

Assignment Order is Not Available to Reach a Debtor's Beneficial Interest in a Trust

By: Ellen Kaufman Wolf **

Creditors may continue to have a very difficult time obtaining a debtor's interests in a trust. In November 2015, the court re-affirmed the protections that can be afforded by a trust in *FirstMerit Bank v. Diana Reese*, E061480. The creditor applied for an assignment order under Code of Civil Procedure Section 708.510(a). The court held that an assignment order is an inappropriate remedy to obtain distributions from a trust, which instead must be reached exclusively under Code of Civil Procedure Section 709.010.

The creditor argued that, "notwithstanding section 709.010, it is permitted to utilize the assignment procedures set out in section 708.510 to obtain "an order directing [debtor] to assign and turnover payments distributed to her from a third party trustee." Such an order would not require jurisdiction over the trustees because it would direct "assignment of [debtor's] right to receive payments of the Trusts *once they are disbursed by the Trustee.*" (Italics added.)

The court rejected that argument as ignoring "the nature of an assignment. An "assignment merely transfers the interest of the assignor. The assignee 'stands in the shoes' of the assignor, taking his or her rights and remedies, subject to any defenses that the obligor has against the assignor prior to notice of the assignment." ... Thus, in seeking an assignment order under section 708.510, [the creditor] sought to acquire [debtor's] rights to receive payments from [debtor's] trustees. ... That result is precisely what the Legislature precluded by enacting exclusive procedures for enforcing money judgments against trusts. (§ 709.010, subd. (a).) Those exclusive procedures allow a court to apply a judgment debtor's interest in a trust "to the satisfaction of the money judgment by," among other means, "collection of trust income," but only if the court has jurisdiction over the administration of the trust. (§ 709.010, subd. (b).)"

The court also rejected a "turnover" order of the trust funds received by the debtor, saying that the creditor would need to levy on the funds "pursuant to a writ of possession." (Perhaps the court meant to say "pursuant to a writ of execution.")

So, creditors are left with only remedies under Code of Civil Procedure Section 709.010, which requires a court petition and hearing to be decided in the probate court's discretion as to whether and how to satisfy the judgment from the debtor's interest in a trust. The real rub there is that most trusts (other than revocable, or *inter vivos*, trusts) are "spendthrift trusts" – which provide that the beneficiary's interest cannot be voluntarily or involuntarily transferred. Spendthrift trusts are not generally subject to enforcement of a money judgment unless the debtor beneficiary is also the settlor, or the judgment is for spousal or child support, criminal restitution, reimbursement of public support

furnished to a spouse or child of the debtor. But note, even spendthrift trusts can result in certain recovery to a creditor: the court can order the trustee to pay to the creditor up to 25% of the amounts which the trustee has determined to distribute to debtor (Probate Code Section 15306.5), or other amounts which the trustee has determined to distribute to debtor in excess of the debtor's education and support (Probate Code Section 15307). Needless to say, the larger the excess in the trust for debtor's benefit, the better the creditor's chances might be at obtaining this type of court order. With both the court and the trustee having discretion of their respective decisions, recovering from a spendthrift trust is a real uphill battle for a creditor.

*** Ellen Kaufman Wolf is the founding partner of Wolf Group L.A., a business law boutique for matters involving business, real estate, and estates, and emphasizing creditors' rights and remedies. With more than thirty years' experience, Ms. Wolf is the 2015-16 presiding Chair of the Executive Committee for the LACBA Remedies Section and the author of Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments annual updates.*