



By **Barry A. Nelson**

## Protecting Trusts From Claims Of Alimony or Child Support

In *Berlinger*, a Florida court ruling updates this issue

**P**arents who want a child's inheritance to pass into a trust, rather than outright, often seek to prevent the child's former spouse from reaching such assets in the event of divorce. As I noted in my April 2013 article for *Trusts & Estates*,<sup>1</sup> under the laws of some states, regardless of whether a trust has a spendthrift provision or is a discretionary trust (or both), a beneficiary's children and/or a former spouse may have rights to reach trust assets that are otherwise protected from creditors. I expressed concern that discretionary and spendthrift trusts under Article 5 of the Uniform Trust Code (UTC) aren't protected from claims of a former spouse who holds a judgment in the form of support (support judgment). I warned that in some states, such as Florida, it was unclear whether a former spouse with a support judgment could garnish assets held in a discretionary trust. My article stated: "[i]n light of the fact that as many as 30 states provide some type of exception creditor access to spendthrift trusts, it appears that for those beneficiaries known to have exposure, forum shopping for more protective jurisdictions may be advisable."<sup>2</sup>

Since that article was published, there's been a new development on this issue. A Florida court, in *Berlinger v. Casselberry*,<sup>3</sup> ruled that a spouse has the right to garnish assets held in a discretionary trust. Note that as we went to press, the ruling in *Berlinger* hadn't yet been deemed "final" due to a Rehearing Motion filed in December 2013 that's yet to be ruled on. However, I believe that practitioners should still consider whether a trust jurisdiction other than Florida is preferable.



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### Law Before FTC Enacted

Prior to enactment of the Florida Trust Code (FTC) in 2006, the Florida Supreme Court decision in *Bacardi v. White*<sup>4</sup> controlled the rights of a spouse or former spouse holding a support judgment resulting from dissolution of marriage against two types of Florida trusts: (1) spendthrift trusts, in which the trustee has an obligation to make distributions to a beneficiary based on a stated standard; and (2) discretionary trusts, in which the trustee has broader discretion whether to make a distribution. *Bacardi* held that, with respect to spendthrift trusts that weren't discretionary, a spouse or former spouse with a support judgment could seek a court order to obtain distributions otherwise provided to an intended beneficiary. For discretionary trusts, when the trustee wasn't obligated to make present distributions to a beneficiary, *Bacardi* held that a court couldn't direct the trustee to make a distribution. However, if the trustee of a discretionary trust decides to make a distribution to an intended beneficiary, then such beneficiary's former spouse who has a support judgment may petition the court to grant a continuing garnishment. Thus, if the trustee wants to make a distribution to or for the benefit of the beneficiary, under *Bacardi*, the beneficiary's former spouse holding a judgment could cut off the proposed distributions before they reach the hands of the intended beneficiary.<sup>5</sup>

There's no official written indication as to whether the members of the Trust Law committee of the Real Property, Probate and Trust Law Section of the Florida Bar, who wrote the FTC, intended that Florida Statutes Section 736.0504, entitled "Discretionary Trusts; effect of standard," override the *Bacardi* decision.<sup>6</sup>

In an article I wrote in March 2012,<sup>7</sup> "*Bacardi* on the Rocks," I concluded that Florida law was unclear and, therefore, risky and that, with respect to potential claims of exception creditors (such as a former spouse),



the laws of Nevada and South Dakota were much more clear and protective of discretionary trust beneficiaries who are subject to support judgments resulting from a dissolution of marriage (note, as indicated below, in 2013, Alaska passed legislation that, in my opinion, made its laws comparable with those of Nevada and South Dakota as to protection of intended beneficiaries of discretionary trusts; Delaware is comparable too and also passed more protective legislation in 2013).<sup>8</sup>

### *Berlinger Facts*

After 30 years of marriage, Bruce Berlinger and his wife, Roberta Casselberry, divorced in 2007. Pursuant to a marital settlement agreement ratified by the court

Remedies provided to exception creditors of spendthrift and discretionary trusts vary from state to state.

and incorporated into the final judgment of dissolution, Bruce agreed to pay Roberta \$16,000 a month in permanent alimony. Thereafter, Bruce and his current wife enjoyed a comfortable lifestyle sustained through payments made to them directly or on his behalf by discretionary trusts, including payments of all of his living expenses, mortgage obligations, property taxes, insurance, utilities, food, groceries and miscellaneous living expenses. Although Bruce continued to benefit from substantial distributions from the discretionary trusts, he voluntarily stopped paying alimony in May 2011.

