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THE NORTH CAROLINA SPENDTHRIFT TRUST STATUTE

GILBERT T. STEPHENSON*

This article is not in any sense a general treatise on spendthrift trusts.¹ Instead, it raises and discusses only two questions about spendthrift trusts. These questions are: (1) In the light of present-day conditions, does the North Carolina spendthrift trust statute need changing? (2) If so, in what respects does it need changing? These two questions are addressed primarily to the members of the Bar and to the members of the General Assembly of the State, for they are both legal and legislative questions.

THE PRESENT STATUTE

The North Carolina spendthrift trust statute provides:

It is lawful for any person by deed or will to convey any property, which does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars, to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild or other relation, whether the same be contracted or incurred before or after the grant.²

This statute was adopted by the General Assembly of 1871-1872. This was only six years after the end of the War between the States. North Carolina, in common with all the other southern states, was economically poor and in the early stages of Reconstruction. The statute has stood in its original form ever since. During the past eighty years tremendous economic changes have taken place in North Carolina.

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¹ The standard treatise on spendthrift trusts is GRISWOLD, *SPENDTHRIFT TRUSTS* (2d ed. 1947). Griswold appraises the North Carolina statute and decisions in sections 210 and 211. For a somewhat different appraisal, see a review of Griswold's first edition, in 15 N. C. L. REV. 306 (1937). A convenient, up-to-date, state-by-state collection of spendthrift trust statutes may be found in either C C H TRUST & EST. REP. §§ 701-749 or P-H TRUST SERV. ¶ 5,221. Perhaps the leading North Carolina case on spendthrift trusts is *Flower v. Webster*, 173 N. C. 442, 92 S. E. 157 (1917).

² N. C. GEN. STAT. § 41-9 (1943, recompiled 1950). This statute was adopted in N. C. Pub. Laws 1871-1872, c. 204, § 1, three years before the United States Supreme Court gave the spendthrift trust its blessing in *Nichols v. Eaton*, 91 U. S. 716 (1875).

Now, the question is, in the light of these changes is the original statute up to date and is it amply serving its purpose?

ANALYSIS OF PRESENT STATUTE

Analysis of the present statute reveals at once that it is of very limited application.

Under it, the corpus of a spendthrift trust is restricted to property that at the time of the creation of the trust does not yield a clear annual income exceeding five hundred dollars. Thus, permissible principal varies with yield at the time the trust is created. If the five hundred dollars represents a four per cent yield, then initial principal is limited to \$12,500. Capitalizing the income at a lower percentage would increase proportionately the amount of principal that could be put into a spendthrift trust.

If "clear annual income" means income received by the trustee, then, at least initially, after deducting the trustee's compensation and other carrying charges of the trust, not more than forty dollars a month will be available for the beneficiary. Forty dollars a month or \$1.33 a day is not enough to supply necessities—food, clothes, and shelter—much less the comforts of life.

The statute restricts the use of the profits (income) of the trust to "support and maintenance." A considerate and humane interpretation would, perhaps, enlarge the scope of "support and maintenance" to include medical or surgical service, schooling, and other usual needs or requirements of the beneficiary.

The beneficiaries of the trust are restricted to children, grandchildren, and other relation of the creator of the trust. This does not include wives or husbands unless they would come under "other relation." This suggests at once the question, how inclusive is "other relation"? It includes, of course, ascendants and descendants. But beyond that, how far does it go into collateral kin—brothers and sisters, uncles and aunts, nephews and nieces, and cousins? Does it include "relation" by adoption or by marriage as well as relation by birth?

The statute clearly prevents involuntary alienation of the trust property. It declares that the property shall not be liable for, or subject to be seized or taken in any manner for, the debts of the beneficiary, whether contracted before or after the creation of the trust. But does it prevent voluntary alienation also? The Supreme Court of the State has said that it does.³ However, suppose the beneficiary should assign his interest in the trust and the trustee should honor the assignment and thereafter pay over the income to, or apply it for the use of, the assignee, to the complete exclusion of the beneficiary himself. Under the present

³ *Fowler v. Webster*, 173 N. C. 442, 444 (1917).

statute, it is clear that the trustee could not be forced to honor the assignment. If he actually did honor it, would he commit a breach of trust and make himself liable to the beneficiary who later changed his mind and repented of the assignment?

