



THE ENFORCER

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Do You Trust Me?

Suppose you are representing a client in a spousal and child support enforcement matter. You discover that sometime in the intervening years since the divorce your client's ex-spouse has become the beneficiary of a trust, or has transferred assets to a trust, or both. Would trust assets or income be available for the purposes of support? The answer depends upon the nature of the former spouse's interest in the trust, the type of trust,¹ and the characteristics of the trust property, i.e. is it income producing? You will need a copy of the trust instrument and the trust inventory. If the trustee is uncooperative, this will require the filing of a petition for trust administration in the probate court.

Spendthrift, Support and Discretionary Trusts - Support Payor as Beneficiary

The Michigan Supreme Court addressed whether a creditor can reach a trust beneficiary's interest in a spendthrift, support or discretionary trust in the case of *Miller v. Dept. of Mental Health*.² In *Miller* the Michigan Department of Mental Health ("DMH") sought reimbursement for services rendered to Carol Miller, who had been in the care of DMH for thirty years. The Court examined whether Ms. Miller had an interest in a trust established by her father that could be reached by DMH.

The *Miller* Court defined three basic types of trusts:

There are, for the purposes of this discussion, three kinds of trusts. Firstly, a trust vesting in the beneficiary the right to receive some ascertainable portion of the income or principal. Secondly, a trust providing that the trustee shall pay so much of the income or principal as is necessary for the education or support of the beneficiary,

called a support trust. Thirdly, a trust providing that the trustee may pay to the beneficiary so much of the income or principal as he in his discretion determines, called a discretionary trust. *Miller, id* at 429, footnotes omitted.

Of the three types of trusts described above, the general rule is that *ordinary* creditors can only reach a beneficiary's interest to the extent that the beneficiary is entitled to receive an ascertainable portion of the income or principal. The exception to that general rule is if there is a spendthrift clause providing that the beneficiary's interest is not transferrable or subject to the claims of creditors. As the Court in *Miller* explained:

Where the beneficiary is entitled to receive an ascertainable portion of the income or principal, creditors can reach the beneficiary's interest unless there is a spendthrift clause providing that the beneficiary's interest shall not be transferable or subject to the claims of creditors. Without regard to whether there is a spendthrift clause, ordinary creditors cannot reach a beneficiary's interest in a support trust because the nature of the beneficiary's interest, being limited to such amount as is necessary for education or support, precludes recognition of the claims of creditors that would defeat the object of the trust. Similarly, without regard to whether there is a spendthrift clause, creditors cannot reach a beneficiary's interest in a discretionary trust because of the nature of the beneficiary's interest. The beneficiary's receipt of any amount depends on the trustee's exercise of his discretion, and thus the beneficiary does not have an ascertainable interest in the assets of a discretionary trust. *Miller, id* at 430-431, footnotes omitted.



However, support payees are not ordinary creditors, and the *Miller* Court articulated exceptions to the general rule which recognize their special status. The interest of a beneficiary in the following two trusts may be reached to enforce claims by the beneficiary's spouse or child for alimony or support: (1) the ascertainable interest of a beneficiary in a trust with a spendthrift clause, and (2) the interest of a beneficiary of a support trust. There is no exception for the interest of a beneficiary of a discretionary trust, because as the Court explained, such a beneficiary has no ascertainable interest in a discretionary trust which could be valued as an asset.

Look to Article VII of Michigan's Estates and Protected Individual's Code, known as the Michigan Trust Code, MCL 700.7101 - 700.7913, for further guidance with determining the nature of the trust instrument and collection. Specifically, MCL 700.7504, discusses the exceptions provided for the collection of support from a beneficiary's interest in a spendthrift or support trust:

700.7504 Spendthrift provision or support provision; exceptions; "child" defined.

(1) The interest of a trust beneficiary that is subject to a spendthrift provision, a support provision, or both may be reached in satisfaction of an enforceable claim against the trust beneficiary by any of the following:

(a) A trust beneficiary's child or former spouse who has a judgment or court order against the trust beneficiary for support or maintenance.

(b) A judgment creditor who has provided services that enhance, preserve, or protect a trust beneficiary's interest in the trust.

(c) This state or the United States.

(2) The court shall order the trustee to satisfy all or part of a judgment described in subsection (1) only out of all or part of distributions of income or principal as they become due.

(3) Notwithstanding that the terms of the trust include a spendthrift provision, this section does not apply to the interest of a trust beneficiary that is subject to a discretionary trust provision.

(4) As used in this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

Identifying the nature of a trust is not necessarily an easy task, as demonstrated by *Miller*. The *Miller* Court's decision turned on whether the trust was a support trust, subject to the claims of the DMH, or a discretionary trust, in which Ms. Miller had no ascertainable interest (and neither would your client). The language of the Miller trust instrument provided that the trustee shall pay so much of the income and such amounts of the principal as the trustee "deems proper" for her support, maintenance and welfare, the trust. The uncertainty of the words "deems proper" left the instrument open to interpretation, and parol evidence came into play.³ Ultimately the case was remanded to the trial court to determine whether it was the *intention* of the settlor of the trust to create a discretionary trust or a support trust.

