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Matter of Cleopatra Cameron Irrevocable Gift Trust, Dated May 26, 1998: A Closer Look

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INTRODUCTION

In its 2019 *Matter of Cleopatra Cameron Gift Trust, Dated May 26, 1998,* decision, the Supreme Court of South Dakota held that a trust beneficiary could prevent child-support payments for which she was responsible from being charged to three third-party spendthrift trusts by changing the trusts' situs from California, where trust assets are subject to such claims, to South Dakota, where they are not.[1] The court summarized the controversy at the beginning of the opinion:[2]

> Trust beneficiary Cleopatra Cameron filed a petition in the circuit court requesting a determination of whether the trust's spendthrift provision prohibits direct payments of her child support obligation to her ex-husband, Christopher Pallanck. A California family court previously ordered the direct payments as part of the couple's divorce, citing a particular feature of California trust law. The circuit court concluded the direct payment order was a method of enforcing Cleopatra's child support obligation to be determined under local law and, therefore, not entitled to full faith and credit. The court further determined that South Dakota law recognizes the validity of spendthrift clauses and

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[1] *Matter of Cleopatra Cameron Gift Trust, Dated May 26, 1998*, 931 N.W.2d 244 (S.D. 2019).

[2] *Matter of Cleopatra Cameron Gift Trust, Dated May 26, 1998*, 931 N.W.2d at 245-246.

their prohibition upon compulsory direct payments to a beneficiary's creditors, like Christopher, who now appeals. We affirm.

At the time of the marriage of Cleopatra Cameron (Ms. Cameron) and Christopher Pallanck (Mr. Pallanck) in 2005, she was the beneficiary of three third-party spendthrift trusts, which the court defined as "the Trust," created by her deceased father. Ms. Cameron and Mr. Pallanck lived with their two minor children in California; he filed for divorce in 2009. In the final divorce decree, the California Family Law Court directed the trustees of the Trust to make monthly child-support payments to Mr. Pallanck in accordance with an exception to California's third-party spendthrift-trust statute.[3] In 2012, Ms. Cameron exercised a power granted her in the Trust and transferred the situs of the Trust to South Dakota, where the trustee continued to make child-support payments to Mr. Pallanck until 2017, when Ms. Cameron petitioned a South Dakota court as to whether the payments should continue. The court concluded:[4]

> Because the means of enforcing judgments do not implicate full faith and credit considerations, the circuit court here was not required to submit to the California order compelling direct payments from the Trust if this method of self-executing enforcement is not authorized by South Dakota law. Based upon a review of our relevant statutes, it is not authorized and is, in fact, expressly prohibited.

The court continued:[5]

> [B]ecause Christopher has not registered a judgment for enforcement, it is unnecessary to address his arguments for the application of the Uniform Enforcement of Foreign Judgments Act under SDCL 15-16A and the Uniform Interstate Family Support Act (UIFSA) under SDCL 25-9C. However, even if the order had been registered for enforcement under SDCL 25-9C-602, the registered support order is only enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state. Similarly, the choice of law provisions of the UIFSA provide that an enforcing state shall apply the procedures and remedies of this state.
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> Under the circumstances, therefore, both the UIFSA and the FFCCSOA leave enforcement mechanisms to the legal standards of the forum state, even if it is without jurisdiction to modify the order. In this regard, a forum state may use its own enforcement mechanisms if it does not alter the amount, scope, or duration of the issuing state's judgment.

The *Cameron* opinion does not cover two significant issues. First, it does not address whether the controversy was properly brought in South Dakota court or whether the courts of South Dakota should have deferred to the courts of California because they were the courts of primary supervision. Second, it does not consider whether the determination of whether trust assets were subject to child-support obligations should have been based on California rather than South Dakota law. Because these issues are likely to arise in future cases, the author considers them here for third-party and self-settled trusts, using the facts of *Cameron* as the basis for analysis.

