

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2483**

**IRVIN N. HOYT
BANKRUPTCY JUDGE**

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December 1, 2004

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**Subject: In re Samson Vernon Britt and Shelly Jo Britt
Chapter 7; Bankr. No. 04-40692**

Dear Counsel:

The matter before the Court is Trustee John S. Lovald's Objection to Claimed Exemptions. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, Trustee Lovald's Objection will be overruled.

Summary. On September 17, 1982, Earl J. Britt ("Britt") created the Earl J. Britt Trust ("the Trust"). On January 20, 1983, Britt amended the terms of the Trust to give Lorraine Britt (his wife) a life estate and Earl J. Britt, Jr. and Samson V. Britt (Britt's sons) contingent remainder interests in the Trust. The Trust included a "spendthrift" clause which provided that:

[n]o interest in the principal or income of this trust shall vest in any beneficiary and neither the principal nor the income shall be liable for the debts of any beneficiary, nor shall any beneficiary have the power to sell, assign, encumber or in any manner anticipate or dispose of any interest in the trust or the income thereof prior to the actual distribution to such beneficiary.

Britt died in January 1983.

Re: Britt
December 1, 2004
Page 2

On May 19, 2004, Samson Britt ("Debtor") and his wife (collectively, "Debtors") filed a petition for relief under chapter 7 of the bankruptcy code. Lorraine Britt was alive on the date Debtors filed their petition. Debtors claimed Debtor's interest in the Trust, which they valued at \$1.4 million, exempt.

On July 13, 2004, Trustee Lovald objected to Debtors' claimed exemptions "on the basis that SDCL § 43-45-4 limits Debtors' exemption claim to value of not more than \$10,000.00." On August 5, 2004, Debtors filed a response to Trustee Lovald's Objection, in which they stated that "Article VII of the trust qualifies as a spendthrift provision and therefore no assets of the trust are capable of attachment by any creditor including a trustee in bankruptcy[.]"

The matter came before the Court on September 1, 2004. The Court directed the parties to file a copy of the Trust documents and to file briefs on the question of whether Debtor's interest in the Trust was property of the estate, reserving the questions of whether and to what extent Debtors could claim Debtor's interest in the Trust exempt if it were found to be property of the estate.

Debtors filed copies of the Trust documents on November 12, 2004. Debtors and Trustee Lovald filed their respective briefs on November 15, 2004. Debtors filed a reply brief on November 30, 2004. In their reply brief, Debtors represented that Lorraine Britt was alive on November 15, 2004, the 180th day after the date of the filing of their chapter 7 petition. The matter was taken under advisement.

Discussion. Property of the estate includes "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Property of the estate also includes:

[a]ny interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date . . . by bequest, devise, or inheritance[.]

11 U.S.C. § 541(a)(5). However, "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2).

Re: Britt
December 1, 2004
Page 3

A trust containing such a restriction on a beneficial interest in the trust is a "spendthrift trust." *Horsley v. Maher (In re Horsley)*, 89 B.R. 51, 52 (D.S.D. 1988). Spendthrift trusts are enforceable under South Dakota law. *Id.* at 53 (citations therein).¹ Therefore, if the Trust is a spendthrift trust, Debtor's interest in it is not property of the estate.

The facts in *Horsley* are remarkably similar to those in this case. *Horsley's* father created a trust, giving *Horsley's* mother a life estate and *Horsley* a remainder interest in it. *Horsley's* mother was alive when *Horsley* filed bankruptcy and for 180 days thereafter. The Court reviewed §§ 541(a)(1), 541(a)(5), and 541(c)(2) and concluded that:

because [the holder of the life estate] was alive when [Debtor] filed her bankruptcy petition and for the following 180 days, [Debtor] had not acquired a present interest in the trust assets and the spendthrift provision remained applicable to prevent a transfer of her future interest. As the contingent remainder was nontransferable due to the operation of the spendthrift provision when the petition was filed and for the following 180 days, it is not includable in [Debtor's] bankruptcy estate under 11 U.S.C. § 541(a)(1) or under 11 U.S.C. § 541(a)(5)(A).

