

IN THE DISTRICT COURT OF APPEAL  
FOURTH DISTRICT OF FLORIDA

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CASE NO. 4D09-759

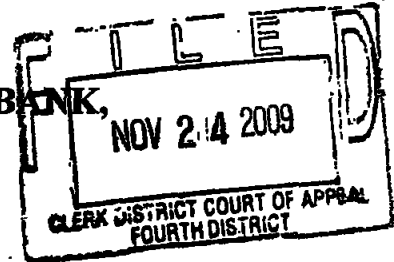
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**JAMES F. MILLER,**  
Appellant,

**KEN BASTANI and CENTENNIAL BANK,**  
Intervenor Appellants,

v.

**GARY KRESSER,**  
Appellee.



On appeal from the Circuit Court of the 15<sup>th</sup> Judicial Circuit  
in and for Palm Beach County, Florida  
L.T. Case No. 2003 CA 005002 AO

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**APPELLEE'S ANSWER BRIEF**

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## INTRODUCTORY STATEMENT

On or about March 6, 2009, the Defendant/Appellant, JAMES F. MILLER (“James Miller”), filed his Notice of Appeal in Case No. 4D09-759. On or about March 6, 2009, the Third-Party Defendant/Appellant, JERRY MILLER (“Jerry Miller”), as TRUSTEE of the JAMES F. MILLER IRREVOCABLE TRUST (the “Trust”), filed his Notice of Appeal in Case No. 4D09-760. On or about April 17, 2009, James Miller and the Trust filed their respective Motions to Consolidate Case No. 4D09-759 and Case No. 4D09-760. On April 27, 2009, this court entered its Order wherein it granted those Appellants’ Motions to Consolidate and consolidated Case No. 4D09-759 and Case No. 4D09-760 for record purposes only.

On or about April 20, 2009, the Intervenors/Appellants, KEN BASTANI (“Mr. Bastani”) and CENTENNIAL BANK (“Centennial Bank”) (collectively, the “Intervenors”), filed their Notice of Appeal in Case No. 4D09-1452. On or about May 12, 2009, the Intervenors filed their Motions for Leave to Intervene in Case No. 4D09-759 and Case No. 4D09-760. On May 27 and May 28, 2009, this court entered its Orders wherein it granted the Intervenors’ Motions for Leave to Intervene in Case No. 4D09-759 and Case No. 4D09-760.

On September 1, 2009, (a) the Intervenors filed their Initial Brief in Case No. 4D09-759, (b) the Intervenors filed their Initial Brief in Case No. 4D09-760, (c) the Intervenors filed their Initial Brief in Case No. 4D09-1452, (d) the Trust filed its Initial Brief in Case No. 4D09-760 and (e) James Miller filed his Notice of Joinder in Case No. 4D09-759 wherein he joined in the Intervenors' and the Trust's Initial Briefs they filed in their respective appeals.

The Plaintiff/Appellee, GARY KRESSER ("Mr. Kresser"), submits this Answer Brief in response to the arguments the Appellants, James Miller, the Trust and the Intervenors (collectively, the "Appellants"), have raised in Case No. 4D09-759 and Case No. 4D-760.<sup>1</sup> Mr. Kresser will submit a separate Answer Brief in Case No. 4D-1452 in response to the additional arguments the Intervenors have raised in that appeal. For that matter, to the extent the Trust has raised in Point III of its Initial Brief in Case No. 4D-760 (which James Miller has adopted in his Notice of Joinder in Case No. 4D-759) the same arguments the Intervenors have more fully addressed in their Initial Brief in Case No. 4D-1452, Mr. Kresser will respond to those arguments in his Answer Brief in Case No. 4D-1452. As such, to

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<sup>1</sup>For purposes of maintaining a proper record, Mr. Kresser is filing separate, but identical, Answer Briefs in Case No. 4D-759 and Case No. 4D-760.

the extent necessary, Mr. Kresser hereby adopts and incorporates herein the arguments he has raised in his Answer Brief in Case No. 4D-1452.

References to the Record on Appeal are cited as (R. \_\_). References to the Trial Transcript are cited as (T. \_\_/\_\_) (page/line). References to Mr. Kresser's Trial Exhibits are cited as (Tr. Ex. \_\_). References to the Trust's Initial Brief in Case No. 4D09-760 are cited as (Trust Init. Br. \_\_). References to the Intervenors' Initial Brief in Case No. 4D09-759 or Case No. 4D-760 are cited as (Intervenors Init. Br. \_\_).

## STATEMENT OF THE CASE AND OF THE FACTS

This appeal involves the trial court's invalidation of a spendthrift provision of a trust based on the beneficiary's exercise of complete dominion and control over the trust's assets and the trustee. The operative facts of this case are largely undisputed and are set forth in detail in the Final Judgment in Proceedings Supplementary in Favor of Barbara Miller and Against Jerry Miller as Trustee of James F. Miller Irrevocable Trust (the "Final Judgment in Proceedings Supplementary") the court entered on February 3, 2009 and the Appellants have appealed herein. (R. 303-316).

