

Steve Leimberg's Estate Planning Email Newsletter - Archive Message #1904

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From: Steve Leimberg's Estate Planning Newsletter

Subject: [Oshins & Bearg on Tannen v. Tannen: Keeping Trust Assets off the Table in a Divorce](#)

Hot off the press, **Steve Oshins** and **Martin Bearg** bring us the results of Tannen v. Tannen, one of the more highly anticipated cases in recent years. New Jersey and other states' practitioners have been holding their breath awaiting the results of this nationally important case. The case was argued on September 13, 2011, and decided by the Court on December 8, 2011.

Steven J. Oshins, Esq., AEP (Distinguished) is a member of the **Law Offices of Oshins & Associates, LLC** in Las Vegas, Nevada. Steve is a nationally known attorney who is listed in The Best Lawyers in America® and has been named one of the Top 100 Attorneys in Worth magazine. He was inducted into the NAEPC Estate Planning Hall of Fame® in 2011. He is one of the most innovative attorneys in the country as demonstrated by how active he has been in writing some of Nevada's most important estate planning and creditor protection laws, including the law making the charging order the exclusive remedy of a judgment creditor of a Nevada LLC and LP, the law changing the Nevada rule against perpetuities to 365 years and the law making Nevada the first and only state to allow a Restricted LLC and a Restricted LP. He is also the author of the Annual Domestic Asset Protection Rankings at http://www.oshins.com/images/DAPT_Rankings.pdf. Steve can be reached at 702-341-6000, x2 or at soshins@oshins.com. His law firm's web site is <http://www.oshins.com>.

Martin L. Bearg, Esq. is a solo practitioner admitted to practice law in New Jersey, New York and Florida. His practice emphasizes trust and estate planning and administration. He is the Assistant Secretary and Government Liaison for the Real Property, Probate and Trust Law Section of the New Jersey State Bar Association, and helped write the Amicus Brief submitted to the Supreme Court of New Jersey in the Tannen case. Mr. Bearg has previously lectured for the New Jersey Institute of Continuing Legal Education, been a licensed provider of CPE credits for accounts and financial/insurance professionals, and an Adjunct Lecturer on contract and tax law at Fairleigh Dickinson University and St. Peter's College. Mr. Bearg is a contributing author of Matthew Bender's (now owned by CCH) Federal Tax Service, and NJICLE's treatise on "Contract Law in New Jersey." Mr. Bearg also previously served as the New Decisions Editor for the Journal of Taxation.

He tried and won one of the first cases in New Jersey regarding a spouse's waiver of the right to exercise her elective share and assisted a New Jersey Assemblyman draft legislation to exempt an IRA from the claims of creditors. Martin can be reached at (973) 994-9080 or martin@bearglaw.com

Here is their commentary:

EXECUTIVE SUMMARY:

Plaintiff Mark Tannen and defendant Wendy Tannen were married for nearly eighteen years. During the marriage, Wendy's parents created and funded an irrevocable trust with Wendy as sole beneficiary and Wendy and her parents as co-trustees ("Wendy Tannen Trust"). Before trial, the judge ordered Mark to name the Wendy Tannen Trust and other family trusts as third-party defendants. This case went to trial only on the issues of equitable distribution, alimony and child support. The issues in this action included whether, for purposes of determining alimony, it was appropriate to impute income to Wendy Tannen based on her beneficial interest in the irrevocable trust.

FACTS:

The Trust Provisions

Section 3 of the Wendy Tannen Trust provided:

The Trustees shall apply and distribute the net income and corpus of the Trust to the beneficiary in the following manner:

(A) The Trustees shall pay over to or apply for the benefit of the beneficiary's health, support, maintenance, education and general welfare, all or any part of the net income therefrom and any or all of the principal thereof, as the Trustees shall determine to be in the beneficiary's best interests, after taking into account the other financial resources available to the beneficiary for such purposes that are known to the Trustees. The term "best interests" shall include, without limitation and in the Trustees' sole discretion as to need and amount, payments from the Trust to help meet educational expenses, medical expenses or other emergency needs of the beneficiary, to enable the beneficiary to purchase a home, and to enable the beneficiary to enter into a business or profession. The time or times, amount or amounts,

manner and form in which said distributions shall be made, or sums so expended, shall be left to the sole discretion of the Trustees and shall be made without court order and without regard to the duty of any person to support such beneficiary.

In another Subsection of Section 3, the trust provided:

(C) Notwithstanding any other provision in this Trust Agreement to the contrary, it is the express intention of the Grantors in creating this Trust that the beneficiary shall not be permitted, under any circumstances, to compel distributions of income and/or principal prior to the time of final distribution.

The Wendy Tannen Trust also contained a spendthrift provision in Section 14 which provided:

Distribution of both income and principal shall be made as directed under the terms of this Trust, and the beneficiary shall not have the right to alienate, anticipate, pledge, assign, sell, transfer or encumber such income or principal distribution without first procuring the written consent of the Trustees. Any endeavor of any such beneficiary to circumvent this direction in any manner shall be wholly disregarded by the Trustees, and shall be null and void.