This article focuses on conflict-of-laws principles. Readers should keep in mind that courts might allow creditors to reach the assets of a third-party or self-settled trust because:

- Transfers to the trust were fraudulent transfers or voidable transactions;
- The trust is an alter-ego, a sham, or a nominee under statutory or common law; and
- There is a judicially created public-policy exception for child support.

In 2012, the Bankruptcy Appellate Panel for the Ninth Circuit said that "[f]ederal courts in the Ninth Circuit and California state courts both look to the *Restatement (Second) of Conflict of Laws* (1971) (the "*Restatement*") for the choice of law rules."[6] Under the *Restatement,* the starting point for resolving both of the above issues is comment e to §272, which deals with the change of a trust's place of administration.

COURT OF PRIMARY SUPERVISION

Restatement §272 comment e begins:[7]

> In the case of an inter vivos trust the trustee can enter upon the performance of his duties without authority from any court, and he is not under a duty to account to any particular court. No one court,

[3] *See* Cal. Prob. Code §15305(c).

[4] *Matter of Cleopatra Cameron Gift Trust*, *Dated May 26, 1998*, 931 N.W.2d at 251.

[5] *Matter of Cleopatra Cameron Gift Trust*, *Dated May 26, 1998*, 931 N.W.2d at 252 (citations and internal quotation marks omitted).

[6] *In re Zukerkorn*, 484 B.R. 182, 189 (B.A.P. 9th Cir. 2012). The author doesn't know whether federal courts in the Eighth Circuit and South Dakota state courts do as well.

[7] *Restatement (Second) of Conflict of Laws* §272 cmt. e (1971) (citation omitted). *See generally* Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott and Ascher on Trusts*, §45.5.3.1-§45.5.3.2 at 3292-3307 (5th ed. 2010).

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therefore, has acquired jurisdiction over the administration of the trust until a suit is brought in a court by the beneficiaries or by the trustee. The situation is different from that which arises where the whole administration of the trust has become subject to the continuing jurisdiction of a particular court to which the trustee is thereafter accountable, such as in the case of a testamentary trust in many jurisdictions, and in the case of an inter vivos trust which has become subject to the continuing jurisdiction of the court to which the trustee is thereafter accountable, as it does in some states where the court is asked to appoint or has appointed a successor trustee or where by application to the court the administration of the trust becomes subject to the continuing control of that court.

According to the *Cameron* decision, California courts had several interactions with the Trust, one of which is specifically contemplated by the above comment:[8]

> Around the time the divorce action was beginning, Cleopatra and Wells Fargo requested approval from a different California judge sitting as a probate court to resign their positions as co-trustees. The probate court granted the request and approved the appointment of BNY Mellon (BNY) as the sole successor trustee in April 2009, after BNY agreed to be bound by the family court's March 10 child support and spousal support order.

Cameron also indicates that the California Family Law Court (Family Court) interacted with the Trust throughout the divorce proceeding. That interaction began as follows:[9]

> The family court joined the Trust in the divorce action on February 3, 2009, to facilitate regular payment of the interim financial obligations it had imposed upon Cleopatra. The family court later confirmed that its intent was to utilize a particular feature of California trust law to require the Trust to directly fund Cleopatra's child support obligation.
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> On March 10, 2009, the family court conducted a hearing on Christopher's motion to show cause to determine whether Cleopatra and Wells Fargo, who were co-trustees at the time, should be held in contempt for failing to pay temporary child support. The court found that Cleopatra and Wells Fargo acted in bad faith and abused their discretion when they failed to satisfy the child support obligation and issued the following order: [t]he court will order the Bank, and its successor, and Mother to pay child support, spousal support, and attorney fees from Mother's Trust including any other ordered awards in this action *until further order of the court. Wells Fargo Bank and any successor are joined in this action until further order of court.*
>
> Wells Fargo objected on the basis that the family court had no authority to order direct payments from a spendthrift trust to a creditor or child support obligee. However, it ultimately complied with the March 10, 2009, order, made the payments directly to Christopher, and did not seek interlocutory appellate review.

