IN THE FOURTH DISTRICT COURT
OF APPEAL OF FLORIDA

CASE NO. 09-759

KEN BASTANI & CENTENNIAL BANK,

Intervenor Appellants,

vs.

GARY KRESSER,

Appellee.

ON APPEAL OF A FINAL ORDER FROM THE FIFTEENTH JUDICIAL CIRCUIT COURT IN AND FOR PALM BEACH COUNTY

INTERVENOR APPELLANTS' INITIAL BRIEF

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INTRODUCTION

This appeal raises the question whether the trial court misapplied the Florida trust doctrine of merger. Under the merger doctrine, if the trustee's legal interests and the beneficiaries' equitable interests are conveyed to the same person, the interests are deemed to have merged, rendering the trust invalid. Here, the trial court applied the merger doctrine to terminate a spendthrift trust although it agreed that the trust documents did not expressly vest the trustee's legal interests in the beneficiaries. That is, the legal and equitable interests were still held by different people. Nevertheless, the trial court concluded that the facts of this case justified a departure from settled trust law and invalidated what it found was otherwise a valid trust. This appeal follows.

STATEMENT OF THE CASE AND FACTS[1]

Gary Kresser obtained a judgment against James Miller and initiated proceedings supplementary to collect on the judgment (R. 1-13, 305). Shortly after the judgment was entered, James Miller's mother amended her will so that whatever property was to go to him individually would instead go into the James F. Miller Irrevocable Trust (R. 305; T. 43, 107, 134-37, 143-44, 246, 584-85; Pl. Ex. 3B). The trust, which contained a spendthrift provision, named Jerry Miller (James' younger brother) as the trustee and James Miller as the primary beneficiary (Pl. Ex. 2). James Miller's two children (the settlor's grandchildren) are remainder beneficiaries (T. 493, 548, 621; Pl. Ex. 2). The trust document gives the trustee sole discretion in managing the trust assets and making distributions (T. 111, 229, 621-22; Pl. Ex. 2). James Miller, as primary beneficiary, has no authority or power under the trust document to manage assets, compel distributions, or select or terminate the trustee (T. 621-22; Pl. Ex. 2).

Before her death, the mother transferred a one-third interest in a house that she owned in Islamorada, Florida (the "Islamorada Property") to the James F. Miller Irrevocable Trust (R. 304; T. 129-30, 159, 537-38, 722-23; Pl. Ex. 4).

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[1] Case Nos. 4D09-759 and 09-760 were consolidated for record purposes. Citations to the record will appear as (R. ___). Citations to the trial transcript (which was filed in 4D09-759) will appear as (T. ___). The parties' trial exhibits will be cited as (Pl. Ex. __) or (Def. Ex. __). An appendix is being simultaneously filed with this brief and will be cited as (App. ___).

Another one-third interest was transferred to her other son's spendthrift trust, the Jerry E. Miller Irrevocable Trust (T. 129-30, 159, 537-38, 722-23; Pl. Ex. 4). The mother retained a one-third interest in the Islamorada Property (R. 304; T. 129-30, 159, 537-38, 722-23; Pl. Ex. 4).

Thus, one of the assets in the James F. Miller Irrevocable Trust, the spendthrift trust at issue in this case, was a one-third interest in the Islamorada Property (R. 304; T. 129-30, 159, 537-38, 722-23; Pl. Ex. 4). While the proceedings supplementary were ongoing, Ken Bastani and Centennial Bank as mortgagee ("Intervenor Appellants") purchased the Islamorada Property (R. 308; Pl. Ex. 186, 195). One third of the proceeds of the sale of the Islamorada Property went to Jerry Miller, as trustee of the spendthrift trust at issue (R. 308; T. 159, 218). James Miller never had an interest in the Islamorada Property individually (T. 52, 738).

