement.[75] The court reasoned:[76]

> I therefore hold that the Antenuptial Agreement into which the James' entered on December 11, 1986 is valid and enforceable as each spouse made fair and reasonable disclosure to the other of his or her financial status, each entered into the agreement voluntarily and freely, with the benefit of

[73] 13 Del. C. § 326(b).

[74] James v. James, 1995 WL 788187 (Del. Fam. Ct. May 18, 1995).

[75] James, 1995 WL 788187, at *20.

[76] James, 1995 WL 788187, at *20.

> independent, competent counsel, and the substantive provisions of the agreement are fair to each party. Thus, the Motion to Set Aside Antenuptial Agreement is hereby denied.

Similarly, in L.W. v. J.J.W. (2014),[77] which followed adoption of the Premarital Agreement Act, the Family Court of Delaware upheld a premarital agreement because:[78]

> The Court concludes that Wife entered into the Agreement voluntarily; that its terms were not unconscionable; that she was provided a fair and reasonable disclosure of Husband's assets; that she expressly waived any right to disclosure beyond that provided in the Agreement; and that she had or reasonably could have had adequate knowledge of Husband's financial obligations. Therefore, Wife's Motion to Set Aside Prenuptial Agreement is DENIED and Husband's Countermotion for Specific Performance of Premarital Agreement is GRANTED.

II. THIRD-PARTY TRUSTS IN DELAWARE

A. The Spendthrift-Trust Statute

Delaware's third-party spendthrift-trust statute[79] contains the following protections for a beneficiary's interest:

- The creditors of a trust beneficiary generally have only such rights against the beneficiary's interest in the trust or the property of the trust as are expressly granted to the creditors by the governing instrument and Delaware law.

- The provision's protections apply regardless of the nature or extent of the beneficiary's interest, whether or not the interest is subject to an exercise of discretion by the trustee or another fiduciary, and regardless of any action that the beneficiary takes or might take in the future.

- The protection is not limited to a certain amount.

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[77] L.W. v. J.J.W., 2014 WL 4203848 (Del. Fam. Ct. June 27, 2014).

[78] L.W., 2014 WL 4203848, at *13.

[79] 12 Del. C. § 3536.

- A beneficiary's interest that is not subject to the rights of his or her creditors is exempt from all legal or equitable process instituted by such creditors, including garnishment.[80]

- A beneficiary's creditor may not bring an action against the trustee or the beneficiary in order to:

  (1) compel the trustee, another fiduciary, or the beneficiary to notify the creditor of a distribution;
  (2) compel the trustee or the beneficiary to make a distribution, whether or not distributions from the trust are subject to the exercise of discretion by a trustee or another fiduciary;
  (3) prohibit the trustee from making a distribution to or for the benefit of the beneficiary, whether or not distributions from the trust are subject to the exercise of discretion by a trustee or another fiduciary; or
  (4) compel the beneficiary to exercise a power of appointment or revocation.

- A beneficiary's voluntary, involuntary, direct, or indirect assignment of an interest that the governing instrument prohibits him or her from assigning is void.

- A beneficiary may not waive a spendthrift clause's protections.

- The provision's protection extends to claims for forced-heirship, legitime, marital-elective-share, or similar rights.

- The provision's protection applies to a trust beneficiary's interest until trust property actually is distributed.

- A trustee may make direct payment of a beneficiary's expenses, even if the beneficiary has outstanding creditors.

- A trustee is not liable to a beneficiary's creditors for paying the beneficiary's expenses.

- A creditor of a trust beneficiary has no right against the beneficiary's interest if the beneficiary has a nongeneral inter vivos or testamentary power of appointment over the trust.[81]

[80] 12 Del. C. § 3536(a).

[81] 12 Del. C. § 3536(d).

- A creditor of a trust beneficiary has no right against the beneficiary's interest if the beneficiary has a general inter vivos or testamentary power of appointment over the trust unless and to the extent that the beneficiary actually exercises the power.[82]

- A beneficiary receiving payments from a charitable-remainder trust (CRT) may release his or her interest in favor of a succeeding charitable beneficiary, even if the CRT has a spendthrift clause.[83]

Three exceptions exist to the protection afforded by the statute—two statutory and one court-made.

B. Statutory Exceptions to Spendthrift-Trust Protection

The statute states that a creditor of a trust beneficiary may reach the assets of a trust if and to the extent that the beneficiary may revoke the trust in his or her own favor.[84]

In addition, a spendthrift clause in a self-settled trust does not prevent a creditor of the trustor-beneficiary from satisfying a claim from the trustor-beneficiary's interest to the extent that such interest is attributable to the trustor-beneficiary's contributions,[85] unless a trust meets the requirements of Delaware's Qualified Dispositions in Trust Act[86] or is a lifetime marital-deduction trust, credit-shelter trust, or other trust.[87] Nevertheless, a trust may include a provision authorizing the trustee to reimburse the trustor for income taxes attributable to the trust on a discretionary basis without causing the trust to become self-settled.[88] In addition, the possessor of any power of withdrawal (not just the possessor of a $5,000/5% power[89]) is not treated as the trustor due to the lapse, waiver, or release of the power.[90]

C. Narrow Court-Created Exception to Spendthrift-Trust Protection—Garretson v. Garretson (1973)

The Supreme Court of Delaware created an extremely narrow public-policy

[82] 12 Del. C. § 3536(d)(1), (2).

[83] 12 Del. C. § 3536(e).

[84] 12 Del. C. § 3536(d)(3).

[85] 12 Del. C. § 3536(c).

[86] 12 Del. C. §§ 3570–3576.

[87] 12 Del. C. § 3536(c)(1).

[88] 12 Del. C. § 3536(c)(2). See Rev. Rul. 2004-64, 2004-2 CB 7 (July 6, 2004).

[89] See Internal Revenue Code §§ 2041(b)(2), 2514(c).

[90] 12 Del. C. § 3536(c)(2).

exception to the protection provided by 12 Del. C. § 3536 in the 1973 Garretson v. Garretson case.[91] In Garretson, the wife filed an action in the Court of Chancery for the following reason:[92]

> In order to obtain jurisdiction over the husband, now a resident of the State of Florida, the plaintiff obtained a sequestration order under which the income from the testamentary trust, payable to the husband, was seized in order to coerce his appearance in the Court of Chancery.

The court held that:[93]

> It is to be noted that both s 3536 and Item II of the will provide in terms that the trust property shall "not be subject to the rights of the creditors of (such) beneficiary, (and) shall be exempt from execution, attachment, distress for rent, on behalf of such creditors." The question thus presented is whether or not a wife, seeking support from her husband, is a creditor within the meaning of the word as it is used in s 3536 and in Item II of the will. If the wife is a creditor, then seizure of any of the trust assets on her behalf is prohibited by the terms of s 3536 and of Item II of the will. The Chancellor concluded that the wife was not a creditor in that meaning of the word, and we agree with that conclusion.
>
> An action brought by a wife seeking separate maintenance from her husband who has deserted her is an attempt on her part to compel the performance of a duty imposed by law upon the husband to support his wife and dependents.
>
> The weight of authority is to the effect that a wife seeking such relief is not a creditor and is not bound by the spendthrift provisions of a trust from reaching the trust assets. A wife, under such circumstances, can hardly be a creditor who is defined as "one to whom a debt is owing by another person who is the debtor"…

[91] Garretson v. Garretson, 306 A.2d 737 (Del. 1973).

[92] Garretson, 306 A.2d at 739.

[93] Garretson , 306 A.2d at 740–41.

Garretson allowed a current—but not a divorced—spouse to reach the assets of a third-party spendthrift trust for support,[94] but Nevada practitioners often misrepresent the breadth of this court-created exception. Typical is the following statement in a January 2016 article:[95]

> Delaware provides that spouses who are beneficiaries of discretionary trusts do not receive protection of their trust assets from alimony claims of a divorced spouse.