The foregoing analysis suggests some of the respects in which, it would seem, the statute needs clarification if not substantial change.

NEEDS FOR PROTECTION OF SPENDTHRIFT TRUST

The needs for the protective features of a spendthrift trust exist in fully as great measure at the present time as they did when the statute was adopted eighty years ago. The same considerations that justified the adoption of the statute then still justify the continuation of the protective features of the statute.

Personal trusts—that is, living and testamentary trusts—are created in order to supply some lacking element of ability, aptitude, or interest of the beneficiary in the management and use of property. This lacking element may be physical capacity, mental competence, frugality, maturity, experience, or interest. Consider a few common examples. A son creates a trust for his aged parent because of the latter's physical incapacity properly to manage and use property. A father creates a trust for his daughter because of the latter's mental incompetence, extravagance, immaturity, or inexperience. Or he creates a trust for his talented, brilliant child who is uninterested in and, therefore, indifferent to the management and use of property simply because he is so intensely interested in and wholeheartedly devoted to some other consuming activity which is utterly foreign to the management of property or investment of funds.

These are some of the reasons for creating a personal trust, regardless of the spendthrift feature. But, what point would there be in creating a trust at all if the beneficiary could assign his interest in the trust at once or at any time in the future and thereby completely frustrate the purpose of the creator of the trust—namely, to protect the beneficiary in the use and enjoyment of the property?

Is not the protective feature of the spendthrift trust an essential concomitant of the personal trust itself if the latter is to serve its purpose? Why should a person create a trust unless he can have some assurance that the trust property will be for the use and enjoyment of the beneficiary? The severest critics of the spendthrift trust readily acknowledge the need for the protection of incapable, incompetent, immature, or inexperienced inheritors of property.

The foregoing is, in brief, the case *for* the protective values of the spendthrift trust. However, over the years critics of the spendthrift trust have been far more numerous and vocal than its advocates.

CRITICISMS OF SPENDTHRIFT TRUST

The involuntary or voluntary inalienability, or both, of property in a spendthrift trust has brought down upon its head severe and caustic criticisms, of which the following are, perhaps, typical.

In 1856, in *Tillinghast v. Bradford*,⁴ Chief Justice Ames of the Supreme Court of Rhode Island said of the principle of the spendthrift trust:

"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."

In 1895, John Chipman Gray, a distinguished professor in the Harvard Law School and member of the Massachusetts Bar, in the preface to the second edition of his treatise, *Restraints on the Alienation of Property*, delivered a broadside against spendthrift trusts from which the following sentences are quoted:

"One of the worst results of spendthrift trusts . . . is the encouragement it gives to plutocracy, and to the accumulation of a great fortune in a single hand, through the power it affords to rich men to assure the undisturbed possession of wealth to their children, however weak or wicked they may be. . . . Were it not for an occasional dissenting opinion, especially an extremely able one by Chief Justice Alvey, late of the Court of Appeals of Maryland, I should be *vox clamant is in deserto*."

In 1924, Chief Justice Wilson of the Supreme Court of Minnesota paid his respects to spendthrift trusts in these words:

"The human race may well profit by using the honey bee as an example. The drone is held in little respect. No policy should be adopted that would tend to make us a nation of drones. Idleness is the father of moral delinquency. . . . It is better to adopt that policy that leads the citizen to vigilance and labor. . . . It is best that the rash of ambition may develop on any citizen. . . . Our policy is to guard against the creation of an aristocracy and to compel every individual in a measure to accumulate and, at least, to sustain his fortune by the strength of his individual superiority and ability, and to avoid an artificial inequality of persons or a deterioration of character. The tendency of restriction is to say that there is no objection to an individual receiving a large fortune by way of gift provided he has unfettered control of it. The theory of restriction is that the recipient should be made to take a "sporting chance" on his ability to keep it, without depending upon the prerogative of the dead. Responsibility develops both manhood and citizenship."⁵

⁴ 5 R. I. 205, 212 (1856).

⁵ *Congdon v. Congdon*, 160 Minn. 343, 363, 200 N. W. 76, 83 (1924).

