IS THE DEAD HAND LOSING ITS GRIP IN TEXAS?: SPENDTHRIFT TRUSTS AND *IN RE TOWNLEY BYPASS UNIFIED CREDIT TRUST*

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I. INTRODUCTION

The classic phrase "dead-hand control" signifies the ability of an individual to direct how and to whom his property will pass after his death.[1] The extent to which the law should encourage or even protect this ability is an underlying issue in almost every legislative and judicial decision creating law on wills, trusts, and estates.[2] Today we never think twice when someone devises their property in a will to a loved one or favored institution. It was their property to control when they were living, so why should they not be able to choose who receives it when they die? The maxim "*Cujus est dare, ejus est disponere*" (whoever has the right to give has the right to dispose of the same as he pleases)[3] embodies the basic concept of the absolute authority of the property owner over his property.[4] This logic appeals to the reasoning of even the least legally-inclined American, especially those on the receiving end of a testator's bounty.

The idea of a trust—where property can be given to a capable person to manage for the benefit of another[5]—flows easily from the acceptance of a testator's right to control his property's final destination. The trust is an incredibly effective estate planning tool, adaptable to an endless number of family situations and economic goals. But when this adaptability and

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[1] *See* RONALD CHESTER, FROM HERE TO ETERNITY?: PROPERTY AND THE DEAD HAND 2 (2007).

[2] *See* CHESTER, *supra* note 1, at 2.

[3] ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS: RESTRAINTS ON THE ALIENATION OF EQUITABLE INTERESTS IMPOSED BY THE TERMS OF THE TRUST OR BY STATUTE 463 (1936) (citing Ashhurst v. Given, 5 Watts & Serg 323, 330 (Pa. 1843)).

[4] Richard R. Powell, *Freedom of Alienation—For Whom?: The Clash of Theories*, 2 REAL PROP. PROB. & TR. J. 127, 127 (1967).

[5] *See* BLACK'S LAW DICTIONARY 1647 (9th ed. 2009).

effectiveness allow the dead hand to maintain too tight of a grip for too long, we begin to question just how much control we should allow from the grave.[6] Envision this scenario: A man works hard all his life, pulling himself up by his bootstraps to rise to a comfortable lifestyle. He fathers a son—now a careless young man who never has known hardship but has lived comfortably off the fruits of his father's labor. The father has amassed a small fortune that he wants to give to his son one day, but the father knows that the son, despite having reached adulthood, most likely would squander the money. Based on the concept of *cujus est dare*, the father, as owner of the money, should have the "freedom of alienation" of his property.[7] In other words, the father should have unlimited freedom not only to choose who receives the gift but also to attach any strings to the gift that he wants.[8] In this example, the father probably wants to ensure that the son uses the funds only for specific purposes and that any of the son's current or future creditors cannot reach it. To achieve these goals, the father could establish a spendthrift trust with the son as the beneficiary.[9] As we shall see, a spendthrift trust is basically a normal trust with a special provision or clause attached.[10] The special provision, called a spendthrift provision, can prevent the son from either voluntarily or involuntarily parting with the money.[11] The problem is that even if we embrace the *cujus est dare* concept that the father can do whatever he wants with his own money, the idea that the father could die and the son could have a large amount of wealth that creditors cannot touch and he can never transfer is still slightly uncomfortable.

This initial discomfort with spendthrift trusts is nothing new. The struggle over the alienability of property can be traced back to the English feudal system,[12] and the modern American spendthrift trust reflects this deep-rooted friction. The spendthrift provision has become an advantageous supplement to the flexible trust device, enhancing the freedom and control of the settlor, even in death.[13] In Texas and many

[6] *See* CHESTER, *supra* note 1, at 2.

[7] Powell, *supra* note 4, at 127.

[8] *Id.*

[9] William H. Wicker, *Spendthrift Trusts*, 10 GONZ. L. REV. 1, 1–2 (1974).

[10] 76 AM. JUR. 2D *Trusts* § 94 (2005).

[11] *See* BLACK'S LAW DICTIONARY 1654 (9th ed. 2009).

[12] GRISWOLD, *supra* note 3, at 3–4.

[13] *See* Wicker, *supra* note 9, at 1.

other states, spendthrift trusts are statutorily valid.[14] Despite its codified enforceability, at the heart of the spendthrift trust lies a tangle of controversy on morality, economics, and politics. These conflicting elements continue to provoke doubts of the desirability of promoting control of the dead hand. At some point the balance between the rights of the dead and those of the living begins to tip in favor of those still capable of suffering consequences.

In *In re Townley Bypass Unified Credit Trust*, the Texarkana Court of Appeals considered a spendthrift trust beneficiary's ability to devise a gift and in an analytically flawed opinion found the spendthrift provision unenforceable.[15] The Texas Supreme Court has denied review of *Townley*, thus opening the door for further confusion over spendthrift protection in Texas. While the *Townley* fact situation is decidedly unique, the fundamental spendthrift trust issues raised by *Townley* present the perfect opportunity to examine current Texas spendthrift law and the direction in which it is headed. This Note surveys the history and purpose of spendthrift trusts both in Texas and nationwide and then compares these findings to *In re Townley Bypass Unified Credit Trust*.

II. HISTORY AND PURPOSE OF SPENDTHRIFT TRUSTS

A. What Is a Spendthrift Trust?

"Spendthrift trusts are probably the most commonly used protective trusts."[16] A spendthrift trust is a trust in which the ability of a beneficiary to transfer, assign, or alienate his rights to income or principal is restricted.[17] As the term indicates, spendthrift trusts are valuable to settlors wishing to provide for a beneficiary while at the same time protecting the beneficiary from his own recklessness and frivolity.[18] Although the phrase is useful in conveying the general idea behind spendthrift trusts, whether the

[14] *See infra* Part IV, V. The spendthrift trust is recognized in some form by every state but not necessarily by statute. *See infra* Part IV.

[15] *In re* Townley Bypass Unified Credit Trust, 252 S.W.3d 715, 721 (Tex. App.—Texarkana 2008, pet. denied).

[16] PETER SPERO, ASSET PROTECTION: LEGAL PLANNING, STRATEGIES, AND FORMS § 6.02 (2009), *available at* 2001 WL 1585151.

[17] 76 AM. JUR. 2D *Trusts* § 94 (2005); Wicker, *supra* note 9, at 1.

[18] Wicker, *supra* note 9, at 1.

beneficiary is in fact a spendthrift is not important.[19] The protection stems from interpretation of the trust instrument and is not limited to beneficiaries who are either legally incompetent or otherwise unable to responsibly manage their finances.[20] This restraint on alienation can be accomplished by the settlor's directions in the trust instrument, typically in the form of a spendthrift clause, or by statute.[21] Many trusts contain such a spendthrift provision:

> The beneficiary of this trust is hereby restrained from anticipating, encumbering, alienating or in any other manner assigning or disposing of her interest in either principal or income of such trust estate and is without power to do so; nor shall such interest be subject to her liabilities or obligations or to judgment, garnishment or other legal process, or bankruptcy proceedings, or any claims of creditors or other parties.[22]

This particular provision indicates the settlor's express intent to impose a restraint on alienation, but courts have also found a similar intention when little or nothing in the trust instrument expressly deals with the issue.[23]

Authorities conflict as to the validity and desirability of spendthrift trusts, and states differ in the extent of protection they allow a settlor to afford a beneficiary.[24] As this Note will discuss later, these restraints are valid in all United States jurisdictions by court decision, statute, or both.[25]

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[19] 3 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 15.2 (5th ed. 2007); Wicker, *supra* note 9, at 1.

[20] RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. a (2003).

[21] SPERO, *supra* note 16, § 6.02; Wicker, *supra* note 9, at 1. See *infra* Part IV for citations to the statutes and cases authorizing spendthrift trusts by each state.

[22] This particular spendthrift provision was recited in the facts of a Texas case. Dierschke v. Cent. Nat'l Branch of First Nat'l Bank at Lubbock, 876 S.W.2d 377, 380 (Tex. App.—Austin 1994, no writ) (emphasis removed).