The *Cameron* opinion reports that the Trust's involvement with California courts continued:[10]

> In addition to imposing interim support obligations upon Cleopatra, the family court also ordered ''Mother and/or the Trusts'' to pay interim attorney's fees to Christopher. The court initially ordered \$ 50,000 in attorney's fees and then ordered an additional \$ 100,000 in attorney's fees on June 16, 2009, both of which were paid by the Trust. The court ordered another \$ 100,000 for attorney's fees on December 1, 2009. BNY elected to appeal the December 1 attorney's fee award, which was immediately reviewable under California law.
>
> In an April 2011 unpublished decision, a California Court of Appeal panel reversed the family court's order to the extent it required BNY to make direct attorney's fee payments to Christopher. The appellate court concluded the Ventura County exception that allows a court to order a trustee to make direct payments from a spendthrift trust is narrow and depends upon the existence of an enforceable child support obligation that a trustee refuses in bad faith to satisfy. The family court's December 1 order, by contrast, did not involve a child support obligation or a bad faith ''refusal to satisfy a delinquent order.''

Finally, *Cameron* recites the following additional actions of the Family Court:[11]

> While the attorney's fees appeal was pending, the family court issued a final judgment of divorce on

[8] *Matter of Cleopatra Cameron Gift Trust, Dated May 26, 1998*, 931 N.W.2d at 247.

[9] *Matter of Cleopatra Cameron Gift Trust, Dated May 26, 1998*, 931 N.W.2d at 246-247 (internal quotation marks and brackets omitted; emphasis in original).

[10] *Matter of Cleopatra Cameron Gift Trust, Dated May 26, 1998*, 931 N.W.2d at 247 (citations and footnote omitted).

[11] *Matter of Cleopatra Cameron Gift Trust, Dated May 26, 1998*, 931 N.W.2d at 248 (internal quotation marks and brackets omitted).

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> October 26, 2010. The judgment incorporated a written statement of decision, dated May 17, 2010, in which the family court granted Christopher legal and physical custody of the couple's two minor children. Cleopatra's parenting time was significantly restricted and subject to supervision. The court set Cleopatra's monthly child support at $ 8,786 and ordered the Trust to make the child support payments directly to Father each and every month, adopting in full its earlier comments on this subject made in court and in writing.
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> Following the judgment, the family court later modified the amount of Cleopatra's child support obligation on October 9, 2012. The decision does not reference the Trust as a party or incorporate the rulings from the 2010 judgment, and it is unclear from the record that the Trust received notice of the modification proceeding. Nevertheless, the Trust continued to pay child support directly to Christopher following the modification.

Comment e to §272 of the *Second Restatement of Conflict of Laws* referred to above says that:[12]

> When an inter vivos trust has become subject to the continuing jurisdiction of a court to which it is thereafter accountable, it becomes necessary to obtain the permission of that court to terminate such accountability. The question arises when the court is thereafter asked to appoint a successor trustee, or when the trustee acquires a place of business or domicil in another state, or when by the exercise of a power of appointment a trustee is appointed whose place of business or domicil is in another state. The same rules are applicable as are applicable in the case of a testamentary trustee.

Comment g to *Restatement* §271, which deals with the change of the place of administration of a testamentary trust, gives this guidance:[13]

> In such a case, . . . it is necessary to obtain the permission of the court for a change in the place of administration. Since the trustee is accountable to the court, it is necessary to obtain the permission of the court to terminate the accountability of the trustee to it.
>
> The court should permit a change in the place of administration and a termination of the trustee's accountability to it if this would be in accordance with the testator's intention, either express or implied. Such a change may be expressly authorized in the will. It may be authorized by implication, such as when the will contains a power to appoint a new trustee in another state, or simply a power to appoint a new trustee if this is construed to include the power to appoint a trustee in another state.
>
> The court may permit a change in the place of administration and a termination of the trustee's accountability to it even though such change was not expressly or impliedly authorized by the testator. The court may authorize such a change when this would be in the best interests of the beneficiaries, as, for example, when the beneficiaries have become domiciled in another state or when the trustee has become domiciled in another state.
>
> The court may refuse to permit a change in the place of administration and termination of the trustee's accountability to it, unless the trustee qualifies as trustee in a court of the state in which the trust is to be thereafter administered.

