Pulling a Rabbi Out of His Hat: The Bankruptcy Magic of Dick Posner

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I always associate Dick Posner with bankruptcy. That requires a bit of explaining, as while Professor Posner did some bankruptcy-related scholarship[1] and Judge Posner has written a number of bankruptcy opinions,[2] bankruptcy almost certainly isn't what Dick is best known for. I clerked for Dick after I graduated from the Law School in 1985. I had spent the summer of 1984 as a summer associate at what was then Sidley & Austin. I had taken the Bankruptcy course from Douglas Baird as a second year student, and I took Wally Blum's Corporate Reorganizations course as a second-year or third-year student. I had a strong interest in bankruptcy, and Sidley was heavily involved in the AM International case, then a Fortune 500 company in bankruptcy in Chicago.

The summer of 1984 was an interesting time in bankruptcy. The Supreme Court had upended the bankruptcy courts in its 1982 *Northern Pipeline* decision, as it declared that Congress had intruded into the judicial powers reserved to Article III courts in the role that Congress had assigned to the Article I bankruptcy courts in the new Bankruptcy Code promulgated in 1978.[3] Since *Northern Pipeline*, the bankruptcy courts had limped along, stuck in purgatory, but the temporary setup was imploding. I was going to bankruptcy court frequently watching judges who didn't know if they had the power to make decisions but being pushed by the lawyers to do so, and who, at a more personal level, didn't know if they were going to get paid. (Congress

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1 See generally Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U Chi L Rev 499 (1976).

2 The search "ju(posner) and to(51)"—51 being bankruptcy—on the CTA7 database on Westlaw on May 20, 2007 returned 102 cases.

3 See *Northern Pipeline Construction Co v Marathon Pipe Line Co*, 458 US 50, 52–89 (1982) (Brennan) (plurality).

did pass new legislation that summer to restore order,[4] though the constitutional status of that arrangement is still somewhat mysterious.)

Clerkship applications were due in the middle of the summer. I wanted to stay in Chicago to clerk and Dick was by far and away my first choice. (I will note that neither of "our" other judges—Easterbrook and Wood—were on the bench at that time.) The informal matching process at the Law School suggested that I might stand a good chance to land a clerkship with Dick and I had my application ready to be hand-delivered at the deadline.

But before the deadline had arrived, while I was sitting in bankruptcy court, I received a note from a paralegal. Judge Posner's secretary had called—Dorothy, as Dick's clerks will know—wanting to know where my application was. Knowing what I know now about clerkship strategy, I think that Dick thought that I might be gaming the system by sequencing my applications (first perhaps to the D.C. Circuit and then to the Seventh Circuit). I wasn't—for someone who is the coauthor of a book on game theory and the law I am shockingly nonstrategic—I was just trying to match the deadline and didn't understand that I should have had the application there *before* the deadline.

I rushed back to Sidley, picked up the application, and headed back to the Dirksen Building (the bankruptcy courts, the district court, and the Seventh Circuit are all in the same building). I was hoping to just deliver the application, but I was told to wait, and then was ushered into Dick's office. We had a pleasant chat, and he called soon thereafter to offer me a clerkship, which I accepted on the spot.

So, for me, Dick and bankruptcy are tightly linked. I teach *Bank of America, N.A. v Moglia,*[5] a recent Posner bankruptcy opinion, in my Secured Transactions class. *Moglia* isn't a front-page-of–the-*Times* opinion—indeed, in many ways just the opposite.[6] Yet the opinion is vintage Dick: short, interesting, and bold in one fell swoop, and it raises some subtle questions about how entities can partition their assets—here using a device known as a rabbi trust—and what that means for some fundamental issues about security interests. *Moglia* validates the trust as a way to partition a firm's assets to the benefit of

4 See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L No 98-353, 98 Stat 333 (1984).

5 330 F3d 942 (7th Cir 2003), affg *In re Outboard Marine Corp*, 278 BR 778 (ND Ill 2002).