In the Garretson case, the Supreme Court of Delaware noted that, "we…consider that…the record discloses solely that the individual parties are still husband and wife."[96] The court concluded:[97]

> It of course remains to be seen, if the husband appears generally in this litigation and subjects himself to the jurisdiction of the Court of Chancery, whether, on final hearing, his contentions with regard to his Mexican divorce will be ultimately upheld, in which event we assume that the wife would lose her status as wife, and there may be an entirely different situation then facing the Chancellor. This question, however, is not before us, and we make no ruling upon the future outcome of the course of the litigation.

D. Cases Refusing to Create Exception to Spendthrift-Trust Protection

1. Introduction

In Garretson, the Supreme Court of Delaware found that a wife who sought support from a husband who had deserted her was not a "creditor" under 12 Del. C. § 3536. Subsequently, three plaintiffs asked the Court of Chancery to create new judicial exceptions to the statute. All three efforts were unsuccessful.

2. Gibson v. Speegle (1984)

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[94] Garretson, 306 A.2d at 737.

[95] Richard A. Oshins & Steven G. Siegel, The Anatomy of the Perfect Modern Trust—Part 1, Est. Plan., Jan. 2016, at 3, 12 (footnote omitted).

[96] Garretson, 306 A.2d at 739.

[97] Garretson, 306 A.2d at 742.

In the Gibson v. Speegle case,[98] Vice Chancellor Berger set the stage as follows:[99]

> This is the decision on the petition and proof of claim filed by Aetna Casualty and Surety Company of America ("Aetna") seeking an order requiring the payment of Aetna's outstanding judgment against Gary Barwick ("Barwick") from the proceeds of a partition sale. One-half of those proceeds, or the sum of $12,799.20, is the share allocated to Arlene B. Gibson ("Gibson"), trustee of a testamentary trust created for the benefit of Barwick by his mother, Virginia Barwick. Gibson contends that Virginia Barwick's will created a spendthrift trust and that Aetna, as a "creditor" within the meaning of 12 Del. C. § 3536, is not entitled to satisfy its judgment from the trust assets.

The vice chancellor first rejected the plaintiff's public-policy argument:[100]

> Aetna contends that ours would be a sorry system of justice if the spendthrift statute were applied to allow a criminal such as Barwick to avoid having to pay for his crimes. Aetna suggests that its position is not unlike that of a wife suing her husband for support and attempting to reach her husband's interest in a spendthrift trust. This Court has concluded that a husband in those circumstances should not be allowed to enjoy the benefits of the trust while neglecting his legal obligation to support his dependents. The husband-wife situation, however, is distinguishable because a spouse has a statutory duty to support the other spouse and their children. Aetna has not cited any authority indicating that a tort-feasor owes a similar duty to a tort claimant.

She then considered—and expressed sympathy for—the plaintiff's contention that a tort victim should not be considered a "creditor" under the statute:[101]

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[98] Gibson v. Speegle, 184 Del. Ch. Lexis 475 (Del. Ch. May 30, 1984), remanded, 494 A.2d 165 (Del. 1984).

[99] Gibson, 184 Del. Ch. Lexis 475, at *1.

[100] Gibson, 184 Del. Ch. Lexis 475, at *5 (citations omitted).

[101] Gibson, 1984 Del. Ch. Lexis 475, at *6 (citations omitted).

> The term "creditor" is not defined in the statute and has not been construed in Delaware other than in the context of the husband and wife support situation described above. However, the authors of several respected treatises on trusts have concluded that tort claimants should not be considered "creditors" for purposes of a spendthrift trust provision. Their reasoning is sound. If a business extends credit to a spendthrift trust beneficiary, it does so at its own risk. A person who is injured by a tort-feasor, by contrast, did not choose to do business with the tort-feasor and should not be prevented from receiving compensation for his injuries by the terms of a spendthrift trust.

Nonetheless, Vice Chancellor Berger, deferring to the decision of the general assembly, dismissed this argument as well:[102]

> In the absence of a statute, I would not hesitate to adopt this view and allow Aetna's claim. I am not at all comfortable with the fact that Virginia Barwick, by use of a spendthrift trust, assisted her son in avoiding his obligation to pay for his crimes. However, it is not the Court's function to write the law but only to interpret it. The statute enacted by the General Assembly contains no exceptions, Dean Griswold proposed a form of statute which, he believed, should retain the desirable elements of spendthrift trusts while eliminating most of the levels which accompany such trusts in their unrestrained form as early as 1947. The proposed statute, which contained an exception for tort claimants, among others, was available to the General Assembly in 1959 when § 3536 was amended. The fact that such a modification was not enacted leaves me no choice but to conclude that the General Assembly intended § 3536 to be an "unrestrained" form of spendthrift provision. As a result, I reluctantly conclude that Aetna is a creditor within the meaning of § 3536 and its proof of claim must be denied.

3. Parsons v. Mumford (1989)

[102] Gibson, 1984 Del. Ch. Lexis 475, at *6–7 (citations omitted).

The next case was Chancellor Allen's 1989 decision in Parsons v. Mumford,[103] in which he described the controversy as follows:[104]

> Plaintiffs are judgment creditors of the individual defendant. The corporate defendant is trustee of a trust in which the judgment debtor has a remainder interest. The suit seeks, among other relief, an order directing the trustee, upon termination of the trust, to pay over a portion of the remainder interest, if then due to the judgment debtor, to plaintiffs in satisfaction of their judgments.

Following Gibson, the chancellor concluded that, "while there are strong equities in favor of the limited remedy sought, the provisions of Section 3536 of Title 12 prohibit it in these circumstances."[105]

4. Mennen v. Fiduciary Trust International of Delaware (2017)

The latest controversy involved trusts created by George S. Mennen in 1970. In this case, the beneficiaries of one trust attempted to reach the assets of a second trust in order to remedy investment losses caused by the principal beneficiary of the second trust in his capacity as trustee of the first trust. In her 2015 final report,[106] Master LeGrow observed that:[107]

> Whatever my personal views regarding the policy supporting spendthrift clauses, I am bound by state statute and controlling precedent to conclude that the spendthrift clause bars the plaintiffs from satisfying the judgment against the individual trustee from the assets in the individual trustee's trust.

She therefore recommended that the Court of Chancery hold that:

- A person with a tort claim is a "creditor" under § 3536;[108]
- A public-policy exception to § 3536 should not be created for tort claims;[109]

[103] Parsons v. Mumford, 1989 WL 63899 (Del. Ch. June 14, 1989).

[104] Parsons, 1989 WL 63899, at *1.

[105] Parsons, 1989 WL 63899, at *5 .

[106] Mennen v. Wilmington Tr. Co., 2015 WL 1897828 (Del. Ch. Apr. 24, 2015).

[107] Mennen, 2015 WL 1897828, at *1.

[108] Mennen, 2015 WL 1897828, at *6.

[109] Mennen, 2015 WL 1897828, at *7.

- A public-policy exception to § 3536 should not be created for claims against a "persistent wrongdoer";[110] and
- The remedy of "impoundment" is not available.[111]

After procedural issues were resolved,[112] Vice Chancellor Laster adopted Master LeGrow's final report as written early in 2017:[113]

> I would like to think that I could improve on then-Master LeGrow's decision, but I know that I cannot.

The Supreme Court of Delaware affirmed:[114]

> This 17th day of May 2017, after careful consideration of the parties' briefs and the record on appeal, we have determined that the Court of Chancery's February 27, 2017 order should be affirmed based on the well-reasoned April 24, 2015 Master's Final Report.

E. Drafting Suggestion

In light of Garretson, Delaware attorneys routinely include language, such as that highlighted below, in spendthrift clauses in third-party spendthrift trusts:

> A beneficiary may not alienate or in any other manner assign or transfer his or her interest in any trust hereunder, and no one (including a spouse or former spouse) may attach or otherwise reach any interest of any beneficiary hereunder to satisfy a claim against that beneficiary, whether the claim is legal or equitable in origin.

Delaware judges probably will exercise restraint in refusing to honor such a provision because, at least since 2000,[115] a Delaware statute has provided in relevant part:[116]

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[110] Mennen, 2015 WL 1897828, at *8.

[111] Mennen, 2015 WL 1897828, at *12.