On or about May 7, 2003, Mr. Kresser sued James Miller, *et al.*, for, among other things, breach of an oral partnership agreement, breach of fiduciary duty and fraudulent transfer. (R. 304). Approximately one year later, in April, 2004, James Miller's mother, Elizabeth Miller, created the irrevocable Trust, naming herself as the settlor, James Miller's younger brother, Jerry Miller, as the trustee and James Miller, himself, as the sole beneficiary. (R. 304; Tr. Ex. 2). Although an attorney, Derek A. Schwartz, Esq. ("Mr. Schwartz"), was supposedly retained by Elizabeth Miller to prepare the Trust, (T. 284/25-285/2), he did not prepare nor request that she sign an engagement letter, (T. 290/4-290/11), charge for his time, (T. 287/9-287/19, 289/19-289/25), keep track of his time, (T. 287/20-287/24), issue an

invoice, (T. 289/9-289/14), or maintain any drafts of the Trust, (T. 297/23-298/1).  
(T. 298/8-298/14).<sup>2</sup>

Article I of the Trust provided, in pertinent part:

(A) During the life of the settlor's son, James F. Miller ("Jimmy"), the trustee shall hold the trust estate as the principal of a separate trust. The trustee is authorized, from time to time and in his absolute discretion:

(1) to pay to Jimmy so much of the net income and principal of the trust as the trustee, in its sole discretion, deems necessary or advisable for his health, education, support and maintenance;...

(3) to pay to Jimmy, in addition to any amount or amounts distributable pursuant to paragraph (1) of this Subdivision, so much of the net income and principal of the trust for any other purpose that the independent trustee deems to be worthwhile and in his best interest....

(B) The discretionary powers over the distribution of income and principal granted to the trustee by the foregoing provisions of this Article shall be exercised in such manner as the trustee believes will serve the best interest of Jimmy, with primary regard for Jimmy's current interests, rather than for any remainder or successor interests.

(Tr. Ex. 2, pp. 1-2).

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<sup>2</sup> At trial, Mr. Kresser maintained that this lack of formality supported his theory that it was James Miller, and not Elizabeth Miller, who actually hired the services of Mr. Schwartz to create the Trust.

Article X of the Trust contained a spendthrift clause providing:

The right of any person to receive any amount, whether of income or of principal, pursuant to any of the provisions of this agreement, shall not, in any manner, be anticipated, alienated, assigned or encumbered, and shall not be subject to any legal process or bankruptcy or insolvency proceeding or to interference or control by creditors or others.

(Tr. Ex. 2, p. 18).

Article V(B) contained a discretionary payment provision stating:

In granting the trustee discretion over the payment of the income and principal of the trusts under this agreement, it is the settlor's intention that the independent trustee (1) may exercise the discretion specifically granted to the independent trustee without the approval or consent of any trustee who is not an independent trustee, and (2) shall have complete discretion to terminate any trust by distributing the entire principal to the beneficiary or beneficiaries eligible to receive distributions from such trust (and if more than one, in equal or unequal shares and to the exclusion of any one or more of them) without further accountability to anyone if the independent trustee determines that continuation of such trust is inadvisable in view of the size of the trust or for any other reason.

(Tr. Ex. 2, p. 9).

Immediately after the formation of the Trust, in April, 2004, Elizabeth Miller transferred to the Trust, among other things, a one-third interest as tenant in

common in a residence (the "Islamorada Residence") located in Islamorada, Florida, then valued in excess of one million dollars. (R. 304).

On June 4 through 7, 2007, the trial court held a jury trial in the underlying *Kresser v. Miller* action and, on June 7, 2007, the jury returned a verdict in favor of Mr. Kresser in the principal sum of \$771,340.02. (Tr. Ex. 203; R. 305). Thereafter, on or about June 21, 2007, the trial court entered its Final Judgment in favor of Mr. Kresser and against James Miller (and the Defendant, Castles Construction and Development LLC) in the sum of \$1,019,095.82. (R. 9-10, 305). On July 5, 2007, Mr. Kresser recorded a certified copy of that Final Judgment in Official Records Book 2306 at Page 1427 of the Public Records of Monroe County, Florida. (R. 9-10).

Separately, on or about May 5, 2003, or just two days before Mr. Kresser initiated his lawsuit against James Miller (but after Mr. Kresser had put James Miller on notice of his claims), James Miller's mother, Elizabeth Miller, had established her own testamentary trust (the "Elizabeth Miller Trust") whereby she provided for dispositions upon her death to her two sons, James Miller and Jerry Miller, individually. (R. 304-305). However, four years later, on or about June 26, 2007, or just a few days after the court entered its Final Judgment against James Miller, Elizabeth Miller amended her trust to eliminate all dispositions to James

Miller, individually, and replace them with dispositions directly to his Trust. (R. 305).

When James Miller failed to pay the underlying Final Judgment, on or about October 27, 2007, Mr. Kresser initiated proceedings supplementary wherein he asserted, among other things, that he was entitled to execute on all of the Trust's assets, including its one-third interest in the Islamorada Residence, because James Miller, as the Trust's beneficiary, exercised complete dominion and control over all of the Trust's assets and its trustee, his younger brother, Jerry Miller. (R. 1-13). In furtherance of those proceedings supplementary, on November 1, 2007, Mr. Kresser recorded a Lis Pendens in Official Records Book 2329 at Page 1287 of the Public Records of Monroe County, Florida. (Tr. Ex. 200). The Lis Pendens contained a specific legal description of the Islamorada Residence and placed all potential purchasers and lenders on notice of Mr. Kresser's claim in his proceedings supplementary in and to that Residence. (Tr. Ex. 200).

Notwithstanding the recordation of the Lis Pendens, on or about April 16, 2008, Mr. Bastani purchased the Islamorada Residence for a purchase price of \$1,100,000.00. (R. 308). At the time of that sale, the Trust, the Jerry Miller Trust and the Elizabeth Miller Trust each owned one-third of that Residence as tenants in common. As such, the Trust received one-third of the sale proceeds, or

approximately \$333,000.00. (R. 308). In connection with his purchase of the Islamorada Residence, Mr. Bastani executed and delivered to Centennial Bank a mortgage in the sum of \$800,000.00.

