Michael Sneeringer

Recent Florida Case Revisits Berlinger Decision1

The recent opinion from the Florida Second District Court of Appeal ("Second DCA") in *Alexander v. Harris*[2] reinforces Florida's strong public policy favoring enforcement of child support orders to the detriment of those who desire to protect family wealth in testamentary and gratuitous transfers. The *Alexander* case supports what many trusts and estates attorneys believe to be a bad decision in *Berlinger v. Casselberry*[3] (this time with child support instead of alimony). *Alexander* also appears to create bad law as the legal basis for the decision appears to have been decided on the wrong legal ground.

Petitioner appealed denial of her petition seeking enforcement of an order awarding child support. She sought a continuing writ of garnishment directed to be disbursements to Respondent from a first party special needs trust ("FPSNT"). The FPSNT was established to hold the proceeds of a settlement on Respondent's behalf.

42 U.S.C. § 1396p(d)(4)(A) authorizes the establishment of a FPSNT by the individual-beneficiary using funds of the beneficiary who is under age 65. A FPSNT is usually funded following a settlement or receipt of the proceeds of a judgment where the beneficiary receives a windfall of money. The facts in *Alexander* infer that the trust was a FPSNT[4].

BITTEN' AT THE BIT & READY TO GIT

"Can't you hurry this up a bit? I hear they eat dinner in Hades at twelve sharp and I don't aim to be late."

Black Jack Ketchum—just before his hanging
Clayton, New Mexico
April 26, 1901

Petitioner argued that the spendthrift provisions of FPSNT were unenforceable against a valid child support order and that discretionary disbursements from the FPSNT are not protected from continuing garnishment for child support. Respondent asserted that using the assets held in the FPSNT would jeopardize his eligibility for public assistance.

While the trial court denied Petitioner's request for a continuing writ of garnishment, the appellate court reversed. The court cited the *Berlinger* case to support its statement that whether the disbursements are paid directly to the beneficiary or to third parties for the benefit of the beneficiary is immaterial to whether disbursements may be garnished[5]. (*Berlinger* is a decision issued from the Second DCA).

Citing *Berlinger,* the court indicated that discretionary disbursements made by the trustee are not protected from continuing garnishment for payment of child support. It found that Petitioner had exhausted traditional methods of enforcing her child support order and a continuing writ of garnishment was appropriate under the circumstances.

Finally, the court found no legal basis for the Respondent's argument that using his FPSNT would jeopardize his eligibility for public assistance. It noted that federal law gives great deference to state courts in family law proceedings. It held that although there is a long standing policy of recognizing the validity of spendthrift trusts under Florida law, there is a stronger policy in Florida favoring the enforcement of parents with child support orders.

Attorneys practicing in the Second DCA should be familiar with the holding in *Berlinger* and the various commentaries following the decision[6]. Through those commentaries and other secondary sources[7], many trusts and estates attorneys are aware of the Florida Supreme Court case of *Bacardi v. White*[8], that held with respect to spendthrift trusts that were not discretionary, a spouse or former spouse with a judgment in the form of support could seek a court order to obtain distributions otherwise designated for receipt by the beneficiary. Effective as of July 1, 2007, Florida adopted the Florida Trust Code ("FTC"), which is a modified

version of the Uniform Trust Code ("UTC"). There was disagreement in 2012 as to whether the FTC intended to overrule *Bacardi*[9]. This author agreed with commentary written by his former boss, and a mentor of his, Barry A. Nelson, that since there was no official written indication as to whether the members of the Trust Law committee of the Real Property, Probate and Trust Law ("RPPTL") Section of the Florida Bar (who assisted in writing the FTC) intended that Florida Statutes §736.0504 override *Bacardi*, and comments of nine members of the Florida Bar RPPTL's Section who worked on the FTC drafting committee, reflected disagreement on whether Florida's adoption of the UTC was intended to override *Bacardi*, the laws of several other states were much more clear and protective of discretionary trust beneficiaries who are subject to judgments in the form of support resulting from a dissolution of marriage[10]. *Alexander* alone does not change this overall landscape of Florida trust law. The Florida Supreme Court has yet to address how Florida Statutes §736.0503(2) should be interpreted. *Alexander* continues to express the public policy of favoring alimony and child support claims over testamentary intent.

