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Spendthrift Trusts: It's Time to Codify the Compromise

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Spendthrift Trusts: It's Time to Codify the Compromise

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I. INTRODUCTION

The debate over the legitimacy of spendthrift provisions in trusts began well over a century ago.1 Although it can be fairly character-
ized as having generated at least as much light as heat, it has generated a good deal of heat. The intensity of John Chipman Gray’s reaction to Justice Miller’s approval of the concept in *Nichols v. Eaton*² can hardly be exaggerated. It has been variously described as “outrage”³ and “trauma,”⁴ and his response⁵ has been called a bitter denunciation,⁶ a diatribe,⁷ and an intemperate tirade.⁸

Gray himself expresses the astonishment, even shock, he experienced upon reading *Nichols v. Eaton*’s endorsement of spendthrift provisions, which he revisited several years later upon reading *Broadway Nat’l Bank v. Adams*,⁹ in which the Massachusetts Supreme Court embraced what had been dictum and confirmed it as law.¹⁰

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2. 91 U.S. 716 (1875).
3. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS AND ESTATES 548 (4th ed. 1990); Alexander, supra note 1, at 1206.
5. JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (1883).
6. Friedman, supra note 4, at 574.
8. Id. at 488.
10. If there is one sentiment, therefore, which it would seem to be the part of all in authority, and particularly of all judges, to fortify, it is the duty of keeping one’s promises and paying one’s debts. . . .

When, therefore, the Supreme Court went out its way to announce that it now repudiated its former doctrine, and that it wished it to be known that property could be fenced about as to secure to it the characteristics of right and enjoyment to the beneficiary and immunity to his creditors, the words came to many persons with a shock. Nor was the shock lessened when the Supreme Judicial Court of Massachusetts, pushing the new doctrine to its extremist limits, held that a man’s inter-
While Gray gives full rein to the strength of his conviction, he is ever the gentleman and colleague in the presentation of his argument even as he twists the knife.\textsuperscript{11} However, no one lays greater claim to the traits of temperance and collegiality than the other major writer on the topic, Erwin Griswold.\textsuperscript{12}

As early as 1895, Gray conceded defeat when he recognized the readiness of courts and legislatures to follow the lead of the United States Supreme Court and the Supreme Court of the Commonwealth of Massachusetts and place their imprimatur upon the concept of the spendthrift trust.\textsuperscript{13} Gray had lost the major battle. \textit{Nichols v. Eaton} and \textit{Broadway Natl Bank} were relied upon to establish the legitimacy of spendthrift provisions, and received overwhelming acceptance.\textsuperscript{14} Creditors of beneficiaries of spendthrift trusts have not given up, how-

\begin{itemize}
  \item \textsuperscript{11} "My modest task has been to show, [sic] that spendthrift trusts have no place in the system of the Common Law. But I am no prophet, and certainly do not mean to deny that they may be in entire harmony with the Social Code of the next century. Dirt is only matter out of place; and what is a blot on the escutcheon of the Common Law may be a jewel in the crown of the Social Republic." \textit{Id.} at x.
  \item \textsuperscript{12} Griswold authored two articles on spendthrift trusts before publishing his treatise. \textit{Erwin N. Griswold, Reaching the Interest of the Beneficiary of a Spendthrift Trust, 43 Harv. L. Rev. 63 (1929)} (hereinafter "Griswold, \textit{Reaching the Interest}"); \textit{Erwin N. Griswold, Spendthrift Trusts Created in Whole or in Part for the Benefit of the Settlor, 44 Harv. L. Rev. 203 (1930)} (hereinafter "Griswold, \textit{Spendthrift Trusts}"). He published his treatise in 1936. \textit{Erwin N. Griswold, Spendthrift Trusts, (1936)} (hereinafter "\textit{Griswold Treatise}"). The second edition was published in 1947. Unless otherwise noted, references to the treatise in this paper are to the second edition.
  \item \textsuperscript{13} \textit{Gray, supra} note 10, at iv-v.
    \begin{itemize}
      \item See also William H. Wicker, \textit{Spendthrift Trusts}, 10 Gonz. L. Rev. 1, 4-5 (1974); Note, \textit{A Rationale for the Spendthrift Trust}, 64 Colum. L. Rev. 1323, 1323 n.4 (1964).
    \end{itemize}
\end{itemize}
ever. Instead, they have waged a war of attrition. The result in many jurisdictions is a general rule confirming the validity of spendthrift provisions, but subjecting them to a hodgepodge of exceptions.\(^1\)

The amount of money held in trust is virtually unimaginable.\(^2\) Spendthrift provisions, whether one views them as abominations, necessary evils, or socially efficacious and morally sound, are, as the song goes, here to stay.\(^3\) They do not, however, place unbreachable defenses around the assets of a trust. The same courts which first recognized the legitimacy of spendthrift provisions balked when faced with the claim of the dependent child seeking enforcement of an unpaid judgement for child support.\(^4\) Other examples abound.\(^5\)

The time has come to codify the compromise that has evolved through over a century of litigation.\(^6\) The settlor of a trust for another person should be allowed to insulate the assets and distributions of the trust from the beneficiaries’ creditors, but only up to a point. Some claims compel recognition on policy grounds. It is economically counterproductive to require that each claimant litigate her entitlement;\(^7\) at the same time, however, it is impossible to classify claims so

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19. See infra notes 76-100 and accompanying text.
20. In proposing a statutory solution, I echo to some extent the position of Erwin Griswold. "Since the question is purely one of policy its solution is more appropriately a function of the legislature than of the courts." GRISWOLD TREATISE, supra note 12, at 639. But, quite appropriately at the time, he equivocated:
   
   [I]t is not at all clear that resort to legislation is necessary in states where spendthrift trusts rest only on judicial decisions. . . . There is no reason why the courts should not themselves mould the spendthrift trust, and limit its effectiveness so as to eliminate the abuses which unquestionably accompany it in its unrestrained form.
   
   Id. at 641-42. While his optimism was justified 45 years ago, it no longer is.
as to uniformly separate just claims from unjust claims. Given the virtually universal recognition of spendthrift provisions, the best solution treats all enforceable claims equally and permits them to be satisfied in a manner that does not jeopardize the existence of the trust, or, in most cases, the fulfillment of its purpose.\textsuperscript{22}

II. RESTRAINTS ON THE ALIENATION OF INTERESTS IN TRUST

An express trust arises when a settlor puts property (the corpus of the trust) in the hands of a trustee for the benefit of a beneficiary. The trustee is given legal title, and the beneficiary is given equitable title. If we assume one of the simplest and most common arrangements, we may postulate a trust corpus comprised of income producing investments. We may also assume that the settlor has directed the trustee to pay the income to the settlor's children, and upon the death of the last child, to divide the remainder among the grandchildren or their surviving issue.\textsuperscript{23}

The parent who makes such an arrangement does so with the hope that the plan will endure. Disruption may occur, though. What if a child or a grandchild incurs an enormous liability? May the creditor satisfy its claim out of the trust income or assets? Might that result in the children and grandchildren being left economically unprotected? The parent/settlor who wants to avoid this possibility has several options. Prime among them is a spendthrift provision. Alternatives include protective provisions and discretionary and support trusts. All have one thing in common: they act to restrain the beneficiary from effectively alienating any interest in the trust. Spendthrift provisions directly restrain the beneficiary, while protective, discretionary and support trusts limit the assets in which the beneficiary has an interest.

\textsuperscript{22}Griswold proposed a model statute which was adopted in Louisiana and Oklahoma. GRISWOLD TREATISE, supra note 12, at 647 n.1. While in the first instance the model statute recognizes the validity and enforceability of spendthrift provisions, it goes on to leave them vulnerable to complete avoidance. Any creditor can attach income in excess of $5,000 per annum, or 10\% of income in excess of $12.00 per week. In addition, as to certain enumerated creditors, "the court shall have power to make such order directing the payment of income to such creditor . . . as shall be just under the circumstances." Id. at 648. Finally, the spendthrift provision is not enforceable with respect to the right "to receive the principal of the trust or any part of it, presently or in the future . . ." Id. at 649. Proponents of spendthrift provisions could well argue that the proposal gives with one hand and takes away with the other.

