

## DIVORCE AND THIRD-PARTY TRUSTS IN DELAWARE

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### I. DIVORCE IN DELAWARE

The Delaware Divorce and Annulment Act (Divorce Act) is in Chapter 15 of Title 13 of the Delaware Code.<sup>1</sup> 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.”<sup>2</sup> Delaware is a no-fault state. Hence, the Family Court may grant a divorce for, inter alia, “separation caused by incompatibility.”<sup>3</sup> 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.<sup>4</sup>

#### A. 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.<sup>5</sup> The first step the court must address is to identify what will be considered marital and nonmarital property between the parties. The court’s decision is guided by Title 13 of the Delaware Code.

#### 2. Identifying The Marital Property

##### a. Background

The court must identify the marital property before the court can allocate it. “Marital property” is defined under Delaware law as:<sup>6</sup>

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1. DEL. CODE. ANN. tit. 13, §§ 1501 – 1523.

2. *Id.* § 1505(a).

3. *Id.* § 1505(b)(4).

4. *Id.* § 1505(a).

5. *Id.* § 1513(a).

6. *Id.* § 1513(b) (emphasis added).

(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.

When reading caselaw, it should be noted that Title 13 sections 1513(b)(1)<sup>7</sup> and (b)(2)<sup>8</sup> were added to the Divorce Act in 1993 and 2016, respectively.

Property given by one spouse to the other during marriage is marital property.<sup>9</sup> 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 within one of the exceptions above.<sup>10</sup>

### **b. Interpreting The Exceptions**

The Supreme Court of Delaware interpreted two of the above exceptions in *Sayer v. Sayer*.<sup>11</sup> At the outset, Justice Moore summarized the issue and the court’s conclusion as follows:<sup>12</sup>

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

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7. 69 Del. Laws 55 (1993).

8. 80 Del. Laws 237 (2016).

9. DEL. CODE. ANN. tit. 13, § 1513(c).

10. *Id.* § 1513(c).

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

12. *Id.*

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:<sup>13</sup>

In this case the Family Court decided that the wife's lifetime income interest in the testamentary trust, which had vested during 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:<sup>14</sup>

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.

The above-referenced exceptions within Title 13 are one aspect of the entire property-division process. There is nothing preventing a married couple from accumulating a broad array of property which must be addressed upon separation. Within the accumulated property, there is potential to find an article of property that is not addressed by statute.

### **c. Defining Marital Property**

#### **(1) Introduction**

Often, when it comes time to divide marital property, the attitude of one or more of the parties is "What is mine is mine, what is yours is negotiable." That being said, the word "trust" does not appear in the statute. Of course, when

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13. *Id.* at 239 (emphasis added).

14. *Id.* at 240 (emphasis added; citations and some internal quotation marks omitted).

something in the law does not have the benefit of a statute, it is left for the courts to consider. Below are some cases where the Delaware judiciary has considered when trust interests constitute marital property; they are instructive.

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

In *A.I.D. v. P.M.D.*,<sup>15</sup> Chief Justice Herrmann of the Supreme Court of Delaware considered the availability of 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,”<sup>16</sup> 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.”<sup>17</sup>

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

In *Frank G.W. v. Carol M.W.*,<sup>18</sup> Justice Quillen of the Supreme Court of Delaware described the controversy as follows:<sup>19</sup>

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 vivos 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 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.

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

16. *Id.* at 942.

17. *Id.* at 943.

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

19. *Id.* at 717.

Justice Quillen summarized the parties' positions as follows:<sup>20</sup>

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 trusts 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 the 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 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:<sup>21</sup>

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:<sup>22</sup>

[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*.<sup>23</sup> There, Chief Justice Christie wrote:<sup>24</sup>

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20. *Id.* at 717 – 18 (footnote omitted).

21. *Id.* at 720 (citation omitted).

22. *Id.* at 727.

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

24. *Id.* 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:<sup>25</sup>

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 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.

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25. *Sayer*, *supra* at 240 (footnote, citations, and some internal quotation marks omitted).

Turning to the present case, he wrote:<sup>26</sup>

Applying this same rationale to a spouse's interest in trust income, we conclude that the term "acquired" in 13 *Del. C.* § 1513(b) 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 important 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 ...."<sup>27</sup>

Second, he specified:<sup>28</sup>

[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:<sup>29</sup>

[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*,<sup>30</sup> Judge Conner of the Delaware Family Court described a matter to be addressed as follows:<sup>31</sup>

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.

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26. *Id.*

27. *Id.* at 239 n.1.

28. *Id.* at 241 (footnote omitted).

29. *Id.*

30. *Brady v. Tigue*, 1988 Del. Fam. Ct. Lexis 6 (Del. Fam. Ct. June 23, 1988). Delaware courts give unpublished opinions substantial precedential weight. *Crystalex International Corp. v. Petroleos De Venezuela, S.A.*, 879 F.3d 79, 85 n.8 (3d Cir. 2018).

