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TRUSTS-RIGHT OF DIVORCED WIFE OF BENEFICIARY OF SPENDTHRIFT TRUST TO REACH THE BENEFICIARY'S INTEREST IN THE TRUST FOR ALIMONY AND SUPPORT FOR CHILDREN

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TRUSTS — RIGHT OF DIVORCED WIFE OF BENEFICIARY OF SPENDTHRIFT TRUST TO REACH THE BENEFICIARY'S INTEREST IN THE TRUST FOR ALIMONY AND SUPPORT FOR CHILDREN — *P*, divorced wife of *D*, brought this action for alimony and for support money for her children. The object of the action was to reach the income from a spendthrift trust created for the benefit of *D* and his present wife and children in the will of *D*'s mother. The will specifically provided that none of the proceeds of the trust were to go to *P* or her child. *Held*, the settlor had the right to devise her property in any manner she chose. There is nothing in the statutes or decisions of Wisconsin which forbid such terms in a trust. Nor is there any public policy which would prevent such. Bill dismissed. There was a strong dissent on the grounds that Wisconsin had not declared its policy on this question and that until such was done this court could decide as it thought just. *Schwager v. Schwager*, (C. C. A. 7th, 1940) 109 F. (2d) 754.

This question as to the right of the beneficiary's wife and children to share

in the income from a spendthrift trust is in great conflict.¹ Some courts allow recovery on the ground that the settlor would have intended to care for the dependents of the beneficiary.² Most courts will try to reach such a decision, but this was impossible in the principal case.³ The *Restatement of Trusts* lays down the rule that public policy requires that the dependents of a beneficiary of a spendthrift trust be supported from the beneficiary's interest in the trust⁴ and there is authority for this rule.⁵ The principal case is the second recent case which discusses the rule laid down by the *Restatement* and then, in a carefully considered opinion, refuses to follow it.⁶ There is also a third recent case which reaches a conclusion contrary to the *Restatement* but without discussing the rule as laid down therein.⁷ In the light of the consideration given the public policy in these recent cases, there seems to be an indication of a trend away from the rule suggested by the *Restatement of Trusts*. This trend is apparently based on the theory that the settlor has the right to dispose of his property as he sees fit and that it is not the function of the courts to interfere with such disposal.⁸

W. Wallace Kent

¹ 1 SCOTT, TRUSTS, § 157.1 (1939); GRISWOLD, SPENDTHRIFT TRUSTS, §§ 333-336, 339 (1936); *Erickson v. Erickson*, 197 Minn. 71, 266 N. W. 161, 267 N. W. 426 (1936); *In re Moorehead's Estate*, 289 Pa. 542, 137 A. 802, 52 A. L. R. 1251 at 1259 (1927); *Gilkey v. Gilkey*, 162 Mich. 664, 127 N. W. 715 (1910).

² *Eaton v. Eaton*, 82 N. H. 216, 132 A. 10 (1926); *Matter of Sand v. Beach*, 270 N. Y. 281, 200 N. E. 821 (1936); *Baker v. Brown*, 146 Mass. 369, 15 N. E. 783 (1888); *Slattery v. Wason*, 151 Mass. 266, 23 N. E. 843 (1890); 1 SCOTT, TRUSTS, § 157.1, note 4 (1939).

³ ". . . not, however, including his first wife or any of his children by her [referring to persons for whose benefit the trust was created]." 109 F. (2d) 754 at 756.

⁴ 1 TRUSTS RESTATEMENT, § 157 (1935).

⁵ *In re Moorehead's Estate*, 289 Pa. 542, 137 A. 802 (1927); *England v. England*, 223 Ill. App. 549 (1922); *Tuttle v. Gunderson*, 254 Ill. App. 552 (1929). See also GRISWOLD, SPENDTHRIFT TRUSTS, § 334 (1936); 1 SCOTT, TRUSTS, § 157.1, note 5 (1939).

⁶ The other case is *Erickson v. Erickson*, 197 Minn. 71, 266 N. W. 161, 267 N. W. 426 (1936).

⁷ *Bucknam v. Bucknam*, (Mass. 1936) 200 N. E. 918; *Burrage v. Bucknam*, (Mass. 1938) 16 N. E. (2d) 705. See also, *San Diego Trust & Savings Bank v. Heustis*, 121 Cal. App. 675, 10 P. (2d) 158 (1932), where the court held that the settlor was under no obligation to support the son (beneficiary)'s wife.

⁸ ". . . a testator has the right to dispose of his property in such manner as his judgment may dictate." Principal case, 109 F. (2d) 754 at 759. "Her [testatrix]' command to pay the income to her son is direct and unequivocal." *Burrage v. Bucknam*, (Mass. 1938) 16 N. E. (2d) 705 at 707. "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." *Erickson v. Erickson*, 197 Minn. 71 at 75, 266 N. W. 161, 267 N. W. 426 (1936).

The principal case is also noted in 53 HARV. L. REV. 1059 (1940); and 88 UNIV. PA. L. REV. 758 (1940).