IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KATHRYN MENNEN, SARAH MENNEN, ALEXANDRA MENNEN, SHAWN MENNEN, and JOHN MENNEN,	)	
Plaintiffs,	)	
v.	)	C.A. No. 8432-ML
WILMINGTON TRUST COMPANY, a Delaware Corporation, GEORGE JEFFREY MENNEN, and OWEN J. ROBERTS, not Individually but solely as the individual Trustee of the TRUST ESTABLISHED BY GEORGE S. MENNEN FOR THE BENEFIT OF GEORGE JEFFREY MENNEN u/a/d 11/25/1970, a Delaware trust.	)	
Defendants.	)	

MASTER'S REPORT
(Trustee Roberts's Motion for Summary Judgment)

Final Report: April 24, 2015
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LEGROW, Master

The summary judgment motion pending before me places an uncomfortable spotlight on the limits of this Court's inherent power to "do equity" and the limits of the storied and much-debated power of the judicial system to "make law." In my post-trial final report issued simultaneously with this report, I conclude that the individual trustee of a once large trust breached his fiduciary duties to the plaintiff beneficiaries and recommend that the Court enter a substantial judgment against the individual trustee. The bulk of the individual trustee's wealth, however, is tied up in his own trust, which contains a typical spendthrift provision exempting it from execution, attachment, or other legal or equitable process instituted by any creditor or assignee of a beneficiary. The plaintiffs contend they should be entitled to satisfy their judgment against the individual trustee from the trust established for his benefit and argue the spendthrift provision is not applicable here, either because the spendthrift clause does not apply to these plaintiffs or because this Court should recognize an exception to allow the spendthrift trust to be pierced.

Spendthrift clauses are consistently enforced throughout the country and the recognized exceptions are narrow and grounded in well-defined policy justifications. In this state, the General Assembly has decreed that spendthrift clauses are enforceable, subject to narrow statutory and common law exceptions not applicable here. This Court, and nearly every other court in the country, has held that tort claimants may not reach the assets in a spendthrift trust. The plaintiffs argue persuasively, but ultimately unsuccessfully, that this Court should expand the circumstances under which a spendthrift clause may be pierced. 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.

BACKGROUND[1]

This action was filed in March 2013 by Kathryn Mennen, Sarah Mennen, Shawn Mennen, Alexandra Mennen, and John Mennen (collectively, the "Beneficiaries"), who are beneficiaries of a trust created in 1970 by George S. Mennen for the benefit of John H. Mennen (the "Trust"). The Beneficiaries named as defendants Wilmington Trust Company ("Wilmington Trust"), the corporate trustee of the Trust,[2] and George Jeff Mennen ("Jeff" and collectively with Wilmington Trust, the "Co-Trustees"),[3] the individual trustee of the Trust. The Complaint sought damages in excess of $100 million as a result of alleged breaches of the Co-Trustees' fiduciary duties. The Complaint also named as a defendant the individual trustee of a trust established by George S. Mennen for the benefit of Jeff and his issue ("the Jeff Mennen Trust"), and alleged one count against the individual trustee of the Jeff Mennen Trust.

On November 25, 1970, George S. Mennen (the "Settlor") established a trust for each of his four children and their issue: the Trust for John H. Mennen that is the subject of this action, the Jeff Mennen Trust, a trust for Elma Christina Mennen (the "Christina Mennen Trust"), and a trust for William G. Mennen, III (the "Bill Mennen Trust" and collectively with the Trust, the Jeff Mennen Trust, and the Christina Mennen Trust, the

[1] Unless otherwise noted, the following facts are not disputed.
[2] Wilmington Trust resigned as corporate trustee of the Trust on May 28, 2013.
[3] For the sake of clarity, I use certain of the parties' first names. No disrespect is intended.

"1970 Trusts"). The 1970 Trusts were funded with stock from the Mennen Company, a closely held family business owned by the Settlor and his siblings. The 1970 Trusts contain identical terms, were funded with nearly identical assets, and initially were administered by the same trustees. Each of the trusts designated one of the Settlor's children and their issue as the current beneficiaries of their respective trusts and granted the beneficiary child a limited testamentary power of appointment to appoint some or all of the trust corpus of their respective trust for one or more of the Settlor's issue. That power of appointment may not be exercised in favor of the child's estate or creditors.[4]

The trust instruments for the 1970 Trusts designated Wilmington Trust as corporate trustee and Lowell Wallace as individual trustee.[5] In 1975, Mr. Wallace resigned. Owen Roberts succeeded Mr. Wallace as individual trustee of the Jeff Mennen Trust and the Bill Mennen Trust, while Jeff assumed Mr. Wallace's position as individual trustee of the Trust and the Christina Mennen Trust.

In the Complaint, the Beneficiaries alleged that after the Mennen Company was sold to Palmolive in 1992, Jeff utilized the now liquid assets in the Trust to fund a series of investments in, or loans to, a number of fledgling companies founded or managed by Jeff's friends and on whose boards Jeff served. The Beneficiaries contended that these self-interested and imprudent investments and loans drained the trust of nearly its entire value, and that Wilmington Trust did nothing to prevent Jeff's self-dealing. Jeff was unable to use assets in the Jeff Mennen Trust to make such investments because Jeff has

[4] Aff. of Brian C. Ralston, Esq. to Def.'s Mem. of Law in Supp. of Mot. for Summ. J. (hereinafter "Ralston Aff.") Ex. C, Art. FIRST ¶ C and Art. FIRST § I(A).
[5] Ralston Aff. Ex. C, p. 1.

no investment control over that trust, which was separately administered by Owen Roberts and Wilmington Trust. Although Jeff attempted at times to influence Roberts's investment decisions, he was not successful in those efforts. Roberts does not consult Jeff regarding investment decisions for the Jeff Mennen Trust.