[112] Mennen v. Wilmington Tr. Co., 2017 WL 751201, at *1 (Del. Ch. Feb. 27, 2017).

[113] Mennen, 2017 WL 751201, at *2.

[114] Mennen v. Fiduciary Tr. Int'l of Del., 2017 WL 2152478, at *1 (Del. May 17, 2017).

[115] 72 Del. Laws 388, § 9 (2000).

[116] 12 Del. C. § 3303(a).

> The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this section. It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.

F. The Discretionary-Trust Statute

Black's Law Dictionary defines a "discretionary trust" as, "a trust in which the settlor has delegated nearly complete or limited discretion to the trustee to decide when and how much income or property is distributed to a beneficiary."[117] Historically, Delaware did not have a statute that covered the ability of creditors to reach a beneficiary's interest in such a trust. Given the uncertainty that now exists on this issue, however, Delaware has adopted legislation in order to provide that:

- A beneficiary who is eligible to receive distributions from a trust in the trustee's discretion has a discretionary interest;[118]
- A creditor may not directly or indirectly compel the distribution of a discretionary interest, except to the extent expressly granted by the terms of a governing instrument in accordance with Delaware's third-party spendthrift-trust statute;[119]
- A court may overturn a trustee's decision regarding a discretionary interest only if the court finds that the trustee abused its discretion within the meaning of Restatement (Second) of Trusts § 187, not Restatement (Third) of Trusts §§ 50 and 60.[120]

The Scott treatise explains the difference between the approaches of the Second and Third Restatements of Trusts as follows:[121]

> Under the Second Restatement, the relevant inquiry seems to have been whether "reasonable men might differ" on the propriety of the exercise of the power. The inference is that the trustee's decision should stand, in the absence of a judicial finding that no reasonable person could conclude that the trustee

[117] Black's Law Dictionary at 1742 (10th ed. 2014).

[118] 12 Del. C. § 3315(b).

[119] 12 Del. C. § 3536.

[120] 12 Del. C. § 3315(a). See Merrill Lynch Tr. Co., FSB v. Campbell, 2009 WL 2913893, at *10 (Del. Ch. Sept. 2, 2009).

[121] 3 Scott and Ascher on Trusts § 18.2.6 at 1361 n.2 (citations omitted).

had acted reasonably. Under the Third Restatement, the relevant inquiry seems to be whether "the trustee's decision is one that would not be accepted as reasonable by persons of prudence."

G. Comment

In sum, Delaware third-party spendthrift and discretionary trusts provide beneficiaries with formidable protection from the claims of their creditors, including in the divorce setting.

2017 DELAWARE TRUST CONFERENCE
WINNING THE WEALTH MANAGEMENT GAME

"DEAL OR NO DEAL" - THE INTERSECTION OF THIRD-PARTY TRUSTS AND DIVORCE LAW

NEW JERSEY LAW

October 25, 2017
3:30-4:30 p.m.
Session 6

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I. DIVORCE IN NEW JERSEY

A. Introduction

New Jersey's law on divorce can be found in Chapter 34 of Title 2A, Subtitle 6 of New Jersey Statutes Annotated - Nullity of Marriage--Alimony and Maintenance--Care and Custody of Children. Article 1 provides separate means to terminate a marriage or civil union: nullification, divorce, dissolution of a civil union, divorce from bed and board and legal separation.[1]

B. Property Division

With exceptions for nullification, upon termination of a marriage or civil union, the court will divide the couple's property and also will determine whether to award alimony or child support. In dividing the couple's property, first, the court will decide which property is eligible or ineligible for equitable distribution (i.e., whether it is marital property); second, the court will determine the value of the marital property; and third, the court will equitably divide the marital property between the couple.[2]

1. Identifying Marital Property

Marital property is defined as any type of property which is legally and beneficially acquired by [the parties] or either of them during the marriage, excluding property legally or beneficially acquired during a marriage by either party by way of gift, devise or intestate succession.[3]

2. Trust Property

Property transferred in trust by a third party for the benefit of a beneficiary (a "third party trust"), being in the nature of a gift or an inheritance, is not marital property of such beneficiary.[4] Subsection (h) provides in pertinent part:[5]

> Except as provided in this subsection, in all actions where a judgment of divorce, dissolution of civil union, divorce from bed and board or legal separation from a partner in a civil union couple is entered the court may make such award or awards to the parties,

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[1] N.J. Stat. Ann. § 2A:34-1 (nullification); N.J. Stat. Ann. § 2A:34-2 (divorce); N.J. Stat. Ann. § 2A:34-2.1 (dissolution of civil union); N.J. Stat. Ann. § 2A:34-3 (divorce from bed and board/legal separation).

[2] *DeVane v. DeVane*, 616, A. 2d 1350, 1351 (N.J. Super. Ch. 1992), *aff'd*, 655 A.2d 970 (N.J. Super. A.D. 1995); *see also* N.J. Stat. Ann. § 2A:34-23.1.

[3] N.J. Stat. Ann. § 2A:34-23(h).

[4] N.J. Stat. Ann. § 2A:34-23(h).

[5] *Id.*

> in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage or civil union. However, all such property, real, personal or otherwise, legally or beneficially acquired during the marriage or civil union by either party by way of gift, devise, or intestate succession shall not be subject to equitable distribution, except that interspousal gifts or gifts between partners in a civil union couple shall be subject to equitable distribution. The court may not make an award concerning the equitable distribution of property on behalf of a party convicted of an attempt or conspiracy to murder the other party.

Prior to 1980, trust property was treated as marital property if the divorcing spouse had access to, or control over, it.[6] In 1980, the state legislature amended the statute to add the proviso that "property, real or personal or otherwise, legally or beneficially acquired during [a] marriage by either party by way of gift, devise or intestate succession, shall not be subject to equitable distribution...."[7] According to the New Jersey Senate Judiciary Committee and the then governor's office, the purpose of this amendment was:

> To permit a compulsory division of the asset between the recipient and his spouse is contrary to the *natural* expectations of the recipient and the giving parent or relative. Since the efforts of neither spouse resulted in the gift, devise or bequest, it need not be regarded as a marital asset under the partnership concept of marriage. [Governor's Statement On Assembly Bill 762 (2nd OCR) (emphasis added).][8]

Accordingly, trust property, both income and principal, should not be considered marital property.[9]

A related question is whether trust property, whether income or principal, is considered to be marital property after it is distributed from the trust to the beneficiary. Based on the statutory exception for gifts and inheritances, distributed trust property should not be considered marital property. Although distributed, it should retain its initial character as a gift, thereby disqualifying it as marital property.

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[6] *See e.g., Mey v. Mey*, 373 A.2d 664 (NJ Super. 1977), *aff'd,* 398 A.2d 88 (NJ 1979).

[7] *Landwehr v Landwehr,* 545 A.2d 738, 741 (NJ 1988) (emphasis added).

[8] *Id*.

[9] *See also Tannen v. Tannen*, 3 A.3d 1229, 1237 n. 5, *aff'd*, 31 A.3d 621 (NJ 2011) (recognizing statutory amendment to exclude gifts and inheritances from marital property).

One exception to the rule that gifts and inheritances are not subject to equitable distribution is where there has been an interspousal gift. The statute provides:[10] "… all such property, real, personal or otherwise, legally or beneficially acquired during the marriage or civil union by either party by way of gift, devise, or intestate succession shall not be subject to equitable distribution, except that interspousal gifts or gifts between partners in a civil union couple shall be subject to equitable distribution." Where the wife contributed her separate property toward the purchase of the marital home, but failed to document that this the contribution was not intended as a gift to her husband, the court refused to treat the wife's contribution to the purchase of the home as the wife's separate property for purposes of equitably dividing the home.[11]

In contrast to third party trusts, property transferred during the marriage by one spouse to a trust for himself or herself (a "self-settled trust") probably retains its character as marital property, provided that the property originally was acquired during the marriage by the settlor. Property transferred to a self-settled trust prior to the marriage may be excluded as marital property as property not acquired during the marriage.