6 It appears to have been cited to date in only three published law review articles, one of which just notes the decision in passing, with the other two articles giving the opinion somewhat more considered analysis. See Joy Anderson, Case Note, *Contracts—Looking for "Something": Minnesota's New Rule for Interpreting Anti-Assignment Clauses in* Travertine Corp. v. Lexington-Silverwood, 32 Wm Mitchell L Rev 1435, 1451 (2006); Robert B. Chapman, *A Matter of Trust, or Why "ERISA-Qualified" is "Nonsense Upon Stilts": The Tax and Bankruptcy Treatment of Section 457 Deferred Compensation Plans as Exemplar*, 40 Willamette L Rev 1, 49–50 (2004).

general creditors and to protect those assets from subsequent invasion by secured creditors. We have many ways of partitioning assets but the excitement is in spotting an unusual species.

I. SITUATING ASSET PARTITIONING

Asset isolation—or asset partitioning—is one of the defining structuring moves of the business lawyer. To take an asset, perform a chant, and have it change legal status is precisely what we expect of our legal priests and they rarely fail to deliver. So the very existence of the corporate form is about limited liability and that is one version of asset isolation. A flesh-and-blood human being injects assets into an artificial corporate solution and thereby isolates, if she dots her corporate i's and crosses her individual t's, her personal assets from the affairs of the business corporation. The corporate vehicle allows her to partition her assets into two stacks—those available to her personal creditors and those available to her corporate creditors.

Take a second example: securitization. A firm has substantial assets including payments owed to it by its retail customers. These assets might form the basis of a traditional secured loan where the lender advances funds and takes back a security interest in the accounts receivable. If the firm filed for bankruptcy, the assets subject to the security interest would become property of the bankruptcy that arises on the filing of the bankruptcy petition.[7] While the secured creditor will enjoy priority as to those assets against competing unsecured creditors, the secured creditor faces substantial delay, so the costs of bankruptcy and the amounts owed to it may be stretched out for many years beyond the original maturity date of the loan.

Securitization tries to solve that problem by introducing more asset partitioning. A new entity is created, usually referred to as a special-purpose vehicle (SPV) or special-purpose entity (SPE). The assets that would form the basis of the secured loan are instead sold to the SPV. The SPV pays for those assets from funds advanced to it by the lenders who would otherwise have made the secured loan in our first structure. We have now separated the accounts receivable from the other operating assets of the firm, and if the firm files for bankruptcy, the assets moved to the SPV will be outside of the bankruptcy estate. The market seems to find this "bankruptcy remoteness" valuable and the dollar amount of securitizations runs into the trillions.[8]

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7 11 USC § 541(a) (2000).

8 See Kenneth Ayotte and Stav Gaon, *Asset-Backed Securities: Cost and Benefits of "Bankruptcy Remoteness"*, 34, 46 table II (Texas Finance Festival Accepted Paper, 2005), online at http://ssrn.com/abstract=813847 (visited Sept 13, 2007).

In the first two examples, we isolated assets by using a separate legal entity. Bankruptcy exemptions are a third form of partitioning or asset isolation and we do so without using a separate legal entity.[9] The simple version of individual bankruptcy is that the beleaguered debtor gives up all of his assets to walk away from his debts. A fresh start—the chance to move forward and earn new income free of the claims of old creditors—is exchanged for all of the individual's assets. But not quite: this simplified version of bankruptcy ignores the elaborate group of exempt assets that we have built up over time. Exempt assets—exemptions for short—are those assets that an individual gets to keep even while wiping out all of his debts. It is hard to know what should be at the core of those exemptions—start with the clothes on your back and the family Bible and work up from there?

Exemptions, of course, are a form of insurance—mandatory publicly provided insurance to be sure, but still insurance—so that you can take business and life risks and know that even if a new project goes poorly you can keep exempt assets. Exemptions are another version of limited liability, though done largely automatically and without the use of a separate entity. Exemptions are implemented, in part, through anti-alienation provisions that limit the ability of a debtor to give creditors access to her exempt assets.[10] Of course, once we have defined a class of exempt assets—and a corresponding category of nonexempt assets—we will see efforts by debtors to shift assets from nonexempt to exempt so as to isolate those assets from their creditors, and that in turn will force us to assess whether we want an elaborate set of rules to control how and when debtors shift assets into exempt categories.[11]