A few months later, a trial was held concerning whether the spendthrift trust could be invalidated or pierced and its assets executed upon by Kresser, the judgment creditor (R. 303). At the conclusion of the bench trial, the trial court made the following findings of fact:

- At the time that it was created by the mother, the spendthrift trust ***was valid and effective*** (R. 304; T. 839, 890).
- None of the assets contained in the spendthrift trust were owned by the primary beneficiary, James Miller, and thus this is not a self-settled spendthrift trust (R. 304-05, 306; T. 890).

- Under the trust documents, the primary beneficiary has no right to compel any distributions of the trust income (R. 311).

- Jerry Miller, as trustee, has limited knowledge regarding trust assets and instead serves as the "legal veneer" to disguise the beneficiary's exclusive dominion and control of the trust assets (R. 306, 309, 311; T. 890).

- James Miller, the primary beneficiary, has "a very strong personality" and, as older brother to the trustee, has at all times exercised complete control over the trustee's actions (R. 309; T. 892).

- While the trust by its terms does not explicitly authorize the primary beneficiary to direct the trustee to convey to him assets from the trust, "[James] Miller, *de facto*, controls the Trustee and the Trust assets" (R. 309, 311; T. 890-92).

On the basis of this finding of "de facto" control, the trial court determined that "there was a merger of the trustee and the beneficiary" and that the spendthrift trust could be terminated and its assets reached by the judgment creditor (R. 310-11; T. 892-93). The trial court ordered execution upon the Islamorada Property that had already been sold to Ken Bastani who was **never made a party** to the proceedings despite numerous references to him or the sale of the Islamorada Property throughout the trial (R. 313, 316; T. 13-14, 50-51, 53, 158, 163-64, 197-98, 200-02, 224, 268-69, 799-800, 884, 877; Pl. Ex. 186, 195). A sheriff's sale of the spendthrift trust's one-third interest in the property was ordered despite plaintiff's counsel's concession in closing argument that the Bastanis would have to be brought in and a separate hearing conducted before their home could be sold (R.

313, 316; T. 877-78).[2] Ken Bastani and his wife learned about the sheriff's sale shortly before it was to take place and moved to intervene and stay the sale (App.1-3, 15-26, 27-40).[3] The trial court granted the motion to intervene and stayed the sale (upon the posting of a bond) until these appellate proceedings were concluded (App. 77-81).

Soon thereafter, this Court allowed Ken Bastani and Centennial Bank (as mortgagee) to intervene in this appeal. Intervenor Appellants do not contest the findings of fact made by the trial court (except those findings referring to Mr. Bastani, who was not a party to and had no knowledge of the pending proceedings).

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[2] A few minutes later, plaintiff's counsel demanded that a writ of execution be delivered to the sheriff of Monroe County to levy on the trust's one-third tenancy-in-common interest in the Islamorada Property and that a sheriff's sale be conducted (T. 884-85). Plaintiff's counsel claimed that **after** the sale of the interest, the trial court could adjudicate any claims or objections that Mr. Bastani may have (T. 884-85). At no point was Mr. Bastani brought into these proceedings.

[3] Although a notice of lis pendens on the Islamorada Property was recorded in November 2007, the title work did not indicate that there was a lis pendens on the property (T. 161-64, 203-04; Pl. Ex. 200). A title agent who worked on the closing testified that the title company was a successor to James Miller's title company and that James Miller closed the file and took the closing documents to oversee the closing personally (T. 310, 321-22). The underwriter did not find any notice of lis pendens on the property (T. 330-31). Thus, Mr. Bastani purchased the Islamorada Property with no knowledge of the lis pendens and in reliance upon the warranty deed and a no-lien affidavit signed by both Jerry Miller and James Miller saying that there were no liens, encumbrances, or claims on the property (T. 200-04; Pl. Ex. 186, 191).