The Beneficiaries named Owen Roberts as a defendant in this action in his capacity as individual trustee of the Jeff Mennen Trust, alleging in their complaint that "equity requires the transfer of assets from [the Jeff Mennen Trust] to the Trust."[6] The Beneficiaries' complaint also alleged, incorrectly, that Jeff, rather than Owen Roberts, was the individual trustee of the Jeff Mennen Trust.[7] Although the Beneficiaries now acknowledge that Jeff has no investment control over the Jeff Mennen Trust, they continue to maintain they are entitled to recoup from the Jeff Mennen Trust damages awarded against Jeff. After the completion of substantial discovery, Owen Roberts moved for summary judgment on the question of whether the spendthrift provision of the Jeff Mennen Trust may be pierced if the Beneficiaries prevail at trial.

The clause at issue is contained in Article NINTH of the Jeff Mennen Trust agreement, which provides:

> The interest of any beneficiary in either the income or principal of any trust hereunder shall not be alienated or in any other manner assigned or transferred by such beneficiary; and such interest shall be exempt from execution, attachment, distress for rent, and other legal or equitable process which may be instituted by or on behalf of any creditor or assignee of such

[6] Verified Compl. (hereinafter "Compl.") ¶ 274. The Beneficiaries initially named the Jeff Mennen Trust as a defendant, but Owen Roberts, in his capacity as trustee for the Jeff Mennen Trust, intervened in this action and was substituted as the real party in interest under Court of Chancery Rule 17(a).
[7] Compl. ¶¶ 23, 122.

> beneficiary. The foregoing provisions of this ARTICLE NINTH shall not be deemed in any manner to limit or impair any power of appointment conferred upon any person under the provisions of this trust agreement.[8]

Owen Roberts argues Article NINTH prohibits the Beneficiaries from collecting from the Jeff Mennen Trust any judgment they may secure against Jeff personally. The Beneficiaries dispute the enforceability of the spendthrift provision against them, arguing first that they are not creditors under Article NINTH or 12 *Del. C.* § 3536, and second that, even if they are creditors, they may pierce the spendthrift trust because (1) public policy precludes enforcing a spendthrift trust against tort claimants of the Beneficiaries' variety, or (2) the 1970 Trusts are essentially sub-trusts and the Beneficiaries are entitled to impound Jeff's interest in the Jeff Mennen Trust.

This case was scheduled for trial in February 2014. A month before trial I issued this report in draft form (the "Spendthrift Draft Report"), recommending that the Court grant Owen Roberts' motion for summary judgment because the spendthrift clause in the Jeff Mennen Trust precluded the Beneficiaries from satisfying any judgment against Jeff with the assets of that trust. I stayed the period to take exceptions to the Spendthrift Draft Report to allow the parties and the Court to focus on the impending trial.

Several events followed the issuance of the Spendthrift Draft Report. First, the beneficiaries reached a settlement with Wilmington Trust on the eve of trial, and trial therefore was limited to the issue of Jeff's liability. On December 8, 2014, I issued a draft report on the issue of Jeff's liability (the "Liability Draft Report"). In the Liability Draft Report, I concluded Jeff personally was liable to the Beneficiaries for many of the

[8] Ralston Aff. Ex. C, Art. NINTH, pp. 26-27.

losses incurred by the Trust during Jeff's stewardship as individual trustee. I then lifted the stay on the period for taking exceptions and the parties filed exceptions to both draft reports. The Beneficiaries took exception to the Spendthrift Draft Report and limited exception to the damages calculation in the Liability Draft Report. Jeff took exception to the Liability Draft Report. The parties briefed those exceptions. In conjunction with this report, which is my final report on Owen Roberts' motion for summary judgment, I am issuing a final post-trial report in which I recommend that the Court enter judgment against Jeff.

ANALYSIS

Summary judgment should be awarded if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[9] When considering a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[10] A party seeking summary judgment bears the initial burden of showing no genuine issue of material fact exists.[11] If the movant makes such a showing, the burden then shifts to the non-moving party to submit sufficient evidence to show that

[9] *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).
[10] *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977).
[11] *Johnson v. Shapiro*, 2002 WL 31438477, at *3 (Del. Ch. Oct. 18, 2002).

a genuine factual issue, material to the outcome of the case, precludes judgment before trial.[12]

This case is rife with disputed factual issues, but the mere existence of disputed facts does not preclude summary judgment if the facts are not material to the legal issue presented by the motion.[13] Although summary judgment may be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial,"[14] the purpose of summary judgment is to avoid the delay and expense of a trial where there is nothing for the fact finder to decide.[15] In their opposition to the summary judgment motion, the Beneficiaries pointed to two categories of disputed facts they contended made summary judgment procedurally premature. The first category involved the hotly contested issue of Jeff's liability, if any, for alleged breaches of his fiduciary duties to the Beneficiaries. For purposes of the motion, however, I accepted the truth of the Beneficiaries' allegations against Jeff.[16] The second category of disputed facts to which the Beneficiaries pointed involved the extent of Owen Roberts's knowledge of the Trust and Jeff's "ruinous misuse of the assets in the [Trust]."[17] Although the parties disputed the extent of Owen Roberts's knowledge, if any, of Jeff's administration of

[12] *Conway v. Astoria Fin. Corp.*, 837 A.2d 30, 36 (Del. Ch. 2003) (citing *Scureman v. Judge*, 626 A.2d 5, 10 (Del. Ch. 1992), *aff'd*, 628 A.2d 85 (Del. 1993)); *Johnson*, 378 A.2d at 632.
[13] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992) ("[I]f the parties are in disagreement concerning the factual predicate for the legal principles they advance, summary judgment is not warranted").
[14] *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).
[15] *In re Maull*, 1994 WL 374302, at *2 (Del. Ch. June 9, 1994) (citing *Merill*, 606 A.2d at 100).
[16] *See Merrill*, 606 A.2d at 99-100; Trustee Roberts's Reply Br. in Supp. of Mot. for Summ. J. (hereinafter "Reply Br.") at 1-2.
[17] Pls.' Answering Br. to Trustee Roberts's Mot. for Summ. J. (hereinafter "Answering Br.") at 20.

