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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

In re: DAVID EMRICK QUIST ELLEN KIRTLAND QUIST Debtors.	Case No. 10-30618 Chapter 13 <i>FILED ELECTRONICALLY</i> Judge William T. Thurman (Confirmation Hearing: 12/13/10 at 9:30 AM)
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**TRUSTEE'S MEMORANDUM WHETHER DEBTOR'S
INTEREST IN TRUST IS PROPERTY OF THE ESTATE**

Kevin R. Anderson, Chapter 13 Trustee, hereby submits the following memorandum as to whether the interest of Ellen K. Quist in the Margaret Gentile Trust is excluded from property of the estate under 11 U.S.C. § 541(c)(2).

FACTS

1. The Debtors filed the above-captioned case on August 5, 2010. Their Current Monthly Income is below the median for Utah, and their plan proposes payments of \$494 per month to return \$1,070 to nonpriority unsecured creditors.

2. Schedule I discloses that Ellen K. Quist receives trust income of approximately \$600 per month as a beneficiary of the *Margaret Gentile Trust* (hereinafter the "Trust").

3. The Debtor is the niece of Margaret Gentile who created the Trust on August 7, 1970. The trustee is the *Christian Science Trustees for Gifts & Endowments*.

4. The Debtor has provided the Trustee with a copy of the *Irrevocable Trust Agreement* (hereinafter the "Trust Agreement"), but due to privacy concerns for the other beneficiaries of the Trust, a copy is not attached hereto but will be provided to the Court at the hearing.

5. The Debtor has also provided the Trustee with an "Account Summary" of the Trust as of September 30, 2009, which indicates that for calendar year 2009, the Debtor received a total of \$8,668 from the Trust in quarterly disbursements (an average of \$722.33 per month).

6. Paragraph 10 of the Trust Agreement contains the following language:

RESTRAINT ON ALIENATION. The interest of each Recipient other than the Donor in any payment made pursuant to the provisions of this agreement **shall be free from the control or interference of any creditor** of a Recipient or any spouse of a married Recipient and shall not be subject to attachment or susceptible of any anticipation or alienation. (Emphasis added.)

7. The Debtors assert that the Trust is not property of the bankruptcy estate under 11 U.S.C. § 541(c)(2), and the Trustee has sought a ruling from the Court as to whether the Trust qualifies as a valid spendthrift trust such that it is not property of the estate and thus does not impact the best-interest-of-creditors test of § 1325(a)(4).

MEMORANDUM

There are two issues arising from the Trust. The first is an accurate projection of the monthly Trust income. Schedule I projects Trust income of \$600 per month, but in 2009 the Debtor received an average of \$722.33 per month from the Trust. Therefore, the Trustee requests that the Debtor provide a copy of the "Account Summary" for the Trust as of September

30, 2010, to verify the status of the Trust and to provide the most accurate projection of the Debtors' income.

The second issue is whether the Debtor's interest in the Trust constitutes property of the bankruptcy estate under 11 U.S.C. § 541 such that the proposed return of \$1,070 does not satisfy the best-interest-of-creditors test of § 1325(a)(4).

Section 541(c)(1), in conjunction with subsection (c)(2), provides that a debtor's beneficial interest in a trust does not become property of the estate if it contains 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." The legislative history to § 541(c)(2) evidences the intent of Congress to "preserve restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law." H.R.Rep. No. 595, 95th Cong., 2d Sess. 369, reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 5963, 6325. In construing § 541(c)(2), the Supreme Court observed:

The natural reading of the provision [§ 541(c)(2)] entitles a debtor **to exclude from property of the estate** any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law.

Patterson v. Shumate, 504 U.S. 753, 758, 112 S.Ct. 2242, 119 L .Ed.2d 519 (1992) (emphasis added).

Whether the Debtor's interest in the Trust is excluded from the bankruptcy estate turns on the nature of such interest under applicable state law. In this case, paragraph 17 of the Trust Agreement provides that "the situs of this trust is Massachusetts, and this instrument shall be construed ... in accordance with the internal laws of that state."

Massachusetts law recognizes and enforces the restrictions of a spendthrift trust. *See In re*

Landry, 226 B.R. 507 (Bankr. D. Mass. 1998) ; *In re CRS Steam, Inc.*, 217 B.R. 365, 371 (Bankr.D.Mass.1998); and *In re Kellogg*, 179 B.R. 379, 389 (Bankr.D.Mass.1995).

The existence of a valid spendthrift trust under Massachusetts law depends on the following factors:

(1) whether the trust includes a provision which restricts the beneficiaries' ability to alienate and the beneficiary's creditors' ability to attach the trust corpus; (2) whether the beneficiaries have the power to revoke the trust; and (3) whether the beneficiary has exclusive and effective control over the trust corpus, distribution of the trust corpus, and termination of the trust.

In re Landry, 226 B.R. at 510. If the trust is disqualified under any one of these factors, the debtor's interest therein becomes property of the bankruptcy estate. *In re Tosi*, 383 B.R. 1 at 11 (Bankr. D. Mass. 2008).

The most litigated issue is when the debtor is the trust's donor and beneficiary or retains control over the disposition of trust property. The concept is that a debtor "cannot keep property beyond the reach of her creditors by placing it in a spendthrift trust for her own benefit." *In re Landry*, 226 B.R. at 510.

In this case, the Trust was established in 1970 and funded by the debtor's aunt, Margaret Gentile. The Trust is administered by *Christian Science Trustees for Gifts & Endowments*, an entity that has served as a trustee for such trusts since approximately the 1930s. The Trustee has not been found any bankruptcy cases where trusts administered by this entity were held to be property of a bankruptcy estate. Therefore, while Ellen Quist is a recipient of the Trust, she neither contributed to nor in any way exercises control over the Trust in a manner that would disqualify the Trust as a valid spendthrift trust.

The key requirement of a spendthrift trust is a valid anti-alienation clause. Section

152(2) of the Second Restatement of Trusts defines a spendthrift trust as: “A trust in which by the terms of the trust or by statute a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed is a spendthrift trust.” The anti-alienation clause of the Trust Agreement (paragraph 10) provides:

RESTRAINT ON ALIENATION. The interest of each Recipient other than the Donor in any payment made pursuant to the provisions of this agreement shall be free from the control or interference of any creditor of a Recipient or any spouse of a married Recipient and shall not be subject to attachment or susceptible of any anticipation or alienation.

The Trustee believes this clause contains the requisite restraint on the voluntary or involuntary transfer of the Debtor’s interest in the Trust for it to qualify as a spendthrift trust.

THEREFORE, the Trustee believes that the Debtor’s beneficial interest in the Trust is not property of the bankruptcy estate; however, the Trustee still requests that the Debtors provide a copy of the “Account Summary” for the Trust as of September 30, 2010, so that the most recent information on the Trust income can be included in the calculation of the Debtors’ projected disposable income.

DATED: March 9, 2012.

KRA/s/
Kevin R. Anderson, Esq.
Standing Chapter 13 Trustee

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 9, 2012, a true and correct copy of the foregoing paper was served electronically via CM/ECF to the persons listed below.

JODY L. HOWE
ECF NOTIFICATION

The undersigned hereby certifies that on March 9, 2012, a true and correct copy of the foregoing paper was addressed to the following persons and deposited in the U.S. Mail, first-class postage prepaid.

DAVID EMRICK QUIST
ELLEN KIRTLAND QUIST
PO BOX 849
SALEM, UT84653

/s/
Office Chapter 13 Trustee