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)

Draft Report: January 17, 2014
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Kevin G. Abrams, J. Peter Shindel, Jr., and Matthew L. Miller of Abrams & Bayliss LLP, Wilmington, Delaware; Attorneys for Plaintiffs.

Thomas W. Briggs, Jr., Jay N. Moffitt, Matthew R. Clark and Brendan W. Sullivan of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware; Attorneys for Defendant Wilmington Trust Company.

Jeffrey S. Cianciulli of Weir & Partners LLP, Wilmington, Delaware; Attorneys for Defendant George Jeffrey Mennen.

Brian J. Ralston and Jessica A. Montellese of Potter Anderson & Corroon LLP, Wilmington, Delaware; Attorneys for Owen J. Roberts.

LEGROW, Master

The summary judgment motion pending before me places an uncomfortable spotlight on both the limits of this Court's inherent power to "do equity" and the limits on the storied and oft-debated power of the judicial system to "make law." Trial will be held next month to resolve the troubling claims in this breach of fiduciary duty action against the trustees of a once substantial, and now nearly worthless, trust. If the plaintiffs succeed in their claims against the individual trustee of the trust, they may be entitled to tens of millions of dollars in damages that the individual trustee likely will not be able to pay. The plaintiffs contend, however, that they should be entitled to collect those damages from an interest the individual trustee has in a separate trust created for his benefit. That trust, however, 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 argue the spendthrift provision is not applicable here, either because they should not be considered creditors 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 consistently 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, I cannot as an officer of

this Court engage in the legal machinations, if not outright violation of the applicable statute, required to reach the conclusion the plaintiffs urge.

BACKGROUND[1]

This action was filed in March 2013 by Kathryn Mennen, Sarah Mennen, John Mennen, Shawn Mennen, and Alexandra 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 defendants are 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 seeks damages in excess of $100 million as a result of alleged breaches of the Co-Trustees' fiduciary duties. The Complaint also names 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 alleges 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 "1970 Trusts"). The four 1970 Trusts were funded with stock from the Mennen

[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.

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 took over Mr. Wallace's position as individual trustee of the Trust and the Christina Mennen Trust.

The Beneficiaries allege that, once the Mennen Company was sold to Palmolive in a stock-for-stock transaction 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. In their complaint, the Beneficiaries charge 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 no investment control over that trust, which was

[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.

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 any damages the Court may award 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.

That spendthrift provision 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, as a matter of law, the Beneficiaries from collecting from the Jeff Mennen Trust any judgment they may secure against Jeff personally. In response, the Beneficiaries first contend there are disputed issues of fact that preclude summary judgment, and therefore urge me to deny summary judgment on that basis alone. The Beneficiaries also 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.

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

[8] Ralston Aff. Ex. C, Art. NINTH, pp. 26-27.
[9] *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

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 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] The Beneficiaries point to two categories of disputed facts they contend make summary judgment procedurally premature. The first category involves the hotly contested issue of Jeff's liability, if any, for alleged breaches of his fiduciary duties to the Beneficiaries. For purposes of the pending motion, however, I may – and in fact must – accept the truth of the

[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).
[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).

Beneficiaries' allegations against Jeff, a point Owen Roberts concedes.[16] The second category of disputed facts to which the Beneficiaries point involves the extent of Owen Roberts's knowledge of the Trust and Jeff's alleged "ruinous misuse of the assets in the [Trust]."[17] Although the parties may dispute the extent of Owen Roberts's knowledge, if any, of the facts alleged in the complaint, the Beneficiaries have not explained how that factual issue is 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. The Beneficiaries have not advanced any legal argument suggesting that the factual dispute regarding Roberts's knowledge is relevant to the legal questions presented by the motion.

A. The parameters to enforcing a spendthrift clause

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

[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.
[18] George Gleason Bogert et al., The Law of Trusts and Trustees § 222 (3d ed. 2007).

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 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

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[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).

[21] The exceptions contained in subsections (c) and (d) of Section 3536 do not apply to the Beneficiaries' claims against the Jeff Mennen Trust.

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 invalidated and subjected to creditors' claims.[23] In likely recognition that the debate has closed regarding the general enforceability of spendthrift trusts, the Beneficiaries instead focus their energies on seeking an exception to the spendthrift clause, arguing 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 them 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 and Section 3536, 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

[22] Bogert et al., supra, at § 222 (quoting *Tillinghast v. Bradford*, 5 R.I. 205, 212 (R.I. 1858)).
[23] *Kulp*, 944 A.2d at 1031.

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, 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

[24] Answering Br. at 30.
[25] 306 A.2d 737, 740-41 (Del. 1973) (citing Blacks Law Dictionary, Rev. 4th ed.) (internal quotation marks omitted).
[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, § 224 n.3 (listing decisions precluding support claimants from piercing a spendthrift trust).
[28] *See, e.g.* Answering Br. at 30-31.

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 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

[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).
[31] *Id.* at ¶ 19.
[32] 1989 WL 63899 (Del. Ch. June 14, 1989).

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 and equally ill-conceived 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* 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

[33] *Id*. at *5. The *Parsons* decision relied heavily on *Gibson*.

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, even if they succeed in their claims against Jeff, the Beneficiaries will be creditors within the meaning of the statute. 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 exception to Section 3536. That argument squarely was rejected in both *Gibson* and *Parsons*, but the Beneficiaries urge me to disregard those cases because *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. Although it is true that Section 3536 did not replace the common law,[35] that fact does not render *Gibson* inapplicable unless the Beneficiaries can point to a common law exception germane to their claims. As set forth

[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.").