[23] 3 SCOTT ET AL., *supra* note 19, § 15.2.4 (citing Eaton v. Boston Safe Deposit & Trust Co., 240 U.S. 427 (1916); RESTATEMENT (SECOND) OF TRUSTS § 152 cmt. e, illus. 6 (1959)). Although beyond the scope of this Note, the finding of presumed intent to restrain alienation is a complex and interesting topic. For further reading, see 3 SCOTT ET AL., *supra* note 19, §§ 15.2.4, .3–.4.

[24] 3 SCOTT ET AL., *supra* note 19, § 15.2.

[25] *Id.*; SPERO, *supra* note 16, § 6.02.

Today, nearly all professionally-prepared trust instruments contain a spendthrift clause.[26]

B. Origin of Spendthrift Trusts

Spendthrift trusts are relative newcomers to the American legal lexicon, but they are a modern phase of the struggle over the alienability of property that has existed in English law for centuries.[27] According to an anecdotal history by Professor Richard R. Powell, the origin of the ability of donors to restrict the control of the donee can be traced to the common beliefs of wealthy Englishmen in the eighteenth century.[28] As fathers of beautiful, precious daughters, the Englishmen believed that the good-for-nothing men their daughters selected as husbands were wasteful scoundrels.[29] The fathers, therefore, needed to provide for the security of their daughters and future grandchildren.[30] The Englishmen further believed that this financial security needed to be protected from the improvidence of the spendthrift sons-in-law.[31]

These beliefs, combined with the fact that many of the Englishmen were also prominent lawyers and judges,[32] contributed to the judicial evolution of one of the principal types of restraints on alienation of property: restraint on the alienation of the separate property of a married women.[33] The law concerning this type of restraint was exceedingly complex, but the innovation was a device that allowed women to hold property and contained a clause that prevented them from being coerced by their husbands to alienate that interest.[34] The result was the earliest situation in which

[26] 3 SCOTT ET AL., *supra* note 19, § 15.2; Wicker, *supra* note 9, at 2 (citing GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 225 (2d ed. 1965)).

[27] GRISWOLD, *supra* note 3, at 3.

[28] Powell, *supra* note 4, at 128.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*; GRISWOLD, *supra* note 3, at 6. Note that a settlor can achieve the same result of a direct restraint on alienation with other provisions in the terms of the trust. GRISWOLD, *supra* note 3, at 11. For example, the terms of the trust may provide that a beneficiary's interest will cease if he alienates the interest voluntarily or if his creditors attempt to reach it, but such a provision does not create a true spendthrift trust. *Id.*

[34] GRISWOLD, *supra* note 3, at 6.

restraints on the alienation of equitable interests were upheld.[35] This particular restraint on alienation is largely obsolete, but the concept is similar to the more modern and prominent American law of spendthrift trusts.[36]

The greatest single factor in the development of spendthrift trusts in the United States was undoubtedly the dictum of Justice Miller in the 1875 United States Supreme Court case *Nichols v. Eaton*.[37] Although cited in countless subsequent cases upholding spendthrift trusts, the case itself actually did not involve the validity of a spendthrift trust.[38] In *Nichols*, a testator left her estate in trust for the benefit of her sons, but provided that if the sons should alienate the income or otherwise become bankrupt or insolvent, the income could become payable to another person at the discretion of the trustees.[39] One son did, in fact, become bankrupt,[40] and the Court held that the son's assignee in bankruptcy was not entitled to anything.[41] Speaking for the Court, Justice Miller seized the opportunity to explore the subject of dead-hand control in depth and recognized the validity of spendthrift trusts.[42] Miller never used the term "spendthrift trust," but he addressed the concept in widely cited dictum:

> Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, who gives without any pecuniary return, who gets nothing of property value from the donee, 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

[35] *Id.* at 10.

[36] *Id.* at 8.

[37] 91 U.S. 716 (1875); GRISWOLD, *supra* note 3, at 25.

[38] 3 SCOTT ET AL., *supra* note 19, § 15.2.1.

[39] 91 U.S. at 717–18.

[40] *Id.* at 719.

[41] *Id.* at 730.

[42] *Id.* at 727–29; GRISWOLD, *supra* note 3, at 25.

do so, is not readily perceived.[43]

Miller reasoned that creditors are neither misled nor defrauded when such restraints are upheld because all wills and instruments creating such trusts are a matter of public record.[44] To compel trustees to continue to pay income to a son after bankruptcy or to his assignee, Miller wrote, was to make a will for the testator that she never had made. The Court refused to assume this task.[45]

Nichols received wide circulation and was soon cited and followed in many states.[46] But if restraints on alienation were such a novel idea in American jurisprudence and Miller's words were merely dictum, how did this radical concept spread so quickly? Erwin Griswold, whose 1936 book *Spendthrift Trusts* is still cited as an essential authority on the subject, attributed the popularity of Miller's philosophy to contemporary thinking: "The spirit of the times was of individualism, at least of individualism for the man of property. What a man owned was his own; with it he could do as he liked."[47] In the preface of the second edition of his book, *Restraints on the Alienation of Property*, John C. Gray wrote what has become the classic statement of the opposition to spendthrift trusts.[48] Gray perceived the spirit of the times in a less pleasant light.[49] The true culprit responsible for the rise of such an abominable doctrine, in Gray's view, was the recent philosophical rejection of *laissez faire*, sacredness of contract, and individual liberty.[50] Gray wrote that spendthrift trusts and socialism shared the same fundamental essence: paternalism.[51] That spendthrift trusts evolved as a mark of socialism is an extreme stance and clearly puts far too much emphasis on the ability of wealthy gentlemen protecting their fortunes from frivolous progeny to affect a widespread change in

[43] *Nichols*, 91 U.S. at 727.

[44] *Id.* at 726; *see also infra* Part III.

[45] *Nichols*, 91 U.S. at 724.

[46] JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY iv (2d ed. 1895); GRISWOLD, *supra* note 3, at 25. "The leading case that actually upheld a restraint on the alienation of a beneficiary interest in trust is *Broadway National Bank v. Adams*." 3 SCOTT ET AL., *supra* note 19, § 15.2.1; *see also* Broadway Nat'l Bank v. Adams, 133 Mass. 170, 172 (1882).

[47] GRISWOLD, *supra* note 3, at 25–26.

[48] *Id.* at 29.GRAY, *supra* note 46, at iii–xii;

[49] GRAY, *supra* note 46, at viii.

[50] *Id.*

[51] *Id.* at ix.

government and society.[52] Regardless of the impetus for the spread of spendthrift trusts, in a short period of time, they found widespread acceptance across the country.[53]

III. ARGUMENTS FOR AND AGAINST SPENDTHRIFT TRUSTS

Hostility traditionally has existed to the enforcement of donor-imposed restraints protecting the living from control by the dead, as well as the alienability of property.[54] Today the arguments in favor of spendthrift restraints have prevailed in terms of general recognition of spendthrift-trust validity,[55] but the classic quarrel still reappears from time to time, especially when the extent of allowing spendthrift restraint is at issue. Spendthrift trusts, their purpose, and effects, therefore, cannot be fully appreciated without a comparison of the arguments made both for and against their enforcement.

The reasoning advanced by Justice Miller in *Nichols v. Eaton* embodies the logic typically adopted and followed in other cases validating spendthrift trusts.[56] That is, a property owner freely giving property can attach whatever strings he likes to the gift.[57] This concept has also been expressed in the oft-used maxim *Cujus est dare, ejus est disponere* (whoever has the right to give has the right to dispose of the same).[58] Accordingly, a donor making a gift exercises his absolute right of disposition, and he should not have to make a gift to anyone, especially a creditor of someone he wishes to benefit, if he does not want to.[59]

Erwin Griswold makes a particularly convincing opposing argument that the premise upon which all of the *cujus est dare* arguments are made—that the owner of property may dispose of it as he wishes—is patently fallacious.[60] Griswold cites several instances where the disposition of

[52] *See* GRISWOLD, *supra* note 3, at 30.