3. Allocating Marital Property

Once the court identifies marital property, it must then equitably divide it between the parties. When determining how to equitably divide assets, the court must consider an extensive list of sixteen factors listed in N.J. Stat. Ann. § 2A:34-23.1, which provides in pertinent part as follows:[12]

> In making an equitable distribution of property, the court shall consider, but not be limited to, the following factors:
>
> a. The duration of the marriage or civil union;
>
> b. The age and physical and emotional health of the parties;
>
> c. The income or property brought to the marriage or civil union by each party;
>
> d. The standard of living established during the marriage or civil union;
>
> e. Any written agreement made by the parties before or during the marriage or civil union concerning an arrangement of property distribution;

[10] N.J. Stat. Ann. § 2A:34-23(h) (emphasis added).

[11] *Pascale v. Pascale*, 644 A.2d 638, 640-641 (N.J. Super. A.D. 1994), *rev'd in part on other grnds*, 660 A.2d 485 (N.J. 1995). *See also Wainer v. Wainer*, 2017 WL 2979399 (unpub. App. Div. July 13, 2017), where proceeds of a gift lost their non-marital status upon commingling in an account used to pay various marital expenses.

[12] N.J. Stat. Ann. § 2A:34-23.1.

f. The economic circumstances of each party at the time the division of property becomes effective;

g. The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage or civil union;

h. The contribution by each party to the education, training or earning power of the other;

i. The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker;

j. The tax consequences of the proposed distribution to each party;

k. The present value of the property;

l. The need of a parent who has physical custody of a child to own or occupy the marital residence or residence shared by the partners in a civil union couple and to use or own the household effects;

m. The debts and liabilities of the parties;

n. The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse, partner in a civil union couple or children;

o. The extent to which a party deferred achieving their career goals; and

p. Any other factors which the court may deem relevant.

While the ownership of non-marital property, such as a gift or inheritance, is not listed in the statute, it is clear that such non-marital property is a resource which may be taken into account as part of an equitable division of marital assets.[13] In *Van Horn*, the Appellate Division upheld the trial court's decision to award the husband all of the marital assets based on the substantial inheritance the wife received at her father's death.[14] There, the couple lived a very modest lifestyle during the marriage. After the couple filed for divorce, the wife's father

[13] *Van Horn v. Van Horn*, No. A-3813-05T3, 2008 N.J. Super. Unpub. LEXIS 797, *26 (App. Div. July 14, 2008) (quoting N.J. Stat Ann. § 2A:34-23.1).

[14] 2008 N.J. Super. LEXIS 797, at *12.

died, leaving a net estate in excess of $6 million. The marital assets – worth approximately $230,000 – were a small fraction of the value of the wife's inheritance. The trial court, mindful that the equitable distribution statute requires a court to consider the economic circumstances of each party at the time of the division, awarded all of the marital assets to the husband based on the magnitude of the inheritance compared to the value of the marital assets.

It should be noted that the wife's father died intestate, and all of his estate passed to the wife, his sole intestate heir. There was no question that the wife had full access to the inheritance. This leaves open a question as to whether *Van Horn* would have been decided differently if the wife's father had bequeathed his estate to her in the form of a discretionary trust. Although *Tannen,* discussed below, did not involve an equitable division dispute, its analysis as to whether the wife's interest in a discretionary trust could count as a resource for purposes of awarding alimony is instructive.[15]

C. Alimony

1. Determining Alimony

In the case of alimony, the court must also take multiple factors into account in fashioning an appropriate alimony award. The statute provides in pertinent part:[16]

> In all actions brought for divorce, dissolution of a civil union, divorce from bed and board, legal separation from a partner in a civil union couple or nullity the court may award one or more of the following types of alimony: open durational alimony; rehabilitative alimony; limited duration alimony or reimbursement alimony to either party. In so doing the court shall consider, but not be limited to, the following factors:
>
> (1) The actual need and ability of the parties to pay;
>
> (2) The duration of the marriage or civil union;
>
> (3) The age, physical and emotional health of the parties;
>
> (4) The standard of living established in the marriage or civil union and the likelihood that each party can maintain a reasonably comparable standard of living, with neither party having a greater entitlement to that standard of living than the other;
>
> (5) The earning capacities, educational levels, vocational skills, and employability of the parties;

[15] *Tannen v. Tannen*, 3 A.3d 1229, *aff'd*, 31 A.3d 621 (2011).

[16] N.J. Stat. Ann. § 2A:34-23(b).

(6) The length of absence from the job market of the party seeking maintenance;

(7) The parental responsibilities for the children;

(8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;

(9) The history of the financial or non-financial contributions to the marriage or civil union by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;

(10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;

(11) The income available to either party through investment of any assets held by that party;

(12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment;

(13) The nature, amount, and length of pendente lite support paid, if any; and

(14) Any other factors which the court may deem relevant.

2. Trust Property As A Resource For Purposes Of Determining Alimony

In determining whether and to what extent a supporting spouse owes alimony, income available to a divorcing party through "investment of any assets held by that party" is a factor to be considered by the court.[17] The supported spouse's ability to contribute to his or her needs is also taken into account.[18] Even if an asset is an inheritance and therefore excluded from equitable division, the income which it generates can be taken into account for purposes of determining alimony.[19] Similarly, trust property is generally not subject to equitable division,

[17] N.J. Stat. § 2A:34-23(b)(11).

[18] *Tannen v. Tannen*, 3 A.3d 1229, 1236 *aff'd*, 31 A.3d 621 (2011), *citing*, *Aronson v. Aronson*, 585 A.2d 956 (N.J. Super. A.D. 1991).

[19] *Aronson v. Aronson*, 585 A.2d 956, 960 (N.J. Super. A.D. 1991).

but income generated by the trust could be considered for alimony purposes, depending on the terms of the trust or the history of trust distributions.[20]

The trust at issue in *Tannen* was a discretionary trust for the sole benefit of the divorcing wife that permitted distributions to the wife in the trustees' discretion for her health, education, maintenance or support ("HEMS").[21] The wife and her parents were co-trustees. The trust was primarily settled by the wife's parents, but the wife also contributed the family home to the trust. The family home originally had been purchased for the wife by her parents and titled in her sole name.

The trust paid for family expenses during the marriage. It paid real estate taxes on the family home, half the cost of a housekeeper, extensive capital improvements to the home, and private school tuition for the children. The trustees turned down a request to pay for a vacation for the wife and her friends.

The *Tannen* trial court "imputed" or treated as if the wife would earn, $4,000 of income from the trust, per month, and thereby reduced the amount of alimony payable by the husband.[22] The court reasoned that the wife had a fiduciary duty to the husband to seek trust income from the trust to support herself (thereby implicitly reducing the husband's alimony obligation).[23] The court found that the wife breached her fiduciary duty by unreasonably refusing to seek trust distributions. The judge concluded, under the *Restatement (Third) of Trusts* § 50 comment d(2) (2003), that the HEMS standard set forth in the trust obligated the trustees to distribute trust property to support the wife's lifestyle and should be considered a resource for alimony purposes.[24] The trial court ordered the trustees to pay $4,000 of income to the wife each month and to continue paying the housing and housekeeping expenses with respect to the family home.[25]

On appeal, the Appellate Division disagreed that divorcing spouses owe a fiduciary duty to one another. The standard is for divorcing spouses to act fairly.[26] The court acknowledged that the essence of a fiduciary duty is that one acts primarily in the interest of another. This level of diligence is not required of divorcing spouses.[27]

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[20] *Tannen v. Tannen*, 3 A.3d 1229, *aff'd*, 31 A.3d 621 (2011).

[21] The wife's father also established two minor's trusts and a dynasty trust for the grandchildren. The action against the dynasty trust was dismissed at trial, but the two minor's trusts remained in the litigation through trial.

[22] *Tannen v. Tannen*, 3 A.3d 1234-1235.

[23] *Id*.

[24] *Id.*

[25] *Id.*

[26] *Tannen*, 3 A.3d at 1237.

[27] *Id*.