Id. at 53.

In his brief, Trustee Lovald argues that the spendthrift clause in this case does not exclude Debtor's interest in the Trust from the estate, because "the way things currently stand[, Debtor] has no present interest in income or principal."² By this, Trustee

¹ In 1995, South Dakota law regarding spendthrift trusts was codified in S.D.C.L. §§ 55-1-16, -17, -18, and -19. To the extent the law as codified has any bearing on a trust created in 1982 and amended in 1983, see S.D. Const., art. VI, § 12 ("No ex post facto law, or law impairing the obligation of contracts or making any irrevocable grant of privilege, franchise or immunity, shall be passed."), nothing in S.D.C.L. §§ 55-1-16, -17, -18, or -19 would lead the Court to decide this case differently.

² It is true that Debtor has no present interest in the Trust's income or principal. For that reason, neither the Trust's income nor its principal is property of the estate. See 11 U.S.C. § 541(a)(1).

Re: *Britt*
December 1, 2004
Page 4

Lovald presumably means to suggest that the spendthrift clause only operates to protect Debtor's mother's present interest in the Trust's income and principal. However, by its express terms, the spendthrift clause operates to protect "any" beneficiary and "any" interest. This would include Debtor's contingent remainder interest in the Trust. See *id.* at 53.

Trustee Lovald also argues that "the scope of the clause in the trust agreement in [*Horsley*] was much broader than the clause in the original *Britt* trust agreement" and that "[t]he clause in the *Britt* trust agreement appears limited to voluntary assignments and transfers." However, a side-by-side comparison of the two clauses reveals no significant difference between them.

Horsley

No title in the Trusts created in and by this Will, or in the income therefrom . . . shall vest in any beneficiary and neither the principal nor the income of any such Trust shall be liable for the debts of any beneficiary, and no beneficiary shall have the power to sell, assign, transfer, encumber, or in any other manner to anticipate or dispose of his or her interest in any such Trust, or the income produced thereby, prior to the actual distribution in fact, by the Trustee to said beneficiary.

Britt

No interest in the principal or income of this trust shall vest in any beneficiary and neither the principal nor the income shall be liable for the debts of any beneficiary, nor shall any beneficiary have the power to sell, assign, encumber or in any manner anticipate or dispose of any interest in the trust or the income thereof prior to the actual distribution to such beneficiary.

Minor differences in verbiage aside, the two clauses are virtually indistinguishable. Those minor differences do not lead the Court to believe the spendthrift clause in *Horsley* was any broader than the spendthrift clause in this case. Moreover, both clauses clearly provide that neither the principal nor the interest shall be liable for the debts of any beneficiary. This operates to protect the trusts against involuntary transfers. Thus, the Court does not agree the spendthrift clause in this case is limited to

Re: Britt
December 1, 2004
Page 5

voluntary assignments and transfers.

Trustee Lovald has not otherwise distinguished *Horsley* or pointed the Court to contrary authority. The Court has relied on *Horsley* in the past. See *In re Wax*, 147 B.R. 205, 206 (Bankr. D.S.D. 1992). No reason appears why it should not do so in this case. Accordingly, Trustee Lovald's Objection will be overruled.³

The Court will enter an appropriate order.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: case file (docket original; copies to parties in interest)

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

DEC 01 2004

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By: Em

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

DEC 01 2004

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

³ Trustee Lovald's proposal that Debtor's interest in the Trust be preserved as an unadministered asset until Debtor's mother passes away is not tenable. Because Debtor's contingent remainder interest in the Trust is not property of the estate, there is no asset to be preserved. That is what distinguishes this case from *In re Norville D. and Jeannette J. Clark*, Bankr. No. 99-40336 (Bankr. D.S.D.) (order entered Sept. 27, 1999), to which Trustee Lovald referred in his brief. Nothing in the record suggests that the trust agreement involved in that case included a spendthrift clause.

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