

2017 Delaware Trust Conference  
Winning the Wealth Management Game  
“Deal or No Deal” – The Intersection of  
Third-Party Trusts and Divorce Law  
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# Introduction

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1. Conventional wisdom about spendthrift trusts and third party trusts.
2. Divorce basics
  - Equitable division of marital property;
  - Award of alimony and/or child support

# Delaware Valley View of Marital Property

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Marital property defined by reference to its acquisition during marriage in Delaware, New Jersey and Pennsylvania

- 13 Del. C. § 1513(b)
- N.J. Stat. Ann. § 2A:34-23(h)
- 23 Pa. Cons. Stat. Ann. § 3501

Gift/inheritance not marital property

- 13 Del. C. § 1513(b)1.a
- N.J. Stat. Ann. § 2A:34-23(h)
- 23 Pa. Cons. Stat. Ann. § 3501(a) (but increase in value in property received by gift or inheritance is marital property)

Commingled non-marital property treated as marital property

- 13 Del. C. § 1513(b)1.a. (interspousal gifts)
- N.J. Stat. Ann. § 2A:34-23(h) (interspousal gifts)
- 23 Pa. Cons. Stat. Ann. § 3501(a) (interspousal gifts)

# Property Division & Trusts

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Trusts settled by a third party should not be deemed to be marital property/subject to property division.

- 13 Del. C. § 1513(b)1.a
- N.J. Stat. Ann. § 2A:34-23(h)
- 23 Pa. Cons. Stat. Ann. § 3501(a)
- Consider *Pfannenstiehl v. Pfannenstiehl*, SJC-12031 (Mass. Sup. Jud. Ct. Aug. 4, 2016)

Under Pennsylvania law the increase in value of trust property during the marriage is marital property to the extent that the beneficiary has access to it or control over it. *Solomon v. Solomon*, 611 A.2d 686 (Pa. 1992).

- Consider *Gibson v. Gibson*, 801 S.E.2d 40 (Ga. 2017) (trust funded for descendants by divorcing spouse)

# Trust As A Resource

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Courts cannot pierce the trust but they can take it “into account” as a resource of the beneficiary-spouse.

- 13 Del. C. §1513(a)(1)-(11); *Preston v. Preston*, 1999 WL 689292 (Del. Fam. Ct. May 11, 1999); *Gibson v. Gibson*, No. 1201-85, 1986 Del. Fam. Ct. LEXIS 226, at \*6-10 (Del. Fam. Ct. Oct. 31, 1986)
- N.J. Stat. Ann. § 2A:34-23.1; *Van Horn v. Van Horn*, No. A-3813-05T3, 2008 N.J. Super. Unpub. LEXIS 797, \*26 (App. Div. July 14, 2008) (involving an inheritance not held in trust)
- 23 Pa. Cons. Stat. Ann. § 3502(a)(5), § 3502(a)(6), § 3502(a)(9), § 3502(a)(10) (factors court may take into account in equitably dividing property)
- Consider *Pfannenstiehl v. Pfannenstiehl*, SJC-12031 (Mass. Sup. Jud. Ct. Aug. 4, 2016)

Trust is a resource with respect to awards of alimony.

- 13 Del. C. §1512(c); *In re Marriage of Tweedale v. Tweedale*, 1996 WL 861492 (Del. Fam. Ct. Dec. 17, 1996)
- N.J. Stat. Ann. § 2A:34-23(b); *Tannen v. Tannen*, 3 A.3d 1229, 1236 *aff'd*, 31 A.3d 621 (2011) (trust income not a resource for alimony or child support purposes notwithstanding subject to HEMS standard; but history of trust distributions can be taken into account for alimony purposes)
- 23 Pa. Cons. Stat. Ann. §3701(b); *Gates v. Gates*, 933 A.2d 102 (Pa. Super. 2007)

# Trust As A Resource

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Trust is a resource with respect to awards of child support