The Appellate Division acknowledged that the court can consider trust income to determine spousal support or alimony provided the beneficiary has control of the trust income or the power to "tap the income source."[28]

To determine whether, in the context of a trust with a HEMS standard, the beneficiary has the power to tap the income source, the Appellate Division compared the *Restatement (Second) of Trusts* § 155 (finding a beneficiary of a discretionary trust had almost no power to compel a distribution while a beneficiary of a support trust had limited ability to compel a distribution) to the *Restatement (Third) of Trusts* § 50 (finding a beneficiary had greater rights to compel a distribution from a discretionary trust whether it has a support standard or not).[29] The court, acknowledging the few cases decided under the *Restatement (Third) of Trusts* with respect to such issue, compared to the many decided under the *Restatement (Second) of Trusts*, declined to adopt the position of the *Restatement (Third) of Trusts.*[30]

The court highlighted the provisions of the trust agreement which circumscribed the wife's ability to compel trust distributions, namely, a provision that the trustees make trust distributions in their "sole discretion," a provision stating the Grantors' intent that the wife not be able to compel distributions and a spendthrift clause. Accordingly, the Appellate Division held that "under the existing law of this state [the wife's] beneficial interest in the [trust] was not an 'asset held by' her."[31] Accordingly, it was improper for the trial court to impute income from the trust to the wife in determining the husband's alimony obligation.[32] The court further held that the court lacked power to compel the trustees of the trust to pay imputed income to the wife and expenses related to the home held in trust.[33] The appellate court remanded the case to the trial court to re-determine the proper amount of alimony and child support.

Despite rejecting the trial court's imputation of income from the trust, the appellate court instructed the trial court to "consider the historical record of payments made by the [trust]" on the wife's behalf for purposes of recalculating the alimony to be paid to her by the husband.[34] In particular, the record showed that the trust owned the marital home, did not charge rent, paid the property taxes, paid for home improvements and paid one-half of the housekeeper's salary. Reviewing this record, the appellate court directed the trial judge not to turn "a blind eye to this reality. To do so would clearly result in a windfall to [the wife] and be

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[28] *Tannen*, 3 A.3d at 1237, quoting *Aronson v. Aronson*, *supra*.

[29] *Tannen*, 3 A.3d at 1239-1240.

[30] *Id*. at 1243, *citations omitted*.

[31] *Id.* at 1244.

[32] *Id*.

[33] *Id*.

[34] *Tannen*, 3 A.3d at 1246.

entirely inequitable to [the husband]."[35] The appellate court instructed the trial court on remand to take the history of trust payments into account in assessing the wife's "actual needs" to maintain her lifestyle, the standard which forms the basis for determining alimony.[36] As a result, the trial court on remand would not be permitted to impute trust income to the wife but was encouraged to reduce alimony based on the trust's history of payments for the wife's benefit.

D. Child Support

1. Determining Child Support

The court will consider multiple factors when determining whether to award child support, including all sources of income and assets of each parent. The statute provides in pertinent part:[37]

> In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, the court in those cases not governed by court rule shall consider, but not be limited to, the following factors:
>
> (1) Needs of the child;
>
> (2) Standard of living and economic circumstances of each parent;
>
> (3) All sources of income and assets of each parent;
>
> (4) Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment;
>
> (5) Need and capacity of the child for education, including higher education;
>
> (6) Age and health of the child and each parent;
>
> (7) Income, assets and earning ability of the child;
>
> (8) Responsibility of the parents for the court-ordered support of others;

[35] *Id.*

[36] *Id.*

[37] N.J. Stat. Ann. § 2A:34-23(a).

(9) Reasonable debts and liabilities of each child and parent; and

(10) Any other factors the court may deem relevant.

2. Trust As Resource For Determining Child Support

A trust benefiting the child's parent could be considered as a source of income if income can properly be imputed to a parent from the trust, since income of each parent is to be taken into account for purposes of determining the amount of child support.[38]

Nevertheless, in *Tannen*, the court held that the trust income from the wife's trust could not be imputed to the wife for purposes of determining alimony to be paid by the husband because the wife did not have control over trust distributions. The court similarly rejected the imputation of income from the trust to the wife for purposes of determining the husband's obligation to pay child support.[39]

A trust benefiting the child could also be considered for purposes of awarding child support, depending on the terms of the trust.[40] Notwithstanding, in *Tannen*, trusts established by the wife's father for the divorcing couple's children were dismissed from the litigation on appeal.[41] There, the trusts for the children were discretionary. No distributions had been made from the trusts, and the trusts prohibited distributions that would discharge any person's support obligation. The trial court had ordered the husband to add the trusts, including the children's trusts, as parties to the divorce action, and had also ordered the wife's trust to pay $4,000 per month to her and to pay certain other living expenses. On appeal, the court reversed, finding that the trial court lacked power to compel the wife's trust to make payments to her.[42] The appellate court further reasoned that since the trial court could not compel the trusts to make disbursements to the wife, the children's trusts were improperly added as parties to the litigation.[43]

In *P.W.H. v. B.J.H.*, the wife sought to compel the payment of college expenses from trusts which the divorcing couple had previously established for their children.[44] The children's trusts prohibited disbursements to pay for legal support obligations. It can be inferred that the trusts were discretionary trusts. The trial court rejected the wife's demand in part because the court could not order the trustees to pay for that which the parents were legally

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[38] . *See* N.J. Stat. Ann. § 2A:34-23(a)(3).

[39] *Id*. at 1247, n. 7.

[40] See N.J. Stat. Ann. § 2A:34-23(a)(7) (referring to income, assets and earning ability of the child).

[41] *Tannen*, 3 A.3d at 1244.

[42] *Tannen*, 3 A.3d at 1243.

[43] *Id*. at 1244.

[44] *P.W.H. v. B.J.H.*, 2015 WL 3511889 (unpubl. App. Div. June 5, 2015).

obligated to pay.[45] Citing *Tannen, supra*., the court also reasoned that it could not "'compel trustees to take an action that is within his discretion under the terms of the trust agreement absent a showing that the trustee has breached his fiduciary duty or abused his discretionary powers [,]' which was not proven here."[46] *1. The Appellate Division confirmed.[47]

II. ENFORCEMENT ACTIONS AGAINST TRUSTS

Once the court enters the divorce decree, there are sometimes lingering causes of action when a party fails to comply with the terms of divorce. In that case, an enforcement action may be pursued against the former spouse. The question is whether a remedy can be imposed upon the trust or assets held in trust benefiting the defaulting former spouse.

A. Enforceability of Spendthrift Clauses

New Jersey adopted its own version of the Uniform Trust Code ("UTC") in 2016, which addresses creditors' claims against trusts. Generally, spendthrift trusts are enforceable in New Jersey.[48] A valid spendthrift clause must restrain voluntary and involuntary transfers of a beneficiary's interest.[49] In *Connelly*, a case where an individual filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code, the court held that the trust property was excluded from her bankruptcy estate, and therefore off-limits to third party creditors.[50]

While it seems clear that a spendthrift clause is enforceable against claims of third party creditors, a spendthrift clause alone may not prevent a spouse, former spouse or child from enforcing a claim for unpaid alimony or child support from the trust. In one early case, the court held that a spendthrift clause was not enforceable against a child because the relationship between the beneficiary and such child was not that of an arm's length debtor and creditor.[51]

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[45] *Id*.

[46] *P.W.H. v. B.J.H*., 2015 WL 3511889 at *1.

[47] *Id*.

[48] N.J. Stat. Ann. § 3B:31-36 (2016).

[49] *Id*. *See also In re Connelly*, No. 05-10969 (DHS), 2006 Bankr. LEXIS 4100, at *4 (Bankr. D.N.J. Mar. 27, 2006).

[50] *In re Connelly*, No. 05-10969 (DHS), 2006 Bankr. LEXIS 4100, at *4 (Bankr. D.N.J. Mar. 27, 2006) *citing Restatement (Third) of Trusts* § 58 (2003).

[51] Elizabeth G. Deleery, 2 *Asset Protection: Dom. & Int'l L. & Tactics* § 14:106, *citing, Marsh v. Scott*, 2 N.J. Super. 240, 63 A.2d 275, 279 (Ch. Div. 1949) (wherein the court ordered the trustees of spendthrift trust with mandatory income payments to the father, to pay a portion of the income to the son).

