

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**In re:**

**Case No. 6:01-bk-05045-ABB  
Chapter 11**

**Stephen J. Farkus, and  
Theo Farkus,**

**Debtors.**

**ORDER**

This matter came on the Objection to Debtor's Claim of Exemption filed by Trustee Kenneth D. Herron Jr. (Doc. 26), Memorandum in Support of Trustee's Objection to the Debtor's Claim of Exemption (Doc. 33), and Memorandum of Facts and Law filed by Debtor Stephen J. Farkus, Joint Debtor Theo Farkus (Doc. 32). The following Findings of Fact and Conclusions of Law are made after reviewing the evidence.

**FINDINGS OF FACT**

Martha E. Britton executed a revocable trust agreement on August 8, 1978, later amended on April 26, 1982 ("Trust"). The Trust provides the Trustee shall, during her lifetime, hold, manage and control the property in the Trust and shall provide the net income from the Trust for Ms. Britton's benefit.<sup>1</sup> Ms. Britton died sometime between April 26, 1982 and the filing of the petition in this case.

The Trust provides that upon the death of Martha E. Britton the Trustee shall pay 70% of the income to Mildred Bowen and 30% to Theo R. Smith (now Theo Farkus) ("Debtor") for the rest of her life.<sup>2</sup> Theo Farkus is entitled to receive payments of interest during her lifetime.

The Trust does not become a spendthrift trust upon Ms. Britton's death. The Trust does not restrict Theo Farkus from selling, transferring, or otherwise disposing of her right to receive payments from the Trust. The Trust does not prohibit Theo Farkus from assigning her interest in the Trust, nor shield her interest from the claims of her creditors.

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<sup>1</sup> Article I (A) of the Trust Agreement.

<sup>2</sup> Paragraph 1 (C) in Amendment to Trust.

The Trust is to be construed and regulated by the laws of the State of Pennsylvania.<sup>3</sup>

**CONCLUSIONS OF LAW**

Trustee contends the interest income from the Trust is property of the estate. Property of the estate includes "all legal or equitable interest of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). An exception to 11 U.S.C. § 541(a)(1) is set forth in 11 U.S.C. § 541(c)(2):

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 case under this title. 11 U.S.C. § 541(c)(2).

The phrase "applicable nonbankruptcy law" refers to state spendthrift trust law.<sup>4</sup> The Trust provides that its provisions are to be "construed and regulated in all respects by the laws of the State of Pennsylvania."<sup>5</sup> The Trust is not a spendthrift trust as to Theo Farkus pursuant to Pennsylvania law.<sup>6</sup>

Pennsylvania law provides a spendthrift trust is one where the beneficiary is entitled to income from the trust for life, but the interest cannot be transferred nor subjected to the claims of creditors.<sup>7</sup> A spendthrift trust must contain language providing (a) the Debtor cannot assign his interest in the trust and (b) income from the trust shall not be available to pay the claims of creditors of the Debtor.<sup>8</sup> These protective provisions prohibit both voluntary assignment of the trust income by the debtor and involuntary attachment of the trust income by creditors, the two essential elements of a spendthrift clause in Pennsylvania.<sup>9</sup>

Neither of these protective provisions are included in the Trust. The Trust does not contain

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<sup>3</sup> Article IX of the Trust Agreement.

<sup>4</sup> *In re Lichstral*, 750 F.2d 1488, 1490 (11<sup>th</sup> Cir. 1985).

<sup>5</sup> Article IX of the Trust Agreement.

<sup>6</sup> The Trust is clearly not a spendthrift trust as to Ms. Britton. See *C.I.T. Corporation v. Flint*, 333 Pa. 350, 353 (1939) (noting a spendthrift trust cannot be established for one's own benefit).

<sup>7</sup> *In re Katz*, 220 B.R. 556, 564 (Bankr. E.D. Pa. 1998).

<sup>8</sup> *In re Katz*, 220 B.R. at 565.

<sup>9</sup> *Id.*

language prohibiting Ms. Farkus from assigning her interest to a third party nor does the Trust contain language prohibiting her creditors from attaching her interest in the Trust income. Therefore, it is

**ORDERED, ADJUDGED AND DECREED** that Trustee's Objection to Debtor's Claim of Exemption (Doc. 26) is **SUSTAINED**; it is further

**ORDERED, ADJUDGED AND DECREED** that interest income from the Trust is property of the estate pursuant to 11 U.S.C. § 541(a)(1) and Trustee is entitled to receive all future distributions of income from the Trust.

Dated this 22<sup>nd</sup> day of February 2005.

/s/ Arthur B. Briskman

Arthur B. Briskman

United States Bankruptcy Judge