In all three examples, it is worth trying to distinguish the idea of separation of assets from the idea of priority over assets. For an individual, creating a corporation separates personal assets from business assets. This is more than merely saying that creditors of the individual have priority over individual assets and corporate creditors have a corresponding priority over corporate assets. Corporate creditors have *no* claim—directly or indirectly—on personal assets, again assuming that our individual owner has done nothing to forfeit the benefits of corporate protection. Creditors of the individual have no direct claim on corporate assets, but can access those assets through the corporate stock owned by the individual. Those indirect claims against the corporate assets will be structurally subordinated to the claims of corporate creditors, though, as individual creditors will step into the shoes of

9 See generally 11 USC § 522 (2004 & Supp 2006).

10 11 USC § 522(e)–(f).

11 See, for example, *Norwest Bank Nebraska, N.A. v Tveten*, 848 F2d 871, 873–74 (8th Cir 1988).

the individual as shareholder in the corporation, and that stock interest is by construction junior to the interest of creditors.

II. INTO *MOGLIA*

With that quick take on the importance of asset partitioning, we should consider Judge Posner's *Moglia* opinion. Outboard Marine Corp. filed for reorganization under Chapter 11 but its case was subsequently converted to Chapter 7, and in Chapter 7, a bankruptcy trustee was appointed—in this case, Alex Moglia—to take over the assets and liquidate them. Bank of America in turn was a secured creditor of Outboard. The security agreement between Bank of America and Outboard included "general intangibles" as collateral.[12] Article 9 of the Uniform Commercial Code establishes the framework for taking security interests in personal property. Under Article 9—in particular § 9-102(a)(42)—"general intangibles" is a residual category—or a leftover category if you prefer. It is defined by exclusion: all personal property other than a long list of defined terms.[13] Taking a security interest in general intangibles therefore turns out to be quite useful and conceptually important as a way of allocating the risk of legal uncertainty. Something which turns out to be not quite something else will often default into the category of general intangibles, and if a secured creditor wants access to assets situated on the borderline, it had better take a security interest in general intangibles.

In this case, Outboard Marine had created—to the tune of roughly $14 million—something known as a "rabbi trust."[14] The rabbi trust is first and foremost a creature of tax law, and the term itself arises from a trust considered by the Internal Revenue Service in a 1980 private letter ruling.[15] A congregation wanted to make a balloon payment to the rabbi upon his death, disability, or retirement, or if the congregation terminated the rabbi's services.[16] We might characterize this as a form of insurance against three bad events (death, disability, or being fired) and as a pension supplement if the rabbi retired. The congregation did not intend this as an ordinary payment today for services currently being rendered. But the rabbi wanted more than a mere promise from his congregation. The congregation could always change its collective mind and refuse to perform the promise, or it

12 See *Moglia*, 330 F3d at 943–44.
13 See UCC § 9-102(a)(42) (ALI 2002).
14 *Moglia*, 330 F3d at 943.
15 IRS Private Letter Ruling No 8113107 (1980).
16 Id.

might be unable to perform due to inadequate funds. So how to pay the funds now and yet not actually pay them to the rabbi?

Enter the trust. The congregation put the funds into the trust and yet the funds were to be released to the rabbi only on the occurrence of one of the conditions. The rabbi knew that the funds were then in place to make the payment, and yet the rabbi didn't receive access to the funds immediately. But now the rabbi has a tax problem: when did the funds in the trust become income for the rabbi? At the point of insertion into the trust or at the time that one of the contingencies was satisfied? Under the Internal Revenue Service's "economic benefit" doctrine, income arose at the time that the funds were irrevocably transferred to the trust if the interest of the beneficiary of the trust—the rabbi—was nonforfeitable.[17]

As structured so far, we have doubled our problems: we have both a tax problem and a cash-flow problem. Parties usually want to defer taxes, meaning here deferring the payment of the income tax until the point that the contingent event kicks in. As to the cash-flow problem, if we deem the payment into the trust to be taxable income to the rabbi at the time that the money is put into the trust, the rabbi has income but not the means to pay it, with the cash still locked in the trust until the contingency is satisfied.