[53] *See* Powell, *supra* note 4, at 131.

[54] Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 650 (2005).

[55] GRISWOLD, *supra* note 3, at 464.

[56] *Id.* at 462–63; *see In re* Morgan's Estate, 72 A. 498, 499 (1909).

[57] *See* Nichols v. Eaton, 91 U.S. 716, 727 (1875).

[58] *See* GRISWOLD, *supra* note 3, at 463.

[59] *See* Broadway Nat'l Bank v. Adams, 133 Mass. 170, 174 (1882).

[60] *See* GRISWOLD, *supra* note 3, at 464.

property already is restricted.[61] For example, if leaving his property in trust (with some exceptions), a settlor must specify a definite purpose or else the trust fails; the settlor cannot leave his property to be distributed as another directs.[62] Similarly, a settlor cannot create contingent interests that violate the Rule Against Perpetuities.[63] Most importantly, Griswold writes, "the owner of property may not impose a valid restraint against the alienation of a legal interest, whether absolute or for life or years."[64] Griswold argues that if a property owner really did have an absolute right of disposition, he could impose any restrictions he wanted on any gift.[65]

Proponents of spendthrift trusts argue that these restraints favor public policy and actually protect society,[66] as they prevent spendthrifts from "becoming paupers, and hence dependent on governmental subsidies."[67] However, the law does not limit spendthrift trusts to alcoholics, gamblers, drug addicts, or anyone else who may need protection from themselves.[68] Thus, while this argument may have some merit, the aims of spendthrift trusts are clearly not as utilitarian as some might assert.

Perhaps the strongest and most popular argument against spendthrift trusts is that a property owner should not be able to escape liability for his debts. In one nineteenth century case, a Rhode Island court declared a spendthrift clause opposed to "the honest policy of the law," and said, "Certainly, no man should have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit, should be also amenable to the demands of justice."[69] Likewise, others argue that a man with apparent wealth tends to mislead creditors and induce them to give him credit.[70] Proponents counter with the *Nichols* reasoning that creditors should exercise proper diligence with a public records search.[71] "That argument had some validity 100 years ago when

[61] *Id.* at 464–67.

[62] *Id.* at 465.

[63] GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 222 (3d ed. 2007).

[64] GRISWOLD, *supra* note 3, at 466–67.

[65] *Id.* at 467.

[66] Wicker, *supra* note 9, at 3.

[67] *Id.*

[68] RESTATEMENT (THIRD) OF TRUSTS § 59 (2003); BOGERT, *supra* note 63, § 222.

[69] Tillinghast v. Bradford, 5 R.I. 205, 212 (1858).

[70] *See* Broadway Nat'l Bank v. Adams, 133 Mass. 170, 173–74 (1882).

[71] Nichols v. Eaton, 91 U.S. 716, 726 (1875); *Broadway Nat'l Bank*, 133 Mass. at 173–74.

most trust instruments were recorded real estate deeds or probate wills," but today the usual subject matter of trusts is personal property; these transfers are seldom recorded or filed as public documents.[72] The *Nichols* argument is also ineffective against tort creditors, who presumably never sought to have the beneficiary indebted to them.[73] Opponents also reason that the donor himself did not have protection from his creditors when he held the property, and individual testators should not be able to singlehandedly create this exemption for their donees.[74] This argument was particularly effective in states when the validity of spendthrift trusts was still an open question.[75] In a 1963 case (overruled in 1991), the Ohio Supreme Court held that spendthrift trusts were invalid in Ohio, declaring that "an owner of property should not, without legislative authority, be permitted, by setting up a spendthrift trust, to exempt either such property or the income therefrom from the claims of the creditors of a beneficiary."[76] A notable counterargument, however, is that the beneficiary's creditors could not have reached the donor's property before the creation of the trust anyway.[77]

A final argument holds that the assurance of a guaranteed income destroys the initiative and self-reliance of the beneficiary.[78] Professor Gray was particularly vehement that spendthrift trusts would create this type of social evil.[79] Gray blasted a New York court that defended a beneficiary-debtor when it applied a statute that allowed spendthrift trusts.[80] The statute allowed the surplus income of a trust, beyond what is necessary for education and support of the beneficiary, to be liable for the beneficiary's debts. Gray commented on the court's position:

> The Court [took] into account that the debtor is 'a gentleman of high social standing, whose associations are chiefly with men of leisure, and who is connected with a number of clubs,' and that his income is not more than

[72] Wicker, *supra* note 9, at 3.

[73] *Id.*

[74] GRISWOLD, *supra* note 3, at 471; *see also* BOGERT, *supra* note 63, § 222.

[75] *See, e.g.*, Sherrow v. Brookover, 189 N.E.2d 90, 92–93 (Ohio 1963), *overruled by* Scott v. Bank One Trust Co., N.A., 577 N.E.2d 1077 (Ohio 1991).

[76] *Id.* at 94.

[77] Wicker, *supra* note 9, at 4.

[78] GRISWOLD, *supra* note 3, at 468.

[79] *See* GRAY, *supra* note 46, at xi.

[80] *Id.*

> sufficient to maintain his position according to his education, habits, and associations.[81]

To Gray, this court-condoned support of an irresponsibly lavish lifestyle sank "to a depth of as shameless snobbishness as any into which the justice of a country was every plunged."[82] No statistics support Gray's argument,[83] and the effect of a secured fortune on anyone's character is presumably an individual matter better left to the study of psychologists and sociologists.

The arguments against spendthrift restraints as violations of public policy tend to be stronger in the case of a restraint on creditors than with respect to voluntary alienation.[84] This discrepancy most likely exists because if a settlor prevents a beneficiary from voluntarily assigning or anticipating an interest, the only parties really harmed by such a restraint are the beneficiary and those whom he would choose to benefit. Where the restraint is on creditors, the harm, as we have seen, arguably can extend to a much larger group of people. Likewise, when a voluntary restraint on alienation is not enforced, the only party offended is the settlor, who may in fact be deceased. Depending on a particular state's law, whether a restraint is voluntary or involuntary still can have a significant impact on a court's willingness to enforce a spendthrift provision.[85]

IV. ATTITUDE OF STATES TOWARD SPENDTHRIFT TRUSTS

After centuries of debate over the desirability and effects of spendthrift restraints, those in favor of spendthrift trusts have prevailed by and large.[86] (Ironically, in English courts, where the struggle over the alienability of property began, spendthrift restrictions in trusts consistently have been held void.)[87] As American courts have recognized a broadened concept of individual liberty with respect to property ownership, spendthrift protection

[81] *Id.*

[82] *Id.*

[83] BOGERT, *supra* note 63, § 222.

[84] *Id.*

[85] *See infra* Part IV.

[86] *See* IIA AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 152.1 (4th ed. 1987); BOGERT, *supra* note 63, § 222; Wicker, *supra* note 9, at 4.

[87] Wicker, *supra* note 9, at 4.

has grown in popularity.[88] Today spendthrift trusts are recognized in all states, either without qualification or subject to some statutory restrictions.[89]

[88] *Id.* at 2.

[89] William S. Forsberg, *Spendthrift Trust Rules: Should Minnesota Make Exceptions?*, 58 BENCH & BAR OF MINNESOTA (2002), *available at* http://www2.mnbar.org/benchandbar/2002/aug02/aug spendthrift.htm; Wicker, *supra* note 9, at 4.

Alabama: *See* Antone v. Snodgrass, 14 So. 2d 506, 507–08 (Ala. 1943).

Alaska: ALASKA STAT. § 34.40.110 (2008).

Arizona: ARIZ. REV. STAT. ANN. § 14-10502 (2005 & Supp. 2009).

Arkansas: *See* Bowlin v. Citizens' Bank & Trust Co., 198 S.W. 288, 288 (Ark. 1917).

California: CAL. PROB. CODE §§ 15300–01 (West 1991).

Colorado: *See* Snyder v. O'Conner, 81 P.2d 773, 774 (Colo. 1938).