\textsuperscript{23}This arrangement assumes the settlor is constrained by the common law rule against perpetuities. Under the UNIFORM STATUTORY RULE AGAINST PERPETUITIES, 8A U.L.A. 80 (Supp. 1987), a settlor wishing to extend the duration of the trust would draft it to take advantage of the 90 year period in gross. See Jesse Dukeminier, The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo, 34 UCLA L. REV. 1023 (1987).
A. Spendthrift Provisions

A spendthrift provision prohibits the beneficiary from voluntarily or involuntarily transferring her interest in the trust.24 It restrains the power of the beneficiary to alienate the beneficial interest, and at the same time directs the trustee to continue distributions to the beneficiary notwithstanding any attempted alienation.25 The following suggested language appears in a corporate trustee's form book:

The interest of any beneficiary in any trust created under this Will shall not be transferred, assigned or conveyed and shall not be subject to the claims of any creditors of such beneficiary, and the Trustee shall continue distributing trust property directly to or for the benefit of such beneficiary as provided for herein notwithstanding any transfer, assignment or conveyance, or action by creditors.26

Arguments for and against the validity of such a provision will be discussed in section III, infra. Suffice it to say that while the proponents have won the day for the most part in this country, English courts rejected the concept.27

Predictably, England has not denied the owner of property who places it in trust the power to control its disposition. Rather, English courts permit protective provisions. A protective provision allows the settlor to provide that a voluntary or involuntary alienation (i.e., an attempted transfer by the beneficiary or an attempted attachment by creditors of the beneficiary) terminates the interest of the beneficiary.28 English law also allows the termination of one trust to trigger the creation of a second, discretionary trust, which may include the original beneficiary.29

24. I use the term "spendthrift provision" as opposed to "spendthrift trust" because the fact that a trust includes a spendthrift clause does not necessarily render the entire trust a spendthrift trust. The clause might, for example, affect the interest of only one of several beneficiaries.
25. A spendthrift provision only controls the interest while it is held by the trustee. Once the property reaches the beneficiary, it is subject to the full panoply of creditors' remedies against assets of the debtor. Kelly v. Kelly, 79 P.2d 1059, 1063 (Cal. 1938); Moffat v. Lynch, 642 S.W.2d 624 (Mo. 1982)(en banc)(a contract binding a beneficiary to pay over a portion of income received from a spendthrift trust after receipt is enforceable); Griswold, Reaching the Interest, supra note 12, at 84; John P. Ludington, Annotation, Validity and Construction of Beneficiary's Arrangement for Payment to Another, As They Become Due, of Sums Due Under Spendthrift Trusts, 83 A.L.R.3d 1142 (1978); RESTATEMENT (SECOND) OF TRUSTS § 152 cmt. j (1959).
29. Trustee Act, 1925, 15 & 16 Geo. 5, Ch. 19, § 33 (Eng.).
B. Protective, Discretionary and Support Provisions as Alternatives

The major problem with a spendthrift provision is that it might not be honored. Some jurisdictions have refused to approve spendthrift provisions on policy grounds. Even if judicial decisions indicate that spendthrift provisions are valid, further decisions may create exceptions that limit the protection afforded to the income and assets of the trust on policy grounds. Likewise, a statute approving spendthrift provisions may be subject to the interpretation that it is not meant to bar certain claims. When the validity of spendthrift provisions is litigated, the claimant who wins the sympathy of the court may win the lawsuit.

If the settlor is primarily concerned with protecting the income and corpus of the trust from creditors of beneficiaries, a protective provision offers a highly effective alternative to a spendthrift provision. Protective provisions insulate the trust by terminating the interest of the beneficiary. The settlor who uses a protective provision simply makes a conditional gift. When the condition is breached, the gift terminates. Many settlors, however, are presumably as interested in protecting the beneficiary as in protecting the trust. If the major purpose of the trust is to provide guaranteed lifetime support to a beneficiary, the protective provision is unsatisfactory. A protective provision need not entirely terminate the interest of the beneficiary. It may, as in England, terminate the beneficiary's

30. Huff, supra note 14, at ¶ 1205.3.
31. Id. at § 1206.1.
33. See, e.g., Shelley v. Shelley, 354 P.2d 282 (Or. 1960). Creditors no doubt mount the most prevalent assaults on spendthrift provisions. However, other problems may arise, and in some circumstances the beneficiary finds the provision too restrictive. Changed circumstances may make maintenance of a small trust uneconomical. A spendthrift provision will ordinarily bar termination of the trust by consent of the beneficiaries after the settlor has died. See GRISWOLD TREATISE, supra note 12, § 304. Returning to our parent/child trust, one of several children who are income beneficiaries may become handicapped; the others may be economically secure and may wish to assign their interest in order to increase the interest to the sibling and to avoid income tax on themselves. A spendthrift clause bars a valid assignment. Id. at § 304.
right to income, while at the same time giving the trustee discretionary power to distribute income to the beneficiary. Put more simply, a protective provision may turn the trust into a discretionary trust with respect to the beneficiary at issue.

The spendthrift provision insulates the asset even though it belongs to the beneficiary. The protective provision terminates the interest of the beneficiary. The discretionary trust, conversely, creates no interest in the beneficiary. The creditor of a beneficiary can only reach the property of that beneficiary. Where the beneficiary has no right to the trust income or corpus, neither, a fortiori, does a creditor of the beneficiary. Again, however, the beneficiary is unprotected. If the trustee who holds a discretionary power to distribute income decides not to distribute to a beneficiary, that beneficiary has no remedy and no right to compel a distribution. It is, after all, the beneficiary's inability to reach the income or assets of the trust that renders the beneficiary's creditor unable to do so as well.35

Similarly, a support trust that directs the trustee to distribute income to the beneficiary as necessary for support is inaccessible to creditors of the beneficiaries, unless the creditors supplied the necessaries.36 However, the beneficiary will be relegated to such distributions as are necessary for support, and the settlor may wish to guarantee more.

III. THE CONTOURS OF THE DEBATE

Nothing, it seems, works quite like the magic of a spendthrift provision. Nothing else allows the settlor to determine exactly how much the beneficiary shall receive, to direct the trustee to distribute that amount to the beneficiary, and to direct the trustee to ignore all claimants, even judgment creditors. Nothing else allows a beneficiary to enjoy a stream of income no matter how impecuniously he has behaved, while foreclosing any attachment or levy on the interest in trust. Thus, spendthrift provisions enjoy increasing popularity, and engender increasing controversy.

A. Arguments Pro and Con: Proponents of Spendthrift Provisions v. The Loyal Opposition

1. Dicta as Historical Imperative

When Nichols v. Eaton37 reached the United States Supreme Court in 1875, American courts seemed committed to the venerable English common law rule invalidating spendthrift provisions.38 The case did

37. 91 U.S. 716 (1875).
38. Bushman, supra note 1, at 306.
not, on its facts, implicate that rule because no spendthrift provision was involved. Justice Miller, however, seized the occasion to offer an extended dictum which even the disapproving John Chipman Gray characterized as elaborate, strong, and the product of a man of intellectual force.\[39\]

The case involved assets held in a trust established by the will of Sarah Eaton. Sarah Eaton's will made her four children the income beneficiaries of a protective trust; should a son's interest terminate because of the attempted alienation or disposition of the income, including the son's insolvency or bankruptcy, that son's share of the income would become payable to his wife and children. If there were no spouse or children the income accumulated, provided that following the termination of a son's right to income the trustee had the discretion to distribute all or any part of that income to the son and/or his wife and children.\[40\]

After Sarah Eaton's death one of her sons, Amasa, became insolvent. Amasa, who was unmarried, made a general assignment of all his property for the benefit of his creditors to Charles A. Nichols. Subsequently, Nichols was appointed his assignee in bankruptcy. Nichols brought suit against the executors and trustees of Sarah Eaton's will and trust to recover the income which Amasa had forfeited, and which was now payable to him at the discretion of the trustees, for the benefit of Amasa's creditors.\[41\]

With reference to the termination of Amasa's interest, Sarah Eaton's will had been carefully drafted to fall within the English rule on protective trusts:

Taking for our guide the cases decided in the English courts, the doctrine of the case of Brandon v. Robinson seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on the insolvency or bankruptcy of the devisee, is good, and that the limitation is valid.\[42\]

In converting the trust to a discretionary trust of which Amasa was a potential beneficiary, however, she went a step further.\[43\] Nichols argued that the discretionary provisions were merely a sham, a way to "evade the policy of the law already mentioned; that the discretion vested in the trustees is equivalent to a direction, and that it was well known it would be exercised in favor of the bankrupt."\[44\] The Court disagreed, and applied the standard rule for discretionary trusts.

