Prepared for Juan Antunez

Steve Leimberg's Asset Protection Planning Email Newsletter - Archive Message #237

Date: 13-Feb-14
From: Steve Leimberg's Asset Protection Planning Newsletter
Subject: Jonathan Gopman, Jeff Baskies, David Ruben & Evan Kaufman on Berlinger v. Casselberry: Why the Decision Was Wrong and Florida May Not Be a Bad Trust Jurisdiction for Discretionary Trusts

"The defendant in Berlinger filed a motion for rehearing in the Florida Second District Court of Appeals. If the motion for rehearing is granted the court will have an opportunity to revisit the case and hopefully overturn a poor decision. Should the Berlinger decision stand, it has the potential to do serious harm to both the beneficiaries of Florida trusts and to the trust industry in Florida.

If the Berlinger decision stands, hopefully the Florida legislature will quickly act to enact legislation addressing this serious problem. As further developments with respect to the Berlinger holding should be on the horizon (either by rehearing or legislative action), unless a trustee is concerned about a significant pending situation that requires immediate attention, it appears clients can (and perhaps should) wait for the final resolution of the Berlinger case to decide whether to take additional steps to further protect beneficiary's interest in a trust.

We disagree with the recommendation that drafters of Florida trusts should consider migrating them to Alaska, Delaware, Nevada or South Dakota. We feel it is perhaps premature to rush out of Florida unless of course, you are the trustee of a discretionary trust with a beneficiary with an exception creditor issue who could use the Berlinger case against you in the near future.

Instead, we urge caution and suggest taking a bit more time before reacting (over-reacting) to the Berlinger decision. There is still hope that the case will be resolved correctly, and if not, that a legislative change will soon follow. If our reading of the legislative history and the Florida Trust Code is correct, then Florida already took strides toward making its trust law palatable to planners, and if the legislature has to adopt even more explicit language to effect that result, then doing so should only make using Florida Trusts even better."

Jonathan Gopman, **Jeff Baskies**, **David Ruben** and **Evan Kaufman** present their analysis as to (a) why the 2nd DCA got the Berlinger decision wrong by improperly applying old Florida case law (from 1985) without understanding the application of new Florida statutes (the Florida Trust Code which became effective July 1, 2007), (b) why the decision may be reheard/withdrawn /reissued or if not how it can be easily fixed legislatively, and (c) why Florida may not be such a bad trust jurisdiction after all.

Jonathan Gopman is a partner in **Akerman LLP's** Naples office and a member of the firm's Wealth Preservation Practice Team (which currently boasts the largest estate planning practice group in Naples, Florida). He currently serves as Vice-Chair of the Asset Protection Planning Committee of the Real Property, Trust and Estate Law Section of the ABA (for the 2013-2014 bar year). He is an adjunct professor at AMU Law School, currently serving on its Curriculum Advisory Committee and chairing its first annual Estate Planning Day Conference to be held in April of 2014. He is a member of the legal advisory board of Commonwealth Trust Company and STEP. He is AV rated. In 2009, 2010, 2011, 2012 and 2013 he was selected for inclusion in *The Best Lawyers in America*® and as a *Florida Super Lawyer* for 2010, 2011, 2012 and 2013 and included in Florida Trend's Legal Elite for 2010 and 2011. In the Dec. 2005 and 2007 issues of Worth Magazine he was recognized as one of the top 100 estate planning attorneys in the US. He is a co-author of the revised BNA Tax Management Portfolio on Estate Tax Payments and Liabilities. He has authored and co-authored numerous articles on asset protection and estate planning and chapters in books on asset protection and frequently lectures on these topics throughout the world. He has been interviewed for and quoted in a number of publications such as the N.Y. Times, Bloomberg, Forbes, Wealth Manager and Elite Traveler. He is the originator of the idea for the statutory tenancy by the entireties trust ("**STET**") in 12 § 3574(f) of the Del. Statutes. His articles and presentations have served as an impetus for changes to the trust laws of several states. In Feb. of 2011, he was appointed to a special committee of the Nevis government and Nevis International Service Providers Assoc. to revise the Nevis International Exempt Trust Ordinance. He is the only attorney in the US appointed to this committee and working with Nevis on this project.