Connecticut: CONN. GEN. STAT. ANN. § 52-321 (West 2005) (giving spendthrift protection to trusts for support); *see also* Chandler v. Hale, 377 A.2d 318, 320–21 (Conn. 1977) (discussing the development of Connecticut statutes relating to spendthrift trusts).

Delaware: DEL. CODE ANN. tit. 12, § 3536 (2007 & Supp. 2008).

District of Columbia: D.C. CODE ANN.§ 19-1305.02 (LexisNexis 2008).

Florida: *See* Waterbury v. Munn, 757, 32 So. 2d 603, 605 (Fla. 1947).

Georgia: GA. CODE ANN. § 53-12-28 (West 2003).

Hawaii: *See* Welsh v. Campbell, 41 Haw. 106, 124 (1955).

Idaho: IDAHO CODE ANN. § 15-7-502 (2009).

Illinois: 735 ILL. COMP. STAT. ANN. 5/2-1403 (West 1999) (providing income and principal may be reached by child support creditors despite spendthrift provision).

Indiana: 30 IND. CODE ANN. § 30-4-3-2 (West 1994).

Iowa: IOWA CODE ANN. § 633A.2301 (West 1992 & Supp. 2009).

Kansas: KAN. STAT. ANN. § 58a-502 (2005).

Kentucky: KY. REV. STAT. ANN. § 381.180 (LexisNexis 2002 & Supp. 2009).

Louisiana: LA. REV. STAT. ANN. §§ 9:2002-2007 (2005).

Maine: ME. REV. STAT. ANN. tit. 18-B, § 502 (1998 & Supp. 2009).

Maryland: Smith v. Towers, 14 A. 497, 500 (Md. 1888) ("[W]e are of opinion that the founder of a trust may provide in direct terms that his property shall go to his beneficiary to the exclusion of his alienees, and to the exclusion of his creditors.").

Massachusetts: Broadway Nat'l Bank v. Adams, 133 Mass. 170, 174, (1882).

Michigan: *See* Matter of Estate of Edgar, 389 N.W.2d 696, 704 (Mich. 1986) (holding that a settlor may set up a spendthrift trust which restricts a beneficiary's ability to alienate both income and principal).

Minnesota: Erickson v. Erickson, 266 N.W. 161, 164 (Minn. 1936); *see also* MINN. STAT. ANN. § 61A.04 (West 2002) (recognizing spendthrift provisions for life insurance policies); MINN. STAT. ANN. § 501B.87 (employee retirement trusts).

Mississippi: MISS. CODE ANN. § 91-9-505 (West 1999 & Supp. 2009).

Missouri: MO. ANN. STAT. § 456.5-502 (West 2007).

Montana: MONT. CODE ANN. §§ 72-33-301 (income), 72-33-302 (principal) (2009).

Several states with statutes validating spendthrift trusts follow the Uniform Trust Code (UTC) Creditors' Claims provisions.[90] Drafted in 2000 in response to the greater use of trusts in recent years, the UTC

Nebraska: NEB. REV. STAT. § 30-3847 (2008).

Nevada: NEV. REV. STAT. ANN. §§ 166.015–.050 (West 2000).

New Hampshire: N.H. REV. STAT. ANN. § 564-B:5-502 (LexisNexis 2006).

New Jersey: See N.J. STAT. ANN. § 3B:9-11 (West 2007) (spendthrift provision not to affect right to disclaim); *see also* Trust Co. of N.J. v. Gardner, 32 A.2d 572, 573–74, (N.J. Ch. 1943) (upholding restraint against voluntary alienation).

New Mexico: N.M. STAT. ANN. § 46A-5-502 (West 2003).

New York: N.Y. EST. POWERS & TRUSTS LAW § 7-1.5 (Consol. 2007).

North Carolina: N.C. GEN. STAT. ANN. § 36C-5-502 (West 2009).

North Dakota: N.D. CENT. CODE § 59-13-02 (2003 & Supp. 2009).

Ohio: Scott v. Bank One Trust Co., N.A., 577 N.E.2d 1077, 1084 (Ohio 1991).

Oklahoma: OKLA. STAT. ANN. tit. 60, § 175.25 (West 1994).

Oregon: OR. REV. STAT. ANN. § 130.305 (West 2009).

Pennsylvania: 20 PA. CONS. STAT. ANN. § 7742 (West 2009).

Rhode Island: R.I. GEN. LAWS § 18-9.1-1 (2008).

South Carolina: S.C. CODE ANN. § 62-7-502 (2008).

South Dakota: S.D. CODIFIED LAWS § 55-1-34 (2009).

Tennessee: TENN. CODE ANN. § 35-15-502 (West 2009).

Texas: Tex. Prop. Code Ann. § 112.035 (Vernon 2007).

Utah: UTAH CODE ANN. § 75-7-502 (West 2009).

Vermont: VT. STAT. ANN. tit. 8, § 3705 (2008) (allowing spendthrift provisions to restrain alienation of a beneficiary's interest in life insurance policies); Barnes v. Dow, 10 A. 258, 263 (Vt. 1887).

Virginia: VA. CODE ANN. § 55-545.02 (West 2009).

Washington: WASH. REV. CODE ANN. § 6.32.250 (West 2009); *see also* Milner v. Outcalt, 219 P.2d 982, 984 (Wash. 1950).

West Virginia: W. VA. CODE ANN. § 36-1-18 (West 2009).

Wisconsin: WIS. STAT. ANN. § 701.06 (West 2001).

Wyoming: WYO. STAT. ANN. § 4-10-502 (2009).

Although some of its citations to current statutes are flawed, footnote 64 in Bogert's *Law of Trusts and Trustees* § 222 is a thorough compilation of the states' current and prior authorities on the validity of spendthrift trusts. BOGERT, *supra* note 63, § 222 n.64.

[90] UNIF. TRUST CODE prefatory note (2005). The jurisdictions that have adopted the UTC are: Alabama, Arizona, Arkansas, District of Columbia, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wyoming. *See* Alan Newman, *Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code* for a comprehensive discussion of the UTC's treatment of spendthrift and discretionary trusts. 40 REAL PROP. PROB. & TR. J. 567, 569 (2005).

purports to be mostly a codification of the common law of trusts.[91] While the UTC's approach to creditors' claims is consistent with the common law of some states, its approach is innovative compared to existing law in others.[92] Sections 502 and 503 address spendthrift provisions and their exceptions.[93] Under section 502, a spendthrift provision is valid only if it prohibits both the voluntary and involuntary transfer of a beneficiary's interest.[94] In other words, a settlor cannot allow a beneficiary to voluntarily assign his interest while also making the interest unattachable by the beneficiary's creditors, or vice versa.[95] "Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or both."[96] Additionally, with some exceptions, a creditor or assignee of a beneficiary cannot reach the beneficiary's interest until after the beneficiary actually has received trust assets.[97]

Although spendthrift restraints are recognized in all fifty states, the arguments against the desirability of spendthrift restraints have not been entirely defeated.[98] Most states, whether adopting the UTC or not, have created certain exceptions to the enforceability of spendthrift provisions.[99] The most common statutory exceptions are: (1) claims for child or spousal support; (2) claims for necessaries provided to the beneficiary; (3) claims for services to protect the beneficiary's interest in the trust; (4) claims by a governmental entity; (5) claims for torts committed by the beneficiary; and (6) self-settled trusts.[100] Section 503 of the UTC exempts the claims of creditors for child or spousal support,[101] creditors who have provided services for the protection of the beneficiary's interest in the trust,[102] and

[91] UNIF. TRUST CODE prefatory note.

[92] *Id.*; Newman, *supra* note 54, at 568–69.

[93] UNIF. TRUST CODE §§ 502–03 (2005).

[94] *Id.* § 502(a).

[95] *Id.* § 502(a), § 502 cmt.

[96] *Id.* § 502 cmt.

[97] *Id.* § 502(c).

[98] *See* Timothy J. Vitollo, *Uniform Trust Code Section 503: Applying* Hamilton *Orders to Spendthrift Trusts*, 43 REAL PROP. TR. & EST. L.J. 169, 175 (Spring 2008).