From December 28 through December 31, 2008, and on January 7, 2009, the trial court conducted a non-jury trial in the proceedings supplementary.<sup>3</sup> (T. 1-896; R. 303). During the trial, Jerry Miller, whom the court found to be “candid, just a great guy to listen to and the most believable here,” (R. 333, 15/14-15/16), testified as to James Miller’s absolute dominion and control over the Trust and himself, as trustee, and his own clear lack of knowledge of and authority over the Trust’s affairs, as follows:

- a. James Miller, the beneficiary, and not Elizabeth Miller, the settlor, asked that Jerry Miller serve as the trustee of the Trust. (T. 100/23-101/2).
- b. Nobody ever advised Jerry Miller of his duties as the trustee of the Trust. (T. 103/13-103/23, 107/7-107/11).
- c. Jerry Miller, the trustee, did not know what assets the Trust held. (T. 109/13-111/6).

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<sup>3</sup> The trial court conducted the trial from December 28 through December 31, 2008, but heard final argument of counsel on January 7, 2009.

d. James Miller, the beneficiary, and not Jerry Miller, the trustee, maintained all deeds and other documents showing what assets and accounts the Trust held. (T. 196/25-197/12).

e. James Miller, the beneficiary, handled all negotiations and document preparation on behalf of the Trust in connection with the loan the Trust obtained from Grand Bank, while Jerry Miller, the trustee, simply executed the promissory note and other documents upon James Miller's request. (T. 172/18-173/10, 174/6-174/13, 176/8-176/14).

f. James Miller, the beneficiary, handled all negotiations and document preparation on behalf of the Trust in connection with the five separate settlement agreements the Trust entered into with Grand Bank, while Jerry Miller, the trustee, once again, just executed the necessary documents upon request. (T. 180/23-182/18, 183/3-184/16, 192/21-193/6, 196/6-196/24).

g. James Miller, the beneficiary, handled the entire closing on behalf of the Trust on its sale of the Islamorada Residence; in fact, Jerry Miller, yet again, simply executed all closing documents on behalf of the Trust upon his brother's request and, then, James Miller personally drove those documents down to the closing in the Keys and, moreover, had his own title company handle all title work for the closing. (T. 199/24-200/14).

h. Subsequent to the closing on the Trust's sale of the Islamorada Residence, James Miller, the beneficiary, specifically directed Jerry Miller, the trustee, how to disburse all proceeds the Trust received from that sale, predominantly to James Miller, himself, through his companies or those companies' creditors; in fact, James Miller actually wrote the checks himself and Jerry Miller just signed them upon request, without any inquiry or investigation. (T. 214/20-215/4, 470/11-470/15, 473/8-482/23; Tr. Ex. 205).

i. James Miller, the beneficiary, maintained the Trust's checkbook. (T. 484/15-484/418).

j. James Miller, the beneficiary, personally wrote a Trust check made payable to cash and *forged his brother's signature on it*, unbeknownst to Jerry Miller, the trustee. (T. 482/24-485/13; Tr. Ex. 205).

k. Jerry Miller, the trustee, has never balanced the Trust's checkbook. (T. 501/12-501/17).

l. And finally, from the inception of the Trust in April, 2004 through the date of Jerry Miller's deposition in the proceedings supplementary in October, 2007 (just two months prior to the trial), Jerry Miller, as trustee, never once made a distribution from the Trust, notwithstanding his supposed authority to do so,

because he “didn’t even know what was in there to distribute.” (T. 112/11-112/25).

At the conclusion of the trial, the court ruled as follows:

Okay, as to the trust. It’s an old saying that meant that bad facts make bad law. The ruling in this case is going to be limited to the specific facts in this case. It is narrowly drawn. And my ruling in this case is in no way to affect the general trust law of the State of Florida. It is drawn very narrowly to my specific findings which I will make on the record in this case. I find that the trust was properly settled by Ms. [Elizabeth] Miller, the... mother of the debtor in this case. I find that at the time the trust was settled it contained a valid spendthrift provision, which if properly protected would have been enforceable.

I make a specific finding that there is absolutely nothing wrong with good estate planning. That it is encouraged under the law. And that there is absolutely nothing wrong with valid asset protection.

Subsequent to the formation of the trust, it became clear that *James Miller exercised actual dominion and control over the assets of the trust. He became the de facto trustee. Jerry Miller was at best a rubber stamp for his brother’s decisions.*

*The facts in this case were shown by the clear and convincing evidence and they are legion. Checks were prepared by James Miller, presented to Jerry Miller for signature, and that signature was given without question. The checkbook was maintained by James Miller. Jerry Miller never balanced the checkbook. And until recently didn’t have possession of it.*

*Jerry [sic, James] Miller<sup>4</sup> exercised dominion and control over the assets of the trust, including the direction as to how assets were to be disposed of, how they were to be invested, including the issue of the purchase of the apartment buildings and the execution of mortgages thereon.*

James Miller went so far as to in [his] Marital Settlement Agreement pledge that he had the ability to lien his trust. And probably the straw that broke the camel's back was that James Miller felt comfortable enough to write checks in his own handwriting on the trust account from the checkbook, which was in his possession.