[35] *See Kulp v. Timmons*, 944 A.2d 1023, 1031 (Del. Ch. 2002).

below, the Beneficiaries' argument falls short in this regard. 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 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. 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.[37] 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

[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, 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] *Gibson*, C.A. No. 124, ¶ 21.

not empower this Court to develop new exceptions in the name of the "common law," when exceptions were not recognized at the time the statute was adopted. 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.[38] The fact that Section 3536 did not replace existing common law, however, does not permit a conclusion that the General Assembly intended to 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, they cannot rely on this avenue to pierce the trust.

Similarly, 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, [39] and 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

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

[39] *See, e.g.*, *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).

exception for tort claimants.[40] 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.[41] Although in *Garretson* this Court identified public policy as an alternate means for excluding familial support claims from Section 3536,[42] the Supreme Court's decision did not address the availability of a public policy exception. 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." The Section does not permit this Court to develop and impose new exceptions based on the Court's perception of public policy.

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)

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[40] *See* Restatement (Second) of Trusts § 157 and comments; Restatement (Third) of Trusts § 59 and comments. *See also* Bogert et al., supra, § 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).

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

[42] *Wife, J.B.G. v. Husband, P.J.G.*, 286 A.2d 256, 259-60 (Del. Ch. 1971).

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.[43]

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 equities that the Beneficiaries identify in support of any of their proffered exceptions are compelling from the standpoint of fairness, they are inconsistent with the role of the judiciary in the face of an unambiguous statute.

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

The Beneficiaries' final bid to reach the assets of the Jeff Mennen Trust is their appeal to the theory of impoundment, which applies when a trustee of a trust, who is also

[43] Restatement (Third) of Trusts § 59, cmt a(2) (2003).

a beneficiary of the trust, commits a breach of trust that harms the trust's other beneficiaries. Under those circumstances, 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.[44]

Whether impoundment is available under Delaware law appears to be an open question, but it is not one I need reach in this case because the separate nature of the trusts at issue, and the type of remedy that the Court would be required to order, renders impoundment unavailable.

The impoundment theory described in the Restatement applies when the trustee and the wronged beneficiaries all share an interest in the trust at issue.[45] 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 share an interest.[46]

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

[44] Restatement (Second) of Trusts § 257 (1959).
[45] *Id*. ("[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).
[46] *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.

Even if impoundment is an available remedy in Delaware, the Beneficiaries' proposed extension of impoundment beyond the narrow circumstances defined in the Restatement is both unworkable and contrary to the plain language of Section 3536. 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 one case that orders impoundment between sub-trusts, and in that case the trust assets never were divided between the sub-trusts and, perhaps more importantly, the trusts were terminating and the assets were being distributed to the beneficiaries.[47] The absence of any other cases ordering impoundment between sub-trusts is more remarkable in light of the fact that Section 257 of the Restatement was published in 1959.

The dearth of case law on this point is not surprising, however, when one considers what this Court would be required to do to achieve the impoundment the Beneficiaries seek. Even with the benefit of the factual assumption that the Settlor had no preference between establishing the 1970 Trusts as four separate trusts or four sub-trusts, and even assuming that impoundment against sub-trusts theoretically would be possible under some cases, the Beneficiaries cannot demonstrate that impoundment is available here, because the nature of the Jeff Mennen Trust would require me to order

[47] *Chatard v. Oveross*, 101 Cal. Rptr. 3d 883 (Cal. Ct. App. 2010).

relief explicitly forbidden by statute. Jeff is not the only current beneficiary of the Jeff Mennen Trust. Jeff's children and grandchildren also are current income and principal beneficiaries. To "impound" Jeff's "share" of the trust is legally impossible, because there is no such identifiable share. The trustees of the Jeff Mennen Trust have discretion to distribute the income and principal to some or all of the beneficiaries, as the trustees determine is appropriate.[48] As a result, the relief the Beneficiaries seek is not as simple as impounding an identifiable share of a trust. During argument, the Beneficiaries suggested this logistical impossibility should not preclude impoundment, asserting that I could "effectively enjoin any distributions [to Jeff] unless and until [Jeff] satisfies his obligations to [the Beneficiaries] and/or require the distributions that are made in the discretion of the trustee to Jeff be sent immediately for the benefit of the [B]eneficiaries."[49] That proposed relief, however, contravenes the terms of Section 3536, which prohibit, in pertinent part:

> actions 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;

[48] Ralston Aff. Ex. C, Art. First, § I(A), § 2(A)-(C).
[49] *Mennen v. Wilm. Trust Co.*, C.A. No. 8432-ML (Dec. 11, 2013) (TRANSCRIPT) at 70.

> (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.

Thus, adoption of the Beneficiaries' proposed impoundment theory would violate the terms of Section 3536. Whether Delaware law permits impoundment under certain circumstances is a matter best left for another day. What is clear is that impoundment cannot extend as far as would be necessary to allow the Beneficiaries to pierce the Jeff Mennen Trust. That is, even if impoundment is available in Delaware, and even if the 1970 Trusts are viewed as four sub-trusts, impounding Jeff's interest in the Jeff Mennen Trust would require a remedy precluded by Section 3536.

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 draft report in this matter. In the interests of

efficiency, and in recognition that the parties will be engaged in trial in less than a month, the time period to take exceptions to this report will be stayed until I issue a draft post-trial report resolving the Beneficiaries' claims against Jeff and Wilmington Trust.