\[39\] Gray, supra note 10, at v.


\[41\] Amasa, along with his half-brother George Ruggles and one William Bailey, was both an executor and a trustee.


\[43\] This is, however, precisely the scheme presently authorized by the English Trustee Act. See supra notes 28-29.

\[44\] Nichols v. Eaton, 91 U.S. 716, 723 (1875). His argument would seem to be but-
Under the instrument, the trustees were given absolute discretion; Amasa could not in fact compel its exercise in his favor. Therefore, he had no interest his creditors could reach.45

Having decided the case, Justice Miller, who wrote for a unanimous Court, went on in dicta to lay the foundation for the approval of spendthrift trusts in the United States. He noted that while the Court had adopted the English Chancery Courts' rule on protective trusts, it did not agree with that court's invalidation of spendthrift provisions as impermissible restraints on alienation. Characterizing the rule as "in-grafted upon the common law for the benefit of creditors, and... comparatively of modern origin,"46 he articulated three rationales for approving spendthrift provisions. First, in every state, debtors were empowered by statute to exempt some portion of their property from creditors' claims; spendthrift trust provisions simply worked an analogous exemption which in no way violated public policy. Second, a creditor relies at her own risk on income or assets which, due to the recordation of wills and testamentary trusts, she is on notice are not available to satisfy her claims. Finally, the owner of property as an incident of ownership should be able to attach conditions for the protection of a donee.47

Gray responded by authoring his classic treatise, Restraints on the Alienation of Property.48 He sought to establish that "[t]he current of law has for centuries been in favor of removing old restraints on alienation," and that this was especially true with reference to "compelling a debtor to apply to his debts all property which he could use for himself or give at his pleasure to others."49

2. Should Spendthrift Provisions Be Treated as Invalid Restraints on Alienation?

The argument relying on the general prohibition of restraints on alienation has not aged well, at least with regard to trusts.50 Two of the significant evils of restraints on alienation—perpetuating the dead hand's control of property and removing property interests from the stream of commerce—are substantially ameliorated by the rise of the modern trust in which the trustee has virtually all the power over the

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45. Id. at 724-25.
46. Id. at 725.
47. Id. at 726-27.
48. Gray, supra note 5.
49. Id. at § 4, p. 2.
50. Restraints on the alienation of legal title, as opposed to the equitable title held by a beneficiary, continue to be disfavored and are generally invalid. IIA Fratcher, supra note 27, at 130-32; Bogert, supra note 28, at 358-69.
legal title to the property that an owner would have. Passive trustees, who might well lack the power to sell or even lease trust property, were once the rule. Now they are archaic exceptions. Trustee's powers are still held somewhat in check, though. While the trustee typically has the power to buy or sell, invest or reinvest trust property, the trustee must ordinarily act with a degree of caution not incumbent on an absolute owner. Put simply, trust capital is not risk capital.

Nonetheless, the alienability of the legal title of most property held in trust supports Justice Miller's position. Yet Justice Miller does not allude to alienability, and at the time he wrote it may well have been common for trustees to have only limited powers to sell. What argument, or policy, obvious at the turn of the century, drove the enthusiastic embrace of the concept of spendthrift provisions?

Viewing spendthrift provisions from the perspective of the law's general antipathy to restraints against alienation helps clarify why spendthrift provisions were accepted in American courts. The disallowance of restraints against alienation has its roots in the ancient rules of property law relating to seisin. If one has a fee interest, one must have the entire bundle of rights that comprise the interest, including the power to alienate it. Therefore, any restriction on a fee is "repugnant" to the grant of the fee and void.

Notwithstanding this theoretical concept, as early as the 12th century, English law imposed considerable restraints on property. As early as the 13th century, however, English law began to remove those restraints. Gray identifies the forces in favor of restraints on alienation as "[f]amily and ecclesiastical pride and natural dishonesty." Gray should have added governmental interests. As he points out, "[t]he abolition [in 1660] of military tenures and of fines to the Crown did away with the last restraints upon the transfer of estates in fee simple. . . ."

Restraints on alienation tend to preserve the status quo by freezing

54. Some commentators identify the disallowance of restraints against alienation as "the major defining characteristic of a liberal commercial society as opposed to a feudal one," Alexander, supra note 1, at 1191. Alexander goes on to explain: "Along with liberty of contract, free alienation is one of the keystones of the twin policies of promoting individual autonomy and free exchange in competitive markets." Id.
55. GRAY, supra note 5, at 2-3.
56. Id. at 2.
57. Id. at 3.
the situation. They are consistent with the requisites of a society with an economy completely controlled, and largely owned, by church and state. Restraints are inconsistent with an entrepreneurial, free market society.\footnote{See Alexander, supra note 1.} Commerce cannot thrive if the critical property cannot be transferred. The invalidation of restraints in general was essential to the economic development of England and the United States.

What, then, accounts for the American approval of a classic restraint on alienation, the spendthrift provision? I would submit that the very interests which must invalidate restraints in order to thrive suddenly find that this particular restraint suits their personal interests quite nicely. That is, the successful entrepreneur utilizes the free market concept to amass a fortune. Once he has amassed his fortune, the protection provided by a restraint on alienation suddenly becomes appealing.\footnote{See Friedman, supra note 4, at 572:\ Validation of the spendthrift trust was primarily a response to the spread of the dynastic trust. The dynastic trust, as we have seen, must be secure from destructive market conditions; hence the need for flexibility in investment. But it must also be secure from destruction at the hands of particular beneficiaries and this need has been met by the spendthrift trust. \textit{Cf.} Alexander, supra note 1, at 1193 n.10. \n
Gray identified the general acceptance of spendthrift provisions as a reaction against “doctrines of laissez faire, of sacredness of contract, and of individual liberty,” \textit{Gray, supra note 10, at viii, and an approval of “that spirit . . . of paternalism, which is the fundamental essence alike of spendthrift trusts and of socialism.” Id. at ix.}

Costigan, who castigated Gray for his reaction to \textit{Nichols v. Eaton},\footnote{Costigan, supra note 7, at 471-72.} defended the concept somewhat smugly:

\begin{quote}
When one thinks of the boost to plutocracy given to the possessors of property by those devices of practical exemption from full legal and financial responsibility for business venture failures, known as limited partnerships and corporations . . . he has to smile at the great to-do made over trusts designed by a trustor to give [an income] to a favored cestui que trust, for a lifetime or less, out of the trustor's property, to which the cestui's creditors in no way contributed. . . .
\end{quote}

The disingenuousness of this position has resulted in one virtually universal exception. A settlor cannot obtain this protection for herself. “A man cannot put his own property beyond the reach of creditors and at the same time reserve substantial interest in it or control over it.”\footnote{Id. at 472. Yet Costigan, by focusing on the need of the beneficiary as legitimizing spendthrift provisions, sharply circumscribes the permissible reach of the protection. If “need” be the justification, then only a “reasonable amount of income” can be justified. \textit{See supra} notes 50-52 and accompanying text.} As early as 1930, Dean Griswold observed, “The cases are uniform in holding that . . . a person cannot create a spendthrift trust

\begin{quote}
A man cannot put his own property beyond the reach of creditors and at the same time reserve substantial interest in it or control over it.'\footnote{Griswold, \textit{Spendthrift Trusts}, supra note 12, at 208.} As early as 1930, Dean Griswold observed, "The cases are uniform in holding that . . . a person cannot create a spendthrift trust

\vspace{1em}

\begin{quote}
\textbf{Griswold, \textit{Spendthrift Trusts}, supra note 12, at 208.}
\end{quote}
for himself which shall be effective against the rights of his subsequent creditors."  