Additionally, all of the bearer notes, which are negotiable instruments, which are demand notes payable to bearers, were held by the beneficiary named. *All of the assets were effectively turned over to James Miller by Jerry Miller pursuant to the discretionary payment by the trustee contained in paragraph [V(B)] on page nine of the trust, in that there was a merger of the trustee and the beneficiary. Therefore, all of the assets of the James Miller Trust are reachable by the creditor in this case.*

Now, it must be noted that I had an opportunity to view the witnesses in this case. James Miller has a very strong personality. And there is no question in my mind as the older brother he had no problem whatsoever controlling his younger brother, Jerry Miller, in this case. *He exercised actual dominion and control, not only over the trust but over the trustee.* And his mother gave him additional power to do that by making him the trustee of Jerry's trust.

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<sup>4</sup> While the transcript references Jerry Miller, the court undoubtedly meant James Miller at this point in the proceedings, based on the clear context of its ruling. (T. 891/10).

But it's clear from watching the interactions of the brothers in the courtroom, that I had an opportunity to observe as the trial judge, that Jerry Miller clearly -- excuse me, that *Jim Miller clearly controls Jerry Miller's actions as trustee.*

All right. Mr. Gache [Mr. Kresser's counsel], if you will put together an order, please, finding that this case -- this ruling is limited specifically to the facts in this case and it is not intended to in any way disturb the existing law of the State of Florida as it relates to trusts. *It is only because there has effectively been a merger of the trustee and the beneficiary in this case, and the actual exercise of true dominion and control over the trust res by the beneficiary that I am making this finding. And this was shown by clear and convincing evidence.*

(T. 889/21-893/17). [emphasis added]

Approximately two weeks later, on January 23, 2009, the trial court heard argument of counsel as to the form of the Final Judgment in Proceedings Supplementary. (R. 319-385). At that hearing, the court stressed:

[B]ut for James Miller doing what he did in this case by *taking over the trust and completely controlling his brother*, this would have been all valid and [Mr. Kresser] would have never reached a dime of it. (R. 324, 6/19-6/23). [emphasis added]

[Mr. Kresser] couldn't have touched it but for the fact that *Jim Miller led his brother along the garden path and totally controlled this and effectively merged it.* (R. 328, 10/8-10/11). [emphasis added]

Look, this was a gumbo, and I wanted it to be a gumbo, because there was a lot of flavor in this, and the flavor was, *is Jerry was doing nothing. Jim did it all.* And watching these guys sit next to each other and the interaction in that courtroom and the personalities of these two is critical to the understanding of what happened in this case, and that's why this is absolutely appropriate, because *James Miller, great strong personality, clearly overshadows Jerry and clearly, clearly controlled what was going on here, and Jerry was at best a rubber stamp. And he wasn't even a rubber stamp at the point that Jim decided that, that Jim decided he didn't even need Jerry anymore, he was just going to keep the checkbook and sign them himself.* (R. 332, 14/1-14/18). [emphasis added]

[I]t was clear that [Jerry's] a very nice fellow and he loves his brother, but *his brother is his leader when it comes to the trust issue.* (R. 333, 15/16-15/19). [emphasis added]

*This is the clearest, the clearest possible case of control of a trust by the beneficiary. It could not be clearer.* And that's why this case is limited to the facts of this case and this case only. (R. 349, 31/5-31/9). [emphasis added]

Ultimately, on February 3, 2009, the trial court entered its Final Judgment in Proceedings Supplementary, (R. 303-316), wherein it set forth its foregoing factual findings in more detail and concluded:

13. Notwithstanding the recording of the lis pendens, on or about April 16, 2008, the Trust and the Elizabeth Miller Trust sold the Islamorada Residence for \$1,100,000.00 to Ken Bastanti.

14. As such, the Elizabeth Miller Trust at closing received one third of the proceeds from the sale of the Islamorada Residence. The Trust also was entitled to (and did) receive one third of the proceeds of the sale, or approximately \$333,000.00, but it disbursed approximately \$40,000.00 of those proceeds to Miller & Miller Holdings, LLC; another \$110,000.00 to Miller's law practice; \$8,000.00 to The Landings at Miller Road, LLC; and \$10,000.00 to a start-up not-for-profit corporation organized by [James] Miller. [James] Miller testified that these distributions were, in fact, loans made by the Trust<sup>5</sup> [footnote no. 3 in original], and copies of promissory notes were produced at trial; however, it was [James] Miller, not Jerry Miller, who held the original notes evidencing these "loans." Moreover, these "loans" were disbursed from the Trust's checkbook, also in [James] Miller's possession and control<sup>6</sup> [footnote no. 4 in original]. Jerry Miller was unable to explain what legitimate maintenance or support purpose these distributions served as required by the Trust's spendthrift provision. The remaining \$150,000.00 of the Trust's portion of the sales proceeds was supposedly applied in satisfaction of an obligation of the Trust to Grand Bank, supposedly securing an additional loan to Lindan Arms, LLC. However, no credible record evidence of any kind was ever produced by Jerry Miller substantiating this obligation to Grand Bank.

15. *In sum, Jerry Miller knows little about the Trust, has limited knowledge regarding what assets it owns, and rather than operating the Trust to provide for the*

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<sup>5</sup> Note: Jerry Miller, as Trustee, testified he was not aware that these payments were loans at all.

<sup>6</sup> In one instance, [James] Miller, himself, wrote a check to Cash from the Trust's checkbook and admitted to forging his brother's signature on the check.