John's Trust, the Beneficiaries failed to explain how that factual issue was material to any of the legal issues raised by them in the present motion. Even if Roberts had complete knowledge of Jeff's allegedly wrongful acts, Roberts is not himself a party to this action and it is unclear how an individual trustee's knowledge of a beneficiary's allegedly wrongful conduct could break a spendthrift clause in a trust. I therefore concluded that the record was ripe for summary judgment.

A. The enforceability of spendthrift clauses

Although commentators and parties continue to debate and test the limits of spendthrift clauses, the general validity of spendthrift restrictions is established in nearly all jurisdictions in this country.[18] The initial argument in favor of recognizing spendthrift clauses appears to have its origins in the concept that a settlor is entitled to impose conditions on gifts or transfers of his property, provided such conditions do not violate the law.[19] The purpose of a spendthrift trust is to protect a beneficiary from his or her own improvidence.[20]

In Delaware, the General Assembly removed any doubt as to the enforceability of spendthrift clauses by passing 12 *Del. C.* § 3536, which provides, in pertinent part:

> (a) Except as expressly provided in subsections (c) and (d) of this section, a creditor of a beneficiary of a trust shall have only such rights against or with respect to such beneficiary's interest in the trust or the property of the

[18] George Gleason Bogert et al., *The Law of Trusts and Trustees* § 222 (3d ed. 2007).
[19] *Id.* ("The law rests its protection of what is known as a spendthrift trust fundamentally on the principle of *cujus est dare, ejus est disponere*. It allows the donor to condition his bounty as suits himself, so long as he violates no law in so doing. When a trust of this kind has been created, the law holds that the donor has an individual right of property in the execution of the trust; and to deprive him of it would be a fraud on his generosity.") (quoting *In re Morgan's Estate*, 72 A. 498 (Pa. 1909)).
[20] *Kulp v. Timmons*, 944 A.2d 1023, 1032 (Del. Ch. 2002).

> trust as shall be expressly granted to such creditor by the terms of the instrument that creates or defines the trust or by the laws of this State. The provisions of this subsection shall be effective regardless of the nature or extent of the beneficiary's interest, whether or not such interest is subject to an exercise of discretion by the trustee or other fiduciary, and shall be effective regardless of any action taken or that might be taken by the beneficiary. Every interest in a trust or in trust property or the income therefrom that shall not be subject to the rights of creditors of such beneficiary as expressly provided in this section shall be exempt from execution, attachment, distress for rent, foreclosure, garnishment and from all other legal or equitable process or remedies instituted by or on behalf of any creditor … .[21]

It may reasonably be argued that enforcement of a spendthrift provision is contrary to common notions of fairness and justice. In early jurisprudence debating the application of spendthrift clauses, one judge described a spendthrift clause as "opposed to 'the honest policy of the law,'" reasoning that "[c]ertainly property available for the purposes of pleasure or profit should also be amenable to the demands of justice."[22] Although the policy arguments against enforcement of spendthrift clauses are interesting and compelling, the passage of Section 3536 made clear that this Court must enforce such clauses, subject only to the limits contained or permitted in the statute.

That is not to say, however, that spendthrift trusts are entirely unassailable. Section 3536 provides that creditors retain such rights against a spendthrift trust "as shall be expressly granted to such creditor by the terms of the instrument that creates or defines the trust or by the laws of this State." By referencing "the laws of this State," Section 3536 did not displace common law principles under which a spendthrift trust may be

[21] The exceptions contained in subsections (c) and (d) of Section 3536 do not apply to the Beneficiaries' claims against the Jeff Mennen Trust.
[22] Bogert et al., *supra* note 18, at § 222 (quoting *Tillinghast v. Bradford*, 5 R.I. 205, 212 (R.I. 1858)).

invalidated and subjected to creditors' claims.[23] In likely recognition that the debate has closed regarding the general enforceability of spendthrift trusts, the Beneficiaries focus their arguments on seeking an exception to the spendthrift clause, contending first that they are not creditors within the meaning of the statute, and second that, even if they are creditors, this Court should recognize a common law or public policy exception allowing the beneficiaries to pierce the spendthrift clause. I will address each argument *seriatim*.

B. If the Beneficiaries secure a judgment against Jeff, they will be creditors within the meaning of Section 3536.

The Beneficiaries seize on the reference to "creditors" within both Article NINTH of the Trust and Section 3536 of the Delaware Code, arguing this Court should recognize that certain tort claimants fall outside any reasonable definition of creditor. The Beneficiaries urge that, under the "especially egregious and specific facts" alleged against Jeff Mennen, this Court should hold that "family member victims of *fiduciary* misconduct are entitled to pierce the spendthrift trust of the faithless fiduciary co-family member to satisfy a judgment in equity."[24]

Over forty years ago in *Garretson v. Garretson*, the Delaware Supreme Court defined a creditor for purposes of Section 3536 as "one to whom a debt is owing by another person who is the debtor."[25] Applying that definition, the *Garretson* court concluded a wife, seeking maintenance and support from her husband, is not a creditor within the meaning of Section 3536 because such an action is not one to collect a debt,