SUMMARY OF ARGUMENT

Florida law is clear that the doctrine of merger applies only where the legal and beneficial interests are expressly conveyed to the same person. As the trial court itself recognized, no Florida court has ever invalidated a spendthrift trust under the merger doctrine where the trust documents conveyed the legal and beneficial interests to distinct and different personalities. Moreover, application of the merger doctrine to a case showing only "de facto" control—where the legal and beneficial interests are still vested in different people—has been expressly rejected by the Fifth District Court of Appeal. *Contella v. Contella*, 559 So. 2d 1217 (Fla. 5th DCA 1990). Here, the trial court misapplied the merger doctrine and improperly departed from Florida trust law when it applied the merger doctrine to a case lacking the express conveyance of all interests to one person. In addition, the merger doctrine cannot apply as a matter of law because the remainder beneficiaries (the grandchildren) had no legal interests or authority of any kind and their beneficial interests remained distinct from the trustee's legal interests. Accordingly, the trial court erred as a matter of law in terminating the admittedly valid spendthrift trust.

STANDARD OF REVIEW

Because the Intervenor Appellants do not contest any of the factual findings made by the trial court, the only question before this Court is whether the trial court properly applied the merger doctrine to these facts. This is a question of law that this Court reviews de novo. *See Brister v. Dep't of Children & Families*, 906 So. 2d 1187, 1188 (Fla. 4th DCA 2005) (noting that where the issue on appeal involves the application of the law to uncontested facts, review is de novo).

ARGUMENT

THE TRIAL COURT ERRED IN INVALIDATING A SPENDTHRIFT TRUST WHERE THE BENEFICIARIES HAVE NO EXPRESS LEGAL POWER OVER THE TRUSTEE OR THE TRUST'S ASSETS AND WHERE ALL THE EQUITABLE INTERESTS HAVE NOT MERGED WITH THE LEGAL INTERESTS

Florida has long recognized the validity of spendthrift trusts. *See Croom v. Ocala Plumbing & Elec. Co.*, 57 So. 243, 244 (Fla. 1911); *Waterbury v. Munn*, 32 So. 2d 603, 605 (Fla. 1947). The purpose of a spendthrift trust is to provide a fund for the maintenance of another while at the same time securing the funds against the beneficiary's own improvidence by not allowing the beneficiary to transfer or assign any interest in the trust property. *Croom*, 57 So. 2d at 244; *Waterbury*, 32 So. 2d at 605. Weighing the varying policy considerations, both the judiciary and the legislature have determined that spendthrift trusts are valid and that the public policy in allowing a person to dispose of his property as he wishes is greater than

the public policy in protecting a beneficiary's creditors. *See Arellano v. Bisson*, 847 So. 2d 998, 1000 (Fla. 3d DCA 2003) (noting that the "principal purpose of a spendthrift trust is to protect a beneficiary against [creditors]").

Florida recognizes only two grounds for terminating a spendthrift trust. First, a spendthrift trust is invalid if the beneficiary of the trust was the settlor of the trust and the original owner of the trust assets. *See In re Lawrence*, 251 B.R. 630, 642 (S.D. Fla. 2000) ("Florida and federal bankruptcy law both prohibit individuals from setting up self-settled spendthrift type trusts and maintaining the benefits of and ability to significantly control same, while keeping the assets away from creditors."); *In re Cattafi*, 237 B.R. 853, 856 (M.D. Fla. 1999) (noting that under Florida law a settlor cannot create a spendthrift trust for his own benefit); *see also Waterbury*, 32 So. 2d at 605 (defining a spendthrift trust as a fund created for the maintenance of *another*). Second, a spendthrift trust is invalid where the trust documents or some other legal document give the beneficiaries express legal power over the trust assets or to compel distributions so that the legal and equitable interests in the trust have merged. *See Croom*, 57 So. at 244-45; *In re Saber*, 233 B.R. 547, 555 (S.D. Fla. 1999).