*maintenance of the beneficiary so as to legitimize the spendthrift trust, he instead serves as the legal veneer to disguise [James] Miller's exclusive dominion and control of the Trust assets.*

16. Additionally, the court had the opportunity to review the witnesses in this case. [James] Miller has a very strong personality and there is no question in the court's mind that *[James] Miller, as the older brother to Jerry Miller, has at all times exercised complete control over all of Jerry Miller's actions involving Jerry Miller serving as Trustee of the Trust and in Jerry Miller's capacity as a co-personal representative of Elizabeth Miller's estate.*

17. *Based on the court's findings as are detailed above, all of which were established not just by a preponderance of the evidence, but by clear and convincing evidence, the court concludes that while title to the Trust's assets remains in the Trust, Jerry Miller, by giving [James] Miller complete access to, as well as dominion and control over the Trust's assets, has effectively turned over to [James] Miller all of the assets of the Trust pursuant to Article V(B) of the Trust, thereby subjecting the Trust's assets to execution....*

21. *While the Trust by its terms does not explicitly authorize [James] Miller to direct the Trustee to convey to him assets from the Trust, [James] Miller, de facto, controls the Trustee and the Trust assets. Jerry Miller has limited knowledge of the assets of the Trust, has never made an investigation into whether it is in the Trust's and the beneficiary's interest to hold or disburse the assets owned by the Trust, and has acknowledged that as Trustee, his sole function has been to sign documents at [James] Miller's behest. If [James] Miller directs Jerry E. Miller as Trustee to acquire condominium projects, mortgage Trust property, sign settlement*

documents or disburse Trust assets – decisions which the Trustee should independently evaluate – instead, Jerry E. Miller as Trustee blindly complies with all of [James] Miller's directions. *As such, [James] Miller has absolute control and dominion over the Trust assets and the spendthrift clause does not protect the assets of the Trust against the reach of the Kresser Judgment. See, Croom; In re Lichstrahl; In re May.; cf., Elvins v. Seestedt, 193 So. 54 (Fla. 1940) (Where trustee has no duties under land trust and must convey property as beneficiaries request, trust is a passive trust vesting legal title in beneficiary). In effect, the Trust has failed and the spendthrift provision is hereby terminated due to [James] Miller's ability to cause the trustee of the Trust to transfer Trust assets to [James] Miller at [James] Miller's direction.*

(R. 308-311). [emphasis added]

Thereafter, the Appellants timely appealed the Final Judgment in Proceedings Supplementary. (R. 470-485, 486-502).

### **SUMMARY OF THE ARGUMENT**

Because James Miller, the Trust's beneficiary, exercised absolute dominion and control over the Trust's assets and the trustee, his younger brother, Jerry Miller, the spendthrift provision of the Trust fails as a matter of law. *Croom v. Ocala Plumbing and Electric Co., 57 So. 243 (Fla. 1911)*. Under these circumstances -- where James Miller actually served as the Trust's *de facto* trustee -- form cannot prevail over substance and prevent Mr. Kresser, as James Miller's judgment creditor, from executing on all of the Trust's principal and income. For

that matter, even if one argues that the trial court invalidated the entire Trust based on the merger of James Miller's legal and equitable interests, instead of only the spendthrift provision thereof based on his dominion and control, the result would be the same -- Mr. Kresser can reach the Trust's assets. *Axtell v. Coons*, 89 So. 419 (Fla. 1921). Accordingly, the trial court's entry of its Final Judgment in Proceedings Supplementary should be affirmed.

### ARGUMENT

#### **THE TRIAL COURT PROPERLY INVALIDATED THE SPENDTHRIFT PROVISION OF THE TRUST BECAUSE THE BENEFICIARY EXERCISED COMPLETE DOMINION AND CONTROL OVER THE TRUST'S ASSETS AND THE TRUSTEE**

A spendthrift trust is defined as a trust which, by the terms of the trust, imposes a valid restraint on the voluntary and involuntary transfer of the beneficiary's interest therein. *In re Nichols*, 42 B.R. 772, 776 (M.D. Fla. 1984), citing *Waterbury v. Munn*, 32 So. 2d 603 (Fla. 1947) ("The typical spendthrift trust bars the voluntary or involuntary alienation of the life beneficiary's interest in his right to receive income."). Spendthrift trusts are "created with a view of providing a fund for the maintenance of another, and at the same time securing it against his own improvidence or incapacity for self-protection." *Croom v. Ocala Plumbing and Electric Co.*, 57 So. 243, 244 (Fla. 1911).

“The general rule is that when one has an interest in property which he may alien or assign, that interest, whether legal or equitable, is liable for the payment of his debts.” *Croom*, 57 So. at 244-245; *Accord, In re Cattafi*, 237 B.R. 853, 856 (M.D. Fla. 1999). Thus, assets in trusts containing valid spendthrift provisions are protected from the reach of the beneficiary’s creditors unless (i) the settlor created the trust for his or her own benefit, rather than for the benefit of another (*i.e.*, a self-settled trust), *In re Cattafi*, 237 B.R. at 856, *citing, In re Witlin*, 640 F. 2d 661, 663 (5<sup>th</sup> Cir. 1981) (“[I]f a settlor creates a trust for his own benefit and inserts a spendthrift clause, it is void as far as then existing or future creditors are concerned. The existing and future creditors can reach the beneficiary’s interests under the trust.”), or (ii) the beneficiary of the trust exercises dominion and control over the trust’s assets. *In re Brown*, 303 F. 3d 1261, 1265-1266 (11<sup>th</sup> Cir. 2002) (“In Florida, trusts containing valid spendthrift provisions are protected from the reach of creditors, so long as the beneficiaries cannot exercise dominion over the trust assets.”); *In re Cattafi*, 237 B.R. at 856, *citing, Croom*, 57 So. at 244-245 (“The purpose of a spendthrift trust is to protect the beneficiary from himself and his creditors. Therefore, such a trust fails where the beneficiary exercises ‘absolute dominion’ over the property of the trust.”). As a result, a spendthrift trust fails under Florida law where the beneficiary has the right to require the trustee to

convey trust property because, in such instances, the beneficiary has, in effect, dominion and control over the trust assets.