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Here is their commentary:

EXECUTIVE SUMMARY:

In **Barry Nelson's** Asset Protection Planning Newsletter #231, and **Steve Oshins** and **Bob Keebler**'s Asset Protection Planning Newsletter #232, the authors clearly summarized (a) Florida law regarding creditor access to beneficiaries interests in spendthrift and discretionary trusts under the Florida Supreme Court Decision in *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985), (b) the relevant provisions of the Florida Trust Code (effective July 1, 2007) which appeared to adopt the Bacardi holding as to spendthrift trusts but override Bacardi as to discretionary trusts, and (c) the 2nd DCA's holding in Berlinger. So we will not rehash all of the background as it was already clearly presented. However, we will note and highlight a few points.

First, Steve and Bob rush quickly to conclude that "(b)ased on how Florida is handling this issue (the rights of exceptions creditors to discretionary trusts as articulated in the Berlinger decision from the 2nd DCA), the careful estate planning professional will … (a)void using Florida law for any irrevocable trust where the expectation is that the trust assets shall be protected from family claims against a beneficiary of the trust." We believe the *Berlinger* decision improperly states Florida law on this point and we hope the *Berlinger* decision will be withdrawn/re-issued or will be over-ridden even more clearly by the Florida legislature and thus disagree with Bob's and Steve's conclusion. Yes, *Berlinger* presents a bump in the road for planners, but unless we have clients in extreme circumstances, we believe it may be premature to suggest moving all trusts from Florida.

Second, Barry Nelson concluded that: "It appears that courts will go out of their way to protect spouses with judgments in the form of support where the law is not absolutely clear. For these reasons, states such as Alaska, Delaware, Nevada and South Dakota are an important consideration." Again, while we generally agree with Barry's analysis of the case, and while we acknowledge Barry has been on the forefront of this issue in several prior writings, we disagree with the recommendation that drafters of Florida trusts should consider migrating them to Alaska, Delaware, Nevada or South Dakota. We just feel again it is perhaps premature to rush out of Florida unless of course, you are the trustee of a discretionary trust with a beneficiary with an exception creditor issue who could use the *Berlinger* case against you in the near future.

Instead, we urge caution and suggest taking a bit more time before reacting (over-reacting) to the Berlinger decision. There is still hope that the case will be resolved correctly and if not that a legislative change will soon follow. If our reading of the legislative history and the Florida Trust Code is correct, then Florida already took strides toward making its trust law palatable to planners, and if the legislature has to adopt even more explicit language to effect that result, then doing so should only make using Florida Trusts even better.

FACTS:

Generally, the *Bacardi* case held that while there were two competing public policies at odds (one favoring spendthrift trust protection and one favoring enforcement of support judgments), the public policy ultimately was stronger in favor of enforcing support judgments (i.e. carving out limited exceptions to the spendthrift protections).

The court in *Bacardi* held that with respect to spendthrift trusts that included mandatory payments, a spouse or former spouse with a judgment in the form of support (spousal support or child support) (i.e. an exception creditor) could seek a court order to obtain distributions otherwise provided to the beneficiary. Further, the *Bacardi* court held that with respect to discretionary trusts that do not include mandatory payments (e.g. where the trustee had discretion whether or not to make distributions to a beneficiary), a court could not force a trustee to make distributions to satisfy an exception creditor; however, if the trustee ever made distributions to or for the benefit of the trust beneficiary then the exception creditor may obtain a writ of continuing garnishment, which would act like a charging order and cause any such distributions to instead be paid to the exception creditor (not the beneficiary).

The authors believe the Florida Trust code (see discussion below) changed the law in Florida by applying the Bacardi holding as to spendthrift trusts (those

with mandatory payouts) but not as to discretionary trusts.

And that's where the problem lies with the decision of the 2nd DCA in *Berlinger v. Casselberry*, Case No. 2D12-6470, 6 (Fla. 2d DCA Nov. 27, 2013). We believe the court misunderstood the impact of the statutory changes that came with the new Florida Trust Code when reaching its decision to uphold a writ of garnishment issued by a trial court against the trustee of a discretionary trust over any present and future distributions made to or for the benefit of a trust beneficiary.