[99] *Id.*

[100] *Id.*

[101] UNIF. TRUST CODE § 503(b)(1).

[102] *Id.* § 503(b)(2).

certain governmental claims.[103] The UTC also makes a spendthrift provision against a beneficial interest by the settlor ineffective.[104] These exceptions by and large reflect the policy concerns discussed in Part III.[105] For example, the justifications for disallowing spendthrift protection against child-support and alimony creditors are that such creditors are unable to "protect themselves from the debtor's irresponsibility, and that a beneficiary should not be able to enjoy a beneficiary interest in a spendthrift trust while simultaneously refusing to support his dependents."[106] Thus, while spendthrift protection is allowed in every state, policy considerations have influenced modern lawmakers, who have chipped away at its effectiveness.[107]

V. SPENDTHRIFT TRUSTS IN TEXAS

Spendthrift trusts have been held valid in Texas since the late nineteenth century, and Texas courts have traditionally justified restraint on alienation not out of consideration for the beneficiary, but for the right of the donor creating the trust to control his gift.[108] Early Texas courts eagerly followed the precedent set by *Nichols v. Eaton*, but they were careful not to imply a spendthrift restraint without a clear statement of purpose by the settlor.[109]

Today spendthrift trusts in Texas are enforced by statute.[110] Under Texas Property Code § 112.035, the current statute validating spendthrift trusts, "A settlor may provide in the terms of the trust that the interest of a beneficiary in the income or in the principal or in both may not be

[103] *Id.* § 503(b)(3).

[104] *See id.* § 505(a)(2), § 502 cmt.

[105] *See supra* Part III.

[106] Vitollo, *supra* note 98, at 176.

[107] *Id.* at 179 (citing Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U.L.Q. 1, 72 (1995)).

[108] Burns v. Miller, Hiersche, Martens, & Hayward, P.C., 948 S.W.2d 317, 321 (Tex. App.—Dallas 1997, writ denied).

[109] *See* Adams v. Williams, 112 Tex. 469, 482, 248 S.W. 673, 678 (1923) ("Mrs. Cooper had the right to create a trust, to designate a trustee and to put the property in his hands to be applied to the use, welfare and comfort of her said sister, free from the demands of her said sister's creditors."); Wallace & Co. v. Campbell, 53 Tex. 229, 234 (1880) (relying on *Nichols* to hold that beneficiary's land was not subject to his debts); Nunn v. Titche-Goettinger Co., 245 S.W. 421, 423 (Tex. Comm'n App. 1930, judgm't adopted) ("A trust should not be construed to belong to that class unless it appears reasonably clear that such was the purpose of the donor or testator.").

[110] *See* Tex. Prop. Code Ann. § 112.035(a) (Vernon 2007).

voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee."[111] Accordingly, a spendthrift provision protects the beneficiary's interest in both the trust corpus and income from claims of the beneficiary's creditors while the corpus and income are held by the trustee.[112] Texas has not adopted the UTC spendthrift provisions, but the UTC actually derived its section 502(b) from Texas Property Code § 112.035(b): terms stating that a beneficiary's interest is held subject to a "spendthrift trust," or similar words, are sufficient to create spendthrift protection.[113]

In Texas, only two exceptions exist to the enforceability of a spendthrift provision.[114] First, because of their effectiveness at protecting trust assets from the claims of creditors, spendthrift trusts are invalid where the settlor creates a trust with himself as the beneficiary.[115] The thinking, of course, is that if self-settled spendthrift trusts were allowed, everyone could put their assets in spendthrift trusts to keep them out of creditors' reach. Second, a court can order the trustee to satisfy the beneficiary's child support obligations despite the existence of a spendthrift clause.[116] These narrow exceptions reflect public policy concerns that the Texas legislature has deemed paramount to the respect of a settlor's wishes.

VI. *IN RE TOWNLEY BYPASS UNIFIED CREDIT TRUST*

Despite the long history of spendthrift trust recognition in Texas, Texas courts continue to struggle with the intricacies of spendthrift-provision enforcement.[117] *In re Townley Bypass Unified Credit Trust*, a recent case out of the Texarkana Court of Appeals, reflects the difficulties courts still face in interpreting and enforcing spendthrift trusts.[118] In *Townley*, the Texarkana court considered whether a spendthrift provision in a trust precluded the remainder beneficiary from devising by will his interest in the

[111] *Id.*

[112] Dierschke v. Central Nat'l Branch of First Nat'l Bank at Lubbock, 876 S.W.2d 377, 380 (Tex. App.—Austin 1994, no writ).

[113] UNIF. TRUST CODE § 502 cmt., § 502(b) (2005); Tex. Prop. Code Ann. § 112.035(b).

[114] *See* Tex. Prop. Code Ann. § 112.035(d); Tex. Fam. Code Ann. § 154.005 (Vernon 2008).

[115] Tex. Prop. Code Ann. § 112.035(d); *Dierschke*, 876 S.W.2d at 380 (citing Adams v. Williams, 248 S.W. at 678 (Tex. 1923)).

[116] Tex. Fam. Code § 154.005.

[117] *See In re* Townley Bypass Unified Credit Trust, 252 S.W.3d 715, 718–21 (Tex. App.—Texarkana 2008, pet. denied).

[118] *Id.*

assets of the trust estate. [119] The court held that it did not. [120] While the court may have reached the correct result in *Townley*, its reasoning sets an unsound precedent, and other Texas courts ultimately may follow in its flawed footsteps. Because the Texas Supreme Court denied review of *Townley*, revisiting the issues the Texarkana court undertook is important, which hopefully will help prevent future misunderstandings about spendthrift trust law in Texas.

A. Facts of Townley

The story of the *Townley* bypass trust is an all-too-typical tale of a settlor who wishes to provide for his family after his death, but despite the assistance of a legal professional, ultimately creates a document that neither effectively communicates nor easily accomplishes his goals.[121] W.D. Townley's will contained a trust for the benefit of his wife, Josie Townley, with all income, and potentially all corpus, to be used for her benefit as determined by the designated trustee.[122] Upon her death, the trust was to terminate, and the corpus of the trust was to be split between the two children, Billy Ray Townley (son) and Jimmy LaRue Wilson (daughter).[123] The will contained a spendthrift provision which prohibited any beneficiary from anticipating, assigning, or transferring any income or principal before receiving it.[124] Townley's will made no provision if either child predeceased Josie—the very thing that occurred when Billy Ray died before his mother.[125] Billy Ray himself left a will leaving all of his property to his wife.[126] Several years later when Josie died, it was uncontroverted that the daughter, Jimmy LaRue Wilson, was entitled to one half of the estate, but since Billy Ray predeceased his mother, the issue became how the other half was to be distributed.[127] Did the spendthrift provision prevent Billy Ray from leaving his portion of the trust in his will to his wife?[128] The trial

[119] *Id.* at 717.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.* at 718.
[125] *Id.*
[126] *Id.* at 719.
[127] *Id.* at 717.
[128] *Id.* at 719.

court determined that the son's one-half interest was vested and thus transferred through Billy Ray's will rather than by intestacy.[129] The Texarkana court of appeals affirmed the trial court's judgment.[130]

B. The Townley *Holding*

1. Vested Remainder

The court of appeals first considered whether Billy Ray's interest in the trust was a vested remainder and correctly determined that it was.[131] The determination of whether the son had a vested remainder interest in the trust corpus is important because it presents a threshold question: Did the trust remainderman (the son), who predeceased the life estate tenant (the mother), continue to have a property interest in the trust?[132] If the son did have an interest after his death, then the issue becomes whether he could assign this interest despite the spendthrift provision.[133] If he did not have an interest, then the son had nothing to pass either testate or intestate, and the effectiveness of the spendthrift provision is moot.[134]

The answer to this question introduces several fundamental concepts of Texas property and trust law, and the Texarkana court identified most of these key principles.[135] First, the court noted, "a remainder interest occurs when a possessory interest in property (often a life estate) is given to one person, with a subsequent taking of the estate in another person."[136] Here, the mother, Josie, was to receive all income and potentially all corpus for her life, and upon her death, the trust terminated, and Billy Ray and Jimmy LaRue were to receive the corpus.[137] It follows, then, that the son and daughter had remainder interests in the corpus of the trust.[138] But were these interests vested or contingent?[139] The well-established rule is that if a

[129] *Id.* at 717.
[130] *Id.*
[131] *Id.* at 717–18.
[132] *See id.*
[133] *Id.* at 719.
[134] *See id.*
[135] *Id.* at 717–21.
[136] *Id.* at 717.
[137] *Id.*
[138] *Id.*
[139] *Id.*

remainder interest is in an ascertainable person and no condition precedent exists other than the termination of prior estates, then it is a vested remainder.[140] Furthermore, "Texas courts will not construe a remainder as contingent when it can reasonably be taken as vested."[141] The only thing that needed to happen in order for Billy Ray and Jimmy LaRue's remainder interests in the trust to become possessory was for their mother, Josie, to die.[142] Neither Billy Ray nor Jimmy LaRue needed to then have a living child born in wedlock,[143] have reached the age of thirty,[144] or have fulfilled any other condition to receive their remainder interests.

