

## Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2868

Date: 11-Mar-21

From: Steve Leimberg's Estate Planning Newsletter

Subject: [Mary Vandenack on In re Trust of McGregor: Nebraska Supreme Court Finds Nonjudicial Settlement Agreement Violated Material Purpose of Trust Because It Ignored the Trust's Spendthrift Provision](#)

*"In the case of [In re Trust Created by Clifford Allen McGregor](#),<sup>17</sup> the Nebraska Supreme Court ruled that a nonjudicial settlement agreement violated a material purpose of trust because it ignored a spendthrift provision. Historically, United States trust doctrine has prohibited modification or termination of a trust if such modification was contrary to a material purpose of the settlor in establishing the trust. As this case demonstrates, a spendthrift clause alone may no longer be enough to provide the protection a settlor expects when incorporating this kind of language."*

**Mary E. Vandenack** provides members with commentary on [In re Trust of McGregor](#).

**Mary E. Vandenack** is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska. Mary is a highly regarded practitioner in the areas of tax, benefits, trusts and estates, business exit planning, asset protection planning, executive compensation, equity fund development, business and business succession planning, tax dispute resolution, and tax-exempt entities. Mary's practice serves high net worth individuals, businesses and business owners, executives, real estate developers and investors, health care providers, companies in the financial industry, and tax-exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as a member of Council and the Planning Committee. Mary is a member of the American Bar Association Law Practice Division where she currently serves as Vice Chair of Law Practice Magazine and Division Secretary. Mary was named to ABA LTRC 2018 Distinguished Women of Legal Tech, received the James Keane Award for e-lawyering in 2015, and serves on ABA Standing Committee on Information and Technology Systems. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on practice management topics including improving the delivery of legal services, technology in the practice of law and process automation.

Here is her commentary:

## **EXECUTIVE SUMMARY:**

In the case of [\*In re Trust Created by Clifford Allen McGregor\*](#),<sup>(iii)</sup> the Nebraska Supreme Court ruled that a nonjudicial settlement agreement violated a material purpose of trust because it ignored a spendthrift provision.

## **FACTS:**

Clifford Allen McGregor created the C.A. McGregor Trust prior to his death. The trust was revocable and amendable during Clifford's life. The trust became irrevocable upon Clifford's death on October 15, 2009. At that time, Clifford's spouse, Evelyn, became the sole trustee.

After payment of expenses and taxes, Clifford's trust provided that the trust would be held and administered as the C.A. McGregor Family Trust ("Family Trust"). The trust held certain real estate. The Family Trust provided that all income would be paid to Evelyn. The trust instrument specifically stated that the trust was not a support trust. The Family Trust provided that upon Evelyn's death, the Family Trust would be divided into shares for Clifford and Evelyn's children, Allen E. McGregor and Debra L. Schardt.

The following provisions applied to the trust shares:

- Allen was to become trustee of the share created for him and Debra was to become trustee of the share created for her.
- The assets of each trust share remain in trust for the life of the primary beneficiary (Allen or Debra).
- During the lives of Allen and Debra, distributions from the share created for Allen were permissible to Allen and his children and distributions from the share for Debra were permissible to Debra and her children. Allen and Debra were to be considered first in making any distributions.
- The trust instrument provided that each share was to be "a non-support discretionary spendthrift trust that may not be reached by the beneficiaries' creditors."
- The trust provided each of Allen and Debra, in regard to the respective share of each, a limited testamentary power of appointment upon death that allowed for transfer to any person, corporation or other entity but could not be exercised in favor of Allen or Debra, his or her estate, or creditors of his or her estate.

In May, 2011, Evelyn, Allen and Debra entered into a non-judicial settlement agreement that provided for distribution of trust assets upon Evelyn's death directly to Allen and Debra rather than in trust. The agreement also reallocated some land and made an equalization payment between Allen and Debra to result in an approximately equal split of trust assets. In 2017, Evelyn sought to revoke the agreement. Allen filed an action to seek approval of the agreement and an order requiring compliance.

The lower court found that the nonjudicial settlement agreement was not valid because the agreement made substantial changes to the trust and violated a material purpose of the Family Trust. Allen appealed the county court decision. The Nebraska Supreme Court ruled that the spendthrift provisions of the trust constituted a material purpose of the trust and that the non-judicial settlement agreement violated that purpose by distributing such assets outright rather than in trust.

## **COMMENT:**

### *Spendthrift Clauses*

Spendthrift trusts provide asset protection to trust beneficiaries by protecting beneficiaries from losing their inheritance to creditors. A spendthrift trust is one that includes a spendthrift clause. A typical clause might read something like the following:

The trusts created by this instrument are intended to be spendthrift trusts and such status is a material purpose of this instrument. No title to this trust estate, or any part thereof, shall vest in any beneficiary until actual distribution thereof to and receipt thereof by such beneficiary. No rights of any of the beneficiaries of this trust estate shall be subject to assignment or to anticipation, or liable for any indebtedness or obligation of any beneficiary, or subject to any attachment or order, decree, judgment or process of any court on account of, or for the purpose of collecting, any such indebtedness or obligation. The Trustee shall not be required to make any disbursements to any assignee or creditor of any beneficiary or otherwise than into the hands of the beneficiary in person.

Spendthrift clauses are viewed differently by different states. Some states allow exception creditors.<sup>[4]</sup>

### *Material Purpose*

A material purpose generally requires some showing of a particular objective on the part of the settlor. Such objective could be the beneficiary's management skills, judgment, or level of maturity. The settlor's objectives

may be clear in the trust document<sup>lvii</sup> itself but courts may also look to other evidence.

### *Flexibility in Modern Trust Drafting*

Historically, United States trust doctrine prohibited modification or termination of a trust if such modification was contrary to a material purpose of the settlor in establishing the trust. That rule was established in *Clafin v. Clafin*.<sup>lviii</sup> More recently, there is a trend towards flexibility.

*Restatement Third of Trusts* states: “A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee.”<sup>lviii</sup> Methods that can be used to change irrevocable trusts include nonjudicial settlement agreements, judicial reformation and decanting.

### *Protecting the Spendthrift Trust*

A spendthrift clause alone may no longer be enough to provide the protection a settlor expects when incorporating this kind of language. Keys to the conclusion in the *McGregor* case included:

- The trust specifically stated that each trust share was to be construed as a non-support discretionary spendthrift trust.
- The trust shares included beneficiaries other than Allen and Debra.
- The powers of appointment granted to each Allen and Debra were limited rather than general.

This case provides guidance for practitioners to consider in drafting trusts for asset protection purposes. Consider the exact language of the spendthrift clause. Specifically state that the spendthrift clause is a material purpose of the trust even if you are drafting for a jurisdiction that provides that by statute. Your settlor might move. Consider limited powers of appointment rather than general. Name more than one beneficiary for a trust share.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!**

*Mary Vandenack*

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## CITATIONS:

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<sup>[i]</sup> [\*In re Trust Created by Clifford Allen McGregor\*](#), 308 Neb. 405 (2021).

<sup>[ii]</sup> [\*In re Trust Created by Clifford Allen McGregor\*](#), 308 Neb. 405 (2021).

<sup>[iii]</sup> Uniform Trust Code §503.

<sup>[iv]</sup> Restatement (Third) of Trusts Section 65 cmt. D.

<sup>[v]</sup> 20 N.E. 454 (Mass 1989).

<sup>[vi]</sup> Restatement (Third) § 50 (2003).

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