In his sometimes biting response to John Chipman Gray, George Costigan points out that while the common law is replete with denunciations of restraints on alienation, even Gray recognized that common law courts had simultaneously approved of certain restraints. Thus, Costigan argues, no universal rule invalidating restraints on alienation exists, and "whether restraints on alienation, voluntary or involuntary, or both, shall be permitted, are purely questions of humanity and of wise public policy." Wise policy, he maintains, while validating spendthrift trust provisions to a great extent, would focus on "the need of the beneficiary, and not the prideful and lordly disposition of the donor...." In other words, even Costigan would impose a needs test and would not extend protection to unchecked amounts of income. Costigan does not, therefore, address the policy questions Gray raises. Furthermore, while a needs test would destroy much of the utility of the spendthrift provision to the rich and answer the criticism that one should not enjoy a luxurious income while not meeting one's obligations, a needs test would also impose intolerable transaction costs by requiring the claimant to establish that the beneficiary was not needy enough to qualify for a public policy exception. Finally, a needs test will inevitably force courts of equity to fashion inequitable remedies. The beneficiary who lives a life reflecting high social status will need more income to meet his basic expenses than will the beneficiary of more modest means. As Gray said of the New York "station in life" rule,

63. Id. at 205. Few voices have ever been raised in support of the proposition that a person should be able to immunize her own property from the reach of her creditors. But see A Rationale for the Spendthrift Trust, 64 COLUM. L. REV. 1323, 1332 (1964) ("Something is unquestionably wrong, however, when a person is prevented from achieving for himself the same degree of future security that a generous benefactor could bestow upon him.")

Griswold himself, somewhat surprisingly, is among them. He concluded his article with the somewhat enigmatic comment: "If spendthrift trusts are to be tolerated at all, we may well question the soundness of a rule which allows a man to hold the bounty of others free from the claim of his creditors, but denies the same immunity to his interest in property which he has accumulated by his own effort." Griswold, Spendthrift Trusts, supra note 12, at 222. By observing this hole in logic he seemed to be tweaking the nose of proponents. In his treatise, however, he proposed that it be closed. GRIswOLD TREATISE, supra note 12, at 644-45.

Both the Columbia Law Review commentator and Griswold are disconcerted by the illogical rule. I would suggest that the problem is caused not by the restriction—which is both logically sound and an expression of compelling public policy—but by the recognition of spendthrift provisions in the first place.

64. See Costigan, supra note 7, at 480-81.
65. Id.
66. Id. at 484.
To say that whatever money is given to a man cannot be taken by his creditors is bad enough; at any rate, however, it is law for the rich and poor alike; but to say that from a sum which creditors can reach one man, who has lived simply and plainly, can deduct but a small sum, while a large sum may be deducted by another man because he is "of high social standing," or because "his associations are chiefly with men of leisure," or because he "is connected with a number of clubs," is to descend to a depth of as shameless snobbishness as any into which the justice of a country was ever plunged.  

Finally, Justice Miller relied in large part on exemption statutes to establish that public policy supports restraints on alienation. As one commentator notes, however, exemption statutes may be thoroughly distinguished from spendthrift provisions:

Exemption laws seek to strengthen the integrity of the debtor by keeping him from absolute poverty, to benefit the community by keeping him off the welfare rolls and to protect the debtor's family from starvation, while still enabling the maximum payment to the creditors. Spendthrift trusts, on the other hand, permit children of rich men to live in debt and luxury at the same time, while the claims of their creditors remain unsatisfied.  

3. The Notice Argument

Justice Miller's second rationale, the notice argument, stands on both the shakiest of footings and the firmest of foundations. He observed that creditors of the beneficiary of a spendthrift trust had little to complain of because testamentary trusts, as part of probated wills, are recorded public documents. Anyone who extends credit despite being on notice that the debtor's income is insulated by a spendthrift provision acts at her own risk:

When . . . it appears by the record of a will that the devisee holds this life-estate or income, dividends, or rents of real or personal property, payable to him alone, to the exclusion of the alienee or creditor, the latter knows, that, in creating a debt with such person, he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is carried out by excluding him from any benefit of such a devise.  

This argument fails on two grounds. First, while testamentary trusts are public records, inter vivos trusts are not; the point simply does not apply to a significant number of trusts. Second, the creditor did not necessarily "recklessly" extend credit. The creditor might hold a tort judgment, or a claim for child support or unpaid taxes.

With reference to contract creditors, however, the spirit of Justice Miller's observation continues to prevail. Contract claimants are unlikely to obtain satisfaction from assets protected by a spendthrift pro-

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67. GRAY, supra note 10, at xi.
68. Bushman, supra note 1, at 312.
70. Nichols v. Eaton involved contract creditors of the beneficiary of a testamentary trust; Justice Miller's dictum is not limited to those facts precisely because it is dictum.
vision. This result turns not on the argument that the creditor is on constructive notice of the provisions of a testamentary trust, but rather on the argument that the creditor should identify security before extending credit.\footnote{IIA Fratcher, supra note 27, § 157.5, at 220.} The creditor who relies on apparent affluence without determining its source does so at his own risk. This position, despite its appeal, has two flaws. First, it increases initial transaction costs in all extensions of credit in order to control relatively few situations. Second, by making the determination of whether a claim is entitled to satisfaction turn on whether it is a contract claim, transaction costs are increased by adding a layer of complexity. Claimants forced into litigation will classify claims as something other than contract claims, \textit{e.g.}, as the tort of negligent breach of contract.\footnote{See, \textit{e.g.}, Sam Finley, Inc. v. Barnes, 275 S.E.2d 380 (Ga. Ct. App. 1980)(quoting Foster Wheeler Corp. v. Georgia Power Co., 230 S.E.2d 494 (Ga. Ct. App. 1976) ("Barnes initially filed suit alleging both breach of contract and negligence in the performance of the contract...We accept as a fundamental legal precept that a single act or course of conduct may constitute either a breach of contract or an independent tort."). See also East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 866-75 (1986).}

4. The Incident of Ownership Argument

Justice Miller's final argument continues to provoke enthusiastic agreement and astonished disagreement. Harking to the American tradition recognizing private property, with its assumption that the owner of property may do with it as he will, Justice Miller waxed both eloquent and sentimental:

\begin{quote}
Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who gives...may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.\footnote{Nichols v. Eaton, 91 U.S. 716, 727 (1875)(emphasis added, except for "gives," which was italicized in the original).}
\end{quote}

Simply stated, Justice Miller's position seems to be, "It's the settlor's property; the settlor can do as he wishes with it." The response is obvious: it is not the settlor's property; rather, it is the beneficiary's property. When questions about the enforceability of spendthrift provisions arise, the property held in trust and at issue "belongs" to the beneficiary. Otherwise, the beneficiary's creditor has no basis for a claim against the trust. To say it is the settlor's property both begs the question and confuses the analysis. It once was the settlor's property, but it no longer is. That argument, therefore, reduces itself to the fun-
damental question of whether the law should allow a person who once owned property to convey it subject to restraints on its alienation.\textsuperscript{74} The law's answer, for the most part, is no. With respect to spendthrift provisions, however, the answer is generally yes.\textsuperscript{75} Whether this is wise remains highly debatable. No one has answered Gray's fundamental objection that the law should not allow a person to enjoy a stream of income, however lavish, that is not subject to claims for just debts.

B. Where the Dust Has Settled

1. Claimants Likely to Prevail—the Restatement List

The overwhelming acceptance of the validity of spendthrift provisions in principle has been ameliorated in most jurisdictions by a concomitant recognition of exceptions. Certain creditors may present such compelling claims that public policy demands recognition. The Restatement lists the claims typically recognized:

Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,

(a) by the wife or child of the beneficiary for support, or by the wife for alimony;
(b) for necessary services rendered to the beneficiary or necessary supplies furnished to him;
(c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary;
(d) by the United States or a State to satisfy a claim against the beneficiary.\textsuperscript{76}

In addition, "The interest of the beneficiary of a spendthrift trust... may be reached in cases others than those herein enumerated, if considerations of public policy so require."\textsuperscript{77}

\textsuperscript{74} One commentator describes this issue as presenting a "basic paradox at the core of liberal property law." Alexander, \textit{supra} note 1, at 1189. Alexander maintains that "Contemporary legal thought lacks any conception of 'social welfare' that coherently rationalizes the extant body of doctrines regulating individual power to impose restraints.... It accedes to social control over the right of disposition in order to further social interests without admitting that it has thereby abandoned the individualized power of disposition." \textit{Id.} at 1263. His quarrel, it seems, is not with the result, i.e., some restraints on the right of disposition are valid, but rather with the theoretical inconsistencies of those who have so concluded. He suggests that "w[we might enrich legal doctrine by treating no single actor's intent as capable of trumping the intentions of all other actors with respect to the disposition of a given asset." \textit{Id.} at 1266. I find it satisfactory to recognize that policy reasons compel certain limitations on the right of unfettered disposition, see GRISWOLD TREATISE, \textit{supra} note 12, § 554-55, and I would conclude that policy reasons mandate disallowing spendthrift provisions.