31. *Brady*, *supra* at \*2 – 3.

Judge Conner rejected the husband's request as follows:<sup>32</sup>

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 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:<sup>33</sup>

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 exception was added to the statute in 1993. Under that exception,<sup>34</sup> 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.

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32. *Id.* at \*3 - 4 (emphasis added; footnote and citation omitted).

33. *Id.* at \*5 - 6 (citation omitted).

34. DEL. CODE. ANN. tit. 13, § 1513(b)(1)a.



In practice, when meeting with clients regarding their estate planning, the topic of protecting an inheritance (and the frustration of not having a crystal ball to see into their children's futures) frequently arises. The concept that an inheritance is able to stay in further trust, with an adult child as a beneficiary and not an owner, particularly for the purposes of property division, is often a very comforting thought. Via a trust, the child can still have the benefit of an inheritance, but the risk is greatly reduced.

#### **d. Allocating The Marital Property**

Once the marital property is identified the court must allocate it. Although some time is inevitably spent explaining it to a client who has been wronged, marital misconduct is irrelevant.<sup>35</sup> In allocating marital property, the court is to consider factors including:<sup>36</sup>

- (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, 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.

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35. *Id.* § 1513(a).

36. *Id.* § 1513(a)(1) – (11).

Although “trust” doesn’t appear in the factors, courts have considered trust interests - whether marital property or nonmarital property - under factors (3),<sup>37</sup> (5),<sup>38</sup> and (7).<sup>39</sup> The Family Court has powers to ensure that orders, whether issued by the Court or stipulated and agreed-to by the parties, are implemented and enforced.<sup>40</sup>

## C. Alimony

### 1. Introduction

The Family Court may award interim alimony to a dependent party during a divorce proceeding.<sup>41</sup> 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.<sup>42</sup> If a marriage has lasted at least 20 years, a person is eligible for alimony for an unlimited time period.<sup>43</sup> Any person awarded alimony generally has an ongoing duty to seek vocational training or employment,<sup>44</sup> a duty that the Court takes very seriously. A person seeking alimony will routinely have to show proof of an on-going and genuine job search to the Court. A written waiver of the right to alimony before, during, or after marriage is binding<sup>45</sup> if it was validly executed.

Unless otherwise agreed in writing, the obligation to pay alimony ceases upon the death, remarriage, or cohabitation of the receiving party.<sup>46</sup> A person receiving alimony must notify the other party of remarriage or cohabitation.<sup>47</sup> Although remarriage is easy enough to verify, what constitutes cohabitation is frequently argued over. Many alimony-paying parties use the services of private investigators to shore up their allegations when requesting that the Court terminate their alimony obligation.

In *Du Pont v. Du Pont*,<sup>48</sup> Chancellor Seitz of the Delaware Court of Chancery considered:<sup>49</sup>

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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, supra*, at \*17-18.

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

40. DEL. CODE. ANN. tit. 13, § 1513(d) – (f).

41. *Id.* § 1512(a).

42. *Id.* § 1512(d).

43. *Id.* § 1512(d).

44. *Id.* § 1512(e).

45. *Id.* § 1512(f).

46. *Id.* § 1512(g).

47. *Id.* § 1512(g).

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

49. *Id.* at 587.

[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:<sup>50</sup>

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:<sup>51</sup>

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 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, as established in the Delaware Code, in the following circumstances:<sup>52</sup>

(b) A party may be awarded alimony only if he or she is a dependent party after consideration of all relevant factors ... 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*,<sup>53</sup> Judge Buckworth of the Delaware Family Court wrote:<sup>54</sup>

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50. *Id.* at 588 – 89.

51. *Id.* at 590.

52. DEL. CODE. ANN. tit. 13, § 1512(b).

53. *Preston*, *supra*.

54. *Id.* at \*8 n.3 (citations and internal quotation marks omitted).

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.

In denying alimony to Wife in *In re Marriage of Tweedale v. Tweedale*,<sup>55</sup> Judge Tumas of the Delaware Family Court had to resolve the following issue:<sup>56</sup>

[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:<sup>57</sup>

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.

More recently in *F.S. v. L.R.S.*,<sup>58</sup> Judge Kuhn of the Delaware Family Court noted the standards for the court to abide by in determining a party’s income. She provided the following guidance:<sup>59</sup>

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.

As evidenced in Judge Kuhn’s guidance in *F.S. v. L.R.S.* the court has been required to address the concept of trusts when addressing the separation of a marital couple.

### 3. Determining The Amount Of Alimony

In awarding alimony, the court must consider factors including:<sup>60</sup>

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55. *In re Marriage of Tweedale v. Tweedale*, *supra*.

56. *Id.* at \*10 (citation omitted).