[23] *Kulp*, 944 A.2d at 1031.
[24] Answering Br. at 36 (emphasis in original).
[25] 306 A.2d 737, 740-41 (Del. 1973) (citing Blacks Law Dictionary, Rev. 4th ed.) (internal quotation marks omitted).

but rather one to compel performance of a duty of support imposed by law upon a spouse.[26] That a spendthrift clause may not be used to avoid support obligations owed to a spouse or other dependents is nearly universally recognized and grounded in the policy that a beneficiary should not be permitted to enjoy an interest in a trust while neglecting to support his dependents.[27]

The Beneficiaries' argument on this point seems to shift at various times between urging this Court to conclude that an involuntary creditor may not be a "creditor" under certain circumstances,[28] or that Section 3536 permits this Court to recognize a common law or public policy exception to enforcing spendthrift clauses against tort creditors.[29] Although it is tempting to embrace either suggestion as a means to overcome what might seem an unfair application of Section 3536, neither argument is grounded in controlling authority.

This Court has opined on at least two previous occasions that a tort claimant is a "creditor" within the meaning of Section 3536. In *Gibson v. Speegle*,[30] this Court considered an action by an insurer to enforce a judgment against a testamentary trust established for the benefit of Gary Barwick, who was convicted of arson and other crimes

[26] *Id*. at 740.
[27] *See id*. at 740-41 (citing authority); *Wife, J.G.B. v. Husband, P.J.G.*, 286 A.2d 256, 259 (Del. Ch. 1971) (citing authority); Restatement (Second) of Trusts § 157 (1959); Restatement (Third) of Trusts § 59 (2003); *but see* Bogert et al., *supra* note 18 at § 224 n.3 (listing decisions precluding support claimants from piercing a spendthrift trust).
[28] *See, e.g.*, Answering Br. at 30-31.
[29] *See, e.g.*, Answering Br. at 33-34, 37; *see also id.* at 30 n.113 ("the Beneficiaries submit that involuntary creditors are not 'creditors' at all within the meaning of the statute and further submit that it is against public policy to permit trustees who have breached their duty of loyalty to hide behind a spendthrift clause while the victims of their misconduct are left impoverished as a result.").
[30] C.A. No. 124 (Del. Ch. May 30, 1984) (Answering Br. Compendium Ex. 1).

that caused damage to a restaurant insured by Aetna. This Court rejected Aetna's bid to pierce the trust to enforce a judgment Aetna obtained against Mr. Barwick. The *Gibson* court first rejected Aetna's suggestion that Delaware should recognize a public policy exception to Section 3536 to allow tort claimants to enforce their judgments against a trust, concluding that the Supreme Court's ruling in *Garretson* did not extend beyond familial support obligations.[31] The *Gibson* court also rejected Aetna's argument that it was not a creditor within the meaning of the statute, concluding that Section 3536 permitted no exceptions. The Court reached a similar conclusion in *Parsons v. Mumford*,[32] holding that Section 3536 prohibited the plaintiffs from imposing an equitable lien requiring the trustee to pay the remainder interest in a trust to the beneficiary's creditors when the trust terminated. The *Parsons* court reached that conclusion even though the plaintiffs were "involuntary creditors" of the trust beneficiary.[33]

Confronted with these two decisions, the Beneficiaries advance several related reasons why those precedents are inapplicable. The Beneficiaries first argue that the familial relationship between Jeff and the Beneficiaries should remove this case from the application of Section 3536, *Gibson*, and *Parsons*, arguing *Garretson* should be applied or extended to exclude from the definition of "creditor" claims made against the trust by a family member of the beneficiary who was harmed by the beneficiary's fiduciary misconduct. *Garretson*, however, cannot be read so broadly. The ruling in *Garretson*

[31] *Id*. at ¶ 19.
[32] 1989 WL 63899 (Del. Ch. June 14, 1989).
[33] *Id*. at *5. The *Parsons* decision relied heavily on *Gibson*.

was premised on the nature of the obligation at issue: one for support owed by a family member to his dependents. Although the Beneficiaries are correct that they are members of Jeff's family, it is there that the similarity with *Garretson* stops. Jeff owes the Beneficiaries no support obligations, they are not his dependents, and therefore the reasoning in *Garretson* and similar cases does not compel or even permit a conclusion that all familial obligations, however attenuated, fall outside the ambit of a spendthrift clause. Although, as the Beneficiaries point out, Jeff's fiduciary obligations to the Beneficiaries at least partially are statutory in nature, that fact also does not bring this case any closer to *Garretson*. The conclusion in *Garretson* focused on the nature of obligation at issue, not the fact that it arose from a statute.[34]

Based on the Supreme Court's definition of "creditor" in *Garretson*, I conclude that, if the Court adopts my recommendations in the Liability Final Report, the Beneficiaries will be creditors within the meaning of Section 3536. Unlike a support obligation, which exists separate from any judgment entered by a court, the Beneficiaries will be creditors by virtue of a judgment of liability against Jeff. That judgment is a debt like any other.

The Beneficiaries also urge me to recognize tort claimants, or some limited variety of tort claimants, as "involuntary creditors" subject to a common law or public policy

[34] *See Garretson v. Garretson*, 306 A.2d 737, 740 (Del. 1973) ("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."); *Wife, J.B.G. v. Husband, P.J.G.*, 286 A.2d 256, 259-60 (Del. Ch. 1971) ("[A] wife suing for support or on a court order directing that her husband pay support to her is not a 'creditor' as that term is commonly defined. … She sues, rather, to compel performance of a duty which the law imposes upon a husband.").

exception to Section 3536. Specifically, the Beneficiaries argue that, at a minimum, the Court should recognize a common law exception to Section 3536 when a tortfeasor engages in "repeated, bad faith, willful fiduciary misconduct."[35] The argument that spendthrift clauses should not apply to "involuntary" creditors squarely was rejected in both *Gibson* and *Parsons*, but the Beneficiaries urge me to disregard those cases because they contend *Gibson* was wrongly decided and *Parsons* relied almost exclusively on *Gibson*.