The *Cameron* opinion does not disclose whether California courts had continuing jurisdiction over the Trust. If they did or if a change of the court of primary supervision was desirable in any event, a court petition in California to change the court of primary supervision from California to South Dakota would have been advisable. Otherwise, California courts would be free to consider a judgment by a South Dakota court as unduly interfering with the administration of a California trust over which California courts had primary supervision and to refuse to give it full faith and credit.[14]

GOVERNING LAW

A comment under §273 of the *Second Restatement of Conflict of Laws,* which is honored in California,[15] says that "[i]n the case of an inter vivos trust, if the settlor has manifested an intention that the trust is to be administered in a particular state, such as by naming as trustee a trust company of that state, the applicable law [regarding restraints on alienation] is the local law of that state."[16] From the *Cameron* opinion, it is clear that California courts applied California law to determine whether spousal support and child support were payable from the trusts at issue. Section 273 and its comments do not consider whether the law governing administration would change with a change

[12] *Restatement (Second) of Conflict of Laws* §272 cmt. e (1971).

[13] *Restatement (Second) of Conflict of Laws* §271 cmt. g (1971).

[14] *Restatement (Second) of Conflict of Laws* §267 cmt. e (1971).

[15] *In re Zukerkorn*, 484 B.R. 182 (B.A.P. 9th Cir. 2012).

[16] *Restatement (Second) of Conflict of Laws* §273 cmt. c (1971).

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of trust situs, but a comment under *Restatement* §272 does and begins:[17]

> When an inter vivos trust has not become subject to the control of a particular court, a question arises as to the effect of a change in the place of administration of the trust. If the actual place of administration is changed, either because the trustee acquires a place of business or domicil in another state, or if in the exercise of a power of appointment a trustee is appointed whose place of business or domicil is in another state, the question arises whether thereafter the administration of the trust is governed by the local law of the other state. This depends upon the terms of the trust, express or implied. Such a change of the applicable law may be expressly authorized by the terms of the trust, or it may be authorized by implication, such as when the trust instrument contains a power to appoint a trustee in another named state.

The comment continues:[18]

> A simple power to appoint a successor trustee may be construed to include a power to appoint a trust company or individual in another state. In such cases, the law governing the administration of the trust thereafter is the local law of the other state and not the local law of the state of original administration.

Nevertheless, the comment contains the following caveat:[19]

> On the other hand, the terms of the trust may show the testator's intention that the trust is always to be administered under the local law of the original state. In such a case the mere fact that the trustee acquires a domicil in another state or that by the exercise of a power of appointment a successor trustee is appointed who is domiciled in another state does not result in a change of the law applicable to the administration of the trust.

Not only does the *Cameron* opinion fail to address whether California courts had taken control over the trusts, but it also does not show whether the governing instrument anticipated that a change of trustee would or would not result in a change of governing law on administration issues.

ENFORCEMENT OF CHILD-SUPPORT ORDERS

The outcome in *Cameron* is surprising given that the goal of a federal statute is to enforce child-support orders. Specifically, the Full Faith and Credit for Child Support Orders Act requires the appropriate authorities of each State to "enforce according to its terms a child support order made consistently with this section by a court of another State."[20] The statute also specifies that "[i]n an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation."[21] All states have enacted a version of the Uniform Interstate Family Support Act.[22] Nevertheless, the federal statute also provides that "[i]n a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply. . . ."[23]

In addition, the trust was a third-party trust not a self-settled trust. The author explores the use of Alaska, Delaware, Nevada, and South Dakota APTs based on the *Cameron* fact pattern below. Suffice it to say here that if Ms. Cameron had funded a South Dakota APT following the divorce, her trust assets would have been subject to child-support claims.