It is also fundamental in Texas that absent specific language of survival, a remainder interest vests at the time the trust is created.[145] Townley did not include any survivorship language whatsoever,[146] so the son and daughter did not even need to survive their mother to have an interest in the trust. Their remainder interests necessarily vested when the trust was created, at their father's death. The fact that Billy Ray's remainder interest was in trust as opposed to outright does not affect its basic property characteristics.[147] "Trust estates are subject to the same incidents, properties and consequences as, under like circumstances, belong to similar estates at law.

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[140] McGill v. Johnson, 799 S.W.2d 673, 675 (Tex. 1990); Chadwick v. Bristow, 146 Tex. 481, 488, 208 S.W.2d 888, 891 (1948); Caples v. Ward, 107 Tex. 341, 345, 179 S.W. 856, 857–58 (1915); *Townley*, 252 S.W.3d at 718–21; Bradford v. Rain, 562 S.W.2d 514, 518 (Tex. App.—Texarkana 1978, no writ); Reilly v. Huff, 335 S.W.2d 275, 278 (Tex. Civ. App.—San Antonio 1960, no writ).

[141] *Townley*, 252 S.W.3d at 717 (citing McGill, 799 S.W.2d at 675 (Tex. 1990)).

[142] *Id.* at 717.

[143] *See McGill*, 799 S.W.2d at 674, 676 (giving effect to testator's overriding intention that his son not have fee simple in trust property unless son had a child born in wedlock).

[144] *See* Roberts v. Squyres, 4 S.W.3d 485, 490–91 (Tex. App.—Beaumont 1999, pet. denied) (identifying specific language requiring beneficiary to reach the age of thirty, or survive, before receiving the remainder of the trust corpus).

[145] *Id.* at 490. The *Roberts* court consulted *Turner v. Adams*: "The Turner court likewise found that the complete absence of specific language requiring survival resulted in the interest vesting at the testator's death with enjoyment of possession deferred until expiration of the life estate and further determined there was no condition precedent because there was no specific language establishing the point in time the remainder was to vest." *Id.* (citing Turner v. Adams, 855 S.W.2d 735, 738 (Tex. App.—El Paso 1993, no writ)).

[146] The portion of the trust addressing the interests of Billy Ray and Jimmy LaRue reads: "(D) Termination of Trust. Upon the death of my wife, Josie Townley, this trust shall terminate and the trust corpus shall be distributed to Billy Ray Townley and Jimmy LaRue Wilson, share and share alike."

[147] *See* 3 SCOTT ET AL., *supra* note 19, § 14.1.

They are alienable, devisable, and descendable in the same manner."[148] Therefore, the court accurately concluded that since Billy Ray and Jimmy LaRue had vested-remainder interests, under normal circumstances, these interests could be transferred from their owner to another person.[149]

2. Spendthrift Provision

A trust beneficiary who has capacity to transfer property has the power to transfer his equitable interest unless restricted by the terms of the trust,[150] and a valid spendthrift provision imposes such a restriction.[151] Because the Townley trust contained a clearly identifiable spendthrift provision, the focus of the court turned to whether this provision operated as a restraint on Billy Ray's ability to devise his vested-remainder interest in the trust to his wife.[152] The court analyzed the following spendthrift provision in the trust:

> (E) Spendthrift Clause. No Beneficiary of the trust shall have the right or power to anticipate by assignment or otherwise any income or principal given to such beneficiary of this Trust Agreement, or in advance of actually receiving the same, have the right or power to sell, transfer, encumber or in anywise charge same; nor shall such income or principal, or any portion of same, be subject to any execution, garnishment, attachment or legal sequestration, levy or sale, or in any event or manner be applicable or subject, voluntarily or involuntarily to the payment of such Beneficiary's debts.[153]

The court evaluated the spendthrift clause against the Texas Property Code spendthrift statute, citing in relevant part § 112.035(a): "A settlor may provide in the terms of the trust that the interest of a 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

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[148] *Id.*, § 14.1 n.9 (quoting Zelley v. Zelley, 136 A. 738, 39 (1927)).

[149] *In re* Townley Bypass Unified Credit Trust, 252 S.W.3d 715, 718 (Tex. App.—Texarkana 2008, pet. denied).

[150] Faulkner v. Bost, 137 S.W.3d 254, 260 (Tex. App.—Tyler 2004, no pet.).

[151] Tex. Prop. Code Ann. § 112.035(a) (Vernon 2007); *Faulkner*, 137 S.W.3d at 260.

[152] *See Townley*, 252 S.W.3d at 719 (providing the definitions of a beneficiary under the Texas Trust Act and Texas Property Code); *see also* Tex. Prop. Code Ann. §§ 111.004(2), 116.002(2), 116.002(11).

[153] *Townley*, 252 S.W.3d at 719.

the trustee."[154] Billy Ray clearly qualified as a "beneficiary" under the statute.[155] Because the bypass trust expressly provided that the corpus was to be split between the son and daughter after the mother's death, half of the corpus became a part of Billy Ray's estate when Josie died.[156] The question, the court said, was whether the corpus was to be distributed under the terms of Billy Ray's will or whether the spendthrift provision required distribution under the laws of intestacy.[157] Having determined that this was a question of first impression in Texas, the court turned to other sources for guidance.[158]

At this point in the opinion, the Texarkana court's research and reasoning begin to go astray. First, the court considers the "analogous situation" of *In re Estate of Campbell*, a Hawaii Supreme Court case.[159] There, the court explains, the issue was whether a deceased beneficiary could leave income that had accumulated, but not distributed, before death to a devisee by will even though the trust included a spendthrift provision.[160] The spendthrift provision in *Campbell* stated that all payments would be considered made, valid, and effectual when received by the beneficiary.[161] The Texarkana court then cites *Campbell* for the argument that "the purpose of the inclusion of the spendthrift clause in the will was to protect an improvident beneficiary against his own folly by insulating him from overreaching creditors."[162] The Hawaii Supreme Court drew this conclusion from the Scott treatise on trusts:

> Where the income of a trust estate is payable to a beneficiary and he dies, his personal representatives are entitled to the income which has accrued at the time of his death and which has not been paid to him, unless it is otherwise provided by the terms of the trust. Even though it is provided by the terms of the trust or by statute that the

[154] *Id.* at n.2; *see also* Tex. Prop. Code Ann. § 112.035(a).

[155] *See Townley*, 252 S.W.3d at 719 (providing the definitions of a beneficiary under the Texas Trust Act and Texas Property Code).

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *See id.*; *see also In re* Estate of Campbell, 394 P.2d 784 (Haw. 1964).

[160] *Campbell*, 394 P.2d at 785.

[161] *Id.* at 787–88.

[162] *Id.* at 789; *Townley*, 252 S.W.3d at 719.