COMMENT:

The *Berlinger* Holding Got It Wrong: The Court Misapplied the *Bacardi* Holding To a Discretionary Trust While Ignoring the Obvious Statutory Distinctions between Spendthrift Trusts and Discretionary Trusts Adopted in the New Florida Trust Code

Florida provides a creditor with the remedies of attachment and garnishment in Chapters 76 and 77 of the Florida Statutes. Florida Statutes §76.01 provides a judgment creditor with a right of "attachment at law against the goods and chattels, lands, and tenements of his or her debtor." Attachment is a remedy that gives a creditor a right to seize the property of the debtor in such debtor's possession. Additionally, Florida Statutes § 77.01 provides that any creditor with a judgment has the right to garnish "any tangible or intangible personal property of defendant in the possession or control of a third person" (*i.e.*, in this case in the possession or control of the Trustee of the Trusts). A garnishment order provides a creditor with the right to seize the property of his, her or its debtor in the possession of a third party.

Through a series of statutes (see Part V of the Florida Trust Code – Florida Statutes §§ 736.0501–736.0507), Florida law addresses whether a judgment creditor can enforce its rights against the interest of a beneficiary of a trust. For instance, Florida Statutes § 736.0501 provides that:

> Except as provided in s. 736.0504, to the extent *a beneficiary's interest* is not subject to a spendthrift provision, *the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or by other means*. The court may limit the award to such relief as is appropriate under the circumstances. (Emphasis added.)

The key issue that seems to have been overlooked by the court in *Berlinger* is the statutory construction in Part V of the Florida Trust Code distinguishing

"spendthrift trusts" from "discretionary trust" as it relates to the claims of creditors of a beneficiary. As will be explained in greater detail below, it is essential to understand that as to a "spendthrift trust" – i.e. a trust with a mandatory payout to a beneficiary (e.g. "pay all of the income of the trust at least annually to the beneficiary") protected "only" by a spendthrift clause - the Florida Trust Code (Florida Statutes §§ 736.0501-.0503) specifically and clearly adopted the existing Florida public policy as expressed in the *Bacardi* case.

Thus as to "spendthrift trusts" (mandatory trusts with spendthrift clauses), the Florida legislature in adopting the Florida Trust Code weighed and balanced the competing public policies, and adopted the approach in *Bacardi* that as to most creditors spendthrift clauses are to be respected (Florida Statutes §736.0502), but pursuant to Florida Statutes §736.0503, there are certain exception creditors (e.g. children or spouses for support) who should be able to reach the beneficiary's mandatory distributions (the beneficiary's property). However, the Florida Trust Code then set out totally separate rules for "discretionary trusts" (those where distributions are in the discretion of the trustee) and directed that regardless of having spendthrift clauses or not, discretionary trusts should be treated differently as to creditors of a beneficiary (the Florida legislature even pulled out those rules and put them in a separate statute – Florida Statutes, § 736.0504) which does not allow for exception creditors and specifically says the provisions relating to exception creditors (Florida Statutes §736.0503) do not apply.

As to spendthrift trusts, Florida Statutes § 736.0502 provides in relevant part that in a trust containing both mandatory distributions to a beneficiary (thus not a discretionary trust as described in more detail below) and a spendthrift provision, "except as otherwise provided in this part...*a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before receipt of the interest or distribution* by the beneficiary."[i] A spendthrift provision prohibits a beneficiary from transferring his or her right to distributions and prevents a creditor of a beneficiary from attaching the beneficiary's interest prior to actual receipt of a distribution from the trust. In jurisdictions that recognize a spendthrift provision, including Florida, such a provision will prevent creditors from reaching a beneficiary's interest in a trust with mandatory payments prior to the beneficiary's actual receipt.

Florida law also recognizes several statutory exceptions to the enforceability of a spendthrift provision. Florida Statutes § 736.0503 provides that a spendthrift provision cannot be enforced against certain classes of creditors (known as "**exception creditors**"), including a beneficiary's child, spouse or former

spouse if such person has a court order for support or maintenance.[ii] The other exceptions creditors include a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust, the state of Florida to the extent Florida law so provides and the United States to the extent federal law so provides (which includes so-called "super creditors" like the IRS and/or other federal agencies).[iii] Florida Statutes § 736.0503(3) allows exception creditors to obtain a court order attaching present or future distributions to or for the benefit of the beneficiary.