The solution is to introduce some way in which the rabbi might not get the money, that is, to make the money forfeitable under certain circumstances. That creates a real risk for the rabbi, but one that he may be willing to bear to solve his tax and cash-flow problems. In the case considered in the IRS letter ruling, the trust document provided that the assets of the estate would remain subject to the claims of the congregation's creditors just as if the assets inserted into the trust were still part of the general assets of the corporation. With that in place, the IRS ruled that the rabbi would receive income when the funds were paid to him, and not when the funds were put into the trust.[18] In 1992, the IRS issued a revenue procedure that included a model form of rabbi trust. The model form required that "[a]ny assets held by the Trust will be subject to the claims of Company's general creditors under federal and state law in the event of [i]nsolvency."[19]

And with that we can quickly circle back to *Outboard Marine* and asset partitioning. Outboard created the trust before it granted a security interest to Bank of America. If we think of the trust as a separate entity, then the assets were long gone before Bank of America could

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17 Id.

18 Id.

19 Rev Proc 92-64, 1992-2 Cum Bull 422, 424.

have had a security interest in them. Any rights that an Outboard creditor could have against the assets in the trust would have to arise under the relevant trust document and that document specified rights for general creditors, not secured creditors:

> It is the intent of the parties hereto that the Trust Corpus is and shall remain at all times subject to the claims of the general creditors of the Company. Accordingly, the Company shall not create a security interest in the Trust Corpus in favor of the [Beneficiaries], the Participants, or any creditor.[20]

So not only did the trust document confer rights on general creditors, it barred Outboard from creating any security interests at all in the assets of the trust.

Bank of America argued that that provision was a restraint on alienation unenforceable under Illinois law. Illinois law, according to the Bank, required that the bar on assignment be stated as a limitation on the power to create a security interest and not just as a statement that no security interest could be created. But the Seventh Circuit would have none of that: Illinois, we are told, follows the general rule of the Restatement (Second) of Contracts that anti-assignment clauses are enforceable "unless a different intention is manifest[]."[21] But here, said Judge Posner, all the bank needed to do was read the trust agreement, and the intention of the trust agreement to bar security interests could not have been clearer.

III. On the Trail of the Rabbi Trust

Why should we care about *Moglia*? As I suggested earlier, asset partitioning is important and ubiquitous. My point here isn't to try to assess the virtues and vices of partitioning, about which much has been written,[22] but instead more one of taxonomy: helping to flesh out a rare species. *Moglia* describes a means by which assets can be reserved—separated out—for a floating mass of unsecured creditors so that secured creditors cannot jump ahead of this group of unsecured creditors. That is quite unusual, and to see that, it may help to review briefly some alternatives.

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20 *In re Outboard Marine Corp*, 278 BR 778, 788 (ND Ill 2002) (emphasis removed) (omissions in original).

21 *Moglia*, 330 F3d at 948, citing Restatement (Second) of Contracts § 322(2) (1981).

22 As to the merits of limited liability, see generally Frank Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Harvard 1991). But see generally Henry Hansmann and Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L J 1879 (1991). More generally see Lynn M. LoPucki, *The Death Of Liability*, 106 Yale L J 1 (1996); James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki's* The Death of Liability, 107 Yale L J 1363 (1998).

Under Article 9 of the Uniform Commercial Code, the essence of secured credit is priority over specified assets. Priority against whom you must ask? Priority against other secured creditors and against unsecured creditors.[23] If a secured creditor jumps through the hoops properly by (usually) creating an effective security agreement and filing an appropriate financing statement with state authorities, the secured creditor will have a superior right to the asset in question. We respect that right outside of bankruptcy by ensuring that the security interest survives intact if an inferior creditor tries to turn the asset into cash by selling the asset to a third party.[24] We respect the superior position in bankruptcy most directly through the Bankruptcy Code's absolute priority rule.[25]

Security interests and the priority that they represent are largely about status, a status acquired by properly working the levers of the secured transactions system, and then, for secured creditors who do so, timing. An unsecured creditor typically has little recourse against a secured creditor and very little prevents a debtor from granting a security interest in an asset that an unsecured creditor had hoped to collect from if the debtor's financial fate turned against it.

