

**Spendthrift Provisions: Wouldn't You Like
to be a Spendthrift Too?**

By:

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Introduction

Historically, the extent to which creditors could access property held in trust for the benefit of a beneficiary/debtor was a matter of common law. Beginning in 1991, the Ohio Supreme Court allowed explicitly for spendthrift trusts, broadening the creditor protection in such trusts again in 1993. With the enactment of the Ohio Trust Code, in 2007, this type of creditor protection was codified and further clarified, largely in Chapter 5805 of the Ohio Revised Code.

This outline serves to:

1. Briefly define spendthrift provisions;
2. Offer a brief history of Ohio common law pertinent to spendthrift provisions;
3. Summarize spendthrift law, now largely codified in the Ohio Trust Code;
4. Discuss how a spendthrift provision is created; and
5. Discuss a variety of more practical issues, including enforceability, drafting considerations, etc.

What is a Spendthrift Provision?

The Ohio Supreme Court has defined a spendthrift trust as “a trust that imposes a restraint on the voluntary and involuntary transfer of the beneficiary’s interest in the trust property.”¹ The Ohio Trust Code (the “Trust Code”) now similarly defines a spendthrift provision as “a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary’s interest.”²

The Trust Code provides that a spendthrift provision is valid only:

“if it restrains both voluntary and involuntary transfer of a beneficiary’s interest,” or

“if it restrains involuntary transfer of a beneficiary’s interest and permits voluntary transfer of a beneficiary’s interest only with the consent of a trustee who is not the beneficiary.”³

In other words, under the Trust Code, a spendthrift provision is only valid if there are restrictions on both voluntary and involuntary alienation of the beneficiary’s interests under the trust. Voluntary alienation/transfer is permissible only if it requires consent by a third party trustee.

Some examples of spendthrift provisions are attached as an Exhibit to this outline.

¹ Scott v. Bank One Trust Co., N.A., 62 Ohio St.3d 39 (1991), 44, referencing 1 Restatement of the Law 2d Trusts (1959) 311, Section 152(2).

² O.R.C. § 5801.01(T).

³ O.R.C. § 5805.01(A), emphasis added.

A Brief History of Spendthrift Case Law in Ohio

Before 1963, there was uncertainty under Ohio law about whether spendthrift provisions were enforceable, though other U.S. jurisdictions favored the validity of spendthrift provisions.

In 1963, the Ohio Supreme Court held that the spendthrift provisions in a trust were not effective against the claims of the beneficiary's creditors.⁴ In so ruling, the Ohio Supreme Court adopted the minority view, at least in the U.S.

Twenty-eight years later, in 1991, in *Scott v. Bank One Trust Co.*, the Ohio Supreme Court revisited the validity of spendthrift trusts.⁵ In *Scott*, the provision in question was not a classic spendthrift provision,⁶ but triggering the "spendthrift" provision modified the beneficiary's interest from one in which the beneficiary was entitled to specific outright distributions to one in which the beneficiary could receive distributions under a discretionary trust. Nonetheless, the Court in *Scott* viewed the case as presenting the same issue decided 28 years earlier,⁷ in *Sherrow* – whether a spendthrift trust is valid under Ohio law. In 1991, in the *Scott* case, the Ohio Supreme Court reversed *Sherrow* and held that spendthrift trusts are valid under Ohio law.⁸ In *Scott*, the Court recognized the tension between two opposing policy positions: (1) a property owner has the right to dispose of his or her property as he or she chooses, including the ability to exempt certain interests from the claims of creditors, vs. (2) allowing for the rights of an unsecured creditor to access property held for the use and enjoyment of the beneficiary. In *Scott*, the Court came down squarely in favor of the owner's right to dispose of his or her property as he or she chooses.⁹

Two years after the *Scott* decision, in 1993, the Ohio Supreme Court revisited the same issues, this time in the context of a judgment creditor suing in equity against equitable future interests held by the beneficiaries of the trusts at issue.¹⁰ In that case, *Domo*, the Court made clear that: (1) a spendthrift provision is valid in Ohio under the *Scott*

⁴ *Sherrow v. Brookover*, 174 Ohio St. 310 (1963). The Court stated: "In our opinion, an owner of property should not, without legislative authority, be permitted, by setting up a spendthrift trust, to exempt either such property or the income therefrom from the claims of the creditors of a beneficiary who is entitled under such trust to such property or the income therefrom." *Id.*, at 316.