SECOND THOUGHTS

"For my handling of the situation at Tombstone, I have no regrets. Were it to be done again, I would do it exactly as I did it at the time."

Wyatt Earp—Lawman

The appellate court in *Alexander* used the wrong legal basis in reaching its decision. The opinion misinterpreted Florida trust law, that is, a FPSNT is a self-settled trust. Although the term "self-settled trust" is not used in the FTC, Fla. Stat. §736.0505 establishes rules related to revocable and irrevocable trusts established by a settlor where the settlor retains a beneficial interest in the trust. The inclusion of a spendthrift provision is irrelevant as is the discretionary nature of the trust[11]. Under Florida law, the assets of a revocable trust are subject to the claims of the settlor's creditors during the settlor's lifetime[12]. With respect to the assets of an irrevocable trust, a creditor or assignee of a settlor may reach the maximum amount that can be distributed to or for the benefit of the settlor[13]. If the trustee has the discretion to distribute the entire principal to the settlor, the effect is as if the settlor had not created the trust for purposes of placing the settlor's assets beyond the reach of creditors[14].

Thus, the Petitioner in *Alexander* should have been able to set aside any perceived creditor protection of the FPSNT because it was a self-settled trust, a trust non-exempt from her claim for child support, and not based on the holding in *Bacardi* or *Berlinger*.

Following the decisions of *Bacardi, Berlinger* and now *Alexander*, it continues to be clear that absent any legislative pronouncement, trusts and estates practitioners should consider avoiding Florida trusts where there is a necessity for trust assets to be protected from exception creditors under Fla. Stat. §736.0503(2).

Endnotes: 1. Adapted from Gopman, Sneeringer, et al., Second DCA Keeps *Berlinger* Alive Another Day, LISI Estate Planning Newsletter #2727, (May 20, 2019) at http://www.leimbergservices.com; 2. *Alexander v Harris,* No. 2D17-3218, 2019 Fla. App. LEXIS 7659 (2d DCA May 17, 2019); 3. *Berlinger v. Casselberry,* 133 So. 3d 961 (Fla. 2d DCA 2013); 4. *See Alexander*, 2019 Fla. App. LEXIS 7659 at #1; 5. *Id.* at 3-4; 6. *See e.g.,* Barry A. Nelson, *Barry Nelson on Berlinger v. Casselberry: Discretionary Trust Held to be Available to an Alimony Creditor,* LISI Asset Protection Newsletter #232 (Dec. 16, 2013); and Jonathan E. Gopman, et al., *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,* LISI Asset Protection Newsletter #237 (Feb. 13, 2014); 7. *See* Barry A. Nelson, *Are Trust Funds Safe From Claims For Alimony or Child Support?,* 152 Tr. & Est. 15 (Apr. 2013); 8. 463 So. 2d 218, 220 (Fla. 1985); 9. *See* Barry A. Nelson, *Bacardi on the Rocks,* 86 Fla. Bar. J. 21 (Mar. 2012); 10. *See* Nelson, LISI 231, *infra.* (note, Michael Sneeringer assisted Barry A. Nelson by performing research for Barry's Commentary); 11. Fla. Stat. §736.0505(1); 12. Fla. Stat. §736.0505(1)(a); 13. Fla. Stat. §736.0505(1)(b); 14. *See* UTC § 505, comments.

SECOND DCA UPHOLDS PROCEDURAL DUE PROCESS FOR AIP's

In *Covey v. Shaffer* (Case No.: 2D18-3084) appellant attorneys Matthew Linde, Robin Merriman, Philip Howard and Lance McKinney appealed a trial court order arguing reversible error in granting a petition to appoint an emergency temporary guardian without a hearing. On July 3, 2019, the 2nd DCA held "[we] read the language of the statute (Florida Statute 744.3031) as requiring a hearing prior to the appointment of an emergency temporary guardian."

"We discern further support for this reading of the statute in the language of rule 5.648. Prior to its amendment in 2015, rule 5.648 required the petitioner to serve 'notice of filing of the petition for appointment of an emergency temporary guardian and any hearing on the petition.' Fla. Prob. R. 5.648(b) (2014). But the 2015 amendment removed the word 'any,' further indicating that a hearing is not optional but rather should be held as a matter of course. See In re Amendments to Fla. Prob. Rules, 181 So. 3d 480, 484 (Fla. 2015)."