Most unsecured creditors recognize this and either accept the consequences (presumably charging more ex ante) or avoiding the consequences by becoming secured creditors. But understand—critically—that having a particular creditor choose to become secured rather than being unsecured isn't the same thing as reserving assets for *all* unsecured creditors, an ever-changing group. We might want to do that to conserve on the sometimes substantial transaction costs of executing security interests. We might do so if we wanted to preserve assets for unsecured creditors who aren't well situated to negotiate for security interests. Think of these as nonconsensual creditors, such as tort victims and the government, or unsophisticated creditors who know little about the complexities of secured transactions.[26]

It is typically quite hard to reserve assets for unsecured creditors. Consider the negative pledge, which may be the most natural device for preserving assets for unsecured creditors. A debtor promises to a particular unsecured creditor—or perhaps to a group of unsecured creditors—that it will not grant a security interest to another creditor in some of its assets. We have to decide whether that promise is self-executing as is or only if some other condition held.

23 See UCC § 9-201(a); UCC § 9-322(a).

24 See UCC § 9-315(a)(1) (stipulating that the lien follows the collateral even if transferred).

25 See 11 USC § 1129(b)(2)(B)(ii) (2004 & Supp 2006).

26 See Lucian Arye Bebchuk and Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 Yale L J 857, 882–91 (1996).

By self-executing I mean that the making of the promise results in the enforcement of the promise without more. This would mean that once the debtor promises that it will not grant a security interest that it actually *loses* the power to do so, so that when the debtor signs a security agreement granting a security interest that act is a nullity and no security interest is created. This would also mean that agreeing to an anti-alienation restriction actually bars alienation. To be clear, the natural alternative is that the negative pledge is just a promise and nothing more, so that when the debtor subsequently grants a security interest it does so effectively and thereby breaches the negative pledge promise made to the unsecured creditor. The unsecured creditor can of course sue on the breach but it would do so as an unsecured creditor and would fall in line behind the secured creditor. Historically, the dominant line in the cases has treated the negative pledge as a mere contract, meaning that, when it actually mattered—at the point of the debtor's insolvency and when the negative pledge had been breached by granting a security interest—it was of no use at all.[27]

And this is just to address the relationship between a potential secured creditor and one or a well-defined group of unsecured creditors. A standard negative pledge clause will be sought by a particular lender and will run in favor of that lender.[28] It is something entirely different to create a protected property right in favor of a floating, changing group of creditors. Within secured transactions itself, the leading case on the subject comes down squarely against floating secured creditors, though whether Revised Article 9 has changed that is up for dispute.[29]

Now consider again the rabbi trust at stake in *Moglia*. In many ways, at least vis-a-vis the unsecured creditors, the rabbi trust looks very much like an old-fashioned pledge. In the traditional pledge, the debtor gave possession of an asset to a secured creditor and that possession operated to "perfect" that security interest against other creditors. As conventionally understood, the pledge solved the ostensible ownership problem posed by secret liens: by giving up possession of the asset the debtor couldn't dupe other creditors into believing that the debtor retained full rights against that asset.[30] Of course, the cru-

27 See Carl S. Bjerre, *Secured Transactions Inside Out: Negative Pledge Covenants, Property and Perfection*, 84 Cornell L Rev 305, 315–18 (1999).

28 For a standard clause, see, for example, Thomas C. Mitchell, *The Negative Pledge Clause and the Classification of Financing Devices: A Question of Perspective*, 60 Am Bankr L J 263, 292 (1986).

29 See *In re E.A. Fretz Co*, 565 F2d 366, 371 (5th Cir 1978). Revised Article 9 seems to contemplate a greater role for representatives of secured parties and there may be some flexibility in how and when representation can be established. See UCC §§ 9-102(a)(72)(E), 9-503(d).

30 See Douglas G. Baird and Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 Stan L Rev 175, 180–81 (1983) (discussing *Twyne's Case*, 76 Eng Rep 809 (1601)).

cial disadvantage of the pledge is that the debtor lost the ability to use the asset if it was turned over to a third party. If I needed my printing press to run my book-printing business, I couldn't very well give up possession of my press.