In 1928, Augustus Peabody Loring, author of *Loring's A Trustee's Handbook*, after quoting Mr. Gray, went on to say for himself:

"The same taint of fraud and fear that marred trusts in their beginning casts its baneful influence over them today in the institution known as the spendthrift trust, the principle of which briefly stated is that a person may settle property on anyone but himself and so fence it around as to secure the characteristics of right and enjoyment to the beneficiary and immunity from his creditors. . . . Hardly less evil is the result which allows the tradesman to be ruined by the nonpayment of the debts of one to whom he naturally extended credit, seeing him live in luxury with apparently unlimited means in his control. If the courts had deliberately attempted to establish a plutocracy and privileged class, they could not have devised a more effective method than the spendthrift trust. Nothing, however, was more distant from their minds. On the contrary, it was the desire to protect the weak from results of their helplessness, ignorance and improvidence that led to a result so unfortunate.

"If the courts have erred in tolerating spendthrift trusts, presumably there is a remedy to be found in the Legislature. . . . Mr. Gray has passed on and his voice is stilled, and so I add my feeble cry to his strong, but so far unheeded protest."⁶

Since 1837, the judicial policy of North Carolina has been to reject the validity of spendthrift trusts, except as permitted by statute. In 1845, Chief Justice Ruffin said:

"For it would be a shame upon any system of law, if, through the medium of a trust . . . property, from which a person is absolutely entitled to a comfortable, perhaps an affluent, support . . . should be shielded from the creditors of that person for his life."⁷

In 1936, Professor, now Dean Erwin N. Griswold of the Harvard Law School, expressed his criticism, not of the spendthrift trust in principle, but of the abuses of the spendthrift trust. He said:

"There is now little disposition to contend that all spendthrift trusts must be regarded as obnoxious. They serve a useful and legitimate purpose in many cases. But in their extreme forms they represent a legal discrimination in favor of wealth that runs counter to many of our professed notions."⁸

What has roiled these distinguished members of the bench and bar is not the spendthrift trust as an original concept—that is, to use Mr. Loring's words, quoted above, "to protect the weak from results of their helplessness, ignorance, and improvidence." What has aroused their ire is the abuses of which can be made of the unrestricted spendthrift trust.

⁶ PROCEEDINGS, NINTH MID-WINTER TRUST CONFERENCE 66 (1928).

⁷ *Mebane v. Mebane*, 39 N. C. 131, 134 (1845); 15 N. C. L. REV. 306 (1937).

⁸ GRISWOLD, SPENDTHRIFT TRUSTS, iv (1st ed. 1936).

How could any fair-minded person justify the employment of a dispositive device that would permit a beneficiary to, after creating debts or incurring obligations, to say when pay-day came, "Mine is a spendthrift trust, I won't pay, you can't make me pay, and that's that"?

In many cases it would not be fair to charge the merchant or hotelman or other person who extends credit with negligence in taking for granted the financial responsibility of the person seeking credit, rather than making investigations. The beneficiary of a spendthrift trust may bear a family name highly respected for its financial integrity and responsibility. To refuse or even to question the credit of such a beneficiary might be highly embarrassing. The person of whom credit was requested or obtained might not know of the existence of the trust, much less of the spendthrift feature.

Even with its severest critics, it is not so much a matter of killing as it is of curing the spendthrift trust.⁹

REMEDIES ADOPTED OR RECOMMENDED

Legislators have dealt with the spendthrift trust in one of four ways, namely: (1) by removing all restrictions upon inalienability; (2) by preventing inalienability of surplus income only; (3) by fixing a definite limit upon inalienability; and (4) by substituting a statutory "protective trust" for the conventional spendthrift trust.

UNRESTRICTED INALIENABILITY

The Delaware statute is typical of those that permit unrestricted inalienability. The statute is as follows:

The creditors of a beneficiary of a trust shall have only such rights against such beneficiary's interest in the trust property or the income therefrom as shall not be denied to them by the terms of the instrument creating or defining the trust or by the laws of this State; provided, however, that if such beneficiary shall have transferred property to the trust in defraud of his creditors the foregoing shall in no way limit the rights of such creditors with respect to the property so transferred. Every interest in trust property or the income therefrom which shall not be subject to the rights of creditors of the beneficiary, as aforesaid, shall be exempt from execution, attachment, distress for rent, and all other legal or equitable process instituted by or on behalf of such creditors. Every assignment of a beneficiary of a trust of his interest in the trust property or the income therefrom which is, by the terms of the instrument creating or defining the trust, unassignable, shall be void.¹⁰

Under this statute the creator of a trust, except in an attempt to

⁹ For further arguments for and against spendthrift trusts, see 1 BOGERT, TRUST AND TRUSTEES 470 (1935).