As the trial court found, this was not a self-settled trust. All of the assets of the trust were owned by James Miller's mother, the settlor. Thus, the first ground for invalidating a spendthrift trust does not apply. The only question before the

trial court, then, was whether the legal and equitable interests in the trust had merged. This, in turn, required a determination whether the trust documents conveyed the trustee's legal interests to the beneficiaries.

The merger doctrine is well settled. In *Axtell v. Coons*, the Florida Supreme Court explained that "[t]he trustee and the beneficiary must be distinct personalities or otherwise there could be no trust, and the merger of interests in the same person would effect a legal estate in him of the same duration as the beneficial interest designed." 89 So. 419, 421 (Fla. 1921); *see also Harvest v. Craft Constr. Corp.*, 187 So. 2d 72, 74 (Fla. 3d DCA 1966) ("It is essential to the existence of any trust that the legal estate be separated from the beneficial enjoyment."). The doctrine of merger operates to prevent the same person from at the same time being the trustee and the beneficiary of the same identical interest. *In re Saber*, 233 B.R. 547, 553 (S.D. Fla. 1999).

But the merger doctrine has *only* been applied in cases where the trust documents expressly convey to the beneficiaries legal power and control over the trust. *See Croom*, 57 So. at 244-45 (invalidating spendthrift trust where the deed expressly provided that the trustees "shall convey" all or any part of the corpus to the beneficiaries upon their request); *In re Lawrence*, 279 F.3d 1294, 1299 (11th Cir. 2002) (invalidating spendthrift provision where trust documents authorized settlor and prospective beneficiary to appoint trustees who could in their absolute

discretion turn trust proceeds over to beneficiary); *In re Wells*, 259 B.R. 776, 781 (M.D. Fla. 2001) (applying merger doctrine to invalidate spendthrift trust where trust documents provided that, upon death of beneficiary, trustee would become sole beneficiary); *In re Saber*, 233 B.R. 547, 550, 555 (S.D. Fla. 1999) (applying merger doctrine to invalidate trust where sole beneficiary became sole trustee by virtue of warranty deed conveying legal title in trust property to sole beneficiary); *In re Bottom*, 176 B.R. 950, 952-53 (N.D. Fla. 1994) (invalidating spendthrift trust where sole beneficiary was named sole trustee in settlor's will and thus possessed the express right to control the trust assets); *In re Smith*, 129 B.R. 262, 264 (M.D. Fla. 1991) (holding that ERISA plan provisions that allowed beneficiary to make withdrawals, collect his interest upon termination of employment, borrow against his vested interest, and direct the investment of his interest did not create a valid spendthrift trust under Florida law because the plan gave the beneficiary express control over the assets); *In re May*, 83 B.R. 812, 814 (M.D. Fla. 1988) (holding that to the extent the trust documents gave beneficiary the right to demand an annual payment, the spendthrift trust was invalid); *In re Gillett*, 46 B.R. 642, 644-45 (S.D. Fla. 1985) (invalidating spendthrift trust where the beneficiary had the express right as sole stockholder, director and officer of the trustee company to make distributions to himself).

As both the trial court and plaintiff's counsel acknowledged, *there is no case* applying Florida law invalidating a spendthrift trust where the trust documents or some other legal document (such as a will or power of attorney) did not convey some express legal power to the beneficiaries over the trust corpus or the trustee; ***an exception was made for this case only*** (R. 314; T. 140-41, 805-06, 889-90, 893).

As a matter of law, de facto control by a beneficiary who has no express legal power over the trust corpus does not trigger the merger doctrine because the legal and equitable interests are not held by the same person. *See Contella v. Contella*, 559 So. 2d 1217, 1219 (Fla. 5th DCA 1990). In *Contella*, the trial court in a dissolution proceeding terminated a spendthrift trust in which Contella was a life-income beneficiary and his children were remainder beneficiaries. *Id.* at 1218. The trustee executed a certificate that gave Contella the authority: to open brokerage and bank accounts; to deposit, pay, and transfer funds to and from such accounts on behalf of the trust; and to handle the case and asset management of the trust and hire attorneys. *Id.* "As a matter of practicality, in certain respects Contella acted as the sole trustee since [the trust's] inception." *Id.* Contella did not, however, have any express legal power to deal with the real property that made up the trust corpus. *Id.* Nevertheless, the trial court found that the legal and equitable interests of the trust had merged and terminated the trust. *Id.*