\textsuperscript{75} See \textit{supra}, note 14.

\textsuperscript{76} \textit{RESTATEMENT (SECOND) OF TRUSTS} § 157 (1959).

\textsuperscript{77} \textit{Id.} at Cmt. a.
The author of a 1984 survey of spendthrift provisions concluded that more than 30 states had, by case law, recognized an exception for child support claimants. Some jurisdictions recognize this exception by statute. Alimony claimants are also likely to prevail, although somewhat less likely than child support claimants.

Claims for necessaries present one of the conundrums of this area of the law. While there has been limited litigation of this issue, most courts agree that those who provide necessaries to the beneficiary can recover from the assets of the trust, a spendthrift provision notwithstanding. The commentators are virtually unanimous. Courts and commentators reason that allowing claimants for necessaries to recover is consistent with the purpose of the trust, which is presumably to provide for the beneficiary.

For those who oppose spendthrift provisions on principle, however, the claimant for necessities presents a peculiar problem. Public policy surely must recognize as meritorious the interest of a settlor in providing permanent economic protection to a disabled beneficiary. Yet the disabled beneficiary is especially likely to incur high expenses for necessaries such as living expenses in a personal care home and medical expenses. To complicate the matter, the claimant may be both a provider of necessaries and a governmental entity. It is ironic that the one class of beneficiaries for whom a strong policy argument can be made supporting the validity of spendthrift provisions in its favor—the disabled beneficiary—is likely to incur substantial claims from two classes of creditors who are likely to prevail when they assert claims against the trust.
Although estate planning for disabled beneficiaries is beyond the scope of this article, it bears mentioning that families confronted with the problem may combine a spendthrift provision with a discretionary trust. The beneficiary can then argue that even though the claimant can prevail against the spendthrift provision, whether relying on the status of a provider of necessaries or of a governmental entity, the claimant can only reach the beneficiary's interest in the trust. If the trust is truly discretionary then absent an abuse of discretion, \(8\) neither the beneficiary nor a creditor of the beneficiary may compel distribution. \(8\) Some estate planners recommend using a spendthrift provision in combination with a supplemental needs trust, but whether such a plan will effectively block claimants for necessaries is unclear in most jurisdictions. \(8\)

The Restatement’s third exception is “for services rendered and materials furnished which preserve or benefit the interest of the beneficiary.” \(8\) This exception exists in part because it would be counterproductive not to recognize it. The exception assures that the beneficiary’s interest in the trust will not be diminished or lost because the person in a position to protect it declines to do so for fear her efforts would be uncompensated. Additionally, this exception involves benefits conferred by the claimant; denying recovery would result in unjust enrichment of the trust. \(8\) Recovery for a benefit

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86. See Watts v. McKay, 162 P.2d 82 (Kan. 1945), discussed in Secretary of Social and Rehabilitation Serv. v. Jackson, 822 P.2d 1033, 1036-37 (Kan. 1991); Department of Mental Health v. Old Kent Bank & Trust Co., 345 N.W.2d 642, 644 (Mich. Ct. App. 1984); Restatement (Second) of Trusts § 155 (1959). Although distribution cannot be compelled absent an abuse of discretion, quaere whether a ft. fa. should lie against any distribution once the trustee decides to make it, but before the transfer can be completed?


88. Restatement (Second) of Trusts § 157(c)(1959).

89. Id. § 157(c), cmt. d. In Evans & Luptak v. Obolensky, 487 N.W.2d 521 (Mich. Ct. App. 1992), the plaintiff law firm was retained in connection with the sale of certain businesses owned by the trust. Although the exact nature of the services was not clear, the defendant did not contest the allegation that the firm was retained "to benefit the defendant's interest in the trust." The trial court ruled that the spendthrift provision barred collection of the claim from the trust. Reversing, the Court of Appeals held that "[i]t would constitute unjust enrichment if the trial court were not able to fashion a remedy that allowed the attorneys to be paid for their services in enhancing the position of the beneficiary." Id. at 523. Whether these plaintiffs were entitled to recover was not resolved, because the Court of Appeals directed the trial court on remand to address two questions:

1. Must the benefit to the interest of the beneficiary be actual or tangi-
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conferred presents a different issue than recovery from the assets contributed by the settlor. Finally, as the Restatement notes, in many such cases, recovery could be had on a contract theory: "[T]he person rendering the services and furnishing the materials would have a claim against the trustee if he contracted for such services and materials, and the trustee would be entitled to indemnity out of the trust property." 90

The fourth and final exception enumerated by the Restatement is for claims by the United States or a state. While the federal government ordinarily defers to state law on the issue of whether a debtor holds any property interest, whether that interest is subject to levy on a federal claim is a question of federal law. 91 With respect to tax liens, the answer is both clear and predictable; an otherwise valid spendthrift provision will not prevent levy by the Internal Revenue Service for satisfaction of a tax lien. 92 In fact, governmental claims in general, whether state or federal, prevail. 93

What of those claims not listed in the Restatement, most notably tort claims and contract claims? While tort claims are not listed as recognized exceptions because of the paucity of decisional authority, 94 comment "a" addresses them:

The interest of the beneficiary of a spendthrift trust . . . may be reached in cases other than those herein enumerated, if considerations of public policy so require. Thus it is possible that a person who has a claim in tort against the beneficiary of a spendthrift trust may be able to reach his interest under the trust. 95

Notwithstanding early approval of the theory that tort claimants should be allowed to recover pursuant to a public policy exception, 96 a

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90. RESTATEMENT (SECOND) OF TRUSTS, § 157(c) cmt. d (1959).
92. First Northwestern Trust Co. v. IRS, 622 F.2d 387 (8th Cir. 1980).
93. See IIA FRATCHER, supra note 27, at § 157.4.
94. Id. at § 157.5: "There is little authority on the question whether the interest of the beneficiary of a spendthrift trust can be reached by persons against whom he has committed a tort. In the absence of authority it was felt by those who were responsible for the preparation of the Restatement of Trusts that no categorical statement could be made on the question (footnote omitted)."
96. IIA FRATCHER, supra note 27, at § 157.5; BOGERT & BOGERT, supra note 82, at 468; GRISWOLD TREATISE, supra note 12 at 648, (Model Act § 2(c)(3)).
recent commentator concluded, "Cases addressing whether tort creditors should be able to reach the beneficial interest in a spendthrift trust, although scarce, overwhelmingly reject an exception for tort victims." At least two state statutes include tort creditors: the Louisiana statute, which is modeled on the Griswold proposal, and the Georgia statute. In the absence of a statute, however, recovery is uncertain at best.  

Pity the poor contract creditor. Those commentators who express sympathy for the tort creditor—after all, one can't check the credit of the driver of a car about to hit oneself—reserve none for the contract creditor. "It has frequently been suggested that [ordinary contract creditors] have only themselves to blame if they extend credit to [the beneficiary of a spendthrift trust] without first ascertaining the amount of his resources that are available for the discharge of his debts," Quaere whether the notice argument should be treated as compelling. How unreasonable is it to rely in extending credit on the appearance of economic substance? What of the small town banker, or shop keeper, well aware of the standard of living of a long-time acquaintance? Is doing business on a handshake something society wants to discourage to the extent of denying the creditor any access to otherwise unencumbered assets of the debtor?  

2. Pensions and Retirement Plans: The Erisa Exception  

No discussion of spendthrift provisions is complete without a consideration of the impact of ERISA, the Employee Retirement Income Security Act of 1974. Congress enacted ERISA as part of a comprehensive effort to protect the retirement rights of workers in pension and welfare benefit plans. The ERISA provisions that generally give the most support to trust beneficiaries are the nonforfeiture laws and the antifoiling provisions. The nonforfeiture laws provide that pension benefits be paid to a plan participant's beneficiary in the event of the participant's death. The antifoiling provisions, found in 29 U.S.C. § 1056(d) and 26 U.S.C. § 401(a)(14), allow the transfer or assignment of pension rights without the consent of the plan participant only in limited circumstances. These provisions have been interpreted to mean that the plan participant may not validly transfer or assign pension rights to third parties without the consent of the beneficiary. Thus, the beneficiary is generally protected from the creditors of the plan participant.  