B. Enforcement Against Self-Settled Trusts

Self-settled trusts are generally not protected from claims of the settlor's creditors.[52] Notwithstanding the general rule, certain self-settled trusts are protected from creditor claims under the following statutes:[53]

> N.J. Stat. Ann. § 25:2-1 et seq. (protection from attachment in the case of a self-settled trust that is a qualified retirement account);
>
> N.J. Stat. Ann. §17B:24-6 (the inability of a creditor to attach proceeds of life insurance policies);
>
> N.J. Stat. Ann. §17B:24-7 (the inability of creditors to attach annuity proceeds);
>
> N.J. Stat. Ann. §17B:24-8 (the inability of creditors to attach health and disability insurance benefits); and,
>
> N.J. Stat. Ann. §17B:24-9 (the inability of creditors to attach proceeds of group insurance policies).

C. Enforcement Against Discretionary Trusts

A fully discretionary trust diminishes the rights of creditors. Under New Jersey's UTC, no creditor can compel a trustee of a discretionary trust, including one in which the trustee's discretion is subject to a standard of distribution, to distribute trust property. The statute provides in pertinent part:[54]

> Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:
>
> (1) The discretion is expressed in the form of a standard of distribution; or
>
> (2) The trustee has abused the discretion.

[52] In New Jersey, a spendthrift provision is not enforceable in a trust where the settlor is also the sole beneficiary of the trust. N.J. Stat. Ann. § 3B:11-1(a); With respect to an irrevocable trust, regardless of whether there is a spendthrift provisions, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. N.J. Stat. Ann. § 3B:31-39.

[53] NJ Assem. Comm. State., A.B. 2915, 9/22/2014.

[54] N.J. Stat. Ann. § 3B:31-38.

The legislative history indicates that spouses, former spouses and children are not exception creditors:[55]

> Section 3B:31-37, concerning exceptions to spendthrift provisions, was revised and is not similar to the comparable provision of the Uniform Trust Code. The Uniform Trust Code provides that there are certain creditors, known as "exception creditors," that can attach a trust with a spendthrift provision. Other "exception creditors" in the Uniform Trust Code would be (i) child support; (ii) a spouse; (iii) a former spouse who has a judgment for support or maintenance; (iv) a judgment creditor who has provided services for the protection of a beneficiary's interest; and (v) governmental claims. In New Jersey there are certain recognized creditors that are "excepted" from the application of the spendthrift clause, thus making additional provisions unnecessary. Adding additional classes of exception creditors, as the Uniform Trust Code proposes, has drawn national criticism. This provision is not included in the bill. Instead, section 3B:31-37 creates a type of trust for the young or disabled, known as a "special needs trust," which would have certain special protections from creditors.

D. Enforcement Against Trusts With Mandatory Distribution Provisions And Exercised General Powers of Appointment

In contrast to a discretionary trust, where the trust provides for mandatory distributions of trust income or principal, such distributions are subject to the claims of creditors once they are overdue, regardless of whether the trust contains a spendthrift provision. The statute provides as follows:[56]

> Except as otherwise provided in section 1 of P.L.1996, c. 41 (C.3B:11-4.1)[imposing a HEMS limitation where a beneficiary is serving as trustee, along with similar other tax saving provisions], whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the mandated distribution date.

The statute helpfully clarifies that a mandatory distribution provision excludes "a distribution subject to the exercise of the trustee's discretion, regardless of whether the terms of the trust (1) include a support or other standard to guide the trustee in making distribution

[55] NJ Assem. Comm. State., A.B. 2915, 9/22/2014.

[56] N.J. Stat. Ann. § 3B:31-40(b).

decisions, or (2) provide that the trustee "may" or "shall" make discretionary distributions, including distributions pursuant to a support or other standard.[57]

No case involving exception creditors has been decided in New Jersey since enactment of the New Jersey UTC in 2016. *Tannen*, which preceded enactment of the New Jersey UTC, is consistent with the thrust of §§ 3B:31-38 and 3B:31-40. The *Tannen* court deduced that if the beneficiary is entitled to discretionary distributions then the beneficiary cannot compel the trustee to make any distributions, and that same limitation prevents the beneficiary's creditors from compelling the trustee to make any payments as well.[58]

The rights of creditors improve where a beneficiary has a general power of appointment. If a beneficiary has a general power of appointment and exercises that power, the property appointed becomes subject to the demands of creditors if the beneficiary's estate is insufficient.[59]

III. PRE- AND POST-NUPTIAL AGREEMENTS

In New Jersey, any waiver of premarital rights is governed by the Uniform Premarital Agreement Act, N.J. Stat. Ann. § 37:2-31, *et seq.*, which was adopted in 1988. The Uniform Premarital Agreement Act allows a spouse to waive rights to alimony provided the waiver is in writing, has a statement of assets attached, and is signed by both parties.[60] However, a premarital agreement will be considered unconscionable if it would render a spouse without any means of reasonable support, make the spouse a public charge, or would provide a standard of living far below that which the spouse enjoyed before the marriage.[61] Mid-marriage agreements are enforceable but should be scrutinized and are subject to certain specific conditions.[62] Finally, New Jersey courts are likely to uphold post-nuptial agreements provided the waivers are made with "full disclosure and full awareness of the other party's condition."[63]

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[57] N.J. Stat. Ann. § 3B:31-40(a).

[58] *Tannen*, 3 A.3d at 1239.

[59] *U.S. Trust Co. v. Montclair Trust Co.*, 133 N.J. Eq. 579, 582 (Ch. 1943).

[60] N.J. Stat. Ann. § 37:2-33.

[61] N.J. Stat. Ann. § 37:2-32(c)(1)-(3).

[62] *Pacelli v. Pacelli*, 319 N.J. Super. 185, 195 (App. Div. 1999) (stating that mid-marriage agreements are like reconciliation agreements and in order for a mid-marriage agreement to be enforceable the marriage must already be weakened and the proponent of the agreement must show that the relationship had deteriorated when the parties signed the agreement).

[63] *Marschall v. Marschall*, 195 N.J. Super. 16, 29 (Ch. Div. 1984).

2017 DELAWARE TRUST CONFERENCE
WINNING THE WEALTH MANAGEMENT GAME

"DEAL OR NO DEAL" - THE INTERSECTION OF THIRD-PARTY TRUSTS AND DIVORCE LAW

October 25, 2017
3:30-4:30 p.m.
Session 6

DIVORCE AND THIRD-PARTY TRUSTS IN PENNSYLVANIA

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DIVORCE AND THIRD-PARTY TRUSTS IN PENNSYLVANIA

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I. DIVORCE IN PENNSYLVANIA

A. Introduction

The Pennsylvania Divorce Code (Divorce Code) is in Chapter 33 of Title 23 of the Pennsylvania Code.[1] Pursuant to the Divorce Code, the Family Court may grant a divorce if there is "fault," "institutionalization," "mutual consent," or an "irretrievable breakdown."[2] The Family Court has jurisdiction in a divorce matter where either the petitioner or the respondent resided in Pennsylvania for at least six months immediately before commencement of the action.[3]

B. Property Division

1. Introduction

Pennsylvania is an equitable-distribution state. Thus, the Divorce Code empowers the Family Court to divide, distribute, or assign "marital property" as the court deems just after considering all relevant factors.[4]

2. Identifying the Marital Property

a. Background

The court must identify the marital property before the court can allocate it. "Marital property" is defined as follows:[5]

> (a) General rule.--As used in this chapter, "marital property" means all property acquired by either party during the marriage and the increase in value of any nonmarital property acquired pursuant to paragraphs (1) and (3) as measured and determined under subsection (a.1).

[1] 23 Pa. Cons. Stat. Ann. §§ 3301-3309.
[2] 23 Pa. Cons. Stat. Ann. § 3301(a)-(d).
[3] 23 Pa. Cons. Stat. Ann. § 3104(b).
[4] 23 Pa. Cons. Stat. Ann. § 3502.
[5] 23 Pa. Cons. Stat. Ann. § 3501.

However, marital property does not include: (1) Property acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage.