Revocable Trusts - Support Payor as Settlor and Trustee

A revocable trust is a trust in which the grantor retains the right to terminate the trust and reclaim the trust principal and income. Unless a trust is specifically made irrevocable, it is revocable.⁴ Revocable trusts are primarily used as an estate planning tool to avoid probate. The creator of the trust is considered the grantor, or "settlor." The grantor may declare himself or herself trustee (a self-declared trust), for the benefit of him/herself for life, with the remainder at grantor's death to go to a designated beneficiary. The grantor may retain the right to amend the trust, control and manage the trust property, and receive income for life from the trust corpus.

Income received by a support payor from a trust is like income received from any other source, and is subject to the claims of creditors. With regard to trust property, although the grantor/support payor would not hold legal title, in the case of a revocable trust, they would have the authority to reclaim it. Further, remedies for fraudulent conveyance of property to a trust are available under the uniform fraudulent transfer act (UFTA), MCL 566.31 et seq.



Endnotes

1. Trusts are a legal specialty unto themselves. This article is not intended to be a treatise, rather the objective is to help the family law practitioner understand that support collection from certain trusts is achievable.
2. 432 Mich 426; 442 N.W.2d 617 (1989)
3. If the words used had been "are necessary" instead of "deems proper" *Miller* would have had a different result.
4. MCL 700.7602(1)

COURT-APPROVED FAMILY LAW MEDIATOR



Carole L. Chiamp

Ms. Chiamp is among the first attorneys in Michigan to be designated as a Family Law Court-Approved Mediator. For more than 30 years she has been appointed mediator, facilitator and arbitrator in cases ranging from negligence, probate and contract law to civil rights and family law. Ms. Chiamp served as a member of the Task Force on Child Support and Alimony Awards, the Mediation Tribunal Selection Committee and the 21st Century Commission on the Courts. For 21 years, Ms. Chiamp has been named to Best Lawyers in America and for 2012 Best Lawyers designated her Detroit Family Law Lawyer of the Year.

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AN INVITATION TO FAMILY LAWYERS

BY ZENELL BROWN

THE WAYNE COUNTY FRIEND OF THE COURT

(ALTHOUGH THIS IS USUALLY DEVOTED TO ALTERNATIVE DISPUTE RESOLUTION, WE HAVE THE HONOR THIS MONTH OF HAVING AN ARTICLE BY THE WAYNE COUNTY FRIEND OF THE COURT, ZENELL BROWN, ON THE IMPORTANT ISSUE OF ESTABLISHMENT OF PATERNITY.)

*His heritage to his children wasn't words or possessions,
but an unspoken treasure, the treasure of his
example as a man and a father.*

-- Will Rogers Jr.

Paternity establishment is the first step in the process for ensuring a strong financial and emotional foundation for the growing number of children born to unmarried parents.

In 2010, 113,438 children were born in Michigan hospitals. Forty-two percent were born to parents who were not married, and in 62% of those births, the mother and father completed an Affidavit of Parentage at the hospital to establish paternity. Domestic relations research shows that the early engagement of fathers is most likely to ensure their ongoing involvement in the lives of their children; therefore, paternity establishment at birth is crucial, not only for individual children, but for the preservation of the family and the communities in which they live.

In recent years, daytime TV and a proliferation of billboards have sensationalized and denigrated the issue of paternity establishment, while emphasizing promiscuity, lies, and child support game-playing. In a culture of Maury Povich's genetic test dramas and 1-800-Who's-the-Dad marketing materials, it is not surprising that Michigan hospitals have experienced an increase in the percentage of births to unmarried parents and a decrease in the percentage of paternity establishments.

Fatherhood involvement is critical to the wellbeing of children and benefits mothers and fathers as well. A National Center for Education headline reads, "National Study Links Father's Involvement to Children Getting A's in School."¹ An involved father encourages his children's exploration of the world

around them, builds confidence, and improves problem solving abilities.² Noted sociologist, Dr. David Popenoe sums it up well:

"Involved fathers bring positive benefits to their children that no other person is as likely to bring."³

This article is an invitation to family lawyers, the advocates for the best interests of children, to effect positive social change by promoting paternity establishment, early engagement of fathers, and fatherhood involvement as societal norms.

Family lawyers serving in the Office of Child Support, local prosecutors' offices, and Friend of the Court offices work diligently within their offices to increase the number of paternity establishments. Public Act 368 of 1978 requires the Office of Child Support to develop and provide hospitals with the Acknowledgment of Parentage forms.

Family lawyers serving the child support program can do more, and work closer with hospitals to promote early engagement of fathers by:

- Assisting in marketing and distributing Office of Child Support's free posters, fliers, and brochures in English and Spanish for hospitals and clinics. Child support lawyers can ensure their local birthing hospitals and prenatal clinics order and display these in lobbies, restrooms, and patient rooms. The informational brochures can be included in hospital welcome and discharge packets.