⁵ 62 Ohio St.3d 39 (1991) (before the Ohio Supreme Court on a question certified to the Court by a federal district Court).

⁶ The Court noted that the provision at issue "is not a true spendthrift provision. It does not expressly restrain the alienability of [the beneficiary's] interest in the trust property." *Id.*, at 44.

⁷ "While the trust provision at issue does not forbid the alienation of [the beneficiary's] interest in the trust property, if does in effect prevent such alienation We therefore agree with the federal court's characterization of the [trust at issue] as a spendthrift trust. We must either apply *Sherrow* or overrule it." *Id.*, at 45.

⁸ *Id.*

⁹ "We are no longer satisfied with the balance struck twenty-eight years ago. The policy reasons against spendthrift trusts, which seemed so strong then, now look weak. The *Sherrow* court too easily dismissed the countervailing policy that the law should allow the property owner, within reason, to dispose of her property as she chooses. We can no longer sustain the *Sherrow* doctrine." *Id.* at 49.

¹⁰ *Domo v. McCarthy*, 66 Ohio St.3d 312 (Ohio 1993).

decision; (2) a beneficiary has only that interest given to him by the trust settlor (reinforcing the rule that a settlor has wide discretion in disposing of his or her assets); and (3) a creditor cannot attach interests if those interests are not owned by the beneficiary himself or herself. The Court held that, based on specific language in the trust, suit by the creditor had effectively converted the beneficiary's interest into the same interest held by the *Scott* beneficiary -- a discretionary interest. Consequently, there was no interest subject to attachment by the creditor.¹¹

Though there are numerous variations in application, exemptions, breadth, etc., the vast majority of U.S. jurisdictions support valid spendthrift provisions, based either in common law or in codified law.¹²

Ohio Trust Code: Spendthrift Provisions Codified

In 2006 the Ohio legislature enacted the Trust Code, which is a variation of the Uniform Trust Code with some Ohio-specific modifications. The enactment was effective as of January 1, 2007. The Trust Code went through an initial set of technical corrections which took effect September 12, 2008, with additional modifications in 2012.

In many respects, the Trust Code served to codify existing common law. However, as to spendthrift provisions, the Trust Code both codified existing law and clarified some ambiguities in the then-existing law. Trust Code provisions are mentioned below where pertinent.

How is a Spendthrift Trust Created?

The Trust Code provides broadly that a spendthrift trust may be created by providing in the trust instrument "that the interest of a beneficiary is held subject to a 'spendthrift trust,' or words of similar import."¹³ Therefore, while no specific language is necessary to create a spendthrift provision, most trust instruments contain explicit and often detailed spendthrift provisions.

Are Spendthrift Provisions Valid in Ohio?

Yes, generally. The Trust Code provides that "a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary."¹⁴ A beneficiary may be allowed to use real property or tangible personal property owned by the trust without that property being treated as distributed to the beneficiary, so long as that arrangement is within the trustee's authority under the trust terms.¹⁵ A spendthrift provision valid under the Trust Code should also be valid in

¹¹ Id.

¹² See Bogert, § 222. Spendthrift trusts in the United States, *The Law of Trusts and Trustees*.

¹³ O.R.C. § 5805.01(B).

¹⁴ O.R.C. § 5805.01(C).

¹⁵ Id.

bankruptcy proceedings.¹⁶ However, once trust assets are distributed to the beneficiary and in the beneficiary's hands, they can be pursued by the creditor.¹⁷

Are There Different Types of Spendthrift Provisions Drafted in Trusts?

Yes, absolutely. Earlier in this outline I referenced how the Trust Code defines spendthrift provisions. However, there are innumerable variations on pertinent language in trust documents. Because Ohio law is deferent to the wishes/intent of the Settlor, and because there is both a statutory overlay of spendthrift law and years of common law, there can be many variations in potential wording and practical effect.

I suggest that there are four valid potential variations to spendthrift provisions in trusts:

1. Prohibition of voluntary and involuntary assignment, and general prohibition against creditors;
2. Prohibition of involuntary assignment, but limited prohibitions on voluntary assignment, and general prohibition against creditors;
3. Approach 1 or 2, in combination with a provision reducing the beneficiary's distributable rights under the trust (e.g., creation of a wholly discretionary trust) upon some triggering event (e.g., pursuit by a creditor);
4. Approach 1 or 2, in combination with a provision eliminating the beneficiary's interests under the trust (e.g., a "poison pill" provision), upon some triggering event (e.g., a determination that trust assets are countable assets for purposes of establishing Medicaid eligibility).