> interest of the beneficiary shall not be transferable by him or subject to the claims of his creditors, the beneficiary's interest in such accrued income passes on his death to his personal representatives, if it would so pass in the absence of such a restraint on alienation. The purpose of the restraint on alienation is to protect the beneficiary, and when he dies he no longer needs such protection. The purpose is not to deprive the beneficiary's estate of the income which was payable to him but which had not been paid at the time of his death. Whatever is thus received by the personal representatives is a part of his estate and is subject to the claims of his creditors. Unless the claims of creditors preclude it, the beneficiary can dispose by will of his right to the income accruing up to the time of his death.[163]

Because this section of the Scott treatise addresses the exact situation in *Campbell*, the Hawaii court correctly relied on it for its holding.[164] The problem is that the Townley trust is completely different from the trust in *Campbell*. *Campbell* specifically addresses a situation involving what to do with accumulated income,[165] but the only question raised by *Townley* is how principal should be distributed.[166] Thus, the inclusion of *Campbell* in the *Townley* opinion is erroneous and misleading in light of the core predicament created by the Townley trust.[167]

Next, the court considered *Cowdery v. Northern Trust Co*, an Illinois case cited by the appellant.[168] *Cowdery* involved two rather complex insurance and testamentary trusts created by a husband for the benefit of his widow and children.[169] The core spendthrift-related issue in *Cowdery* concerned the widow, who was entitled to trust income for her lifetime.[170] The widow died, leaving a will that attempted to dispose of her interest in

[163] *Campbell*, 394 P.2d at 789 (citing II AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 158.1 (2d ed. 1956).

[164] *Id.*

[165] *Id.*

[166] *Townley*, 252 S.W.3d at 719.

[167] *Id.* at 719–20.

[168] 53 N.E.2d 43 (Ill. App. Ct. 1944).

[169] *See id.* at 45.

[170] *See id.* at 51.

the trust income.[171] The trust contained a spendthrift provision that specifically precluded any beneficiaries from encumbering or anticipating any trust income before actually receiving it.[172] The question, then, was whether the spendthrift trust prevented the widow from devising the income that had accrued between her death and the last distribution.[173] Quoting the very same portion of the Scott treatise as the Hawaii Supreme Court in *Campbell*,[174] the *Cowdery* court determined that the terms of the spendthrift provision went beyond mere protection of the widow during her lifetime.[175] If the accrued income owing to the widow were to be paid to her estate and pass by her will, that income would be obtainable by the widow's creditors.[176] Such a situation is exactly what the testator was trying to avoid by including the spendthrift provision, and the *Cowdery* court said, to override the restraint would be "a manifest perversion of the settlor's intention to prevent income of the trust estate . . . ever at any time or in any part being subject to the claims of the creditors of the widow."[177] Thus, as the Texarkana court correctly asserts, *Cowdery* is not factually on point with respect to the Townley trust because *Cowdery* involved income that had accumulated but not been distributed before a beneficiary's death—not property to be received after a beneficiary's death.[178]

One of the significant flaws in *Townley* is the court's failure to identify, discuss, and decide Texas treatment of spendthrift provisions involving accrued income versus those involving trust principal. Confusingly, the Texarkana court recognized that *Cowdery* was unhelpful to the *Townley* issue yet itself had presented an "analogous" case—citing the identical Scott treatise passage—involving accrued income, *Campbell*.[179] To make matters worse, the court further muddied its stance by citing the Restatement of Trusts on an executor's right to accrued income following the death of a beneficiary.[180]

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[171] *See id.*

[172] *Id.* at 52; *see also Townley*, 252 S.W.3d at 720 (quoting the spendthrift provision).

[173] *See Cowdery*, 53 N.E.2d at 51.

[174] *Id.* at 51–52 (quoting IIA SCOTT & FRATCHER, *supra* note 86, § 158.1).

[175] *Id.* at 52.

[176] *See id.*

[177] *Id.* at 53 (emphasis omitted).

[178] *In re* Townley Bypass Unified Credit Trust, 252 S.W.3d 715, 719 (Tex. App.—Texarkana 2008, pet. denied); *see Cowdery*, 53 N.E.3d at 51–52.

[179] *See Townley*, 252 S.W.3d at 719–20.

[180] *Id.* at 720.

The Townley trust clearly stated that upon Josie Townley's death, the trust was to terminate, and the *corpus* of the trust was to be split between Billy Ray and Jimmy LaRue.[181] Neither child ever had an income interest in the trust, so no income was "payable" to them that would accrue.[182] Presumably some amount of lag time between Josie's death and the actual transfer of the trust principal would exist, during which the trust would be producing income. But these funds are not at issue in *Townley*; here, the court clearly is charged with determining who gets Billy Ray's one-half interest in the trust principal.[183] The *Townley* situation is not factually similar to either *Campbell* or *Cowdery*, and by devoting a substantial portion of its opinion to these cases, the court submits confusing dicta with the potential to encourage Texas courts to treat cases involving the distribution of principal in the same manner as those involving accrued income.[184]

VII. AUTHORITY ON THE *TOWNLEY* PREDICAMENT

Although the Texarkana court stumbled in distinguishing accrued income from a remainder interest in principal, the proper result in *Townley* is neither well established nor easily identified. While Texas courts have addressed situations involving creditors' rights to principal or income, no other case has been quite like *Townley*—in which a beneficiary attempted to voluntarily devise his future interest in trust principal.[185]

A. Limited Texas Precedent

Texas courts have been willing to enforce a restraint on a beneficiary's right to receive principal in the future, but these cases have focused on attempts at involuntary alienation. In the 1922 case *Caples v. Buell*,[186] the testatrix's will created a trust that gave her children varying monthly

[181] *Id.* at 717.

[182] *See id.* at 719; IIA SCOTT & FRATCHER, *supra* note 86, § 158.1.

[183] *See Townley*, 252 S.W.3d at 719 ("The question is then, was the corpus to be distributed under the terms of his will, or does the spendthrift provision require distribution under the laws of intestacy?").

[184] *See id.* at 719–20.

[185] *Id.* at 719.

[186] *See* IIA SCOTT & FRATCHER, *supra* note 86, § 153 n.13 (referencing Caples v. Buell, 243 S.W. 1066, 1067 (Tex. Comm'n App. 1922, judgm't adopted) as Texas authority for enforcement of a restraint on a beneficiary's right to receive principal in the future).

amounts from the trust income for a period of ten years, and after ten years, the remaining principal was to be split equally among the surviving children.[187] The will included a spendthrift provision:

> No child of mine shall have any right to sell, transfer, convey or encumber any part of the property or estate disposed of by this codicil until after the expiration of ten years from my death and not until the expiration of such trust and such child has received his or her part, nor shall any part of my estate or property disposed of by this codicil be seized, attached or in any manner taken by any judicial proceedings or court process against any of my children until the expiration of ten years from my death and the termination of this trust.[188]

The court then considered whether the trust estate was subject to attachment during the ten-year period following testatrix's death.[189] The *Caples* court relied almost exclusively on the time period during which the spendthrift provision was in effect; in other words, the fact that the children may ultimately receive trust property in fee simple at the expiration of ten years did not affect their ability to attach it during the ten-year period.[190] "The implied provision against alienating, coupled with the express provision against subjecting the land to the debts of the beneficiaries, during that period, constituted a spendthrift trust."[191]

The *Caples* court also relied on another Texas case, *Hoffman v. Rose*, in holding that the trust property could not be attached on account of the spendthrift provision in the will.[192] In *Hoffman*, a testator's will had been construed to create a spendthrift trust and vest the legal title of the property, together with all its accumulations, in the trustee during the trust, with the testator's son as sole beneficiary of the trust estate.[193] The court further held that under the terms of the will, the son had no interest that was subject

[187] *See id.* (referencing *Caples*, 243 S.W. at 1067 as Texas authority for enforcement of a restraint on a beneficiary's right to receive principal in the future).

[188] *Caples*, 243 S.W. 1066, 1066.

[189] *Id.* at 1067.

[190] *See id.*

[191] *Id.*

[192] 217 S.W. 424, 426 (Tex. Civ. App.—Austin 1919, writ ref'd).