The Fifth District reversed, holding that the doctrine of merger did not apply. *Id.* at 1219. Despite his "de facto" control over the trust assets, Contella had no express legal power over the actual corpus of the trust and thus the Fifth District held that the legal interests in the real property were still held solely by the trustee, making the merger doctrine inapplicable. *Id.* This requirement of express legal power by the beneficiaries has always been the law in Florida (as evidenced by the cases cited above). To expand the doctrine, as the trial court did here, to include circumstances of "de facto" control in spendthrift trust cases would mire the courts in endless litigation.

The key players in a spendthrift trust case are usually closely related. A "de facto control" exception would require extremely fact-intensive inquiries into the degree of pressure that one family member exerts over another—resulting in a completely subjective analysis of what constitutes unreasonable pressure. A judgment creditor can challenge practically any action by a trustee as being the result of an unreasonable exertion of familial pressure by the beneficiary, claiming that the beneficiary—through his influence over the trustee family member—de facto controls the trust assets. Litigation would never end as a judgment creditor could theoretically institute separate actions against a trust on a claim of de facto control every time a trustee makes a decision with respect to the trust that benefits the beneficiary. This is not and cannot be the law.

In addition, as the *Contella* court explained, the merger doctrine applies only when the entire legal interest (i.e., the trustee's interest) and the entire equitable interest (i.e., all the beneficiaries' interests) are held by one person. *Id.* Where there are multiple beneficiaries, as is the case here, each beneficiary's equitable interest in the trust has to merge with the legal interest for merger to apply. "[M]erger applies *only* when the legal and equitable interests are held by one person and are coextensive and commensurate—i.e., the legal estate and the equitable estate are the same." *Id.* (emphasis original). This may occur when the entire beneficial interest passes to the trustee, or the legal title passes to a *sole* beneficiary. *Id.*

Thus, besides refusing to apply the merger doctrine where the documents did not convey express legal power over the trust or the trustee to the beneficiary, the Fifth District further held that the merger doctrine was inapplicable because Contella's children held equitable remainder interests in the trust and those interests had not merged with their father's interests in the trust. *Id.*; *see also In re Saber*, 233 B.R. at 554 (citing *Contella* and noting that there was no merger in *Contella* because the trustee in that case "did not hold *all* of the beneficial interest in the trust; the trustee was not the *sole* beneficiary") (emphasis original). As the court explained, the equitable interests of the remainder beneficiaries were separate from Contella's and could not be said to have merged with any legal interests in the trust.

Contella, 559 So. 2d at 1219. Thus, the Fifth District held that the doctrine of merger did not apply to terminate the trust. *Id.*

Contella is again on point. Regardless whether the primary beneficiary exercised de facto control over the trust assets, the trial court could not and should not have ignored the interests of the grandchildren—the remainder beneficiaries—in this case. Not a single piece of evidence was presented at the trial to indicate that the grandchildren had any power (legal or de facto) over the trust or the trustee. Accordingly, the merger doctrine could not apply as a matter of law because the trustee's and the beneficiaries' interests are not held by one person.