Examples of approaches ##1-3 are in the spendthrift provisions included with this outline.

Are Spendthrift Provisions Valid as to Trust Distributions to Third Parties?

Probably. Neither the Uniform Trust Code nor the Ohio Trust Code addresses this issue directly. Presumably, so long as the assets are distributed directly to the third party under the terms of the trust, those assets cannot be reached by a creditor. However, it is interesting to note that the Ohio Trust Code does not explicitly contemplate distributions to a third party for the benefit of a beneficiary, except in the case of a beneficiary who is a minor or otherwise under a legal disability, such as incapacity.¹⁸

¹⁶ See 11 U.S.C. § 541(c)(2) and Official Comment to the Uniform Trust Code (2006).

¹⁷ O.R.C. § 5805.01(C).

¹⁸ See Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code, Alan Newman, 40 Real Prop. Prob. & Tr. J. 567, 570 (2005). This article contains an extensive "Q&A" discussion based on the Uniform Trust Code – the basis for Ohio's Trust Code. See Also The Uniform Trust Code: An Analysis of Ohio's Version, 34 Ohio N.U.L. Rev. 135, Alan Newman (2008).

Are Spendthrift Provisions Valid for Self-Settled Trusts in Ohio?

No. At least not yet. The Trust Code provides that, as a general rule, a trust settlor's creditors may reach the assets of the settlor's revocable trust during the settlor's lifetime, regardless of whether the trust instrument contains spendthrift provisions or other provisions to the contrary.¹⁹

Some limited exceptions to this general rule exist or likely exist, such as for assets that are exempt under homestead rights and other exemptions from creditors' claims (as if the assets were held in the settlor's individual name),²⁰ and for self-settled supplemental needs trusts.²¹

I reference "at least not yet" based on the "Ohio Legacy Trust" legislation currently pending in the Ohio legislature (H.B. 479), which is designed to allow a trust settlor to create and fund a trust that is generally inaccessible to the settlor's creditors, subject to some exceptions. In part, the proposed legislation explicitly cross-references the Trust Code's spendthrift provisions and applies them to self-settled trusts. At the risk of stating the obvious, this would be a major shift in Ohio law and has not been enacted as of the writing of this outline.²²

If creditor protection is desired from a trust settlor's potential creditors, under present law non-Ohio solutions are likely the best option, such as offshore trusts or domestic asset protection trusts established in a jurisdiction where such trusts are permissible.²³

Are Spendthrift Provisions Universally Effective?

No. So-called "super creditors" may still be able to access the trust assets, at least under certain circumstances. Some "super creditor" exceptions include:

- A child or spouse of the beneficiary, for support obligations²⁴
- Claims of the State of Ohio or the United States, to the extent provided by the Revised Code or federal law.²⁵

¹⁹ O.R.C. § 5805.06(A)(1).

²⁰ See Uniform Trust Code § 505 comment (2005); Uniform Trust Code art. 5, general comment (2005).

²¹ O.R.C. § 5805.06(A)(3).

²² For background see *The Ohio Legacy Trust: A Review of the Proposed Statute*, 20 Ohio Prob. L.J. 206, Joanne E. Hindel and Susan S. Locke.

²³ See, e.g., *Asset Protection for Ohioans: Why the Planning Is Better Outside Ohio*, 20 Ohio Prob. L.J. 74, John E. Sullivan III.

²⁴ O.R.C. § 5805.02(B)(1). However, the exception for these super creditors is limited, applying "only if distributions can be made for the beneficiary's support or the beneficiary is entitled to receive mandatory distributions under the terms of the trust." *Id.* In addition, the award for support may be limited "[t]o the relief that is appropriate under the circumstances, considering [various circumstances]." O.R.C. § 5805.02(D).

²⁵ O.R.C. § 5805.02(B)(2). See discussion of whether spendthrift clauses are effective as to federal tax liens and accompanying attachments under I.R.C. § 6321. *Bank One Ohio Trust Co, N.A. v. U.S.*, 80 F3d 173, 96-1 U.S. tax Cas. (CCH) P50188, 77 A.F.T.R.2d 96-1579, 1996 FED App. 0110P (6th Cir. 1996).