APPLICATION TO SELF-SETTLED TRUST

Introduction

Cameron involved a third-party spendthrift trust not a domestic asset-protection trust (APT). The author now will set out the statutory exceptions to the protection provided by the self-settled trust legislation of Alaska (Alaska Act), Delaware (Delaware Act), Nevada (Nevada Act), and South Dakota (South Dakota Act), and then analyze the *Cameron* fact pattern in three scenarios involving the use of a domestic APT.

Exception Creditors: Alaska, Delaware, Nevada, and South Dakota

Alaska

The Alaska Act does not provide protection to the extent that "[a]t the time of the transfer, the settlor is

[17] *Restatement (Second) of Conflict of Laws* §272 cmt. e (1971).

[18] *Restatement (Second) of Conflict of Laws* §272 cmt. e (1971).

[19] *Restatement (Second) of Conflict of Laws* §272 cmt. e (1971).

[20] 28 U.S.C. §1738B(a)(1). *See* Kurtis A. Kemper, *Validity, Construction, and Application of Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C.A. §1738B—State Cases,* 18 A.L.R. 6th 97 (2006).

[21] 28 U.S.C. §1738B(h)(3).

[22] *See, e.g.,* Alaska Stat. §25.25.101-§25.25.903; Cal. Fam. Code §5700.101-§5700.905; Del. Code Ann. tit. 13, §6-101-§6-903; Nev. Rev. Stat. §130.0902-§130.802; S.D. Codified Laws §25-9C-101-§25-9C-903.

[23] 28 U.S.C. §1738B(h)(1).

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in default by 30 or more days of making a payment due under a child support judgement or order.''[24]

Delaware

The Delaware Act does not extend protection:[25]

> (1) To any person to whom the transferor is indebted on account of an agreement or order of court for the payment of support or alimony in favor of such transferor's spouse, former spouse or children, or for a division or distribution of property *incident to a judicial proceeding with respect to a separation or divorce* in favor of such transferor's spouse or former spouse, but only to the extent of such debt; or
>
> (2) To any person who suffers death, personal injury or property damage on or before the date of a qualified disposition by a transferor, which death, personal injury or property damage is at any time determined to have been caused in whole or in part by the tortious act or omission of either such transferor or by another person for whom such transferor is or was vicariously liable but only to the extent of such claim against such transferor or other person for whom such transferor is or was vicariously liable
>
> Paragraph (1) of this section shall not apply to any claim for forced heirship, legitime or elective share.

The following definition applies to the above provision:[26]

> 'Spouse' and 'former spouse' means only persons to whom the transferor was married at, or before, the time the qualified disposition is made.

Nevada

Domestic APTs in Nevada are vulnerable to creditor claims beyond fraudulent transfers. This is because the Nevada Act is not protective if ''the transfer violates a legal obligation owed to the creditor under a contract or a valid court order that is legally enforceable by that creditor.''[27]

South Dakota

The South Dakota Act was based on the Delaware Act. Consequently, although South Dakota subsequently deleted its exception for death, personal injury, or property damage, the following family-claim exception still is quite similar to Delaware's:[28]

> [T]his chapter does not apply in any respect to any person to whom at the time of transfer the transferor is indebted on account of an agreement or order of court for the payment of support or alimony in favor of the transferor's spouse, former spouse, or children, or for a division or distribution of property in favor of the transferor's spouse or former spouse, to the extent of the debt.

Scenario 1: Ms. Cameron Creates Domestic APT Prior to Marriage

Suppose that the facts are as described at the beginning of this article, except that, instead of having third-party spendthrift trusts established in 1998, Ms. Cameron received an outright inheritance in 1998 and immediately placed it in a domestic APT. Mr. Pallanck would not qualify as an exception creditor in any of the four states: in Alaska because Ms. Cameron was not 30 or more days behind in making child-support payments when she transferred assets to the APT, in Delaware because Mr. Pallanck was neither a current nor a former spouse when Ms. Cameron transferred assets to the APT, in Nevada because no child-support order had been issued when Ms. Cameron transferred assets to the APT, or in South Dakota because Mr. Pallanck was not a spouse or former spouse when Ms. Cameron transferred assets to the APT.