¹⁰ DEL. REV. CODE § 4415 (1935).

defraud his creditors, can make both the principal and the income of the trust, regardless of the amount involved, completely inalienable either voluntarily or involuntarily.

The following is a typical spendthrift-trust provision found among the wills and trust agreements of that state:

The interest of a beneficiary in the trust property or the income therefrom shall not be subject to the rights of the creditors of such beneficiary and shall be exempt from execution, attachment, distress for rent, and all other legal or equitable process instituted by or on behalf of such creditors; and the interests of such beneficiary in the trust property or in the income therefrom shall be unassignable.

The proponents of unrestricted inalienability of property base their arguments mainly upon the need for a complete freedom of disposition of property. On this point Professor Bogert says:

"Probably the strongest argument for the spendthrift trust is that of freedom of disposition on the part of the donor. Many courts have felt that a property owner ought to be able to give on such conditions and limitations as he chooses, provided no principle of public policy be violated. And they have not felt there was anything anti-social in the spendthrift trust."¹¹

However, the fact that under the Delaware and similar statutes no limit is set to the amount of property that can be made voluntarily or involuntarily inalienable has brought down severe criticism of trusts taking advantage of the statute.¹²

ALIENABILITY OF SURPLUS INCOME

A New York statute of 1828, still in force, makes surplus income alienable. The first paragraph of the statute reads:

Where a trust is created to receive the rents and profits of real property, and no valid direction of accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property.¹³

Another statute applies to the alienability of surplus income of personal property in trust.¹⁴

Neither statute gives any clue as to what shall be regarded as surplus income over and above that necessary for the education and support of the beneficiary and, therefore, each puts the matter squarely up to the courts.

¹¹ 1A BOGERT, *TRUST AND TRUSTEES* 471 (1935).

¹² GRISWOLD, *SPENDTHRIFT TRUSTS*, iv (1st ed. 1936).

¹³ N. Y. REAL PROP. LAW § 98.

¹⁴ N. Y. PERS. PROP. LAW § 15.

In 1886, one New York court, interpreting this part of the statute and holding, in effect, that what was necessary for the beneficiary's comfort and support should be determined in the light of his station in life, made this statement:

"(The beneficiary) . . . is a gentleman of high social standing, whose associations are chiefly with men of leisure, and is connected with a number of clubs, with the uses and customs of which he seems to be in harmony both in practice and expenditure, and it is insisted on his behalf that his income is not more than sufficient to maintain his position according to his education, habits and associations."¹⁵

In 1895, the foregoing statement provoked John Chipman Gray to make the following caustic criticism of the New York statute:

"If the remedy (for abuses of unlimited inalienability) is like that applied in New York, it is, if not worse, more disgusting than the disease. One merit of the theory of the common law, whatever may have been its shortcomings in practice, was the absolute equality before it of the rich and the poor. How rich a party to a suit might be . . . was a question never asked in a court of justice. The statutes of New York, as interpreted by the courts, provide that the surplus income beyond what is necessary for the education and support of the beneficiary shall be liable for his debts. The education and support to which any and every person is entitled at common law is an education at the public school and a support as a pauper, and his father's history and his own are matters of no consequence; but now, under the New York statutes, as interpreted, all this is changed."¹⁶

The New York statute has been adopted, in substance, by at least four other states—Michigan,¹⁷ Minnesota,¹⁸ Montana,¹⁹ and Wisconsin.²⁰

INALIENABILITY OF FIXED AMOUNT

Another group of states, of which North Carolina is one, limits inalienability of income or principal, or both, to a stated amount. The North Carolina limit is the income from property that at the time of conveyance does not yield a clear annual income of over \$500. In Alabama the limit is \$1,800 of annual income;²¹ and in Virginia it is annual income from \$100,000 of principal.²²

In 1936, Professor Griswold suggested the form of a spendthrift

¹⁵ *Kilroy v. Wood*, 42 Hun 636, 638 (N. Y. 1886).

¹⁶ GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY*, x (2d ed. 1895).

¹⁷ MICH. STAT. ANN. §§ 26.63, 26.69 (1937).