However, the legislature provided that avoiding spendthrift clauses should be the exception not the norm (under Florida law), specifically providing in Florida Statutes § 736.0503(3) that the ability of exception creditors (a beneficiary's child, spouse, former spouse, or a judgment creditor who has provided services for the protection of a beneficiary's interest in a trust) to pierce spendthrift trusts should apply "**only as a last resort** upon an initial showing that traditional methods of enforcing the claim are insufficient." (emphasis added)

Notwithstanding the right granted to exception creditors under Florida Statutes § 736.0503(3), Florida Statutes § 736.0504 provides that a creditor of a beneficiary of a discretionary trust, *regardless* of whether it includes a spendthrift provision, may not compel a distribution or "[a]ttach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary."[iv] It seems logical that Florida Statutes § 736.0504 would prohibit the creditor of a discretionary beneficiary from attaching or otherwise reaching such beneficiary's interest because the beneficiary only has an expectancy or a mere possibility of receiving a distribution and no enforceable right to such distribution.

A close examination of this part of the Florida Trust Code (that is, Florida Statutes §§ 736.0503(3) and 736.0504(2)) strongly suggests a limited application of Florida Statutes § 736.0503(3). Florida Statute § 736.0504(2) *prohibits* the creditor of a discretionary beneficiary from *attaching or otherwise reaching* the beneficiary's interest, yet Florida Statute § 736.0503(3) *allows* exception creditors to obtain a court order attaching present or future distributions to or for the beneficiary "[e]xcept as otherwise provide in...s. 736.0504." To read Florida Statutes § 736.0503(3) in *pari materia* with Florida Statutes § 736.0504(2), it seems more logical to conclude that Florida Statutes § 736.0503(3) should only apply to *mandatory* distributions and other mandatory rights. In other words, Florida Statutes § 736.0503(3) should allow exception creditors to attach only *mandatory* distributions to or for the benefit

of the beneficiary – and thus to pierce trusts which rely on a spendthrift trust for protection as opposed to those that are discretionary. This seems most logical since attachment applies to a beneficiary or debtor's property interests and a discretionary interest in a trust should not be construed as a property interest.

Furthermore, the foregoing analysis relating to Florida Statutes §§ 736.0503(3) and 736.0504(2) is supported by legislative history. The House of Representatives staff analysis of the 2007 amendments to Florida Statutes §§ 736.0501–736.0504 indicates that a purpose of the bill was to provide that "the exceptions to a spendthrift provision in a trust *do not override* the provisions relating to discretionary trusts in s. 736.0504, F.S." and "the protections given to the discretionary interest of a trustee *outrank* the interest of a creditor."[v]

The analysis of the changes to Florida Statutes § 736.0501, which generally addresses the rights of a beneficiary's creditor to reach the beneficiary's interest, provides that "[t]he rights given to creditors under the section are limited to those cases where a beneficiary has a *right* to distributions [and if] distributions are discretionary a beneficiary has no 'attachable' trust interest."[vi] This analysis supports the interpretation that the remedies provided to exception creditors in § 736.0503(3) only apply to a mandatory interest protected by a spendthrift clause.

Nevertheless, in analyzing Roberta's right to garnish Bruce's potential interest as a discretionary beneficiary, the court appears to misinterpret Florida Statutes §736.0504(2) and bases its decision on *Bacardi v White*, 463 So. 2d 218 (1985).

While noting that the creditor remedies provided in Florida Statutes § 736.0503(3) are subject to the exception found in Florida Statute § 736.0504(2), the court nevertheless concludes that Florida Statutes § 736.0504(2) "does not expressly prohibit a former spouse [a creditor] from obtaining a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion."[vii] In its analysis the court determined that while Florida Statutes § 736.0504(2) prohibits a court order against a discretionary trustee either compelling a distribution or attaching the beneficiary's interest, it would *not* prohibit a court order granting a writ of garnishment against discretionary distributions made by the trustee.[viii] Thus, the court's holding provides a writ of garnishment may attach to the beneficiary's interests in a trust, like a charging order applies in the context of a debtor's interest in a limited partnership or limited liability company.

However, the court appears to ignore the fact that a garnishment appears to be

a subset of attachment when a third party holds or has possession of a debtor's property, and thus requires an underlying property interest to be enforceable – which is lacking in the context of a purely discretionary trust.