The Beneficiaries first assert *Gibson* is not reliable because it was based on what the Beneficiaries contend was the Court's incorrect conclusion that Section 3536 permitted no exceptions, when other decisions make clear that Section 3536 did not displace common law exceptions to the enforcement of spendthrift trusts. The Beneficiaries, however, misread *Gibson*. The Court did not hold that there were no permitted exceptions to the enforceability of spendthrift clauses, but simply stated that the statute "contains no exceptions." That statement is not inconsistent with other cases in which this Court concluded Section 3536 did not displace the common law. The Beneficiaries also take issue with *Gibson* because the Court considered, but ultimately did not rely upon, the same set of authorities on which the *Garretson* court relied in concluding a claim for spousal support was not subject to Section 3536. This argument is puzzling. That the *Garretson* court cited certain authorities[36] to support its conclusion

[35] Beneficiaries' Br. in Support of Their Exceptions to Draft Reports at 42.
[36] *Compare Garretson*, 306 A.2d at 740 (citing 2 *Scott on Trusts* § 157.1; Bogert et al., *Trusts and Trustees* § 224 (2d ed.), Griswold, *Spendthrift Trusts*, § 333 (2d ed.), and *Levine v. Levine*, 209 F.Supp. 564 (D. Del. 1962)) *with Gibson v. Speegle*, C.A. No. 124, ¶ 20 (Del. Ch. May 30,

that a wife seeking support is not a creditor under Section 3536 does not mean the Supreme Court reached any conclusion regarding the applicability in Delaware of other exceptions identified in those authorities.

The Beneficiaries also argue that *Gibson* is not controlling precedent because the decision by the Court of Chancery was remanded by the Supreme Court for a new trial to address a number of issues raised *sua sponte* by the Supreme Court regarding the settlor's motivations in establishing the trust and the affect, if any, of those motivations on the application of Section 3536.[37] The parties to the case apparently settled their dispute before another trial was held, leaving unresolved both the questions raised by the Supreme Court and the larger question of whether the Supreme Court would have adopted the lower court's conclusions regarding the availability of an exception to Section 3536 for tort claimants. Because *Gibson* was appealed and never affirmed, the Beneficiaries argue, the reliance on that decision by the *Parsons* court was misplaced and *Parsons* therefore also is unreliable. Even if I concluded, however, that *Gibson* and *Parsons* were not binding precedents, they remain persuasive in their conclusions regarding the propriety of this Court redefining the public policy adopted by the legislature in Section 3536.[38] Significantly, the General Assembly has revised Section

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1984) (citing 2 Scott, *The Law of Trust* § 157 (3d ed. 1976), Bogert *Trusts & Trustees* § 224 (Rev. 2d ed. 1979), and Griswold, *Spendthrift Trusts*, § 365 (2d ed. 1974)).

[37] Transmittal Aff. of J. Peter Shindel, Esq., Ex. 18.

[38] In my view, because the Supreme Court never reversed *Gibson*, it remains binding on this Court.

3536 several times since both *Gibson* and *Parsons* were decided, and never has revised that section to create a statutory exception for tort claimants.[39]

Finally, the Beneficiaries refute the method of statutory interpretation relied on by the *Gibson* court when it concluded that the General Assembly had considered, but rejected, an exception to Section 3536 for tort claimants.[40] Assuming for the sake of argument that the Court misapplied a rule of statutory construction, however, the Beneficiaries' claim is no stronger unless they can point to some authority indicating that the General Assembly intended to permit the courts to develop unenumerated public policy exceptions to an unambiguous statute.

The absence of any recognized common law or public policy exception for tort claimants seeking to pierce a spendthrift trust proves fatal to the Beneficiaries' argument. Although the Beneficiaries are correct that Section 3536 did not displace existing common law exceptions to the general validity of spendthrift trusts, that fact alone does not empower this Court to develop new exceptions in the name of the "common law" when those exceptions would eviscerate the intent of the legislature. It is one thing to conclude the General Assembly did not intend to supplant existing common law – a conclusion reached by this Court in *Kulp v. Timmons* and supported by established precedent.[41] It is altogether different to conclude that the General Assembly intended to

[39] This Court presumes the General Assembly is aware of judicial decisions when it enacts or amends a statute. *Teachem v. Terry*, 56 A.3d 1041, 1047 (Del. 2012).
[40] *Gibson*, C.A. No. 124, ¶ 21.
[41] *See Makin v. Mack*, 336 A.2d 230, 234 (Del. Ch. 1975) ("It is not to be presumed that a change in the common law was intended beyond that which is clearly indicated by express terms or by

give this Court *carte blanche* authority to develop new, non-statutory exceptions to Section 3536 as this Court's sense of fairness or justice dictates. Because the Beneficiaries cannot identify any common law exception for tort claimants existing at the time Section 3536 was adopted, or even one that has become generally accepted within the common law of trusts, they cannot rely on this avenue to pierce the trust.

Although facially there is appeal to the Beneficiaries' argument that this Court should recognize a public policy exception for tort claimants, that argument routinely has been rejected by courts throughout the country.[42] Such an exception also is not supported by the text of any of the Restatement sections addressing exceptions to spendthrift trusts, although the comments to such sections suggest the possibility of a public policy exception for tort claimants.[43] In the absence of ambiguity in the statute, it is for the legislature, and not this Court, to define the policy decisions of this State.[44] Although in *Garretson* this Court identified public policy as an alternate means for excluding familial

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necessary implication from the legislative language used.") (citing *Assoc'd Transport v. Pusey*, 118 A.2d 362 (Del. 1955)).