57. *Id.* at \*10.

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

59. *Id.* at \*4 (emphasis added; footnotes and internal quotation marks omitted).

60. DEL. CODE. ANN. tit. 13, § 1512(c).

- (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*,<sup>61</sup> Judge Buckworth took Wife's trust income into account under factor (1),<sup>62</sup> further demonstrating the incorporation of trust interests in assessing marital assets.

### D. Child Support

In Delaware, parents have an equal duty to support a child under age 18 whether born in or out of wedlock.<sup>63</sup> 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.<sup>64</sup> The Family Court has jurisdiction to resolve issues of child support.<sup>65</sup>

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61. *Preston, supra*.

62. DEL. CODE. ANN. tit. 13, § 1512(c)(1).

63. *Id.* § 501(a), (c). See DEL. FAM. CT. C.P.R. 500 – 510.

64. DEL. CODE. ANN. tit. 13, § 501(d).

65. *Id.* §§ 507 – 508.

The availability of trust resources arose in calculating child support in *Hobbs v. Koly*.<sup>66</sup> Regarding Father's duty to contribute to private school tuition, Judge Crowell of the Delaware Family Court said:<sup>67</sup>

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.<sup>68</sup> Under the Premarital Agreement Act, a premarital agreement must be in writing and signed by both parties but need not be for consideration.<sup>69</sup> Such an agreement may cover specified matters<sup>70</sup> and takes effect upon marriage.<sup>71</sup> In the best circumstances, both parties have separate counsel and the resulting agreement is signed well in advance of the anticipated marriage.<sup>72</sup> As stated earlier, a well-drafted trust created by a parent for the benefit of a child can act as a de facto premarital agreement with regard to trust property.

Not all premarital agreements are enforceable. Section 326(a) provides:

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

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

67. *Id.* at \*6.

68. DEL. CODE. ANN. tit. 13, §§ 321 – 328.

69. *Id.* § 322.

70. *Id.* § 323.

71. *Id.* § 324.

72. *Id.* § 326(a).

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 has authority to resolve any question of unconscionability.<sup>73</sup> The below cases are illustrative.

In *James v. James*,<sup>74</sup> which predated adoption of the Premarital Agreement Act, Judge Ableman of the Family Court of Delaware sustained a premarital agreement.<sup>75</sup> The court reasoned:<sup>76</sup>

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 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.*,<sup>77</sup> which followed adoption of the Premarital Agreement Act, Judge Buckworth of the Family Court of Delaware upheld a premarital agreement because:<sup>78</sup>

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<sup>79</sup> 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.

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73. *Id.* § 326(b).

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

75. *Id.* at \*20.

76. *Id.* at \*20.

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

78. *Id.* at \*13.

79. DEL. CODE. ANN. tit. 12, § 3536.

- 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.
- 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.<sup>80</sup>
- 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 non-general *inter vivos* or testamentary power of appointment over the trust.<sup>81</sup>
- 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.<sup>82</sup>
- A beneficiary receiving payments from a charitable-remainder trust (CRT) or a lifetime marital-deduction trust or other trust may release his or her interest in favor of succeeding beneficiaries, even if the trust has a spendthrift clause.<sup>83</sup>

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.<sup>84</sup>

80. *Id.* § 3536(a).

81. *Id.* § 3536(d).

82. *Id.* § 3536(d)(1), (2).

83. *Id.* § 3536(e).

84. *Id.* § 3536(d)(3).



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,<sup>85</sup> unless a trust meets the requirements of Delaware's Qualified Dispositions in Trust Act<sup>86</sup> or is a lifetime marital-deduction trust, credit-shelter trust, or other trust.<sup>87</sup> 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.<sup>88</sup> In addition, the possessor of any power of withdrawal (not just the possessor of a \$5,000/5% power<sup>89</sup>) is not treated as the trustor due to the lapse, waiver, or release of the power.<sup>90</sup>

### **C. Narrow Court-Created Exception To Spendthrift-Trust Protection - *Garretson v. Garretson* (1973)**

The Supreme Court of Delaware created an extremely narrow public-policy exception to the protection provided by section 3536 in the 1973 *Garretson v. Garretson* case.<sup>91</sup> In *Garretson*, the wife filed an action in the Court of Chancery for the following reason:<sup>92</sup>

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:<sup>93</sup>

It is to be noted that both § 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 § 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 § 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.

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85. *Id.* § 3536(c).

86. *Id.* §§ 3570 – 3576.

87. *Id.* § 3536(c)(4).

88. *Id.* § 3536(c)(2). See Rev. Rul. 2004-64, 2004-2 CB 7 (July 6, 2004).

89. See I.R.C. §§ 2041(b)(2), 2514(c).

90. DEL. CODE. ANN. tit. 12, § 3536(c), flush language at end.

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

92. *Id.* at 739.