Nevertheless, the court gave great weight to the holding in *Bacardi*. In *Bacardi*, a husband and wife divorced and the husband was obligated pursuant to the dissolution of marriage judgment to pay the wife $2,000 per month in alimony until the earlier of the wife's death or her remarriage.[ix] Thereafter, the husband stopped paying alimony and the wife obtained three judgments against him.[x] The wife served a writ of garnishment on the trustee of a spendthrift trust created by the husband's father for the benefit of the husband.[xi] Additionally, the wife obtained a continuing writ of garnishment against the trust income for future alimony payments.[xii]

While the Third District Court of Appeals ruled that income from the trust was exempt from garnishment to satisfy court-ordered alimony, the Supreme Court of Florida quashed the decision and held that disbursements from spendthrift trusts are subject to garnishment when traditional remedies to enforce alimony obligations are not effective.[xiii] Additionally, although really in *dicta*, the Supreme Court ruled that any discretionary distributions were subject to the writ of garnishment.[xiv]

Based upon the differences in Florida Trust law from 1985 (when *Bacardi* was decided) to 2013 (when *Berlinger* was decided), the *Berlinger* court's reliance on *Bacardi* appears to have been inappropriate.

First, the *Bacardi* decision predates the existence of the Florida Trust Code (including Florida Statutes §§ 736.0501–736.0504) by more than twenty (20) years. While the *Bacardi* decision discusses at length the competing public policy of enforcing spendthrift provisions *versus* the enforcement of alimony and child support orders, it is important to note that this was an unsettled issue at the time. These competing public policies were also the subject of great controversy when the current version of the Uniform Trust Code (the "UTC") was originally promulgated.[xv] The original version of § 504 in the UTC appeared to have created exception creditors for not only spendthrift trusts but also discretionary trusts.[xvi] In response to the controversy, many states chose to modify this provision or in some cases repeal the UTC altogether. [xvii]

Second, the *Berlinger* court ignored how the Florida legislature modified Florida's version of Section 504 of the UTC, Florida Statutes § 736.0504, in a number of ways.[xviii] First, Florida Statutes § 736.0504 removes the exception for certain creditors. Section 504(b) of the UTC prohibits a creditor

of a discretionary beneficiary from compelling a distribution, however, subject to the exceptions provided in paragraph (c) of Section 504 (which gives the court the power to compel or direct discretionary distributions to certain exception creditors if a trustee "has not complied with a standard of distribution or has abused a discretion."). Florida Statutes § 736.0504(2) not only removes the precatory phrase "[e]xcept as otherwise provided in subsection . . ." but also adds the phrase "including a creditor as described in s. 736.0503(2)" in an apparent attempt to clarify that the prohibited creditor actions are *not* subject to exceptions.

Additionally, Florida Statutes §736.0504(2) adds to the list of prohibited creditor actions (that are not, as discussed immediately above, subject to an exception). Section 504(b) of the UTC only includes "compel a distribution" in the list of creditor actions that are prohibited (subject to the exceptions); however, Florida Statutes § 736.0504(2) adds "[a]ttach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary" in an obvious attempt to clarify that a creditor's attempt to attach or otherwise reach a beneficiary's interest is not only prohibited but also not subject to an exception. Thus, the Florida legislature appears to have addressed, subsequent to the *Bacardi* decision, the competing public policies at issue in *Bacardi* in the form of Florida Statute §§ 736.0503(3) and 736.0504(2) – and it chose to treat the issue of exception creditors differently for spendthrift trusts (trusts with mandatory distributions and spendthrift clauses) and discretionary trusts (trusts where distributions are not mandated but are solely made in the trustee's discretion).

Berlinger Should Be Overturned on Rehearing or Appeal, or the Florida Bar and Legislature Should Act To Repeal the Holding

If permitted to stand, the court's decision in *Berlinger* not only appears to violate the express terms of the Florida Trust Code and the legislative history surrounding its passage, but it also appears to create an awkward public policy conundrum. Discussions with any corporate trustee would immediately identify the problem.

If Berlinger stands, the trustee of the trust (a discretionary trust) cannot make a distribution for the benefit of the beneficiary (in this case, Bruce), but it also cannot make a distribution to the spouse (or other exception creditor) holding the support order (in this case, Roberta) because making such distribution would be a clear violation of the trustee's fiduciary duties. Thus, if *Berlinger* stands, then any trustee of a discretionary trust against whom a writ of garnishment is issued would be forced to make no distributions to anyone -

perpetually. A public policy that potentially creates two paupers (or wards of the state) rather than one is a poor policy.

Furthermore, while a spouse or ex-spouse of a beneficiary can qualify as an exception creditor under Florida Statutes §736.0503, the statute also provides for three other classes of exception creditors. As previously mentioned, these exception creditors include a beneficiary's child with a court order for support, a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust and the State of Florida or the United States to the extent permitted by law. At least in the case of three of these four additional exception creditors it may be difficult to conclude that the same public policy concerns exist to protect the interests of those creditors. Nonetheless, the holding in *Berlinger* would provide support for those creditors garnishing the purely discretionary interest of a beneficiary in a discretionary trust. This appears to establish a poor public policy.