97. Brooks, supra note 1, at 125.  
98. Id. at 129. Oklahoma, which also patterned its statute on the Griswold proposal, omitted tort creditors. Id.  
100. A recent issue of the California Lawyer included an article describing a lawsuit by a woman attempting to recover damages resulting from a sexual assault. The defendant, who is on San Quentin's death row for a murder committed within a week after the assault, receives at least $300 per month from a trust, established by his mother, which includes a spendthrift provision. Professor McGovern of UCLA Law School is quoted as opining that recovery would be inappropriate because the California legislature enacted an exception for child support, and did not enact one for tort claimants. Diane Keaton, Breach of Trusts, 10 CAL. LAW. 24 (November 1990). Subsequently, a 1991 California law authorized payment of "restitution judgments" from distributions to the beneficiary from a spendthrift trust. CAL. PROB. CODE § 15305.5 (West Supp. 1993).  
101. "A man who is about to be knocked down by an automobile has no opportunity to invest the credit of the driver of the automobile and has no opportunity to avoid being injured no matter what the resources of the driver may be." IIA Ffratcher, supra note 27, at 220.  
102. Id. at 188.  
103. Id.  
hensive plan to safeguard the retirement income of the nation’s workers. In return for submitting to federal regulations, employers who establish tax qualified ERISA plans gain a number of advantages.

Basically, there are three advantages to tax qualification. First, employers are able to deduct currently contributions made to the plan even though employees actually may not receive this deferred compensation until a later time. Second, the trust to which plan contributions are made is exempt from income tax. Third, plan participants need not recognize their plan benefits as income until they actually receive them.

In order to be tax qualified, an ERISA plan must have a spendthrift provision. "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." The facial clarity of this provision notwithstanding, creditors of beneficiaries of ERISA qualified plans have been predictably aggressive in seeking to overcome this barrier to recovery from their debtor’s interest in the trust.

Alimony and child support creditors have been successful. ERISA, when first enacted, contained a blanket anti-alienation provision and no alimony or child support exception. Nonetheless, virtually every court confronting this issue found that an exception existed. Congress concurred in this construction of the ERISA anti-alienation provision when it enacted the Retirement Equity Act of 1984 and included an exception for “qualified domestic relations orders.”

Notwithstanding over a decade of contentious litigation, and the adoption by the lower courts of a number of “implied exceptions,” it now appears that ERISA spendthrift provisions are virtually impregnable. In two recent cases, the Supreme Court decisively resolved two major issues in favor of the trusts. Even more critically, the Court

106. Radford, supra note 32, at 691 (footnotes omitted).
112. See Radford, supra note 32; Sherman, supra note 32; Ronald I. Kirschbaum, ERISA Spendthrift Rules—It Just Shouldn’t Be This Hard, 11 Campbell L. Rev. 29 (1988).
staked its position by describing itself as "vigorously [enforcing] ERISA's prohibition on the assignment or alienation of pension benefits, [and] declining to recognize any implied exceptions to the broad statutory bar." 114

In Guidry v. Sheet Metal Workers National Pension Fund, 115 Curtis Guidry pled guilty to embezzling funds from the sheet metal workers union of which he served as an officer. Guidry also served as a trustee for one of three union pension funds from which he was eligible to receive benefits. While serving his sentence for embezzlement, Guidry filed suit against two of the plans alleging that they were wrongfully withholding his benefits. He did not sue the third because he had reached a settlement with it. The union intervened, joined the third plan, and obtained a $275,000 judgement against Guidry. 116

The union sought to recover on the judgement by imposing a constructive trust on Guidry's interests in the plans. The plans contended that the prohibition on the alienation of benefits in section 206(d)(1) of ERISA 117 barred this remedy. Reading ERISA in pari materia with the Labor Management Relations Act and the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), the district court concluded that "circumstances where the viability of a union and the members' pension plans was damaged by the knavery of a union official" presented a narrow exception to the ERISA anti-alienation provision. 118 The United States Court of Appeals for the Tenth Circuit affirmed. 119

The Tenth Circuit was not alone in concluding that criminal misconduct by the employee justified imposition of an equitable remedy on the employee's interest in the company's pension fund. 120 The Supreme Court disagreed, however. Recognizing that "there may be a natural distaste for the result we reach here," 121 the Court held firm to the statutory bar on alienation: "[T]he identification of any exception should be left to Congress." 122

One scenario may, however, fit a statutory exception. In Guidry, the Tenth Circuit relied on section 409(a) of ERISA, 123 finding that it created a statutory exception. That section provides that when a plan

116. The facts are taken from the opinion of the Supreme Court. Id.
119. Guidry v. Sheet Metal Workers' Nat'l Pension Fund, 856 F.2d 1457 (10th Cir. 1988).
121. Id. at 377.
122. Id.
123. 29 U.S.C. § 1109(a).
fiduciary breaches a fiduciary duty to the plan she "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." The Supreme Court's disagreement was based on the facts of the case. Finding that Guidry, who had been convicted of embezzling from the union, had "not been found to have breached any duty to the plans themselves," the Court concluded that § 409(a) was not applicable. The Supreme Court did not decide whether this provision could present an exception to the anti-alienation bar.

Both prior to and subsequent to Guidry, lower federal courts have split on this issue. In the most recent case, the district court concluded that § 409(a) did not create an exception to § 206(d)(1): "[T]he Supreme Court's reasoning in Guidry counsels a strict application of this anti-alienation provision."

The other hotly contested alleged exception arose when plan participants went bankrupt. The Bankruptcy Code allows a debtor to exclude from his bankruptcy estate property subject to a spendthrift provision which is enforceable under "applicable nonbankruptcy law." Despite the facial clarity of that provision, a substantial number of courts concluded that "applicable nonbankruptcy law" described only state law, not federal law. If participants in ERISA plans went bankrupt and the court concluded that neither ERISA's spendthrift provisions nor applicable state law protected the plan, the result would be that a creditor could reach the plan assets. In Patterson v. Shumate, the district court reached just that conclusion, and ordered the trustee to turn the participant's interest in the plan over to his bankruptcy estate.

Somewhat surprisingly, rulings like this persisted even after the Internal Revenue Service took the position that a breach of the ERISA-required spendthrift provision disqualified the entire plan.

124. Id. at 374.
126. Id. at 351.
127. 11 U.S.C. § 541 (c)(2).
129. Id.
130. Creasy v. Coleman Furniture Corp., 83 B.R. 404 (1988). This opinion was reversed by the Fourth Circuit, 943 F.2d 362 (4th Cir. 1991), and the Supreme Court unanimously affirmed. 112 S. Ct. 2242 (1992).
131. Priv. Ltr. Rul. 81-31-020 (May 5, 1981). Subsequent private letter rulings to the same effect include Priv. Ltr. Rul. 90-11-037 (Dec. 20, 1989); Priv. Ltr. Rul. 89-51-067 (Sept. 28, 1989); and Priv. Ltr. Rul. 89-10-035 (Dec. 9, 1989). "The IRS has indicated informally that, if anything, it would be more likely to actively pursue disqualification if a plan administrator offers little or no resistance to a bankruptcy trustee's request or to a proposed order for payment of plan benefits, as opposed to a situation where the plan administrator actively contests payment."
The Supreme Court opinion in *Patterson* makes short work of the interminable and extraordinarily complex debate over the relationship between the Bankruptcy Code and ERISA with reference to spendthrift provisions. In *Patterson*, the Supreme Court described itself as having "vigorously . . . enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to the broad statutory bar." 

Although *Guidry* and *Patterson* should shut down litigation over "implied exceptions," they leave open the possibility of exceptions carved out by other federal statutes. Any such exception will have to be express, however, with reference to its application to ERISA plans. In *Guidry*, the unions relied on section 501(a) of the LMRDA. The Supreme Court held, however, that even assuming the LMRDA authorized the particular remedy of a constructive trust for the unions, it did not authorize overriding ERISA's anti-alienation provision. The Court held:

In our view, the two statutes are more persuasively reconciled by holding that the LMRDA determines what sort of judgment the aggrieved party may obtain, while ERISA governs the narrow question whether that judgment may be collected through a particular means—a constructive trust placed on the pension.