(2) Property excluded by valid agreement of the parties entered into before, during or after the marriage.

(3) Property acquired by gift, except between spouses, bequest, devise or descent or property acquired in exchange for such property.

(4) Property acquired after final separation until the date of divorce, except for property acquired in exchange for marital assets.

(5) Property which a party has sold, granted, conveyed or otherwise disposed of in good faith and for value prior to the date of final separation.

(6) Veterans' benefits exempt from attachment, levy or seizure pursuant to the act of September 2, 1958 (Public Law 85-857, 72 Stat. 1229), as amended, except for those benefits received by a veteran where the veteran has waived a portion of his military retirement pay in order to receive veterans' compensation.

(7) Property to the extent to which the property has been mortgaged or otherwise encumbered in good faith for value prior to the date of final separation.

(8) Any payment received as a result of an award or settlement for any cause of action or claim which accrued prior to the marriage or after the date of final separation regardless of when the payment was received.

(a.1) Measuring and determining the increase in value of nonmarital property.--

> The increase in value of any nonmarital property acquired pursuant to subsection (a)(1) and (3) shall be measured from the date of marriage or later acquisition date to either the date of final separation or the date as close to the hearing on equitable distribution as possible, whichever date results in a lesser increase. Any decrease in value of the nonmarital property of a party shall be offset against any increase in value of the nonmarital property of that party. However, a decrease in value of the nonmarital property of a party shall not be offset against any increase in value of the nonmarital property of the other party or against any other marital property subject to equitable division.
>
> (b) Presumption.--All real or personal property acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by the parties in some form of co-ownership such as joint tenancy, tenancy in common or tenancy by the entirety. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a).

Note: (a) was modified and (a.1) was added in 2004. Caselaw must be read with that in mind.

b. Defining Marital Property

(1) Introduction

The word "trust" does not appear in the statute. Nevertheless, courts have considered when trust interests constitute marital property. The below cases are instructive.

(2) Hutnik v. Hutnik (1987)

In Hutnik v. Hutnik (1987),[6] a husband's mother had sold her house, and the proceeds were held in certificates of deposit.[7] The husband's name was also on the certificates of deposit as a matter of convenience.[8] If his mother did not use the money, upon her death, it would be expected to pass to the husband.[9] The court stated that "the realization of an expectancy is contingent upon the continuing existence of at least three factors: the res, the beneficiary, and the benevolent interest of the prospective donor toward the divorcing party. These are all readily mutable, so that what is involved is the possible receipt of an uncertain amount at some undeterminable future date. To allow such a protean element to control in any way the disposition between the parties of jointly owned, ascertainable assets would perform a disservice to both."[10]

The court did note, however, that "[t]here may be circumstances, such as irrevocable trusts, under which an expectancy or inheritance falls outside the usually applied definition, but that is not the case herein."[11]

(3) Anthony v. Anthony (1986)

In Anthony v. Anthony (1986),[12] one spouse owned real estate at the time of the marriage which had increased in value at the time of the parties' separation. The court held that the increase in value during the parties' marriage in the value of the real estate was marital property subject to equitable distribution.[13] It also determined that a court should not take into account inflation when determining the increase in value.[14]

(4) McGinley v. McGinley (1989)

[6] Hutnik v. Hutnik, 369 Pa. Super. 263 (1987).
[7] Hutnik at 272.
[8] Hutnik at 272.
[9] Hutnik at 274.
[10] Hutnik, at 273-274.
[11] Hutnik, at 275.
[12] Anthony v. Anthony, 355 Pa. Super. 589 (1986). This case did not involve a Trust, but is informative re how the "increase in value" is calculated.
[13] Anthony at 593-595.
[14] Anthony at 600.

In McGinley v. McGinley (1989),[15] the husband's grandfather had established a trust under his Will. Pursuant to the terms of the trust, the income was to be paid to the grandmother during her lifetime; following her death, the income was to be paid to the husband's father and the husband's uncle, and on the death of the husband's father, the assets would be held in trust for the husband and his siblings until a grandchild turned thirty.[16] The court determined that the increase in value of the husband's vested future interest in the trust did not qualify as marital property, because he only had a vested future interest, and not an interest that had come into his possession.[17]

(5) Solomon v. Solomon (1992)

In Solomon v. Solomon (1992),[18] the wife became a beneficiary of an irrevocable trust which was established for the benefit of her and her sisters one year after her marriage.[19] The wife, as beneficiary, was entitled to income from the trust and had the limited right to withdraw $6,000 per year; she could withdraw one-half of the principal at age 35 and the remainder at age 40.[20] She filed for divorce when she was 38.[21] The husband argued that the total increase in the value of the trust from the date the trust was funded until the date of separation qualified as marital property.[22] The court held that the increase in value of the trust prior to the wife's 35th birthday was not marital property, since the wife did not have sufficient ownership and control over the principal.[23]

3. Allocating the Marital Property

Once the marital property is identified the court must allocate it. Marital misconduct is irrelevant and the court must consider what is "just" and must consider "all relevant factors."[24] In allocating marital property,

[15] McGinley v. McGinley, 388 Pa. Super. 500 (1989).
[16] McGinley at 507.
[17] McGinley at 511.
[18] Solomon v. Solomon, 611 A.2d 686 (Pa. 1992).
[19] Solomon at 687.
[20] Solomon at 688.
[21] Solomon at 689.
[22] Solomon at 688.
[23] Solomon at 691.
[24] 23 Pa. Cons. Stat. Ann. § 3502(a).

relevant factors include:[25]

(1) The length of the marriage;

(2) Any prior marriage of either party;

(3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties;

(4) The contribution by one party to the education, training or increased earning power of the other party;

(5) The opportunity of each for future acquisitions of capital assets and income;

(6) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits;

(7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker;

(8) The value of the property set apart to each party;

(9) The standard of living of the parties established during marriage;

(10) The economic circumstances of each party at the time the division of property is to become effective;

(10.1) The Federal, State and local tax ramification associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain.

(10.2) The expense of sale, transfer or liquidation associated with a particular asset,

[25] 23 Pa. Cons. Stat. Ann. § 3502(a)(1)-(11).

which expense need not be immediate and certain.

(11) Whether the party will be serving as the custodian of any dependent minor children.

An interest in a trust is not an explicit factor in determining marital property; however, the assets of a trust available to a beneficiary could influence several of these factors, including (5), (6), (8), (9) and (10).

C. Alimony

1. Introduction

A court may award interim alimony to a dependent party during a divorce proceeding.[26] Generally, a court may allow alimony (as it deems reasonable) to either party only if it finds that alimony is necessary.[27] The court determines the duration of the alimony, which can be for a definite or indefinite period of time.[28]

A petitioner is not entitled to receive alimony if he or she cohabitates with a member of the opposite sex who is not a family member subsequent to the divorce.[29] In addition, the obligation to pay alimony ceases upon the death of the receiving party.[30]

2. Determining Whether Alimony Is Necessary and the Amount of Alimony

In determining whether alimony is necessary and the nature, amount, duration and manner of payment of alimony, the court must consider all relevant factors, including:[31]

(1) The relative earnings and earning capacities of the parties;

(2) The ages and the physical, mental and emotional conditions of the parties;

(3) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits;

[26] 23 Pa. Cons. Stat. Ann. § 3702.
[27] 23 Pa. Cons. Stat. Ann. § 3701(a).
[28] 23 Pa. Cons. Stat. Ann. § 3701(c).
[29] 23 Pa. Cons. Stat. Ann. § 3706.
[30] 23 Pa. Cons. Stat. Ann. § 3707.
[31] 23 Pa. Cons. Stat. Ann. § 3707(b).