But when the assets are inserted into the rabbi trust, the debtor loses control over those assets. In *Moglia* itself, Northern Trust served as trustee for the trust that Outboard created. Outboard could only access those assets per the terms of the trust agreement.[31] The unsecured creditors need not fear that the debtor will fritter away those assets by pursuing low expected-return projects. The chief concern for the unsecured creditors is that one of the conditions of the trust will be satisfied so that the rabbi will be entitled to the assets. But as an asset partitioning device, those risks aren't a given, and there is very little that would prevent a debtor from inserting assets into a trust free of these contingent risks subject to continuing claims of unsecured general creditors. That is how the rabbi trust would be a device superior to the negative pledge if the point of the exercise is protecting unsecured creditors against subsequent secured creditors.

Where does all of this put our purported secured creditor, Bank of America in *Moglia*? If the assets that formed the res of the trust had been transferred to a third party, creditors would have few rights to those assets. If a security interest had attached to those assets prior to their transfer, the security interest would survive unusual transfers of assets and be lost on ordinary transfers.[32] As to unsecured creditors, they can typically pursue assets transferred by a debtor only if the debtor was insolvent at the time of transfer. If that is the case, the law of fraudulent conveyance kicks in and creates a series of remedies against the assets even though those assets are in the hands of third parties.

But this depends very much on knowing the status of the assets in question. Secured transactions lawyers have long feared a process that made the status of security interests dependent on disclosure by the debtor. The point of insisting on a public filing such as a financing statement for personal property or the recordation of a mortgage for realty is precisely to create a source of independent information not dependent on debtor honesty in disclosure. The *Moglia* opinion recognizes this issue but treats an express documentary limit as equivalent to recordation.[33] But these mechanisms differ precisely on the question of whether lenders have access to an independent source of information about the status of the assets.

31 See *In re Outboard Marine Corp*, 278 BR at 780–81.

32 See UCC § 9-315(a)(1).

33 See *Moglia*, 330 F3d at 948.

The opinion suggests that we would confer a windfall on Bank of America if we refused to enforce the trust limitation on granting security interests. At least ex post, insolvency is just an allocation problem: who suffers the shortfall, or, in this case—unusually—who gets the windfall? It seems extraordinarily unlikely that the unsecured creditors organized their affairs around the possibility of collecting the assets of the rabbi trust. Unsecured creditors typically are relying on the cash flow of the business for payment, not what particular assets might realize in value if the business needs to be liquidated. Secured creditors make those sorts of assessments, not unsecured creditors. If by windfall we mean unexpectedly available assets, the unsecured creditors would almost certainly receive a windfall if the security interest doesn't attach. Again, the condition imposed in favor of the unsecured creditors wasn't put there for their benefit; it was inserted in fealty to the IRS model rabbi trust which required such a provision to prevent the rabbi from receiving immediate income.

As Judge Posner recognizes, it is difficult to see what the IRS has at stake in how the assets of the insolvent firm are divided, yet the IRS's Private Letter Ruling and the subsequent model rabbi trust blessed by the IRS turn out to be exactly about that question. Recall that the reason the original rabbi trust provided that the creditors of the congregation could reach the assets of the trust was to delay the recognition of income that would otherwise result in immediate taxation to the rabbi when the assets where inserted into the trust. The fact that the creditors of the congregation could get at those assets on the congregation's insolvency meant that the rabbi could forfeit the assets. But that forfeiture arises regardless of how those assets are distributed to creditors; the only point that matters is that the assets are lost to the rabbi on insolvency.

CONCLUSION

So *Moglia* leaves us in something of an odd but interesting posture. Negative pledge clauses sought by unsecured creditors have offered weak protection to those creditors. They are usually treated as mere promises and normally run to a specified group of creditors. At the point at which they are needed—when the debtor is insolvent and the promise has been breached—they have typically been useless. In contrast, the rabbi trust in *Moglia*—a device designed to offer greater security to its executive beneficiaries—turns out to offer strong protection for *all* unsecured creditors—even though none of them asked for it—because the court finds it easier to enforce an anti-alienation provision inserted to ensure that income taxes wouldn't be paid at the point that assets were added to the trust.