[42] *See, e.g.*, *Jackson v. Fidelity and Deposit Co.*, 608 A.2d 901 (Va. 2005); *Duvall v. McGee*, 826 A.2d 416 (Md. 2003); *Scheffel v. Krueger*, 782 A.2d 410 (N.H. 2001); *Kirk v. Kirk*, 456 P.2d 1009 (Ore. 1969). In *Sligh v. First National Bank*, 704 So.2d 1020, 1028 (Miss. 1997), the Mississippi Supreme Court concluded that it was against public policy to enforce a spendthrift trust against tort claimants. At the time *Sligh* was decided, Mississippi did not have a spendthrift statute. *Id*. at 1024-45. A year later, the Mississippi legislature overruled *Sligh* by statute. Miss. Code Ann. § 91-9-503 (1998).

[43] *See* Restatement (Second) of Trusts § 157 and comments; Restatement (Third) of Trusts § 59 and comments. *See also* Bogert et al., *supra* note 18, § 224 ("It may be argued that the trust beneficiary should not be permitted to circumvent the case and statutory law as to liability for tortious conduct by taking advantage of the spendthrift clause. The law to date is to the contrary, however.") (footnote omitted).

[44] *Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 62 A.3d 1212, 1217 (Del. 2013).

support claims from Section 3536,[45] the Supreme Court's decision did not address the availability of a public policy exception or address its parameters. At most, the lower court's reference to public policy arose from ambiguity in the definition of a creditor under Section 3536. No similar ambiguity appears in the exceptions that are permitted by the statute; Section 3536 unambiguously limits exceptions to those identified in the statute or permitted by the trust or "the laws of this State."

C. Delaware law does not recognize an exception to spendthrift clauses for beneficiaries who engage in repeated acts of wrongdoing.

The foregoing analysis applies with equal force to the Beneficiaries' argument that this Court should recognize a "persistent wrongdoer" exception to the enforceability of spendthrift clauses. The Beneficiaries' argument relies almost entirely on a comment to Section 59 of the Restatement (Third) of Trusts. That Section discusses circumstances under which an otherwise valid spendthrift trust may be reached to satisfy a claim against a trust beneficiary. The only exceptions identified in the text of Section 59 are: (1) claims for support of a child, spouse, or former spouse, or (2) services or supplies provided for necessities or for the protection of the beneficiary's interest in the trust. The comments to Restatement Section 59 indicate those exceptions are not exclusive, and that

> [t]he nature or pattern of tortious conduct by a beneficiary, for example, may on policy grounds justify a court's refusal to allow spendthrift immunity to protect the trust interest and the lifestyle of that beneficiary, especially one whose willful or fraudulent conduct or persistently reckless behavior causes serious harm to others.[46]

[45] *Wife, J.B.G. v. Husband, P.J.G.*, 286 A.2d 256, 259-60 (Del. Ch. 1971).
[46] Restatement (Third) of Trusts § 59 cmt. a(2) (2003).

Notably, neither the comment nor the reporter's notes cite any cases in which courts have considered adopting this type of exception. The reporter's note to Section 59 suggests that the "persistent wrongdoer" exception is an "extension[] of public-policy limits to otherwise permissible spendthrift restraints."

The same reasons that compel rejection of a tort claimant exception compel rejection of the more limited "persistent wrongdoer" exception. The Beneficiaries have not identified any common law principle recognizing this exception before Section 3536 was passed and, in the absence of ambiguity in the statute, this Court cannot resort to public policy to engraft an exception into the statute. Although the Beneficiaries argue that this Court may develop new exceptions because the common law is fluid, rather than static, I disagree that the reference to "the laws of this state" in Section 3536 was intended to grant this Court broad authority to scale back, on a case-by-case basis, the public policy the legislature articulated when it adopted broad enforceability of spendthrift clauses. Although I have sympathy for the Beneficiaries' argument that the Court should not permit Jeff to escape his willful misconduct without consequence, I do not believe the Court can or should adopt the exception the Beneficiaries seek in the name of "public policy" and in contravention of an unambiguous statute. The type of "results-based" judicial reasoning the Beneficiaries advocate may seem desirable to meet their ends, but it rarely creates the type of coherent or predictable body of law on which our judicial system is based.

D. The Beneficiaries cannot reach the Jeff Mennen Trust through impoundment.

The Beneficiaries' also contend that the theory of "impoundment" provides an exception to the application of the spendthrift clause in this case. Under the Beneficiaries' vision, the Jeff Mennen Trust – or at least a portion of it – may be impounded to satisfy the judgment entered against Jeff. Impoundment applies when a trustee of a trust, who also is a beneficiary of the trust, commits a breach of trust that harms the trust's other beneficiaries. Under those circumstances, Section 257 of the Restatement (Second) of Trusts states:

> If a trustee who is also one of the beneficiaries commits a breach of trust, the other beneficiaries are entitled to a charge upon his beneficial interest to secure their claims against him for the breach of trust, unless the settlor manifested a different intention.[47]

The comments to Section 257 explain the impoundment rule may apply even though the trustee-beneficiary's interest in the trust is not subject to the claims of creditors through a spendthrift clause, unless the settlor has "manifested a different intention."[48] As the Beneficiaries explain, impoundment arises from a "common sense understanding" of a settlor's likely intent to protect trust assets from claims by outsiders, while continuing to hold a beneficiary, who also serves in a fiduciary role, liable to the other beneficiaries for misconduct. The Beneficiaries present impoundment as a settled principle of trust law, though they concede there is no case applying it in Delaware. They argue, however, that impoundment is a "default" rule of construction that was an

[47] Restatement (Second) of Trusts § 257 (1959).
[48] *Id.*, cmt. f.

accepted exception to spendthrift protection at the time the Settlor established the 1970 Trusts, and the Settlor did not manifest an intent that the rule not apply.