(4) The expectancies and inheritances of the parties;

(5) The duration of the marriage;

(6) The contribution by one party to the education, training or increased earning power of the other party;

(7) The extent to which the earning power, expenses or financial obligations of a party will be affected by reason of serving as the custodian of a minor child;

(8) The standard of living of the parties established during the marriage;

(9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment;

(10) The relative assets and liabilities of the parties;

(11) The property brought to the marriage by either party;

(12) The contribution of a spouse as homemaker;

(13) The relative needs of the parties;

(14) The marital misconduct of either of the parties during the marriage. The marital misconduct of either of the parties from the date of final separation shall not be considered by the court in its determinations relative to alimony, except that the court shall consider the abuse of one party by the other party. As used in this paragraph, "abuse" shall have the meaning given to it under section 6102 (relating to definitions);

(15) The Federal, State and local tax ramifications of the alimony award;

(16) Whether the party seeking alimony lacks sufficient property, including, but not limited to, property distributed under Chapter 35 (relating to property rights), to provide for the party's reasonable needs; and

(17) Whether the party seeking alimony is incapable of self-support through appropriate employment.

A judge may take into account the expectancies and inheritances of both parties in determining alimony. A judge may also take into account the relative assets of a party, the property brought to the marriage, and the sources of income for a party. Irrevocable trusts would be relevant to each of these factors. In Gates v. Gates,[32] the court included income from income-generating assets received through a trust distribution as a type of expectancy to be considered for determining alimony. The Gates court did not directly address whether the corpus of the trust was also a factor that could be considered.[33] However, the court stated that it was inappropriate for the appellant to rely on Humphreys v. DeRoss, a case holding that the corpus of an inheritance is not income for purposes of calculating child support.[34] The caselaw indicates that "the court must consider numerous factors including . . . income sources" to determine alimony.[35]

D. Child Support

Parents are liable for the support of their children who are unemancipated and under the age of 18.[36] Parents may be liable for the support of their children who are 18 years of age or older.[37]

Pennsylvania statutes place primary emphasis on the net incomes and earning capacities of the parents when determining child support.[38] When describing what constitutes income, the Pennsylvania legislature explicitly included income from an interest in an irrevocable trust: [39]

> "Income" for purposes of determining support "[i]ncludes compensation for services, including, but not limited to, wages, salaries, bonuses, fees, compensation in kind, commissions and similar items, income derived from business, gains derived

[32] Gates v. Gates, 933 A.2d 102, 107-08 (Pa. Super. Ct. 2007).
[33] Gates at 108.
[34] Gates at 107-08 (citing Humphreys v. DeRoss, 790 A.2d 281 (Pa. Super. Ct. 2002)).
[35] Teodorski v. Teodorski, 857 A.2d 194, 200 (Pa. Super. Ct. 2004).
[36] 23 Pa. Cons. Stat. Ann. § 4321(2).
[37] 23 Pa. Cons. Stat. Ann. § 4321(3).
[38] 23 Pa. Cons. Stat. Ann. § 4322(a).
[39] 23 Pa. Cons. Stat. Ann. § 4302 (emphasis added).

from dealings in property, interest, rents, royalties, dividends, annuities, income from life insurance and endowment contracts, all forms of retirement, pension, income from discharge of indebtedness, distribution share of partnership gross income, income in respect of a decedent; **income from an interest in an estate or trust**; military retirement benefits; railroad employment retirement benefits; social security benefits; temporary and permanent disability benefits; workers' compensation; unemployment compensation; other entitlements to money or lump sum awards, without regard to source, including lottery winnings; income tax refunds; insurance compensation or settlements; awards or verdicts; and any form of payment due to and collectible by an individual regardless of source."

Income from a trust will be considered whether or not a parent has the ability to control the receipt of the trust funds.[40]

E. Premarital Agreements

Premarital agreements are generally enforceable in Pennsylvania as codified in 23 Pa. Cons. Stat. Ann. § 3106. A premarital agreement is not enforceable if the party seeking to set aside the agreement proves, by clear and convincing evidence, that:[41]

(1) The party did not execute the agreement voluntarily; or

(2) The party, before execution of the agreement:

a. Was not provided a reasonable disclosure of the property or financial obligations of the other party;

b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

[40] Mencer v. Ruch, 928 A.2d 294 (Pa. Super. Ct. 2007) (holding that payments made to a father for his benefit from a supplemental needs trust over which he had no control nevertheless counted as "income" for child support purposes).
[41] 23 Pa. Cons. Stat. Ann. § 3106(a).

c. Did not have an adequate knowledge of the property or financial obligations of the party.

The leading case on this matter, Simeone v. Simeone,[42] held that prenuptial agreements are contracts and should be evaluated under that same standard: "absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements."[43] Parties do not need legal representation for a premarital agreement (including a waiver of statutory rights) to be valid; all that is required is a "full and fair" disclosure of both parties' financial situations.[44] While not a requirement per se, both spouses should be represented by separate counsel.

F. Postnuptial Agreements

The same rules for premarital agreements apply to postmarital agreements.[45] This includes the rule that "a spouse may enforce a postnuptial agreement without having to demonstrate that statutory rights have been disclosed."[46]

II. THIRD-PARTY TRUSTS IN PENNSYLVANIA

A. The Spendthrift-Trust Statute

1. How to Create a Spendthrift Trust

A trust that states that the interest of a beneficiary is held subject to a "spendthrift trust" (or has words "of similar import") is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.[47]

However, a spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.[48]

2. Who Can Override a Spendthrift Provision

A creditor or an assignee of a beneficiary of a spendthrift trust cannot reach the interest or a distribution by a Trustee before its receipt by the beneficiary.[49]

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[42] Simeone v. Simeone, 581 A.2d 162 (Pa. 1990).
[43] Simeone at 165.
[44] Karkaria v. Karkaria, 592 A.2d 64 (Pa. Super. Ct. 1991).
[45] Adams v. Adams, 607 A.2d 1116 (Pa. Super. Ct. 1992).
[46] Stoner v. Stoner, 819 A.2d 529 (Pa. 2003).
[47] 20 Pa. Cons. Stat. Ann. § 7742(b).
[48] 20 Pa. Cons. Stat. Ann. § 7742(a).
[49] 20 Pa. Cons. Stat. Ann. § 7742(c).

However, Pennsylvania statutes expressly allow certain creditors to bypass a spendthrift provision. It provides that a spendthrift provision is unenforceable against:[50]

> (1) a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance, to the extent of the beneficiary's interests in the income and principal of the trust;
>
> (2) any other person who has a judgment or court order against the beneficiary for support or maintenance, to the extent of the beneficiary's interest in the trust's income;
>
> (3) a judgment creditor who has provided services for the protection of the beneficiary's interest in the trust; and
>
> (4) a claim of the United States or the Commonwealth to the extent Federal law or a statute of this Commonwealth provides.

3. Discretionary Trusts and Compelled Distributions

Subject to certain exceptions, a creditor of a beneficiary may not compel a distribution that is subject to the Trustee's discretion, even if the discretion is expressed in the form of a standard of distribution, the Trustee has abused the discretion, or the beneficiary is a Trustee or a co-Trustee of the trust.[51]

The exceptions relate to support and maintenance claims.[52] If there is a judgment or court order against a beneficiary for the support or maintenance of the beneficiary's child, *to the extent of the beneficiary's interest* in *the income, principal or both of the trust*, the court shall direct the Trustee to pay the child from the trust an amount equitable under the circumstances (although not more than the amount the Trustee would have been required to distribute to or for the benefit of the beneficiary had the Trustee complied with the standard or not abused his or her discretion).[53] If there is a judgment or court order against the beneficiary for the support or maintenance of someone other than the beneficiary's child, *to the extent of the beneficiary's interest in the income* of the trust, the court will direct the Trustee to pay the person from the trust an amount equitable under the circumstances (although not more than the amount of income the Trustee would have been required to distribute to or for the benefit of the beneficiary had the Trustee complied with the standard and not abused his or her

[50] 20 Pa. Cons. Stat. Ann. § 7743(b).
[51] 20 Pa. Cons. Stat. Ann. § 7744(b).
[52] 20 Pa. Cons. Stat. Ann. § 7744(c).
[53] 20 Pa. Cons. Stat. Ann. § 7744(c)(1) (emphasis added).

discretion).[54] The corollary Uniform Trust Code provision does not limit a divorcing spouse's interest to income.

[54] 20 Pa. Cons. Stat. Ann. § 7744(c)(2) (emphasis added).