Notably, a claim for support of a former spouse is not included as a “super creditor,” nor is a judgment creditor who has provided services for the protection of the beneficiary’s interest in the trust, nor is a tort creditor. The Trust Code specifically provides that there are no additional exceptions beyond the super creditors explicitly described.²⁶ In other words, in theory courts may not expand the list of super creditors. Only the legislature is permitted to add to or subtract from that list.

Also, see the discussion below where a trust is required to make mandatory distributions. In effect, the mandated distributions are generally reachable by creditors.

How Do Spendthrift Provisions Relate if the Trust is Required to Make Mandatory Distributions?

The Trust Code provides that the mandatory trust distributions cannot be reached while still in the trust, so long as the distributions are made within a reasonable time after the distribution due date.²⁷ If the trustee fails to make a mandatory distribution within a reasonable time, the beneficiary’s creditors may reach the distribution amount.²⁸

Two issues are raised: (1) what is a “mandatory distribution?” and (2) what constitutes a “reasonable time?” The Trust Code defines mandatory distribution as:

[A] distribution of income or principal, including a distribution upon termination of the trust, that the trustee is required to make to a beneficiary under the terms of the trust. Mandatory distributions do not include distributions that a trustee is directed or authorized to make pursuant to a support or other standard, regardless of whether the terms of the trust provide that the trustee “may” or “shall” make the distributions pursuant to a support or other standard.²⁹

Based on the above-quoted Trust Code language, any distribution language requiring distribution of trust income, a unitrust or annuity payment, or payments tied to a specified age or date would constitute mandatory distributions (which could be reached by a creditor if not distributed by the trustee within a reasonable time). By contrast, distributions made under a discretionary standard (such as HEMS – health, education, maintenance, and support) are not considered mandatory distributions for this purpose, even if the trust document compels the trustee to make them.

No specific guidance is offered in the Trust Code for what constitutes a “reasonable time.” Presumably, that determination will be one that is fact-specific and will eventually be better defined by case law.

²⁶ O.R.C. § 5805.02(E).

²⁷ O.R.C. § 5805.05(B).

²⁸ Id. See also, *Domo v. McCarthy*, 612 N.E.2d 706, 715 (Ohio 1993).

²⁹ O.R.C. § 5801.01(M).

Is a Spendthrift Provision Necessary to Obtain Creditor Protection?

Not necessarily.

Wholly Discretionary Trusts

In a codification of pre-Trust Code law, the Trust Code provides that a “wholly discretionary trust” is not reachable by a creditor, unless federal preemption applies.³⁰ This brand of creditor protection is even broader than that offered by traditional spendthrift provisions, protecting from almost all creditors – even the super-creditors referenced above.

The definition of a wholly discretionary trust under the Trust Code is lengthy and is not discussed in detail here. However, the most pertinent characteristics are that: (1) there are no standards provided to guide the trustee in making distributions to the beneficiary; (2) the trustee’s discretion is described in absolute terms, with words such as “sole,” “absolute,” or “uncontrolled;” and (3) the beneficiary cannot be a trustee – at least not a trustee who can participate in distribution decisions.³¹ A wholly discretionary trust created under the Trust Code need not contain any specific spendthrift provision. Full creditor protection should apply regardless of whether such a provision exists. However, prudent drafters attempting to create wholly discretionary trusts will often both: (1) include explicit spendthrift provisions for good measure, and (2) explicitly state that the settlor intends to create a wholly discretionary trust.

No Spendthrift Provision, Not a Wholly Discretionary Trust, and Mandatory Distributions

If a trust instrument does not contain a valid spendthrift provision, is not a wholly discretionary trust, and provides for mandatory distributions to a beneficiary, a court may allow a creditor to attach a beneficiary’s interests or access the assets in other ways, within limits defined by the code.³² As to the mandatory distributions, the court “may limit an award . . . to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the support needs of the beneficiary, the beneficiary’s spouse, and the beneficiary’s dependent children or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary’s basic support.”³³ In other words, courts have discretion to use a laundry list of factors in determining the access a creditor can gain to trust assets in this situation. See also the discussion below.