Scenario 2: Ms. Cameron Creates Domestic APT During Marriage

Suppose that the facts are the same as in Scenario 1, except that Ms. Cameron establishes a domestic APT in 2006 rather than in 1998. The trustee of the domestic APT would not have to make child-support payments in Alaska or Nevada: in Alaska because Ms. Cameron was not 30 or more days behind in making child-support payments when she transferred assets to the APT, and in Nevada because no child-support order had been issued when Ms. Cameron transferred assets to the APT.[29] But, the trustee of a domestic APT in Delaware or South Dakota would have to

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[24] Alaska Stat. §34.40.110(b)(4).

[25] Del. Code Ann. tit. 12, §3573 (emphasis added).

[26] Del. Code Ann. tit. 12, §3570(9).

[27] Nev. Rev. Stat. §166.170(3).

[28] S.D. Codified Laws §55-16-15(1). South Dakota has not added the italicized phrase in the first Delaware provision quoted above, which might cause South Dakota APTs to be more susceptible to creditor claims and provide less assurance regarding federal tax treatment than Delaware.

[29] Although this article focuses on conflict-of-laws principles, readers should be aware that actions during marriage might be found to be fraudulent transfers or voidable transactions. In this regard, a federal district court in Illinois noted recently: ''Other states that have adopted the Uniform Fraudulent Transfer Act have considered the definition of a creditor in similar contexts. For ex-

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make such payments unless Mr. Pallanck had waived his right to receive them, in Delaware because Mr. Pallanck was a spouse when Ms. Cameron transferred assets to the APT, and in South Dakota for the same reason. The only pertinent judicial pronouncement to date is from Nevada, where the Supreme Court held in 2019 that ''Nevada SSSTs are protected against the court-ordered child-support or spousal-support obligations of the settlor/beneficiary that are not known at the time the trust is created.''[30]

Scenario 3: Ms. Cameron Creates Domestic APT After Divorce and Child Support Ordered

Suppose that the facts are the same as Scenario 1, except that Ms. Cameron establishes a domestic APT in 2012 rather than in 1998. The trustee of the domestic APT would have to make child-support payments in all four states: in Alaska because Ms. Cameron was 30 or more days in arrears in making child-support payments when she transferred assets to the APT, in Delaware because Mr. Pallanck was a former spouse to whom Ms. Cameron was obligated to make child-support payments when she transferred assets to the APT, in Nevada because Ms. Cameron was obligated by a court order to make such payments when she transferred assets to the APT, and in South Dakota because Mr. Pallanck was a former spouse to whom Ms. Cameron was obligated to pay child support when she transferred assets to the APT.

CONCLUSION

The *Cameron* decision clarifies the creditor protection that is available through third-party and self-settled trusts. Regrettably, the opinion fails to confront conflict-of-laws issues that may well arise in similar future cases. The author hopes that this article equips practitioners to plan for those issues and to address them if they do indeed arise.

ample, in Massachusetts, 'marriage alone is not sufficient to make one a creditor of her spouse.' *Foisie v. Worcester Polytechnic Inst.*, 967 F.3d 27, 46 (1st Cir. 2020) (citation omitted). But in both Massachusetts and Connecticut, a spouse can be a ''creditor'' if an allegedly fraudulent transfer occurred 'while divorce proceedings were either ongoing or imminent.' Id. Given that Illinois courts have emphasized the broad nature of a ''claim,'' it's instructive that other states with the same statute have recognized a creditor-debtor relationship between spouses before divorce proceedings officially began, provided that those proceedings were imminent'' *Nancy Malek v. Marc Malek*, No. 19 CV 8076, 2020 BL 397253, n.8 (N.D. Ill. Oct. 15, 2020).

[30] *Klabacka v. Nelson*, 394 P.3d 940, 951 (Nev. 2017) (footnote omitted).

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