¹⁸ MINN. STAT. ANN. §§ 501.14, 501.20 (1947).

¹⁹ MONT. REV. CODES ANN. §§ 86.106, 86.112 (1947).

²⁰ WIS. STAT. §§ 231.13, 231.19 (1947).

²¹ ALA. CODE ANN. tit. 58, § 1 (1940).

²² VA. CODE ANN. § 55-19 (1950).

trust statute, limiting inalienability to a fixed amount of annual income, the enactment of which, he said, "should retain the desirable elements of spendthrift trusts while eliminating most of the evils which accompany such trusts in unrestricted form."²³

²³ GRISWOLD, *SPENDTHRIFT TRUSTS*, 647-650 (1947).

The draft of the statute suggested by him is as follows:

Section 1. The instrument creating a trust or an insurance policy may provide by specific words that the interest of any beneficiary in the income of the trust or in installment payments under the insurance policy shall not be subject to voluntary or involuntary alienation by such beneficiary. Subject to the provisions of the following Sections of this Act, a direction to this effect shall be valid and enforceable.

Section 2. Notwithstanding a provision in the terms of a trust or in an insurance policy restraining the alienation of the interest of a beneficiary, an assignee or creditor of the beneficiary shall be entitled to reach the interest of the beneficiary in satisfaction of his claim to the following extent:

(a) All income due or to accrue in the future to the beneficiary in excess of \$5000 per annum shall be subject to attachment by a creditor of the beneficiary and shall be freely alienable by the beneficiary.

(b) Where the income from the trust or insurance policy exceeds twelve dollars a week, creditors of the beneficiary may, in addition, reach by attachment an aggregate amount of ten per cent of the income due or to accrue in the future to the beneficiary.

(c) Where the claim of the creditor is for (1) the support of a husband, wife or child of the beneficiary, or for alimony, (2) necessary services rendered or necessary supplies furnished to the beneficiary, (3) a tort, or (4) is based on a judgment for any such claim, the court shall have power to make such order directing the payment of income to such creditor, in addition to that provided in the two preceding paragraphs, as shall be just under the circumstances.

Section 3. (a) Where two or more creditors undertake to reach the interest of any beneficiary of a trust or insurance policy, pursuant to the provisions of this Act, they shall be subject to priority of payment in the order of the service of a notice of attachment on the trustee. The pendency of any attachment shall not prevent the filing of a further attachment by the same or any other creditor.

(b) Where the beneficiary of any spendthrift trust or insurance policy is also the beneficiary under any other spendthrift trust or insurance policy created or administered either within or without this State, the aggregate income payable under all such trusts and policies to the beneficiary shall be considered together for the purpose of determining the rights of creditors and assignees under Section 2 of this Act.

Section 4. The right of any beneficiary of a trust to receive the principal of the trust or any part of it, presently or in the future, shall be freely alienable and subject to the claims of his creditors, notwithstanding any provision to the contrary in the terms of the trust.

Section 5. Where the interest of the beneficiary of a trust or insurance policy is subject to the exercise of discretion by the trustee or by another, the provisions of this Act as to the rights of creditors and assignees shall apply with respect to any sums which the trustee or such other person determined shall be paid to or for the beneficiary.

Section 6. A trust in which the interest of the beneficiary is subject to restraints on alienation as provided in this Act may be called a "Spendthrift Trust," and a direction in any instrument creating a trust or in any insurance policy that the interest of any beneficiary shall be held on or subject to a spendthrift trust shall be sufficient to restrain the alienation of such interest to the extent provided in this Act.

Section 7. Nothing in this Act shall authorize a person to create a spendthrift trust or other inalienable interest for his own benefit. The interest of the settlor as a beneficiary of any trust shall be freely alienable and subject to the claims of his creditors.

Section 8. This Act shall apply to all trusts whether created before or after the date of its enactment.