Additionally, the *Berlinger* court focusing on one particular case fails to consider the inherent difficulties a trustee in Florida will encounter administering a discretionary trust because of this decision. If a trustee is aware of the possibility that a beneficiary's interest may be garnished in the future, the trustee certainly has a fiduciary duty to take action to protect the beneficiary's interest. Rather confusing and problematic, however, will be determining when the trustee has a duty to take such action.

For instance, should every trustee of a discretionary trust governed by Florida law and/or administered in Florida immediately considering taking action by moving or transfer the situs of such trust to a more protective jurisdiction and change the governing law of the trust to such other jurisdiction? Should a trustee act when it learns that a beneficiary is in the process of getting married, is having marital difficulties, considering a divorce or is experiencing severe financial or personal difficulties? Would the answer to this question change if the exception creditor is the State of Florida or the United States government? Anyone can experience problems with the Internal Revenue Service. Certainly it seems odd to adopt a public policy that promotes trusts (or legitimate commerce) fleeing the state, and steps in such direction should fail for a number of reasons.

The decision has the potential of discouraging estate planning practitioners and trustees from recommending clients establish trusts in Florida. Arguably, a trustee of an existing trust has a fiduciary duty to transfer the situs of the trust to another jurisdiction and change the governing law.[xix] It is not difficult to envision the entire estate planning community recommending that our clients establish their trusts in more protective jurisdictions and move existing trusts to

those jurisdictions.

Practitioners who continue to draft discretionary trust agreements that will be governed by Florida law should strongly consider including certain provisions in their trust agreements to provide sufficient flexibility to a trustee to address the concerns created by the *Berlinger* decision. Such provisions could, for example:

1. Give a trustee the power to move a trust to another jurisdiction and change the governing law of the trust.

2. Give a trustee the power to make decanting distributions from the trust to another trust governed by the law of a more protective state.

3. Grant a person a limited power of appointment that would allow the holder of the power to appoint trust assets to another more protective trust.

4. Include a class of beneficiaries of a discretionary trust rather than provide for a single beneficiary. If the trustee is unable to make a distribution to a beneficiary because of a garnishment order, distributions could still be made to the other beneficiaries. Such additional beneficiaries might include a qualified spouse of the debtor beneficiary (that is, an individual who is married to and living with the debtor-beneficiary at a particular time) or siblings of the debtor-beneficiary. A qualified spouse could receive distributions to pay for personal expenses that indirectly benefit the beneficiary. Similarly a beneficiary's siblings could receive distributions and use their annual exclusions to transfer the funds to benefit the debtor-beneficiary.

5. Grant a trustee or third party the power to add individuals and other trusts to the class of beneficiaries eligible to receive distributions to provide the same flexibility described in item 4.

6. Appoint an independent trustee or individual to control the foregoing powers.

For all of these reasons and more, it is hoped that the 2nd DCA will reconsider its holding in *Berlinger* and withdraw it – or even better, issue a new ruling more clearly distinguishing "spendthrift trusts" from "discretionary trusts" and permitting the application of a writ of garnishment in the case of exception creditors to spendthrift trusts but not discretionary trusts, as the authors believe the legislature intended.

If such reconsideration does not occur, then the authors urge the Real Property, Probate and Trust Law Committee of the Florida Bar to quickly initiate a

legislative initiative aimed at clarifying Florida Statutes §§736.0503 and 736.0504 to more clearly and to definitively protect beneficiaries of discretionary trusts from exception creditors.

One approach may be along the lines of a suggestion contained in **Barry Nelson**'s newsletter (see Asset Protection Planning Newsletter #231) where the RPPTL section of the Florida Bar might propose an amendment to Florida Statutes §§736.0503 and 736.0504 to explicitly stipulate that garnishments are not an available remedy to any creditor of a beneficiary of a discretionary trust (specifically stating that garnishments are not available even to exception creditors under Florida Statutes §736.0503). As Barry suggested, it would be nice to also state in the statute that trust distributions "should be authorized by a trustee directly to or for the benefit of a beneficiary (of a discretionary trust), even a beneficiary subject to a spousal support order (or other exception creditor)."