Moreover, where the beneficiary controls the disposition of trust property, the estate planning policy consideration behind spendthrift trusts would be, in effect, overshadowed by a policy to avoid the perpetration of fraud against the beneficiary's creditors. In those cases, the principal purpose of a spendthrift trust, *i.e.*, allowing an individual to dispose of property as he wishes for the maintenance of another, while protecting the beneficiary against creditors, would be undermined by the beneficiary's own ability to alienate and assign the trust property in any way he sees fit, to the exclusion of his creditors.

In the seminal case on spendthrift trusts, *Croom v. Ocala Plumbing and Electric Co.*, 57 So. 243 (Fla. 1911), the Florida Supreme Court recognized the dominion and control exception to the general rule protecting beneficiaries of a spendthrift trust against the claims of creditors. In *Croom*, the court found a deed providing that the trustees "shall convey all or any part of the corpus of the property conveyed thereby to the [beneficiaries] or to their assigns as they may direct upon their joint request" insufficient to protect the subject property from the beneficiaries' creditors because "the deed virtually gives the [beneficiaries] such absolute dominion over the property as to vest in them or their assigns an absolute

title to the property, when it vests in them the right to require the trustees, upon their bare request, to convey any part or the whole of the property either to them or to their assigns in fee simple absolute." *Croom*, 57 So. at 244-245.

Thus, if the beneficiary of a trust has sufficient control over the trustee so as to, in effect, control the disposition of the trust's assets, then the spendthrift provision is invalid and the trust's assets are subject to the claims of the beneficiary's creditors. *In re Gillett*, 46 B.R. 642, 644 (S.D. Fla. 1985) ("Where the beneficiary of a spendthrift trust has the right to require the trustee to convey trust property to him, then the beneficiary has dominion and control over the trust res and the trust will fail as a spendthrift trust."); *In re Bottom*, 176 B.R. 950, 953 (N.D. Fla. 1994) ("If a beneficiary exerts sufficient dominion and control over the trust property, the trust can no longer be considered spendthrift."); *In re Smith*, 129 B.R. 262, 264 (M.D. Fla. 1991) ("Under Florida law, the purpose of a spendthrift trust is to protect the beneficiary from himself as well as his creditors. Thus, a spendthrift trust cannot exist if the beneficiary is able to control the assets of the trust before its maturation.").

After *Croom*, several courts have invalidated a spendthrift provision of a trust, without terminating the trust as a whole, based on the beneficiary's exercise of dominion and control over the trust's assets. In their decisions, those courts

have strictly relied on the beneficiary's authority and conduct in connection with the trust's assets, instead of the merger of the trustee's legal interest and the beneficiary's equitable interest, in voiding only the spendthrift provision of the trust, instead of the trust as a whole.

In *In re Lichstrahl*, 750 F. 2d 1488 (11<sup>th</sup> Cir. 1985), the court cited *Croom* and found that, notwithstanding their anti-alienation provisions, pension plan trusts a debtor created, naming his professional association (P.A.) as settlor, himself as trustee and the P.A.'s employees, including himself, as beneficiaries, were not valid spendthrift trusts because, while the debtor could not assign or alienate his interest as beneficiary in the trusts, he could nevertheless amend or terminate the trusts as the principal of the settlor. *In re Lichstrahl*, 750 F. 2d at 1490. As such, the court determined that the debtor "alone enjoys the authority to act, whether as an agent of the settlor or in his own right as trustee and beneficiary" and "therefore enjoys 'absolute dominion' over the property of the trusts." *Id.* As a result, the court held the debtor's creditors could not only attach or levy the debtor's beneficial interest in the trust, but could also satisfy their claims from the corpus of the trusts. *Id.*

In *In re May*, 83 B.R. 812 (M.D. Fla. 1988), the court again cited *Croom* and found that, to the extent a beneficiary could demand an \$8,000.00 annual payment

from a trust her mother created, she maintained dominion and control over the trust's assets to that extent and her creditors could reach that annual sum. *In re May*, 83 B.R. at 814. In holding that the spendthrift clause did not protect that annual payment, the court stated, "Had the defendant been able to reach beyond this sum and to exhaust the trust corpus, then the trustee in bankruptcy would be able to avoid the claimed exemption in its entirety and bring *both the principal and the proceeds* into the bankruptcy estate." *Id.* [emphasis added] In other words, even though the trust was not a self-settled trust, as it was created by a mother for the benefit of her daughter, the court specifically held the beneficiary's ability to control the trust's assets to a certain degree (\$8,000.00 per year or otherwise) extended to her creditors the right to invade those assets to the same degree to satisfy their claims. *Id.*

In *In re Nichols*, 42 B.R. 772 (M.D. Fla. 1984), the court invalidated a spendthrift clause in a profit-sharing trust fund because the beneficiary/employee maintained a vested interest in, and could compel distribution of, all sums he had contributed to the trust fund and additional sums his employer had contributed based on the length of his employment and the reason for his termination and also because he had the ability to borrow monies from the trust fund. *In re Nichols*, 42 B.R. at 774, 776. Thus, the court found it "apparent that the debtor has sufficient

control over the funds to remove them from the protection of the spendthrift restrictions.” *In re Nichols*, 42 B.R. at 776. Once again citing *Croom*, the court reiterated, “where a debtor has the power to terminate the trust or reach the corpus to give him virtually absolute dominion over the trust, a spendthrift clause does not secure the property from the creditors.” *Id.*