The characteristic features of the suggested statute are: (1) Not over \$5,000 of annual income shall be both voluntarily and involuntarily inalienable and, if the income is over \$12 a week, an aggregate of 10 per cent of the income shall be involuntarily alienable; (2) where the claim of a creditor is for the support of a husband, wife, or child of the beneficiary or for necessary goods or services for the beneficiary or for a tort committed by the beneficiary, the court can go into the otherwise inalienable income to the extent that it deems just under the circumstances; (3) no matter how many spendthrift trusts are created for a single beneficiary, only the \$5,000 and 10 per cent provisions mentioned above apply to the aggregate income; (4) the right of a beneficiary to principal of the trust is completely alienable; (5) in discretionary trusts the rights of creditors and assignees attach to any sums which the trustee or the other person with the discretionary power determines shall be paid to or for the beneficiary; (6) no one can create a spendthrift trust for his own benefit; and (7) if the draftsman of the instrument leaves property "on spendthrift trust" or "subject to a spendthrift trust," either of these phrases will incorporate the statute by reference.

The suggested statute, in substance, has been adopted in Louisiana²⁴ and Oklahoma.²⁵

ENGLISH PROTECTIVE TRUST

The spendthrift trust as such never has been recognized in England.²⁶ However, in 1925, the British Parliament adopted the English Trustee Act,²⁷ which established the protective trust, so called, that is designed to serve the same general purposes as the spendthrift trust.

The section of the Act relating to protective trusts is as follows:

Section 33—(1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called "the principal beneficiary"²⁸) for the period of his life or for any less period, then, during that period (in this section called the "trust period") the said income shall, without prejudice to any prior interest, be held on the following trusts, namely:—

(i) Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under

²⁴ LA. REV. STAT. tit. 9 §§ 1922, 1923 (1950).

²⁵ OKLA. STAT. tit. 60 §§ 140, 175.25 (1941).

²⁶ *Brandon v. Robinson*, 18 Ves. 429 (1811); 1A BOGERT, TRUST AND TRUSTEES § 221 p. 471 *et. seq.* (1935).

²⁷ 15 Geo. 5, c. 19.

²⁸ In this statute the term "principal beneficiary" is used in a different sense than in American trust literature. In the English statute it means the immediate beneficiary who is entitled to receive the income or have it applied for his benefit and has no reference to the principal or *corpus* of the trust.

any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;²⁹

(ii) If the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)—

(a) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any, or

(b) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the person who would if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as to the case may be;

as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

(2) This section does not apply to trusts coming into operation before the commencement of this Act, and has effect subject to any variation of the implied trusts aforesaid contained in the instrument creating the trust.

(3) Nothing in this section operates to validate any trust which would, if contained in the instrument creating the trust, be liable to be set aside.³⁰

Here again, as in the case of Dean Griswold's suggested spendthrift trust act, the statute can be incorporated by reference by simply saying that the property shall be held "on protective trusts."

If property is left on protective trusts, the income will be paid over to the income beneficiary until he does something—for example, assigns the income—or something happens—as an attempt to reach the income by legal or equitable action of a creditor or assignee—that would

²⁹ Compare *Mizell v. Bazemore*, 194 N. C. 324, 139 S. E. 453 (1927). The testator devised to his son a life estate in real property subject to the condition that, if the son attempted to sell or to mortgage or his creditors attempted to reach the property, the life estate was to terminate, with a remainder over in that event. The son was to remain on the land without rent or accounting. The court held that the condition was void, ruling that, "The manifest purpose . . . is that the life estate . . . upon the happening of a contingency, shall cease, only in so far as the rights of creditors are concerned." The life estate was held subject to execution. *Quaere*, would the court have upheld an absolute and complete forfeiture?

³⁰ This section of the English Trustee Act, 1925, is quoted in full in 1A BOGERT, TRUSTS AND TRUSTEES § 221, p. 461 n. 44 (1935).

deprive him of a the right to receive the income. Whereupon, in either case, the trustee, in the exercise of his absolute discretion, would cease making payments direct to the beneficiary and thereafter would apply the income for the maintenance or support or otherwise for the benefit of the beneficiary or spouse or children or more remote issue or, if there was no spouse or children or grandchildren in existence, for the benefit of the income beneficiary and the next successive income or principal beneficiary.

Unless the trust instrument otherwise provides, this Act may serve completely to prevent either voluntary or involuntary alienation of the trust property. In this aspect, it serves the same purpose as an unrestricted spendthrift trust.

One advantage of the protective trust is that it gives the trustee full discretion to use the income not only for the income beneficiary but also for the dependent members of his family and, in the absence of a family, for the ultimate beneficiary.

One possible disadvantage of the English protective trust is that it gives the trustee such broad powers of disposition. In the hands of an incompetent or inexperienced trustee, the trust property might be misapplied. But this is a calculated risk which everyone who creates a trust and gives his trustee broad powers must take. His protection, of course, is in the selection of the trustee.