Conclusion

The defendant in *Berlinger* filed a motion for rehearing in the Florida Second District Court of Appeals. If the motion for rehearing is granted the court will have an opportunity to revisit the case and hopefully overturn a poor decision. Should the *Berlinger* decision stand, it has the potential to do serious harm to both the beneficiaries of Florida trusts and to the trust industry in Florida. If the *Berlinger* decision stands hopefully the Florida legislature will quickly act to enact legislation addressing this serious problem.

As further developments with respect to the *Berlinger* holding should be on the horizon (either by rehearing or legislative action), unless a trustee is concerned about a significant pending situation that requires immediate attention, it appears clients can (and perhaps should) wait for the final resolution of the *Berlinger* case to decide whether to take additional steps to further protect a beneficiary's interest in a trust.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Jonathan Gopman

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CITATIONS:

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[i]F.S. § 736.0502(3).

[ii]F.S. § 736.0503(2).

[iii]F.S. § 736.0503(2).

[iv]F.S. § 736.0504(2)(a)-(b).

[v]House of Representatives Staff Analysis to HB 1183 dated (March 8, 2007) (emphasis added).

[vi]*Id*. (emphasis added).

[vii]*Berlinger v. Casselberry,* Case No. 2D12-6470, 6 (Fla. 2d DCA Nov. 27, 2013).

[viii]*Id*.

[ix]*Bacardi v White*, 463 So. 2d 218, 220 (Fl. 1985).

[x]*Id.*

[xi]*Id.*

[xii]*Id.*

[xiii]*Id.* at 223.

[xiv]*Id.* at 222.

[xv]An detailed discussion of the controversy surrounding the promulgation of Section 504 of the UTC is beyond the scope of this commentary, however, many commentators viewed this provision of the UTC as a radical departure from long-standing common law principals of trusts and asset protection. Under common law a beneficiary of a purely discretionary trust was viewed as having virtually no enforceable right to receive a distribution from the trust. Such a beneficiary was able to enforce a right only upon a trustee's action in bad faith. Generally a purely discretionary trust was considered an effective means of protection of a beneficiary's interest because a creditor would only have the same right to enforce the distribution as the beneficiary. The UTC, however, arguably granted a class of exception creditors the right to compel distributions and attach to trust assets at a significantly lower threshold. See Merric & S. Oshins, "The Effect of the UTC on the Asset Protection of Spendthrift Trusts," 31 EP 375 (Oct. 2004).

[xvi]Section 504 of the UTC provides:

> (a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.
>
> (b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:
>
> (1) the discretion is expressed in the form of a standard of

distribution; or

(2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and

(2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(d) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(e) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or cotrustee.

[xvii]See, *e.g.*, the Oregon Uniform Trust Code (Oregon Revised Statutes §§ 130.001–130.910), which specifically omits section 504 of the UTC.

[xviii]Florida's modified version of Section 504 of the UTC is Florida Statutes §736.0504. Florida Statutes § 736.0504 provides:

(1) As used in this section, the term "discretionary distribution" means a distribution that is subject to the trustee's discretion whether or not the discretion is expressed in the form of a standard of distribution and whether or not the trustee has abused the discretion.

(2) Whether or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, including a creditor as described in s. 736.0503(2), may not:

(a) Compel a distribution that is subject to the trustee's discretion; or

(b) Attach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.

(3) If the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee.

(4) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.(2) Whether or not a trust contains a spendthrift provision, if a trustee may make discretionary distributions to or for the benefit of a beneficiary, a creditor of the beneficiary, including a creditor as described in s. 736.0503(2), may not:

(a) Compel a distribution that is subject to the trustee's discretion; or

(b) Attach or otherwise reach the interest, if any, which the beneficiary might have as a result of the trustee's authority to make discretionary distributions to or for the benefit of the beneficiary.

[xix]A number of jurisdictions have statutes that are designed to prevent exception creditors from reaching the interest of a trust beneficiary. See, *e.g.*, South Dakota Codified Laws §55-1-35 (providing that "[r]egardless of whether a beneficiary has any outstanding creditor, a trustee of a spendthrift trust may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. No trustee is liable to any creditor for paying the expenses of a beneficiary of a spendthrift trust."). See also, Nevada Revised Statutes §163.419(4) (providing that "[r]egardless of whether a beneficiary has an outstanding creditor, a trustee of a discretionary interest may directly pay any expense on the beneficiary's behalf and may exhaust the income and principal of the trust for the benefit of such beneficiary.").