Moreover, in cases where a beneficiary exercises complete dominion and control over a trust’s assets, the existence of other beneficiaries, including remaindermen, is immaterial. To that end, if a primary beneficiary controls a trust’s assets during his lifetime to the exclusion of other beneficiaries, he need not account to those other beneficiaries upon his distribution of, or his creditors’ invasion of, the trust property. *See, Axtell v. Coons*, 89 So. 419, 420 (Fla. 1921) (“He was given possession, control, the beneficial use and absolute and uncontrolled dominion over the property. Such power defeats the creation of a trust for the benefit of anyone else.”).

Accordingly, in the instant case, James Miller’s descendants, as remaindermen under the Trust, cannot challenge the trial court’s finding that, based on James Miller’s control of the Trust, the spendthrift provision thereof fails as a matter of law. In any event, inasmuch as James Miller’s “descendants,” instead of

any particular individuals, are named as the remaindermen under the Trust, (Tr. Ex. 2, p. 2), James Miller, alone, is, in fact, the *sole* beneficiary under the Trust.

Separately, while the trial court specifically invalidated the spendthrift provision of the Trust, without terminating the Trust itself, based on James Miller's dominion and control over the Trust, the trial court also repeatedly stated there had been a "merger of the trustee and the beneficiary." (T. 892/8-892/9, 893/12-893/13). In the event of such a merger, the legal and equitable interests in the property merge together, thereby invalidating the entire trust and extinguishing all other potential beneficiaries' rights in or to any remaining property. In *Axtell v. Coons*, 89 So. 419 (Fla. 1921), the court explained:

A fundamental essential to the existence of any trust is the separation of the legal estate from the beneficial enjoyment; and no trust can exist where the same person possesses both.... If the legal and equitable estates come together in the same person, the equitable is merged in the legal, and the trust is terminated. Absolute control and power of disposition are inconsistent with the idea of a trust. [citations omitted]

*Axtell*, 89 So. at 420.

In that regard, Mr. Kresser would point out that, had the trial court invalidated the entire Trust based on the doctrine of merger, James Miller, as both the beneficiary and the *de facto* trustee, would obtain fee simple title to all of the Trust's assets. Certainly, in that case as well, his creditors would also be entitled

to execute on all Trust property. For that matter, the only possible merger in this case in which the “legal and equitable estates come together in the same person,” *Axtell*, 89 So. at 420, would be the merger of James Miller’s legal interest as *de facto* trustee and his equitable interest as beneficiary. Jerry Miller, on the other hand, while supposedly serving as the appointed trustee, simply has no equitable interest in the Trust property to merge with his apparent legal interest. Thus, under any circumstance, whether only the spendthrift provision is invalidated by James Miller’s dominion and control, or the entire Trust is invalidated by the merger of James Miller’s legal and equitable interests, the result is the same -- Mr. Kresser, as James Miller’s creditor, can reach the Trust’s assets. *Cf., In re Brown*, 303 F. 3d 1261, 1268 (11<sup>th</sup> Cir. 2002) (“In the absence of a valid spendthrift provision, a beneficiary’s interest in a trust is a property right which is liable for the beneficiary’s debts.”).

While the instant case appears to be one of first impression -- where a beneficiary with no *express* authority over a trust nevertheless exercises complete dominion and control over the trust’s assets and the trustee himself -- it is not the first time a family member has served as a *de facto* trustee over the actual appointed trustee. In *United States v. Lena*, 2008 WL 2774375 (S.D. Fla. 2008), Evangelos and Joanne Lenas, as the settlors, created an irrevocable trust, naming

their children as the beneficiaries and another individual, Chris Kachoureff, as the sole trustee. *Id.* at \*1. On the same date they created the trust, the Lenas conveyed a residence to the trust, with the trustee to hold legal title for the benefit of their children. *Id.* at \*3. Thereafter, Mr. Kachoureff served as the trustee for more than ten (10) years, at which point two other individuals were successively appointed as trustees. *Id.* at \*3. Meanwhile, notwithstanding the trustee's express duties, the Lenas, themselves, "exercised dominion and control over the trust." *Id.* at \*7. Accordingly, the court ruled that the plaintiff, as the Lenas' creditor, could attach and foreclose its lien against the residence.

Just as the trial court in the instant case found that Jerry Miller merely served as a "rubber stamp for his brother's decisions," (R. 890/24-890/25), the *Lena* court similarly found that the named trustee in that case served as a "figurehead" to carry out the orders of the real person in control:

Plaintiff's presentation of evidence established that *the Lenas exercised dominion and control over the trust....*

The evidence also showed that *the trustees were mere figureheads that did not perform any duties on behalf of the trust independent of Mr. Lena's control.* Kachoureff stated in his response to plaintiff's interrogatories that *he did not recall performing any duties on behalf of the trust.* During Kachoureff's time as trustee, Mr. Lena made arrangements to have the roof replaced on the property without contacting Kachoureff....