The parties spend much of their briefs disputing the record facts regarding the Settlor's manifested intent – if any – regarding application of impoundment to the 1970 Trusts. In my view, it is neither appropriate nor necessary to resolve that factual dispute for purposes of the summary judgment motion. Rather, for purposes of the pending motion, the Beneficiaries are entitled to a presumption that the Settlor intended the default rule of impoundment to apply to the 1970 Trusts. The question, however, is whether impoundment allows the beneficiaries of the Trust to satisfy a judgment against Jeff using assets in the Jeff Mennen Trust.

First, there appears to be ample room to debate whether impoundment is even available in a Delaware trust that contains a spendthrift clause. There are no Delaware cases addressing impoundment, but Section 3536 seems expressly to prohibit this type of remedy for spendthrift trusts. Specifically, the Beneficiaries contend that impoundment could be accomplished by applying a "by anticipation" presumption, whereby Jeff would be treated as receiving his share of the trust "by anticipation."[49] Although Jeff does not have an identifiable "share" of his trust, and instead is one of several current beneficiaries who may receive discretionary distributions from the Jeff Mennen Trust, the beneficiaries argue that this "by anticipation" theory would allow the Court to impound the assets of the Jeff Mennen Trust up to the amount of the judgment by presuming that he had received that amount "by anticipation." The Beneficiaries offer scant authority for this

[49] *See* Beneficiaries' Br. in Supp. of Exceptions at 27.

"by anticipation" presumption, citing only a decision of the New York Surrogate's Court, *In re Van Nostrand's Will*.[50] That case is discussed in greater detail below. Even if this "by anticipation" appropriation of an otherwise undivided trust may be available in some cases, it is not clear it is available in Delaware, given the language of Section 3536, which prohibits:

> [A]ctions at law or in equity against a trustee or beneficiary that seeks [sic] a remedy that directly or indirectly affects a beneficiary's interest such as, by way of illustration and not of limitation, an order, whether such order be at the request of a creditor or on the court's own motion or other action, that would:
>
> (1) Compel the trustee or any other fiduciary or any beneficiary to notify the creditor of a distribution made or to be made from the trust;
>
> (2) Compel the trustee or beneficiary to make a distribution from the trust whether or not distributions from the trust are subject to the exercise of discretion by a trustee or other fiduciary;
>
> (3) Prohibit a trustee from making a distribution from the trust 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 other fiduciary; or
>
> (4) Compel the beneficiary to exercise a power of appointment or power of revocation over the trust.

The Beneficiaries argue, however, that Section 3536 does not bar the application of impoundment or any potential method of "equitably appropriating" Jeff's interest in the Jeff Mennen Trust, because impoundment is an exception to the spendthrift clause and therefore Section 3536 does not apply. I am skeptical that such a conclusion is consistent with the intent of the legislature when it adopted Section 3536. As set forth above, although Section 3536 did not supplant the common law exceptions to spendthrift

[50] 29 N.Y.S.2d 857 (Sur. Ct. 1941).

protection, it is not clear that impoundment is a common law exception recognized under Delaware law. Nevertheless, I need not reach that issue, because even if impoundment is available in certain cases, the Beneficiaries do not convincingly argue that the theory extends so far as to allow the beneficiaries of one trust to reach a trustee's interest in a separate trust, at least where the separate trust has additional current beneficiaries. In other words, as I read the Restatement and the limited cases applying impoundment, it is available only where the remedy would not prejudice the interests of other current beneficiaries.

The impoundment theory described in the Restatement applies when the trustee and the wronged beneficiaries all share an interest in the trust at issue.[51] It is logical that impoundment of the wrongdoer's share may be appropriate under those circumstances, because the principle articulated by the Restatement presumes a settlor would not want a spendthrift trust to apply to claims between the beneficiaries relating to the trust in which they all share an interest.[52]

The Beneficiaries seek to expand that principle to allow beneficiaries of one trust to pierce a separate trust created by the same settlor, on the same day, but for different beneficiaries. The Beneficiaries reason that it was nothing more than a personal preference of the drafting attorney to create four separate trusts rather than one large family trust with four sub-trusts, and that drafting choice should not defeat the

[51] Restatement (Second) of Trusts § 257 (1959) ("[i]f a trustee who is *also* one of the beneficiaries commits a breach of trust, the *other* beneficiaries are entitled to a charge upon his beneficial interest ….") (emphasis added).
[52] *Id*. cmt. f.

presumption that a settlor would not want a spendthrift clause to apply to a beneficiary who, as trustee, breached his fiduciary duties to other beneficiaries.

As an initial matter, no court has concluded that impoundment is an available remedy between beneficiaries of separate, but related, trusts. Even if I were to conclude, as the Beneficiaries urge me to do, that the four separate trusts were functionally sub-trusts of one family trust, the Beneficiaries identify only two cases in which a court ordered impoundment between sub-trusts. The first such case, *Chatard v. Oveross*,[53] is a decision of the California Court of Appeal, which concluded that a trustee-beneficiary's share of a family trust could be impounded or surcharged for damages arising from her breach of trust, notwithstanding the spendthrift clause in the trust. In that case, the family trust was to be divided into two sub-trusts, and the trustee was a fiduciary for both trusts but a beneficiary of only one. During her time as trustee, the trustee failed to divide the assets between the trusts, failed to distribute the trusts as required by the trust agreement, and engaged in other misconduct that harmed the trust. Importantly, at the time the court ordered impoundment of the trustee-beneficiary's share, the trust was terminating, the assets were to be distributed, and the trustee had an identifiable share that the court could impound without jeopardizing the interests of any other beneficiary. The fact that the trust was terminating and the assets were to be distributed was significant to the court's conclusion that the spendthrift clause did not bar impoundment[54] and also distinguishes *Chatard* from the case before me. In the second case on which the Beneficiaries rely, *In*