93. *Id.* at 740 – 41 (citations omitted).

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'.

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

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, Chief Justice Wolcott of the Supreme Court of Delaware noted that, “[w]e ... consider that ... the record discloses solely that the individual parties are still husband and wife.”<sup>96</sup> The court concluded:<sup>97</sup>

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 section 3536. Subsequently, three plaintiffs asked the Court of Chancery to create new judicial exceptions to the statute. All three efforts were unsuccessful.

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94. *Id.* 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*, *supra*, at 739.

97. *Id.* at 742.

## 2. *Gibson v. Speegle* (1984)

In the *Gibson v. Speegle* case,<sup>98</sup> Vice Chancellor Berger set the stage as follows:<sup>99</sup>

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:<sup>100</sup>

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:<sup>101</sup>

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.

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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. *Id.* at \*1.

100. *Id.* at \*5 (citations omitted).

101. *Id.* at \*6 (citations and some internal quotation marks omitted).

Nonetheless, Vice Chancellor Berger, deferring to the decision of the general assembly, dismissed this argument as well:<sup>102</sup>

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)

The next case was Chancellor Allen's 1989 decision in *Parsons v. Mumford*,<sup>103</sup> in which he described the controversy as follows:<sup>104</sup>

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."<sup>105</sup>

### 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,<sup>106</sup> Master LeGrow observed that:<sup>107</sup>

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102. *Id.* at \*6 – 7 (citations omitted).

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

104. *Id.* at \*1.

105. *Id.* at \*5.

106. *Mennen v. Wilmington Trust Co.*, 2015 WL 1897828 (Del. Ch. Apr. 24, 2015).

107. *Id.* at \*1.

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 section 3536;<sup>108</sup>
- A public-policy exception to section 3536 should not be created for tort claims;<sup>109</sup>
- A public-policy exception to section 3536 should not be created for claims against a “persistent wrongdoer”;<sup>110</sup> and
- The remedy of “impoundment” is not available.<sup>111</sup>

After procedural issues were resolved,<sup>112</sup> Vice Chancellor Laster adopted Master LeGrow's final report as written early in 2017;<sup>113</sup>

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:<sup>114</sup>

This 21st day of June 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 Report Pursuant to Delaware Supreme Court Rule 19(c) should be affirmed for the reasons stated ... by the Master in Chancery in her well-reasoned April 24, 2015 final report on the motion for summary judgment ....

### 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

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108. *Id.* at \*6.

109. *Id.* at \*7.

110. *Id.* at \*8.

111. *Id.* at \*12.

112. *Mennen v. Wilmington Trust Co.*, 2017 WL 751201, at \*1 (Del. Ch. Feb. 27, 2017).

113. *Id.* at \*2.

114. *Mennen v. Fiduciary Trust Int'l of Del.*, 166 A.3d 102, 102 (Del. 2017).

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.

Based on the foregoing decisions, it is believed that Delaware judges will exercise restraint in refusing to honor such a provision because, at least since 2000,<sup>115</sup> a Delaware statute has provided in relevant part:<sup>116</sup>

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."<sup>117</sup> 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 as described below, however, Delaware has adopted legislation in Title 12 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;<sup>118</sup>
- 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;<sup>119</sup>
- 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.<sup>120</sup>

The Scott treatise explains the difference between the approaches of the Second and Third Restatements of Trusts as follows:<sup>121</sup>

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

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115. 72 Del. Laws 388, § 9 (2000).

116. DEL. CODE. ANN. tit. 12, § 3303(a).

117. BLACK'S LAW DICTIONARY 1742 (10th ed. 2014).

118. DEL. CODE. ANN. tit. 12, § 3315(b).

119. *Id.* § 3536.

120. *Id.* § 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).

stand, in the absence of a judicial finding that no reasonable person could conclude that the trustee 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

On September 25, 2018, Master Griffin issued her report in *In re: The Trust of FBO Samuel Francis duPont under trust agreement dated August 4, 1936*,<sup>122</sup> wherein trustees of a trust sought instructions from the court as to the proper distribution of the principal and income of a trust, which granted the donee a nongeneral testamentary power of appointment.<sup>123</sup> In this particular matter, a divorcing beneficiary’s exercise of his nongeneral power of appointment became an issue when it was included as part of his 1962 divorce settlement agreement. The same beneficiary later exercised his non-general power of appointment in contravention of this agreement. The subsequent filing of a request for instructions by the trustee to the Delaware Court of Chancery demonstrates that this area of the law is complicated but holds benefits to those who choose to create a trust to protect their assets.

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. As the existing caselaw demonstrates, when a provision has been tested, the trust has proved an effective and reliable means of asset protection.

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122. *In re Trust FBO duPont Under Trust Agreement dated August 4, 1936*, 2018 WL 4610766 (Del. Ch. Sept. 25, 2018).

123. *Id.*

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