The Trial Court Decision

In rendering its judgment following trial, the court applied the Restatement (Third) of Trusts to determine that the terms “support” and “maintenance” in the Wendy Tannen Trust required the trustees to distribute “such sums as are necessary to maintain” Wendy’s lifestyle. The court determined it must consider trust benefits before computing alimony and imputed income to Wendy from the Wendy Tannen Trust. In the final judgment of divorce, the trial court ordered the trustees to make a \$4,000 monthly payment to Wendy and to continue making payments for shelter-related expenses that it historically had made. Based on that imputed income, the court calculated Mark’s permanent monthly alimony obligation at \$4,500.

The Appellate Court Reverses

Mark, Wendy and the trusts cross-appealed various aspects of the judgment and prior orders of the trial court. The Appellate Division reversed in part,

affirmed in part, and remanded the matter to the trial court for further proceedings consistent with its published opinion.[\[i\]](#)

The Appellate Division noted that the Restatement (Third) of Trusts had not been adopted by any reported decision in New Jersey and, if adopted, would operate to change the law in New Jersey. The panel recognized that pursuant to the Restatement (Third) of Trusts, Wendy would have an enforceable interest in the income of the Wendy Tannen Trust. The panel determined, however, that as a court of intermediate appellate jurisdiction it would not presume to adopt that restatement and suggested that such a decision would be more appropriately made by the Supreme Court.

The Appellate Division held that by applying existing law, which has incorporated various provisions of the Restatement (Second) of Trusts, Wendy's beneficial interest in the Wendy Tannen Trust was not an "asset held by" her for purposes of N.J.S.A. 2A:34-23(b)(11) of the alimony statute and she could not, merely by being a named co-trustee, without the consent of her parents, compel discretionary distributions. Thus, the panel determined that no income from the Wendy Tannen Trust should have been imputed to Wendy in determining Mark's alimony obligation.

The Supreme Court Affirms

The Supreme Court affirmed the judgment of the Appellate Division substantially for the reasons expressed in the Appellate Decision's written holdings.

Discretionary, Support and Hybrid Trusts[\[ii\]](#)

Whether a trust is protected from a particular creditor is often determined by whether the court classifies the trust as a discretionary trust versus a support trust.

A "discretionary trust" is a trust that gives an independent trustee sole and absolute discretion over distributions to the beneficiaries. A discretionary trust is generally protected from all creditors irrespective of whether a spendthrift provision is included in the trust agreement.

A "support trust" is a trust that includes a support standard for providing distributions to the beneficiary. The most widely used standard is for "health, education, maintenance and support." This type of trust must rely on its

spendthrift provision to protect its assets from the creditors of the beneficiaries. Certain classes of creditors are able to access the trust assets as “exception creditors”, either by state statute or by judicial creation. One such popular exception creditor is a divorcing spouse.

A third type of trust is a “hybrid trust” which is a discretionary support trust. The Wendy Tannen Trust has both discretionary language and support language and therefore is a hybrid trust. Despite the protections ultimately determined by the New Jersey Supreme Court, practitioners should be careful to avoid this issue altogether by drafting trusts as purely discretionary trusts whenever possible. It is also important to not name a beneficiary as a co-distribution trustee. The trial court in the Tannen case created a fiduciary duty that Wendy owed to Mark, despite the prohibition against her making a demand for distributions, to exercise her power as a trustee to make discretionary distributions.

The following court decisions noted that the language of the trust used both discretionary and support language, but held that the trust was a discretionary trust:

- Myers v. Kansas Depts of SRS, 866 P.2d 1052 (Kan. 1994).
- Roorda v. Roorda, 300 N.W. 294 (1941).
- Lineback by Hutchens v. Stout, 339 S.E.2d 103 (NC App. 1986).
- Chenot v. Bordeleau, 561 A.2d 891 (RI 1989).

The following court decisions noted that the language of the trust used both discretionary and support language, but held that the trust was a support trust:

- Bohac v. Graham, 424 NW 2d. 144 (ND 1988).
- Button by Curio v. Elmhurst Nat. Bank, 522 N.E.2d 1368 (Ill. App. 1988).
- Kryzsko v. Ramsey County Social Services, 607 N.W.2d 237 (ND 2000).
- Bureau of Support in Dept. of Mental Hygiene and Correction v. Kreitzer, 243 N.E. 2d 83 (Ohio 1968).
- McNiff v. Olmsted County Welfare Dept., 176 N.W.2d 888 (Minn. 1970).

Therefore, the court determination depends upon the jurisdiction involved and the actual language of the trust agreement.

COMMENT:

This landmark case established important law in New Jersey, which has implications in other jurisdiction as well. Where possible, the trust scrivener should draft a third party funded trust as a discretionary trust rather than a support trust or a discretionary support trust (or hybrid trust). Protecting our clients' gifts and bequests from divorcing spouses of the clients' trusts' beneficiaries should be an important part of the planning process.

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

Steve Oshins
Martin Bearg

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CITATIONS:

^[i] Tannen v. Tannen, 416 N.J. Super. 248 (App. Div. 2010).

^[ii] See writings by Attorney Mark Merric. The caselaw cited in this discussion comes from his materials.