³⁰ See O.R.C. § 5805.03. As to the federal preemption, see, e.g., United States vs. Cohn, 855 F. Supp. 572 (D. Conn. 1994).

³¹ O.R.C. § 5801.01(Y). See also Beneficiary Controlled Trusts – An Effective Ohio Asset Protection and Estate Planning Tool, 21 No. 1 Ohio Prob. L.J. 1, D. Bowen Loeffler and Brian C. Layman.

³² O.R.C. § 5805.05(A).

³³ Id.

No Spendthrift Provision, Not a Wholly Discretionary Trust, and Distributions Under a Standard

Even if a trust does not contain a valid spendthrift provision, is not a wholly discretionary trust, and provides for distributions under a standard to guide the trustee (e.g., maintenance and support), creditors may not compel distributions, regardless of how the standard of distribution is expressed (e.g., HEMS or otherwise) or whether the trustee has abused its discretion under the standard.³⁴ Even under those circumstances, a creditor may not force the sale of the beneficiary's interest under the trust.³⁵

Finally, if the trustee is also a beneficiary, but distributions are limited to an ascertainable standard (e.g., HEMS), a creditor cannot compel distribution except to the extent that would be possible if the beneficiary were not acting as trustee.³⁶

Under common law, distinctions were made between “support trusts” and “discretionary trusts.” For purposes of creditor rights, those distinctions have been eliminated by the Trust Code and under the Uniform Trust Code.

How Do Spendthrift Provisions Relate to Medicaid Eligibility?

Standing alone, a trust with a spendthrift provision will not facilitate “Medicaid” eligibility. However, so-called Supplemental Needs Trusts can be created using wholly discretionary trusts, often in combination with valid spendthrift provisions and so-called “poison pill” provisions. A comprehensive discussion of this topic is well beyond the scope of this outline.³⁷

Some Open Issues?

1. Are there ways for a beneficiary's creditors to reach distributions made to third parties for the benefit of the beneficiary and in compliance with the terms of the trust?
2. If there is a mandatory distribution from the trust, what timeframe represents a “reasonable time” after its due date?
3. What language might be deemed sufficient to create a spendthrift provision under the Trust Code, thus triggering all of the protections afforded by the Trust Code?
4. What happens after the trustee invokes a spendthrift provision? Defining and honoring the trustee's intentions.

³⁴ O.R.C. § 5805.04(B).

³⁵ O.R.C. § 5804.04(E).

³⁶ O.R.C. § 5804.04(F).

³⁷ See, e.g., Special Needs Planning, An Ever-Evolving Challenge, 21 No. 1 Ohio Prob. L.J. 8, Philip S. Kaufman and Stephanie R. Kormanec; Pack v. Osborn III, The Final Chapter—Observations About this Trilogy, and What the Decisions Mean to Practitioners, 19 Ohio Prob. L.J. 108, Richard E. Davis. For reference to the “poison pill,” see O.R.C. § 5111.151(G)(4)(d).

Spendthrift Provision Drafting Considerations
Under Ohio Law
J. Paul Fidler as of September 2012

1. Does the Settlor desire protection from his or her own creditors, in a trust under which the Settlor is a beneficiary? If “Yes,” then STOP. This is not currently permissible under Ohio law. Look to offshore trusts or domestic assets protection trusts formed under the law of other states (e.g., Delaware, Alaska, Nevada, etc.).
2. Are strong spendthrift characteristics central to the trust purpose, or is the Settlor aware of current creditor concerns?
 - a. If “Yes,” then consider drafting a wholly discretionary trust within the meaning of O.R.C. § 5801.01(Y).
 - b. Also use an explicit spendthrift trust provision.
 - c. Also consider using a “spray” trust approach allowing distributions to any one or more of a class of beneficiaries (including the “primary” intended beneficiary(ies)).
 - d. If “special needs” planning is a possibility, consider whether a provision that terminates the beneficiary’s interest if the trust is considered a “countable resource” (a “poison pill”) is warranted. See O.R.C. § 5111.151(G)(4)(d).

Note: If the desire is to protect against any super-creditors (e.g., spousal support or child support obligations of the beneficiary; obligations to any governmental entity), then the wholly discretionary trust is highly preferable.