[193] *Id.*

to execution and sale by his creditors.[194] The son's creditors creatively sought to reach the trust property by forcing its sale but promising not to take possession of the property during the trusteeship or interfere with administration of the trust during the son's life.[195] The *Hoffman* court refused to allow the sale:

> The estate, by the terms of the will having been impressed with a spendthrift trust, the purpose of the testator cannot be permitted to be defeated by the sale of any part of the corpus of the estate and the passing of the legal title, which we have repeatedly held was vested in the trustee during the life of the trust.[196]

Accordingly, Texas courts have been willing to enforce a restraint on a beneficiary's right to receive principal in the future. Notably, however, both *Caples* and *Hoffman* involved attempts by creditors to attach trust principal—not an attempted devise by the beneficiary, as in *Townley*. Thus, while these cases are instructive, the *Townley* scenario does appear to be a case of first impression in Texas, and the Texarkana court logically turned to other authorities for guidance.[197]

B. Secondary Sources

In a different passage of the same Scott treatise cited by *Townley*, *Campbell*, and *Cowdery*, Scott addresses the question of whether a restraint on a beneficiary's right to receive the principal of a trust in the future is valid.[198] Scott writes that where trust income is payable to one beneficiary and the principal is ultimately payable to another, absent a valid restraint on alienation, creditors of the principal beneficiary can reach his interest in principal without disrupting the right of the income beneficiary to receive income.[199] Furthermore, unless otherwise forbidden by statute, a restraint on a beneficiary's right to receive the principal of the trust in the future is valid regardless of whether the beneficiary is entitled to the income in the

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[194] *Id.*

[195] *Id.*

[196] *Id.* at 427.

[197] *In re* Townley Bypass Unified Credit Trust, 252 S.W.3d 715, 719 (Tex. App.—Texarkana 2008, pet. denied).

[198] IIA SCOTT & FRATCHER, *supra* note 86, § 153.

[199] *Id.*

meantime.[200] Scott then cites a slew of cases in various states that support this assertion.[201] Scott does not, however, address the specific situation where a principal beneficiary attempts to devise—as opposed to allowing creditors to attach—his interest in the trust. Thus, according to Scott's treatise on trusts, the restraint on alienation of principal that Townley imposed on his trust through a spendthrift provision could be valid and enforceable, thereby preventing either Billy Ray or Jimmy LaRue from assigning their interest.[202]

Although no cases exist, Texas or otherwise, addressing the exact situation in *Townley*, the Third Restatement does appear to provide a much-needed answer to this unique question.[203] Section 58, comment g of the of the Third Restatement specifically says that "if an interest survives (that is, is not terminated by) the beneficiary's death . . . the interest is an asset of the beneficiary's probate estate.[204] As such it passes, subject to administration and creditors' claims, to the deceased beneficiary's testate or intestate successors . . . ."[205] In the portion quoted by the court in *Townley*, the Restatement further explains this concept:

> A continuing income or remainder interest in the trust, despite the spendthrift provision, is transferable by will or intestacy for the same reason, and also because the right to pass the continuing interest on to others is a natural feature of such an interest as it was given to the beneficiary by the settlor.[206]

Therefore, it is crystal clear that under the Third Restatement of Trusts, Billy Ray's vested remainder interest in the trust principal should pass to his devisees under his own will despite the spendthrift provision.[207].

The *Townley* court recognized that the Restatement is not a controlling authority, but because it found no others, it chose to follow the logic and

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[200] *Id.*

[201] *Id.*, § 153 n13. Scott cites *Caples v. Buell* as Texas authority for this assertion, but the extent to which *Caples* actually provides such support is discussed above.

[202] *Id.*, § 153.

[203] RESTATEMENT (THIRD) OF TRUSTS § 58 (2003).

[204] *Id.* § 58 cmt. g.

[205] *Id.*

[206] *Id.* § 58 reporter's notes to cmt. g.

[207] *See In re* Townley Bypass Unified Credit Trust, 252 S.W.3d 715, 720 (Tex. App.—Texarkana 2008, pet. denied).

reasoning of the Third Restatement.[208] The court noted that the traditional purpose of spendthrift trusts is to "protect the beneficiary from his or her own folly," and that this purpose "cannot be promoted after the beneficiary's death."[209] The court further acknowledged that Texas law recognizes a person of sound mind's perfectly legal right to dispose of his or her own property as that person wishes.[210] As a result, the Texarkana Court of Appeals held that Billy Ray's one-half interest in the trust corpus was vested and transferred through his will to his widow rather than by intestacy.[211]

VIII. TWO ROADS TO *TOWNLEY*

The *Townley* decision comes down to a choice between a strict interpretation of a testator's power to control his gift and a more liberal approach to spendthrift restraints that adapts to the circumstances. On the one hand, Texas courts tend to go to great lengths to interpret and fulfill a testator's wishes.[212] Here, the testator Townley specifically prohibited anticipation by assignment or otherwise by all beneficiaries of the trust.[213] He also did not specify what was to happen if one of the children predeceased their mother.[214] Applying strictly the *cujus est dare* principle that a donor can attach whatever strings he wishes to his gift,[215] perhaps it would best fulfill the testator's wishes in this case to refuse to allow the son to devise his interest in the trust. Maybe Townley disliked whomever he suspected his son would devise the trust principal to and instead wanted the funds to pass to the son's heirs at law; or maybe Townley was concerned that his son would devise the funds to creditors. These theories are, of course, very unlikely, but based on what Townley did specify in this poorly-drafted trust instrument, it is not entirely unreasonable to prevent literally any anticipation of the trust corpus.

[208] *Id.* at 721.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 717.

[212] *See, e.g.*, *supra* Part VII.A.

[213] *Townley*, 252 S.W.3d at 717.

[214] *Id.*

[215] *See supra* Part I.

On the other hand, Texas law favors any interpretation that avoids intestacy.[216] Presumably the testator was most concerned with protecting and providing support for his wife during her lifetime; he probably did not want the son's creditors to have standing to challenge any decisions by the trustees based on a future interest in the trust corpus. Had he truly been concerned about what the children would do with the principal once they had possession of it, he would have continued the trust after his wife's death. In this light, Scott's assertion that when the beneficiary dies he no longer needs spendthrift protection becomes very logical.[217] Perhaps in this particular situation it is better policy to allow the son's will to control the trust principal. Had he survived his mother, Billy Ray would have had it in fee and would have devised it anyway.

IX. CONCLUSION

Ultimately, the Texarkana court chose to avoid intestacy by allowing Billy Ray's interest to pass via his will.[218] At first glance, the decision seems to go against the very nature of *cujus est dare*, but the outcome of *In re Townley Bypass Trust* was probably appropriate under these exact circumstances. The problem with the *Townley* decision, however, is that the court does not adequately explain why this result is appropriate in a way that sets a clear precedent. Another court armed with a superficial knowledge of spendthrift trusts and the *Townley* case might be tempted not only to confuse accrued income with principal but also to attach too much significance to the concept that the historical purpose of a spendthrift provision is to protect the beneficiary from his own folly. A court could take this dictum to the extreme and practically rewrite a settlor's trust document when the beneficiary does not need to be protected from his own folly, such as when a beneficiary is elderly or infirm.

Spendthrift trusts have proven themselves to be valuable and effective estate-planning tools, but *Townley* illustrates that in some situations, the viability of their enforcement becomes hazy. Often, the classic arguments for and against spendthrift trusts are resurrected when courts find themselves asking questions that statutory law simply does not answer. Many states, such as Texas, already have carved out certain areas where public policy has dictated that spendthrift provisions should not be

[216] Rothermel v. Duncan, 369 S.W.2d 917, 923 (Tex. 1963).

[217] *See* IIA SCOTT & FRATCHER, *supra* note 86, § 158.1.

[218] *Townley*, 252 S.W.3d at 721.

enforced.[219] Despite legislative efforts, courts continue to face the difficult task of balancing the interests of the dead with those of the living, and undoubtedly even more thorny spendthrift trust matters lie ahead.

[219] *See supra* Parts IV–V.