*Guidry* and *Patterson* highlight the complexity of law making and decision rendering. These opinions resolved conflicting issues in a manner consistent with our notions of separation of powers, yet also consistent with rational public policy choices, of which separation of powers is itself one, albeit one made by the Constitution. They decisively effectuated an important act of Congress. They should deter litigious attempts to breach ERISA's anti-alienation provision by their announcement of a clear rule: there are no exceptions unless Congress creates them. Yet it is somewhat disconcerting that this "rule" is explained in part by a footnote reference to the congressionally created exception of qualified domestic relations orders, an exception

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132. For a chronicle of the developments in this area prior to *Patterson*, see Radford, *supra* note 32, at 733-51.
134. See Radford, *supra* note 32, at 724-726, for a discussion of yet another alleged "implied exception," that arguably arises when the beneficiary kills the plan participant.
135. Quaere whether the regulation establishing an exception for federal tax liens, see *supra* note 104, meets *Patterson's* criteria.
138. *Id.* at 376 n.18.
which most likely would not exist but for the determined, persistent efforts of litigants. The message of *Guidry* and *Patterson* seems to be, "Don't go to court, go to Congress." *Quaere* whether political lobbying will prove as efficacious in illuminating and correcting inappropriate policy choices as has litigation.

IV. CODIFYING THE COMPROMISE

A. The Wheels of Justice Grind Slowly

In jurisdictions where the validity of spendthrift provisions has been established by judicial decision, exceptions are recognized in a continuing patchwork of decisions. The evolution of the Florida law on the alimony exception exemplifies this situation.139

In 1947, the Florida Supreme Court recognized the validity of spendthrift provisions.140 By 1984, when *White v. Bacardi*141 reached the Court of Appeals for the third district, no legislation limiting or qualifying the validity of spendthrift provisions had been enacted.142 The trust at issue had been created in 1971, during the defendant's first marriage, by the defendant's father. The income beneficiaries were the defendant and his three children. The marriage between the defendant and the petitioner had lasted for two years. They had no children. In the property settlement incorporated in the divorce decree, the defendant had agreed to pay his wife alimony of $2000.00 per month. Armed with judgments for unpaid alimony in the amount of $14,000 and attorney's fees in the amount of $1,000, the petitioner had obtained an order authorizing a continuing garnishment against the trust income.143

The *Bacardi* court recognized that the Restatement position, which would have allowed the claim, purported to represent the majority view in 1935. Citing critics of that position, however, the court "align[ed] with what appears to be both the modern trend and the best reasoned view,"144 holding that a divorced wife could only reach trust assets in the hands of the trustee if she could show "by competent and

139. Florida is not the only state to take a torturous path toward resolution of these issues. See Gary E. Dienstag, *The Spendthrift Trust: A Fortress Against Claims for Child Support and Maintenance?*, 73 ILL. B.J. 648 (Aug. 1985)(the caption to the article reads: "Illinois law has long been unsettled over the troublesome issue of whether spendthrift trusts can be attached directly to provide and collect child support or maintenance. The Non-Support Act as well as a recent landmark decision by the Illinois Supreme Court have now settled the issue in favor of collection of those obligations. Questions remain, however, about whether the spendthrift fortress has truly fallen").

140. Waterbury v. Munn, 32 So. 2d 603 (Fla. 1947).
142. *Id.* at 153.
143. *Id.* at 152.
144. *Id.* at 156.
substantial evidence that it was the settlor's intent that she participate as a beneficiary."145 Florida law was hardly clarified by the opinion, however, in view of the court's disclaimer:

We do not decide whether the income of a spendthrift trust may be reached to support a wife where there has been no dissolution of marriage, or where there are dependent children. On those questions, public policy may be clearer. Neither do we decide whether there are any equitable circumstances where a spendthrift trust should be defeated, as a policy matter, in order to provide reasonably for an alimony-debtor ex-spouse. On the record before us no special circumstances are presented.146

Had Florida law been settled, the calm would have been remarkably short lived. A scant three days later the District Court of Appeal for the second district reached a contrary decision. In Gilbert v. Gilbert,147 the court dealt with a claim by an ex-wife for $50,500 arrearages in alimony and medical expenses, and $18,000 in attorney's fees. The opinion offers scant facts about the relationship between the parties, but the wife's medical expenses were attributable to her multiple sclerosis, and the husband is described as having "fled the jurisdiction."148 The court goes on:

He is now thought to be living in England. The husband also removed his assets from the state, thereby thwarting the wife's efforts to collect the arrearages. . . .149 [T]he instrument provides for the husband to receive $50,000 from the corpus of the trust together with accrued income each December 10 until the corpus is exhausted. . . . [B]y the time the garnishment judgment was entered . . . the bank was holding more than $100,000 which was payable to the husband under the trust.150

Faced with these compelling facts, the court held that the former wife could reach the trust assets, the spendthrift provision notwithstanding, and that a continuing garnishment would lie.151 Judge Lehan, writing separately, would have expressly limited the opinion to the situation "where the ex-wife has recourse . . . against no property of the ex-husband, and invasion of the spendthrift trust is the last resort."152 He also would "specifically limit the application of this decision to the trust now before us, to other existing spendthrift trusts which are revocable and can be changed, and to spendthrift trusts created after the date of this decision."153

A year later the Florida Supreme Court affirmed Gilbert154 and

145. Id.
146. Id. at 156 n.7.
148. Id. at 300.
149. Id.
150. Id. at 302.
151. Id.
152. Id. at 303 (Lehan, J., concurring in part and dissenting in part).
153. Id.
reversed Bacardi.155 Two theories underlie decisions allowing claims for alimony against assets protected by spendthrift provisions. The first theory is that the claimant is within the class the settlor sought to favor or expected to benefit. The second theory is that, notwithstanding the settlor's intent not to allow this claimant to reach the assets, public policy demands an exception be made. The Bacardi court chose the latter theory. The court also affirmed the right of the claimant to collect attorney's fees as well as alimony arrearages, and to use a continuing garnishment in these circumstances. However, the court restricted the breadth of its opinion by adopting Judge Lehan's view that spendthrift trust assets could only be reached when all other means had failed. The retroactivity issue was not discussed.156

The inevitable complexity of litigation emerges strikingly in these two cases. It is notable that Florida recognized spendthrift provisions in 1947157 and nearly 40 years elapsed before this fundamental question—whether the spendthrift provision bars alimony claimants—was decided. Furthermore, while the decisions resolve three basic issues—alimony claims are public policy exceptions, a continuing garnishment will lie, and attorney's fees may be included—they leave open the question of retroactivity, and create the "other assets are available" defense, which is certain to protract litigation in some cases.

A judicially created exception grounded in public policy may also exist when the spendthrift provision derives its validity from a statute, at least where the statute itself contains no exceptions. When the statute addresses the problem by providing certain exceptions, a strong argument can be made that the public policy issues have been resolved by the legislature, and the court has no room in which to act. Where no exceptions are provided, however, a court may conclude that the legislature did not address the issue, and did not intend to preclude certain claims. ERISA, for example, when first enacted, contained a blanket anti-alienation provision and no alimony or child support exception. Nonetheless, virtually every court which confronted this issue found that a child support exception existed.158 Congress concurred in this construction of the ERISA anti-alienation provision when it enacted the Retirement Equity Act of 1984159 and included an exception for "qualified domestic relations orders."160

The history of domestic relations claimants’ success against spendthrift provisions—even in the teeth of federal regulation—indicates

156. Id.
158. See Radford, supra note 32 at 722-23; Sherman, supra note 32, at 272-73.
that the common law works. It does. Unfortunately, it works slowly and at great cost. The economic cost of litigation does not fall solely on the claimant. In some cases, particularly those involving domestic relations orders, the claimant’s attorney’s fees may be recoverable from the trust.\textsuperscript{161} In all cases, the expenses of defending the lawsuit on behalf of the trust are borne by the trust.\textsuperscript{162} Society itself incurs significant costs in providing the forum and the adjudicator.

Litigation, as expensive as it is, solves problems at an exceedingly slow rate. It is an inherently piecemeal process. Courts sit to resolve particular disputes on their facts. Related issues that are either not presented or do not require resolution to dispose of the case at hand are ordinarily not addressed. When related issues are addressed, the court’s comments are not binding.\textsuperscript{163} Thus, each claimant is required to press his own claim, and to counter the defendant’s inevitable argument that, since this claim is different from those that have been decided, this claim should not be allowed.\textsuperscript{164}

Granted, some “enforceable” claims probably should not be allowed. Were Solomon to resurrect himself, he would pick out worthy claims and dismiss unworthy ones. However, once it has been established that a claim is “enforceable” and that a debt is “legitimate,” sorting out those that public policy demands approval of from those less compelling is a game not worth the price of the ticket. The costs are simply too high.