3. Regardless of the answer to #2, consider the type of spendthrift provision desirable:
 - a. Prohibition against involuntary or voluntary transfer; or
 - b. Prohibiting involuntary transfer but allowing for voluntary transfer, only with the consent of a trustee who is not the beneficiary; or
 - c. Use a. or b. in combination with a provision to convert to a discretionary trust (perhaps a wholly discretionary trust) for the beneficiary upon a triggering event (e.g., a creditor problem); or
 - d. Use a. or b. in combination with a provision to divest the beneficiary of his or her beneficial interests upon a triggering event (e.g., a creditor problem), and provide for successor beneficiaries. Note: Use approach d. sparingly.

4. Regardless of the answer to #3, consider the extent to which “mandatory distributions” (see O.R.C. § 5801.01(M)) are appropriate.

Note: The more the Settlor is concerned with creditor protection or spendthrift issues, the less desirable are any mandatory distributions. Ascertainable standards (health, education, maintenance, support – HEMS) are not considered “mandatory distributions” from a spendthrift trust perspective.

Example Spendthrift Provisions
J. Paul Fidler as of September 2012

Note: The author makes no representation about the usefulness or suitability of the trust language below. In other words, use it at your own risk!

1. **Bare Bones Spendthrift Provision**

A. **Spendthrift Limits.** No interest in a trust under this instrument shall be subject to the beneficiary's liabilities or creditor claims or to assignment or anticipation.

2. **More Expansive Spendthrift Provision** *No voluntary or involuntary transfer. Explicitly allows for distributions to third parties for the benefit of the beneficiary. Protects against some tax issues.*

Spendthrift Provision

A. **No Assignment.** Each trust shall be a spendthrift trust to the maximum extent permitted by law and no interest in any trust hereunder shall be subject to a beneficiary's liabilities or creditor claims, assignment or anticipation. After my death no interest in income or principal shall be voluntarily or involuntarily anticipated, encumbered, assigned or subject to claims of creditors, spouses, former spouses or others. Notwithstanding the foregoing, no provision of this Article shall prevent the appointment of an interest in a trust through the exercise of a power of appointment.

B. **Protection from Creditors.** If the Trustee shall determine that a beneficiary (other than my Spouse [a defined term] with respect to any Marital Trust [a defined term]) would not benefit as greatly from any outright distribution of trust income or principal because of the availability of the distribution to the beneficiary's creditors, the Trustee shall instead expend those amounts for the benefit of the beneficiary. This direction is intended to enable the Trustee to give the beneficiary the maximum possible benefit and enjoyment of all the trust income and principal to which the beneficiary is entitled.

3. **Traditional Spendthrift Clause.** *Concise clause drafted under common law. Protects against some tax issues. No voluntary or involuntary transfer.*

A. **Spendthrift Clause.** The provisions of this Paragraph shall not be applicable while my said [Spouse] is alive. No interest whatsoever in the principal and/or income of any trust, share or portion subject to the provisions of this Article shall be alienated, disposed of, or in any manner assigned or encumbered by the person for whom held, voluntarily or involuntarily, while such principal and/or income is in the possession or control of the Trustee. For purposes of this Paragraph, the exercise of any power of appointment granted herein or the exercise of any disclaimer by a beneficiary of any rights or benefits under the Trust Agreement shall not cause or result in the provisions of this Paragraph becoming applicable.

4. **Spendthrift Provision With Creation of Discretionary Trust** *No involuntary transfer. Allows for limited voluntary transfers. Protects against some tax issues. Drafted under common law, and converts a beneficiary's interest to a discretionary trust, including elimination of mandatory distributions.*

B. **Spendthrift Provisions.** With respect to both principal and income, the trusts shall not be anticipated, alienated, encumbered nor in any other manner assigned by the beneficiary unless the beneficiary first shall have obtained the consent of the Trustee (other than by a Trustee who is a beneficiary). Such interest shall not be subject to any legal processes, bankruptcy proceedings, or the interferences or control of a beneficiary's creditors, spouse, divorced spouse, or others unless the Trustee shall consent thereto (consent may not be obtained from a Trustee who is also the beneficiary), and if for any reason any such interest shall or would vest in or be enjoyed by any person, firm or corporation other than the beneficiary without such consent, the beneficiary whose interest is so affected shall forthwith cease to be entitled to any income and shall be entitled to receive or have expended for his or her benefit only so much of the income as the Trustee, in the Trustee's sole and absolute discretion, deems necessary or desirable for the health, education, maintenance or support of such former beneficiary, and if any principal payments shall be due and payable to such former beneficiary, the Trustee may, in the Trustee's sole and absolute discretion, pay the same to or for the use or benefit of such former beneficiary, to be applied and used solely for the health, education, maintenance or support of such person, or the persons in fact dependent upon the former beneficiary, to be applied and used solely for the health, education, maintenance or support of such persons. Should such anticipation, alienation or interference or control by a creditor or others be vacated, released or discharged, the interest of such former beneficiary shall be restored, subject to being again divested as provided in this Paragraph. Upon the death of such former beneficiary, any such undistributed income and/or principal then held by the Trustee shall be distributed to or be held for the person or persons entitled thereto according to the provisions of this Agreement relating to the holding or distribution of such former beneficiary's share upon the death of such