[53] 101 Cal. Rptr. 3d 883 (Ct. App. 2010).
[54] *Id* at 889-90.

re Van Nostrand's Will,[55] the decedent's will devised the residue of his estate to 4 trusts for the benefit of his children and, after their death, for their issue.[56] One of the decedent's sons, Gardiner, served as personal representative of the estate and trustee of the trusts and embezzled a substantial sum from the estate. Gardiner's debt to the estate was not satisfied before his death. When the decedent's last child died without issue, the New York court was called upon to determine how the assets remaining in the trust should be distributed. The court first held there was no valid gift of the remainder of the trust and that it therefore devolved to the decedent's heirs as intestate property. As a result, Gardiner's heirs would have claimed an interest in the remainder of the trust.[57] The court, however, held that Gardiner – and therefore his issue by representation – was not entitled to a share of the intestate property until Gardiner's debt to the estate was satisfied, reasoning:

> [I]mmediately upon the making of the defalcations an equitable lien was impressed upon any rights or interests which Gardiner possessed in the estate and [] these were in effect forthwith appropriated by equity for the purpose of accomplishing partial restitution of his misappropriations. It follows that the share to which [Gardiner] would otherwise have been entitled is deemed to have vested in the other distributees for the purposes of pro tanto reparation of his defalcations and that those claiming through him possess no interest in the present distribution.[58]

[55] 29 N.Y.S.2d 857 (Sur. Ct. 1941).
[56] *Id*. at 861.
[57] *Id*. at 862.
[58] *Id*. at 865.

In so holding, the *Van Nostrand* court cited with approval the trust principal that "prevents an embezzling fiduciary from participating in any benefits from the trust which he has wronged until after he has completely repaired his defalcations."[59]

The facts underlying *Van Nostrand* are substantially different than those in the present case, and the case therefore has limited application to the question before me. Although the New York court cited with approval the trust theory of impoundment, it appeared to rely equally on principals of estate administration and intestate succession, since the assets previously held in the trust were not distributed through the terms of the trust (*i.e.,* the decedent's will) but through principles of intestate succession. More fundamentally, however, and similar to the decision in *Chatard*, even if the residue in the trust had been divided under the terms of the trust, the trust was ending and the assets were being distributed, thereby allowing the Court to identify a discrete share of the assets to which the faithless fiduciary otherwise would have been entitled. The Court therefore was able to implement this equitable remedy without harming the interests of any other beneficiary.[60]

The remedy the Beneficiaries seek is substantially different from the remedy awarded in either *Chatard* or *Van Nostrand*. In addition to Jeff, his children and his grandchildren are current beneficiaries of the Jeff Mennen Trust. The trustees of the Jeff

[59] *Id*. at 865.

[60] By the time of the Court's decision, Gardiner also had died, and his children therefore would have been entitled to his share of the trust assets had the Court not equitably appropriated the assets to satisfy Gardiner's debt to the estate. Importantly, the interests Gardiner's children claimed were derivative of their father's interest, and existed only because of his death. In contrast, Jeff's children have an independent current interest in the income and principal of the Jeff Mennen Trust that does not derive from Jeff's interest.

Mennen Trust have discretion to distribute the income and principal to some or all of the beneficiaries, as the trustees determine is appropriate.[61] As a result, the relief the Beneficiaries seek is not as simple as impounding an identifiable share of a trust. Instead, to impound the assets in the Jeff Mennen Trust as though there were a discernable "share" of that trust attributable to Jeff would both create a legal fiction and work a substantial injustice on the other beneficiaries, who are no more at fault than the plaintiffs for Jeff's actions. In their exceptions, the Beneficiaries make compelling arguments about the inequities of effectively insulating Jeff from his misconduct by upholding the enforceability of the spendthrift clause, particularly given my conclusion in the post-trial report that Jeff used John's Trust as a "piggy bank" and could do so knowing his own financial security was secured by the Jeff Mennen Trust. Those arguments, however, gloss over the inequities of punishing all the beneficiaries of the Jeff Mennen Trust for the misconduct of one.

For those reasons, I conclude that the principles of impoundment – even if applicable in Delaware – do not extend so far as to allow the beneficiaries of one trust, who are harmed by misconduct of a non-beneficiary trustee, to "impound" all or a portion of the trustee's interest in a second trust, at least where that remedy would jeopardize the interests of other current beneficiaries of the second trust. Although the Beneficiaries' argument has facial appeal, it would be a hollow form of equity to punish one group of innocent parties for the sake of making another group of innocent parties whole.

[61] Ralston Aff. Ex. C, Art. First, § I(A), § 2(A)-(C).

E. The parties' dispute regarding the admissibility of expert testimony offered by Owen Roberts is moot.

On January 6, 2014, the Beneficiaries filed a motion to (1) strike the expert report offered by Owen Roberts and (2) preclude the expert's testimony at trial, arguing Owen Roberts's expert was not identified in a timely manner and in accordance with the Court's rules and the scheduling order. Because I conclude this Court should grant Owen Roberts's motion for summary judgment, the Beneficiaries' motion to exclude the expert report and testimony is moot.

CONCLUSION

For the foregoing reasons, I recommend that the Court grant Owen Roberts's motion for summary judgment and deny as moot the Beneficiaries' motion to strike Owen Roberts's expert report. This is my final report and the parties may take exceptions in accordance with Court of Chancery Rule 144.

/s/ *Abigail M. LeGrow*
Master in Chancery