The *Contella* rule requiring a merger of *all* interests was just recently upheld by the Second District Court of Appeal. In *Hansen v. Bothe,* 10 So. 3d 213 (Fla. 2d DCA 2009), the Second District held that the merger doctrine did not apply to terminate a spendthrift trust because the legal and equitable interests were not all held by one person. In *Hansen*, a husband and his then-wife had created a trust whereby the wife was co-trustee and beneficiary. *Id.* at 215. Nine people were named remainder beneficiaries. *Id.* The couple divorced and, seven days later, the husband died. *Id.* The trial court found that the trust terminated upon the parties' divorce under the merger doctrine because a marital settlement agreement allegedly vested full trust ownership in the wife (who was also the primary beneficiary). *Id.* Finding that the trial court had misapplied the merger doctrine,

the Second District reversed. As the Fifth District in *Contella* had asserted almost 20 years before, the *Hansen* court emphasized that the doctrine of merger could not apply where other equitable interests—those of the remainder beneficiaries—remained. *Id.* at 216. That is, for the doctrine of merger to apply, the legal and beneficial interest must be *completely* coextensive and held by the same person; the trust will not terminate if other equitable interests are held by someone other than the trustee. *Id.* (citing *Denver Found. v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1125 (Colo. 2007)). In this case, as in *Hansen*, there are remainder beneficiaries—the grandchildren—whose equitable interests simply cannot be ignored and whose existence preclude the application of the merger doctrine as a matter of law.

Here, the trust documents do not give any of the beneficiaries express legal power over the trust assets or the trustee (Pl. Ex. 2). The trustee has never (as the trustee did in *Contella*) executed any document conveying authority to the primary beneficiary to manage the trust. Nor has any document been executed attempting to transfer legal interest in the trust corpus to the primary beneficiary as occurred in *Hansen*. If the trustee does not make a single distribution, the primary beneficiary cannot compel the trustee to do otherwise because the trustee has absolute discretion under the trust documents. Simply put, the primary beneficiary has no legal recourse should the trustee decide, in a good-faith exercise of his

absolute discretion, to take any action. Moreover, as *Contella* and *Hansen* explain, the merger doctrine does not apply as a matter of law where the legal and equitable remainder interests are not held by the same person. Because the grandchildren hold remainder equitable interests, the merger doctrine does not apply as a matter of law.[4] Thus, the trial court erred in terminating the trust, extinguishing the grandchildren's interest and depriving them of their inheritance. *Contella*, 559 So. 2d at 1219; *Hansen*, 10 So. 3d at 216; *In re Saber*, 233 B.R. at 554.

[4] The trustee is legally liable to the remainder beneficiaries if he fails to discharge his duty properly. *See* Fla. Stat. § 736.0504(4) (2009); Fla. Stat. § 736.0814(1) (2009); *see also Barley v. Barcus*, 877 So. 2d 42, 44 (Fla. 5th DCA 2004) (holding that contingent remainder beneficiary of trust was an interested person with standing to challenge appointment of trustee); *Railey v. Skaggs*, 220 So. 2d 689, 691 (Fla. 3d DCA 1969) (holding that contingent remainder beneficiary had standing to maintain action for removal of trustee for alleged mismanagement). Thus, this is not a situation where no one exists to check the trustee's actions.

CONCLUSION

The trial court misapplied Florida law, applying the doctrine of merger where the legal and equitable interests in the trust corpus had not merged completely. Accordingly, this Court should vacate the final judgment and remand for entry of a judgment in favor of the defendants and Intervenors.

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CERTIFICATE OF SERVICE

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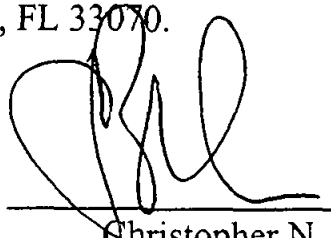

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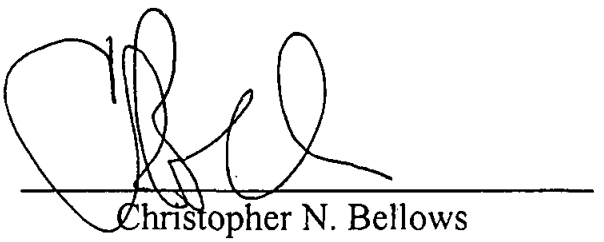

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