former beneficiary, but as if such beneficiary had failed to exercise any power of appointment granted to him or her in this Agreement. This Paragraph shall not apply to any trust qualified for the Ohio or federal QTIP deduction.

5. **Spendthrift Provision Drafted Around the Trust Code** *No voluntary or involuntary transfer. Drafted under the Trust Code, and converts a beneficiary's interest to a wholly discretionary trust in a concise drafting style. As is, not suitable for use where the beneficiary is also the Trustee.*

C. **Spendthrift Provision.** Each trust shall be a spendthrift trust to the maximum extent permitted by law. Notwithstanding the foregoing, no provision of this Article shall prevent the appointment of an interest in a trust through the exercise of a power of appointment. Each trust under this instrument shall be held subject to a spendthrift trust, as contemplated in Ohio Revised Code Chapter 5805, particularly in § 5805.01(B).

D. **Wholly Discretionary Trust.** If the trustee determines, in the trustee's sole discretion, that a beneficiary would not benefit as greatly from his or her trust because a creditor of the beneficiary is actively pursuing the beneficiary's beneficial interest under the trust and/or the beneficiary himself or herself, the trust shall be immediately converted to a wholly discretionary trust under Ohio Revised Code § 5801.01(Y), under which the beneficiary and each of the beneficiary's then living descendants are potential distributees during the lifetime of the beneficiary. Upon the death of such beneficiary, the trust for the beneficiary shall be distributed to or be held for the person or persons entitled thereto according to the provisions of this Agreement relating to the holding or distribution of such beneficiary's share upon the death of the beneficiary.

6. **Comprehensive Spendthrift Provision With Creation of Discretionary Trust** *No involuntary transfer. Allows for limited voluntary transfers. Protects against tax issues comprehensively. Drafted under common law, and converts a beneficiary's interest to a discretionary trust, including elimination of mandatory distributions. Consider before using where the beneficiary is also the Trustee.*

E. **Spendthrift Provision.** The Paragraph is not applicable to [the Marital Trust/Trust A] or to any other trust or share of such trust for which an election under Section 2056(b)(7) of the Internal Revenue Code has been made, it shall not affect the rule against perpetuities provision of this document, and it shall only apply to a Qualified Subchapter S Trust to the extent that such application does not adversely affect the qualified status of such Qualified Subchapter S Trust; but it shall control if in

conflict with any other provision of this document. The interest held in trust for any beneficiary under the provisions of this document shall not be anticipated, encumbered, or assigned by such beneficiary unless such beneficiary first shall have obtained the consent of the trustee. Such interest shall not be subject to any legal process, lien or levy by the IRS, bankruptcy proceedings, or the interference or control of any creditor, or spouse, divorced spouse, or other person unless the trustee shall consent thereto. If for any reason any such interest, except for this provision, would vest in or be available to any person, firm, or corporation other than such beneficiary without the trustee's consent, then during the continuance of such situation, the application of the trust provisions concerning such interest shall be suspended as to such beneficiary and the trustee may pay to such beneficiary or expend out of such interest for such beneficiary such sums of the trustee in the trustee's discretion deems proper; provided, however, that if such beneficiary is then serving as the trustee, no payments to or for such beneficiary shall be made from the trust for so long as such beneficiary is serving as the trustee. The trustee shall retain any unexpended portion of such interest as part of the principal of the trust; and upon the death of such beneficiary, such interest shall be governed by the provisions of this document for distribution of principal upon the death of such beneficiary.

Analysis Chart for Spendthrift Trusts in Administration

J. Paul Fidler,
September 2012

