Leimberg Information Services, Inc.

Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2727

Date:30-May-19

Subject: Jonathan E. Gopman, Michael A. Sneeringer, Anna E. Els and Laura R. Feitelson – Second DCA Keeps *Berlinger* Alive Another Day

"The opinion written for the recent case of Alexander v. Harris reinforces Florida's public policy favoring enforcement of child support orders to the detriment of testamentary freedom. On the one hand, Alexander supports an already bad decision in Berlinger (this time with child support instead of alimony), and on the other, Alexander creates very bad law as the wrong decision on the law was decided on the wrong law."

Jonathan E. Gopman, **Michael A. Sneeringer**, **Anna E. Els** and **Laura R. Feitelson** provide members with their commentary on the recent Florida case of *Alexander v. Harris*.

Jonathan E. Gopman is a partner in **Akerman LLP**'s Naples office and Chair of the firm's Trusts & Estates Practice Group. He currently serves as a Co-Vice Chair of the Asset Protection Planning Committee of the Real Property, Trust and Estate Law Section of the ABA (for the 2018-2019 bar year) and is a Fellow of the American Bar Foundation. He is a Fellow in the American College of Tax Counsel. He is an adjunct professor at Ave Maria School of Law, currently serving on its Curriculum Advisory Committee and he chaired its first annual Estate Planning Day Conference 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, 2013, 2014, 2015, 2016 and 2017 he was selected for inclusion in The Best Lawyers in America® and as a Florida Super Lawyer for 2010, 2011, 2012, 2013, 2014, 2015, 2016 and 2017 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 was a co-author of the former 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 is co-author and co-editor of “The Tools & Techniques of Trust Planning 1st Edition” in 2016 with Stephen R. Leimberg. He has been interviewed for and quoted in a number of publications such as the New York 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 and now part of the Nevis International Exempt Trust Ordinance. 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 recently concluded this project with the passing of a new Ordinance in May of 2015. He was the principal draftsperson of this Ordinance and continues to work with the Nevis government consulting on other laws. He also provided advice and consultation on the proposed revised charging order statute for the Nevis Limited Liability Company Ordinance and together with his former colleague, Linda Charity, provided advice and consultation on the content of the proposed banking ordinance in Nevis. He received his J.D. from Florida State University College of Law (with High Honors) and his LL.M. (in Estate Planning) from the University of Miami School of Law.

Michael A. Sneeringer is a senior associate in **Porter Wright**’s Naples office. He focuses his practice on asset protection, estate planning, probate administration, and tax law.

Anna E. Els is an associate in **Akerman LLP**’s Naples office. She practices in the areas of estate planning, asset protection planning, and tax law. She received her J.D. from Stetson University College of Law and her LL.M (in Taxation) from the University of Florida.

Laura R. Feitelson is an associate in **Akerman LLP**’s Naples office. She practices in the areas of estate planning, asset protection planning, and tax law. She received her J.D. from Rutgers School of Law-Camden and her LL.M (in Taxation, and an Estate Planning Certificate) from the Temple University Beasley School of Law.

Here is their commentary:

EXECUTIVE SUMMARY:

The recent opinion from the Second District Court of Appeal in Florida in the case of *Alexander v. Harris*[1] 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 practitioners believe to a poor decision in *Berlinger v. Casselberry*[2] (this time with child support instead of alimony). *Alexander*, however, also appears to create bad law as the legal basis for the decision appears to have been decided on improper legal grounds.

FACTS:

Petitioner (mother) appealed the denial of her petition seeking enforcement of an order awarding her child support. She sought a continuing writ of garnishment directed to disbursements to Respondent (father) from a special needs trust. Respondent was "catastrophically injured" in an automobile accident and received funds from the settlement of a product liability action brought on his behalf. As a result of the settlement Respondent became the sole beneficiary of a special needs trust established pursuant to 42 U.S.C. § 1396p. The trust was established to hold the proceeds of the settlement pursuant to a court order and therefore was a self-settled trust as to Respondent, its sole beneficiary.

42 U.S.C. § 1396p(d)(4)(A) authorizes the establishment of a First Party Special Needs Trusts ("FPSNT") by the individual-beneficiary, a parent, grandparent, legal guardian, or the court using funds of the beneficiary who is under age 65.

A FPSNT must contain a payback provision whereby any amount paid to the beneficiary by the state must be repaid to the state from the assets remaining in the trust at the beneficiary's death.[3] Following the payback, the remaining assets may be distributed to remainder beneficiaries as specified in the trust document. The trustees of these trusts are typically family members of the beneficiary.

A FPSNT is usually funded following a settlement or receipt of the proceeds of a judgment where the beneficiary receives a windfall of money. In such a case the beneficiary is disabled not only as defined under the Social Security Act,[4] but also in the practical sense such that he cannot readily use the money and is supported by Medicaid and Social Security Disability. Without using a FPSNT a beneficiary would lose his public benefits following the financial windfall of a personal injury lawsuit.

While the facts in *Alexander* state little other than that the trust was "established pursuant to 42 U.S.C. § 1396p with funds from the settlement of a product liability action brought on the father's behalf after he was catastrophically injured in a car accident as a minor," it can be inferred that the trust was a FPSNT.[5]

The FPSNT received monthly income of $3,035.59 and held approximately $141,997.27 in assets. The opinion indicated that the total arrearage for child support was $91,780.28.[6]

Petitioner argued that the spendthrift provisions of the FPSNT are unenforceable against a valid child support order pursuant to Florida Statutes § 736.0503 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 to satisfy his child support obligations would jeopardize his eligibility for public assistance under federal law.