The English protective trust does not apply to principal. The beneficiary ultimately entitled to the principal can assign or convey and his creditors can reach his interest in the property, subject, of course, to the intervening interest of the income beneficiary. In this respect the protective trust is like Dean Griswold's suggested spendthrift trust.

SUGGESTIONS REGARDING THE NORTH CAROLINA STATUTE

Let us revert now to the two questions posed at the beginning of this article.

In the light of present-day conditions, does the North Carolina spendthrift trust statute need changing?

It would seem that the answer definitely should be yes. Clearly, in the light of present-day economic and social conditions, the limit of \$500 a year or \$40 a month or \$1.33 a day of inalienable income is too restrictive to meet the needs of beneficiaries who should be protected. The beneficiaries of a spendthrift trust should include persons other than children, grandchildren, and "other relation." They should include all dependent beneficiaries regardless of relationship by blood or marriage. The purposes for which the income of a spendthrift trust can be used should go beyond "support and maintenance" to include schooling, surgical and medical care, and purposes "otherwise

for the benefit" of the beneficiary. The inalienability of the income should include voluntary as well as involuntary alienation. Permit the beneficiary of a spendthrift trust voluntarily to assign his right to the income and the trust itself, in the hands of an inexperienced trustee, is likely to fail of its purpose. In these and, perhaps, in other respects the present statute needs change in substance or, at the least, needs clarification.

Come now to the second question: If the present statute needs changing, in what respects does it need changing? In meeting the issue raised by this question, the General Assembly has a wide range of choices.

It can let the present statute stand as it is, except to increase the \$500-a-year limit to some figure more in keeping with present-day conditions—say, to \$1,000 or \$2,500 or \$5,000 or to any other reasonable figure. This would be the change most easily accomplished, but it would leave unanswered the questions already raised about several features of the present statute.

The General Assembly, going from one extreme to the other, can remove all restrictions and make all the trust property both voluntarily and involuntarily inalienable by adopting a statute similar to the present Delaware statute. If it did this, it would, no doubt, arouse all of the classic arguments against the spendthrift trust in principle and thereby convert the present innocuous statute into a highly controversial one.

Next, the General Assembly can make inalienable only the income necessary, in the opinion of the court, for the support and maintenance of the beneficiary by adopting, in substance, the New York statute. This type of spendthrift trust would, no doubt, arouse all the criticism that has been levelled against the New York statute. It would invite litigation over how much income was necessary in a particular case for the support and maintenance of the given beneficiary, for each case would have to be considered and adjudicated on its own merits.

Or, the General Assembly can repeal the present statute and in its place adopt a protective trust statute after the form and substance of the English protective trust. Certainly, the term "protective" is preferable in every respect to "spendthrift." The beneficiaries of spendthrift trusts so called are not, as a rule, spendthrifts by any reasonable interpretation of that ugly word. They are persons who need protection because of their physical incapacity, their mental incapacity, their immaturity, their inexperience, or their lack of interest in or aptitude for the management of property in far more cases than because of their improvidence or extravagance or wasteful habits. If the General Assembly should see fit to adopt the substance of the English protective trust statute, if we can judge by England's 27 years of experience with that

type of statute (as reported by trustees who have had protective trust under administration), the needs of beneficiaries who should be protected will be well served. In other words, the General Assembly would not make a mistake in adopting the protective trust statute.

Or, finally, the General Assembly can repeal the present statute and, in its place, adopt the statute suggested by Dean Griswold which already has been quoted in full in footnote 23. If the figures named in that statute are not satisfactory to the General Assembly, it can be changed without changing the wording of the statute in any other respect. If the suggested statute should be substituted for the present one, it might be advisable to adopt it in its precise wording, except possibly some change in the figures, for the wording has been worked out by Dean Griswold with great care and the adoption of the statute by state after state eventually would make for uniformity of interpretation of various questions that may be raised from time to time.

The suggested statute, as Dean Griswold says, should retain the desirable elements of spendthrift trusts while eliminating most of the evils which accompany spendthrift trusts in unrestricted form.³¹

³¹ See Smith, *A Study of the Proposed Statute on "Spendthrift Trusts,"* 16 THE TRUST BULL. 18 (1937).