The only act on record performed by a trustee is that carried out by Christina Henley. On January 7, 2008, Henley was appointed as trustee, and on the same day she conveyed the property by quitclaim deed to [the Lenas' children] at the direction of Mr. Lena.... Thus, *it is evident that Henley was appointed merely to accomplish the purpose of Mr. Lena.* Aside from this one act, which was *under the control of Mr. Lena*, the record is void of any acts performed by trustees.

*Id.* at \*7. [emphasis added]

In concluding that Mr. Lena served as the *de facto* trustee over the appointed trustee, the *Lena* court found:

Mr. Lena was appointed as the trust's general manager, and although not formalized in the trust document, Mrs. Lena served as the trust's secretary and Constantine Lena, Mr. Lena's brother, was appointed the protector of the trust. Although no family members were formally titled "trustees," *the evidence adduced at trial established that Mr. Lena has controlled the trust such that he is a de facto trustee.* Notwithstanding the fact that Mr. Lena was titled "general manager" of the trust, *his control over the trust equaled, if not exceeded, the power granted to trustees under the trust.* *Id.* at \*8. [emphasis added]

While neither Mr. Lena nor James Miller served as the appointed trustee of their respective trusts or maintained any *express* authority to control the disposition of trust property, each of them, in effect, exercised complete dominion and control over his entire trust and served as its *de facto* trustee. While Mr. Lena was the settlor of his trust and James Miller is the beneficiary of his, neither one can (or for

that matter should be allowed to) simply hide behind the trust document and escape the consequences of his actual control of all of his trust's principal, income and its trustee.

In contrast, in *Contella v. Contella*, 559 So. 2d 1217 (Fla. 5<sup>th</sup> DCA 1990), the primary case on which the Appellants rely, the beneficiary had authority to manage the trust's income and affairs and "in certain respects... acted as the sole trustee." However, he still had "*no power to deal with the corpus of the trust, which was composed of real property.*" *Contella*, 559 So. 2d at 1218. [emphasis added] In particular, the court held:

*Contella* had no authority or power over the real property of the trust, although he had broad discretion to direct sales, investments and distributions of income. The legal interests as to the real property were still held solely by the trustee, separate from any legal or equitable interest held by *Contella*.

*Contella*, 559 So. 2d at 1219.

In the instant case, the trial court specifically found, by clear and convincing evidence, that James Miller controlled not only the Trust's income, but its corpus and its trustee, as well. Jerry Miller, the named trustee, acted solely as a straw man and agent for James Miller. He had no knowledge of the Trust's assets, never made any investigation as to whether it was in the Trust's and beneficiary's best interests to acquire, sell, distribute or mortgage any of the Trust's property and

admitted his sole function, as the trustee, was to sign documents at his brother's request. In fact, when James Miller, as the beneficiary, directed Jerry Miller to acquire condominium projects, sign mortgages, sign settlement documents, sign checks and disburse Trust assets -- acts which he, as the trustee, should independently evaluate -- he, instead, blindly complied. To that end, while Jerry Miller, as the trustee, should have been operating the Trust for the maintenance of the beneficiary, as required to legitimize the spendthrift provision, James Miller, himself, has instead utilized the Trust to hinder Mr. Kresser's ability to execute on his Final Judgment.

As such, whether the trust instrument actually said it or not, James Miller had absolute dominion and control over the Trust's assets (and the trustee for that matter), so as to invalidate the spendthrift provision of the Trust. Under these circumstances, form should not prevail over substance. *In re Holiday Isles, Ltd.*, 29 B.R. 827, 829 (S.D. Fla. 1983) ("The legal concept of a *de facto* trustee is an application of a long-settled general proposition of law that a person can *de facto* represent an entity and that *form will not be elevated over substance.*"). [emphasis added]

As the trial court properly found, in light of James Miller's total control over the Trust, and thus in the absence of a valid spendthrift clause, the Trust cannot

protect its assets against the reach of Mr. Kresser, as James Miller's judgment creditor. *In re Brown*, 303 F. 3d 1261, 1265-1266 (11<sup>th</sup> Cir. 2002) (“[T]rusts containing valid spendthrift provisions are protected from the reach of creditors, so long as the beneficiaries cannot exercise dominion over the trust assets.”).

### CONCLUSION

Based upon the foregoing points and authorities, Mr. Kresser requests that this court affirm the trial court's entry of its February 3, 2009 Final Judgment in Proceedings Supplementary and grant such other and further relief as the court deems just and proper.

**CERTIFICATE OF COMPLIANCE WITH RULE 9.210**

The undersigned certifies that this Answer Brief complies with Florida Rule of Appellate Procedure 9.210 and is printed in Times New Roman 14-point font.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail upon Norman L. Schroeder, II, Esq., Norman L. Schroeder, II, P.A., *Attorneys for James Miller*, 6801 Lake Worth Road, Suite 120, Lake Worth, Florida 33467, Brian M. O'Connell, Esq., Ashley N. Girolamo, Esq., Casey Ciklin Lubitz Martens & O'Connell, *Attorneys for the Trust*, 515 North Flagler Drive, 18<sup>th</sup> Floor, West Palm Beach, Florida 33401, Christopher N. Bellows, Esq., Rebecca M. Plasencia, Esq., Holland & Knight LLP, *Attorneys for the Intervenor*s, 701 Brickell Avenue, Suite 3000, Miami, Florida 33131, and Jeffrey Berin, Esq., 1110 North Olive Avenue, West Palm Beach, Florida 33401, this 24 day of November, 2009.

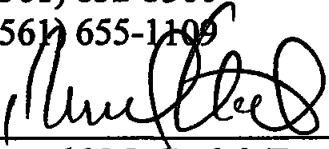
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