The trial court denied Petitioner's request for a continuing writ of garnishment concluding that it could not garnish the discretionary payments made for the benefit of the Respondent from the FPSNT. It determined that despite the existence of the FPSNT the Respondent had no ability to pay the arrearage or his ongoing support obligations. The appellate court reversed. Interestingly, Petitioner was a *pro se* litigant on appeal.

The appellate court held that under Florida law a continuing writ of garnishment may attach to discretionary disbursements to enforce support orders and arrearages. 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.[7] (Importantly, it

should be noted that *Berlinger* is also a decision issued from this same Florida mid-level appellate court (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 longstanding policy of recognizing the validity of spendthrift trusts under Florida law, there is a stronger policy in Florida favoring the enforcement of former spouses or parents with alimony or child support orders.

COMMENT:

LISI members are familiar with the holding in *Berlinger* and the various commentaries following the decision.[8] Through those commentaries and other secondary sources,[9] **LISI** members were informed of the Florida Supreme Court case of *Bacardi v. White*,[10] which 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*.[11]

One author of this commentary opined that with respect to the *Berlinger* decision, the court misapplied the *Bacardi* holding to a discretionary trust and ignored the obvious statutory distinctions between spendthrift trusts and discretionary trusts adopted in the FTC.[12] Another author of this commentary agreed with prior **LISI** commentary that the lack of 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 Section 736.0504 override *Bacardi* together with comments from 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.[13] Both of these authors agree that this issue requires legislative action, however, unfortunately, such legislative action is not forthcoming based on Florida's strong public policy favoring enforcement of alimony and child support orders.

Alexander alone does not change the overall landscape of Florida trust law. In fact, it does little more than purportedly reinforce the same appellate court's prior decision in *Berlinger*. The Florida Supreme Court has yet to address the issue and interpret how Florida Statutes Section 736.0503(2) should be interpreted.

At best, *Alexander* continues to express the public policy of favoring alimony and child support claims over testamentary intent and the intent of settlors establishing trusts. Nonetheless, significantly, the appellate court in *Alexander* used the wrong legal basis in reaching its decision. The opinion misinterprets one critical nuance of Florida trust law, that is, a FPSNT is a self-settled trust. Although the term "self-settled trust" is not used in the FTC, Florida Statutes Section 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.[14]

Under Florida law the assets of a revocable trust are subject to the claims of the settlor's creditors during the settlor's lifetime, however, only to the extent such assets would not be exempt from creditors' claims if held directly by the settlor.[15] 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.[16] If there is more than one settlor, the amount that may be reached may not exceed the portion of the irrevocable trust attributable to the settlor's contribution. Subsection (1)(b), of Florida Statutes Section 736.0505, conforms to the holding of *In re Witlin*, that is, that a beneficiary who is also the settlor may not use the trust to shield his assets from creditors.[17] If the trustee has the discretion to distribute the entire income and 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 his or her creditors.[18]

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, that is, a trust non-exempt from her claim for child support, and not based on the holding in *Bacardi* or *Berlinger*.

Conclusion

Following the decisions of *Bacardi*, *Berlinger* and now *Alexander*, it continues to be clear that absent any legislative pronouncement, trusts and estates practitioners would be wise to avoid using Florida law for trusts where there is a necessity for trust assets to be protected from family claims against a beneficiary of the trust or the claims of a governmental entity, that is, exception creditors under Florida Statutes Section 736.0503(2). This would seem to be a concern for almost every trust that exists.

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

Jonathan E. Gopman
Michael A. Sneeringer
Anna E. Els
Laura R. Feitelson

CITE AS:

LISI Estate Planning Newsletter #2727, (May 30, 2019) at http://www.leimbergservices.com Copyright 2019 Leimberg Information Services, Inc. (LISI). Reproduction in Any Form or Forwarding to Any Person Prohibited – Without Express Permission.

CITATIONS:

[1] *Alexander v. Harris*, No. 2D17-3218, 2019 Fla. App. LEXIS 7659 (2d DCA May 17, 2019).

[2] *Berlinger v. Casselberry*, 133 So. 3d 961 (Fla. 2d DCA 2013).

[3] *See* 42 U.S.C. § 1396p(d)(4)(A).

[4] *See* 42 U.S.C. § 1382c(a)(3).

[5] *See Alexander*, 2019 Fla. App. LEXIS 7659 at *1.

[6] *Id.* at *3.

[7] *Id.* at *3-4.

[8] *See* Barry A. Nelson, *Barry Nelson on Berlinger v. Casselberry: Discretionary Trust Held to be Available to an Alimony Creditor*, LISI Asset Protection Newsletter #231 (Dec. 10, 2013); Steve Oshins and Bob Keebler, *Steve Oshins & Bob Keebler on Berlinger v. Casselberry: Discretionary Trusts Available to 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).

[9] *See* Barry A. Nelson, Are Trust Funds Safe From Claims For Alimony or Child Support?, 152 Tr. & Est. 15 (Apr. 2013).

[10] 463 So. 2d 218, 220 (Fla. 1985).

[11] *See* Barry A. Nelson, *Bacardi on the Rocks*, 86 Fla. Bar. J. 21 (Mar. 2012).

[12] *See* Gopman, et al., *infra*.

[13] *See* Nelson, LISI 231, *infra.* (note, Michael A. Sneeringer assisted Barry A. Nelson by performing research for Barry's Commentary).

[14] Fla. Stat. § 736.0505(1).

[15] Fla. Stat. § 736.0505(1)(a).

[16] Fla. Stat. § 736.0505(1)(b).

[17] *See In re Witlin*, 640 F.2d 661 (5th Cir. Fla. 1981).

[18] *See* UTC § 505, comments.