- 13 Del. C. § 501 et. seq.; Del. Fam. Ct. C.P.R. 500-507; *Hobbs v. Koly*, 1998 WL 915866 (Del. Fam. Ct. July 9, 1998)(reduced father's child support obligation in light of mother's substantial trust income)
- N.J. Stat. Ann. § 2A:34-23(a); *Tannen v. Tannen*, 3 A.3d 1229, 1236 *aff'd*, 31 A.3d 621 (2011) (trust income not a resource for child support purposes notwithstanding subject to HEMS standard)
- 23 Pa. Cons. Stat. Ann. §4302; *Mencer v. Ruch*, 928 A.2d 294 (Pa. Super Ct. 2007)(trust income is a resource even if beneficiary-spouse is unable to control receipt of trust funds)

# Failure to Pay & Remedies

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A trust's dispositive features impact whether court may reach the assets of a trust in failure to pay scenario

- Mandatory distributions
- Support trust
- Discretionary trust
  - *Berlinger v. Casselberry*, 2013 WL 6212023 (Fl. Dist. Ct. App. 2013) (alimony arrears)
  - *Pratt v. Ferguson*, 3 Cal.App.5th 102 (9/6/16) (property division)

# DE – NJ – PA Approach

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12 Del. C. § 3536 (creditor cannot compel distribution from discretionary trust including one with HEMS; court cannot fashion remedies in aid of creditors)

- *Garretson v. Garretson*, 306 A.2d 737 (Del. 1973) (spouse is not a creditor while couple remains married)

N.J. Stat. Ann. § 3B:31-38 (creditor cannot compel distribution from a discretionary trust, including one with HEMS)

N.J. Assem. Comm. State., A.B. 2915 (Sept. 22, 2014)(legislative history indicates that New Jersey UTC is dissimilar to UTC in that alimony and child support creditors are not exception creditors)

- *See also, Tannen v. Tannen*, 3 A.3d 1229, 1236 *aff'd*, 31 A.3d 621 (2011) (recognizing creditors cannot compel distributions from a discretionary trust)

20 Pa. Cons. Stat. Ann. § 7744(b)(1)-(3) (Spouse subject to a divorce who obtains judgment against trust beneficiary for support or maintenance or child who has obtained the same can compel trust distribution but only limited to trust income to which trustee would have been required to distribute to the beneficiary-spouse)

20 Pa. Cons. Stat. Ann. § 7744 (child may enforce payment of child support against a third-party trust from income and principal)



# Court Intervention

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Petition court having primary supervision over trust if it's in a different state than divorcing couple

- *Dahl v. Dahl*, 345 P.3d 566 (Utah 2015) (court held trust revocable despite obvious scrivener's error)
- *IMO Daniel Kloiber Dynasty Trust U/A/D December 20, 2002*, C.A. No. 9685-VCL (Aug. 6, 2014) (Delaware court asserted jurisdiction)

Migrate into favorable jurisdiction

# Drafting Considerations – Dispositive Provisions

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Full discretion v. HEMS

- *Pfannenstiehl v. Pfannenstiehl*, SJC-12031 (Mass. Sup. Jud. Ct. Aug. 4, 2016)

May v. shall

Sole and absolute discretion

Outside resources

Shut down or kick out clause

- *Pratt v. Ferguson*, 3 Cal.App.5th 102 (9/6/16)(shut down clause held unenforceable)

Third party powers

- *SL v. RL*, 774 N.E.2d 1179 (Mass. App. Ct. 2002)

# Drafting Considerations – Bells and Whistles

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Independent trustee v. family member v. beneficiary/trustee

Stronger spendthrift clause

- Spouse/former spouse is a creditor
- Beneficiary has no right to compel distributions

Silent trust

# Administrative Considerations

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Intermittent v. regular distributions

- *Tannen, supra.*

Formal process for receipt of distribution

Timing of any trust modifications

- *Ferri v. Powell-Ferri*, 72 N.E.3d 541 (Ma. 2017) (decanting permitted under circumstances)
- *See also Ferri v. Powell-Ferri*, 326 Conn. 438 (Conn. 2017); *Powell-Ferri v. Ferri*, 326 Conn. 457 (Conn. 2017).

Delay distributions

# Tie In With Prenuptial Agreement

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Prenuptial agreements are generally enforceable.

- 13 Del. C. § § 321-328
- N.J. Stat. Ann. § 37:2-31 *et seq.*
- 23 Pa. Cons. Stat. Ann. § 3106

Generous distributions to beneficiary contingent on spouse signing waiver of any rights

- Bruce Stone's idea

Delay in distributions in absence of prenuptial agreement