B. A Proposal for a Statutory Solution

More than 50 years ago Erwin Griswold proposed a model spendthrift trust statute. Quickly adopted in Louisiana and Oklahoma, it then fell into desuetude.\textsuperscript{165} The Griswold proposal first provides that spendthrift provisions are valid and enforceable, and then severely limits their reach. All income over $5000, and 10% of income over $12 per week can be alienated or attached.\textsuperscript{166} Even those protections are overridden when the claim is for alimony, child support, necessaries, or a tort; then the court can allow the creditor to reach whatever trust

\textsuperscript{162} This assumes the trustee commits no breach in determining to mount a defense.
\textsuperscript{163} They may have enormous effect, however. Witness the dicta in Nichols v. Eaton, 91 U.S. 716 (1875).
\textsuperscript{164} These criticisms of litigation could be raised in virtually any context. My purpose, however, is not to attack litigation as a conflict resolution process in general. Rather, I am contending that because the recognition of spendthrift provisions is an anomaly, the adversely affected claimant should not have to bear the burden of litigation in order to establish the enforceability of a claim.
\textsuperscript{165} BOGERT & BOGERT, supra note 82, at 420, 436; Wicker, supra note 14, at 15, 18.
\textsuperscript{166} GRISWOLD TREATISE, supra note 12, at 648, (Model Act § 2(a)(b)).
SPENDTHRIFT TRUSTS

income the court finds to be "just under the circumstances." The spendthrift provision does not protect the beneficiary's interest in the principal, only in the income.

The Griswold proposal has not proven politically viable, perhaps because it gives with one hand and takes away with the other. Spendthrift provisions are valid, but only the first $5,000 of income is protected, and the provision may be completely overridden for certain claimants. Whatever the merits of this plan in terms of fairness, it does not satisfy the proponents of spendthrift provisions. It also suffers from two other significant flaws. First, by using sum certains ($5,000 per year and $12.00 per week) to determine what amounts are protected in the first instance, the statute is vulnerable to becoming outdated by inflation or recession. Second, by providing that favored claimants can recover what a court determines to be just, it forces them into litigation they may not be able to afford. If the matter is litigated, the trust itself will be further depleted by its share of the costs.

Several things are now clear. First, most jurisdictions approve spendthrift provisions in concept. Second, those that do find certain creditors' claims compelling. Any class of creditors can present an individual with a claim that equity finds overwhelming. What of the paralyzed father/construction worker, unable to support his family, injured by a reckless driver with a long history of traffic violations? What of the widow/shopkeeper, struggling to keep her own family afloat, who has extended credit on account to the seemingly affluent scion of the town's most substantial family? They are tort and contract creditors, ordinarily less favored by the law of spendthrift provisions.

The converse is true as well—a class ordinarily favored may include an unworthy claimant. An alimony claimant may have been a contributing partner in a long standing marriage, or may be a schemer who marries and quickly divorces a vulnerable, albeit wealthy, beneficiary. Quaere whether it makes sense to separate out claimants with enforceable claims according to the class of creditor to which they belong. Enforceability itself should insure some measure of "justness." Forcing virtually every claimant to litigate the merits of her claim is both grossly inefficient and grossly unfair.

A true compromise is called for—a compromise that constricts, if not eliminates, the need for litigation of claims and provides creditors with an efficient method of obtaining some satisfaction of their claims, but a compromise that also protects the essence of the spendthrift pro-

167. Id. (Model Act § 2(c)).
168. Id. at 649 (Model Act § 4).
169. Virginia uses the sum certain approach, but the protected amount is $500,000. VA. CODE ANN. § 55-19 (Michie Supp. 1992).
vision by insulating a significant portion of the beneficiary’s interest in the trust. True compromise requires giving something up. If my proposal were enacted, the creditor would lose the right to seek the recovery of more than the statutory limit, that is, to ask the court to order a transfer of however much is “just under the circumstances,” even if that be the beneficiary’s entire interest. In return, the creditor is freed of the burden of litigating his claim. To make that bargain worthwhile, in cases where the obduracy of the trustee results in the creditor being forced to litigate, the creditor should be entitled to recover the costs of the litigation, including attorney fees.

I would retain the venerable rule that a settlor cannot create a valid spendthrift provision for her own benefit. If possible, I would have one rule with no exceptions, but that is not possible. ERISA trusts are exceptions; no state law can affect that. Because they are, I would level that playing field and create an exception for all bona fide retirement or pension trusts. To do otherwise leaves participants in ERISA qualified plans with an irrational advantage over other working people. In sum, I would propose a statute along the following lines:

_Spendthrift Provisions_

(a) A spendthrift provision is a provision in a trust that the interest of the beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.

(b) Except as otherwise provided in this subsection, a spendthrift provision is valid and enforceable.

(1) A spendthrift provision is not valid if the beneficiary is the settlor.

(2) A spendthrift provision is not valid with reference to one-third of any distribution of principal or income to the beneficiary.

(c) In any case in which the trustee refuses to honor a claim and a creditor brings suit to enforce the creditor’s right to recover from the trust pursuant to

170. I would not, for example, create an exception for handicapped beneficiaries.
171. Federal tax liens are also an exception, but a state statute need not expressly take them into account. See supra note 92 and accompanying text.
173. An exception is necessary to avoid the argument that a pension or retirement trust is fully or partially self-settled. See Sherman, supra note 32. To control abuse of the exception, it is limited to “bona fide” retirement or pension funds.
174. Some retirement plans, most notably state government plans, are not ERISA qualified because they do not need to qualify for tax purposes; others, most notably individual accounts, are not ERISA qualified because they do not come within the scope of the statute.
175. This proposal is modeled on the spendthrift provision section in the Georgia Trust Act of 1991. Ga. Code Ann. § 53-12-28 (Michie Supp. 1992). Sections (a) and (d) are verbatim. I am indebted to the sub-committee members who worked on that section for their input into this proposal. They are Michael Alembik, Henry L. Bowden, Jr., Herbert Elsas, Barbara Hipple, Albert Reichert, and James C. Rehburg.
176. Obviously, this figure may be adjusted as legislatures deem appropriate.
this statute and the court enters a judgment in favor of the creditor, the creditor shall be entitled to recover costs and attorney's fees from the trust. Recovery under this subsection shall be in addition to recovery under subsection (b).

(d) Notwithstanding any other provision in this Code section to the contrary, a spendthrift provision in a bona fide pension or retirement trust is valid and enforceable with reference to the entire interest of the beneficiary in the income or in the principal or in both, even if the beneficiary is also the settlor of the trust, except where a claim is made pursuant to a qualified domestic relations order as defined in 26 U.S.C. § 414(p), or any subsequent statute of similar import.177

V. CONCLUSION

"The life of the law has not been logic; it has been experience." 178 Logic, to my mind, impels the conclusion that spendthrift provisions are invalid. Gray's arguments carry the day. Experience, on the other hand, teaches that they are valid. The current of history has swept away Gray's position without refuting it. Spendthrift provisions may be theoretically suspect; they are, nonetheless, not only valid but also thriving.

Writing on a clean slate, I would severely constrict the reach of spendthrift provisions, were I to approve of them at all. Writing in the face of their all but universal acceptance, however, I counsel a pragmatic approach. Allow creditors to claim a percentage of each distribution—enough to be significant, but not so much as to frustrate the settlor's goal of taking care of the beneficiary. Some may complain that one-third is too low, and surely it will be in some cases. Just as surely, in others, it may seem too high. But for the most part it strikes a balance that recognizes the interests of the settlor, the beneficiary, and the creditor.179 In this highly complex age, certainty has its costs. Sometimes the costs are worth it.

177. If the trust is not a bona fide pension or retirement trust, then to the extent that the assets represent contributions of the beneficiary, the trust is self-settled and the spendthrift provision is not valid. Assets representing contributions from any other source would be subject to subsections a-c.


179. This proposal equalizes the positions of all creditors with enforceable claims, and of all beneficiaries. The beneficiary who is in fact a spendthrift is afforded no special protection. That troubles me not at all. Nor is the beneficiary who is disabled, and unable to fully care for herself. That troubles me not a little. Some jurisdictions have special rules for disabled beneficiaries. See Ga. Code Ann. § 53-12-28(c)(Michie 1992 Supp.); Va. Code Ann. § 55-19(D)(2)(Michie 1991 Supp.); I have rejected that approach because the concept of disability, necessarily elastic, creates an issue of fact requiring litigation for its resolution.