When Bruce stopped paying alimony, Roberta filed a motion to enforce and for contempt. Just prior to the hearing, the parties reached a settlement wherein Bruce agreed to satisfy his alimony arrears by liquidating an individual retirement account. After the IRA liquidation, \$32,625.54 remained owing on the arrears judgment. The court issued writs of garnishment to SunTrust Bank (SunTrust), as trustee of the discretionary trusts.

Around September 2011, Bruce was provided a Visa card from SunTrust to use for paying expenses not directly paid by the trusts. The trusts paid the Visa credit card bills, including expenses for travel, entertainment, clothing, medical expenses, grooming, gifts and Bruce's current wife's credit card bills.

In January 2012, Roberta filed a second motion for civil contempt and enforcement against Bruce, whereby the trial court issued writs of garnishment against SunTrust.

On April 26, 2012, Roberta filed a motion for continuing writ of garnishment against SunTrust, seeking to attach the present and future distributions made to or for the benefit of Bruce. Roberta alleged that traditional methods of enforcing alimony were insufficient.

On Nov. 5, 2012, one day before the hearing on Roberta's motion for continuing writs of garnishment, a new trustee (who replaced SunTrust) filed an action seeking a declaration that the family trusts at issue were discretionary trusts.

During the Nov. 6, 2012 hearing, the new trustee testified that for the past year, the trustees hadn't made any payments directly to Bruce. Instead, the trustees made payments on behalf of Bruce and his current wife directly for their health insurance and household expenses, including: the mortgage, property taxes, homeowner's insurance, electricity, water, garbage, sewer, telephone, Internet, lawn care, pool care and pest control. The new trustee asserted that the trusts were discretionary and opined that the applicable trust statute, Section 736.0504, prohibited any creditor, including Roberta, from attaching any distributions paid on behalf or for the benefit of Bruce. Neither Bruce nor his current wife were employed, and neither of them intended to look for work.

Evidence regarding the credit card given to Bruce in September 2011 reflected all bills went to the trustee, who paid them from the trust assets. Bruce also took cash advances on the card to pay his maid, provide cash to his current wife and pay her personal expenses.

Bruce argued Florida Statutes Section 736.0504 prohibited Roberta from attaching distributions from a discretionary trust for his benefit. Specifically, Bruce said Florida Statutes Section 736.0504 prohibits creditors from attaching distributions from a discretionary trust, which are afforded greater protection from



creditors under the FTC.

On Nov. 27, 2012, the trial court entered orders granting Roberta's motion for continuing writs of garnishment.

### Berlinger Ruling

The opinion in *Berlinger* was quite direct, stating “[w]e conclude that the Florida Supreme Court’s decision in *Bacardi v White*, 463 So.2d 218 (Fla. 1985), is still controlling.”<sup>9</sup>

The court analyzed Florida Statutes Sections 736.0503 and 736.0504, both enacted as part of the FTC. Because the trust in *Berlinger* was a discretionary trust, the critical section was Florida Statutes Section 736.0504(2), which provides a former spouse may not compel distributions that are subject to a trustee’s discretion or attach or otherwise reach [emphasis added] the interest, if any, which the beneficiary may have.<sup>10</sup> The opinion states:

... [t]he section does not expressly prohibit a former spouse from obtaining a writ of garnishment against discretionary disbursements made by a trustee exercising its discretion. As a result it makes no difference that the trusts are discretionary.<sup>11</sup>

The opinion notes that the spouse seeking the continuing garnishment wasn’t seeking an order to compel the trustee to make a distribution or allowing the creditor to “attach” the beneficiary’s interest. “Instead, she obtained an order granting writs of garnishment against discretionary disbursements made by a trustee exercising its discretion.”<sup>12</sup>

The *Berlinger* opinion states:

Sections 736.0503 and 736.0504 codify the Florida Supreme Court’s holding in *Bacardi*. Neither section protects a discretionary trust from garnishment by a former spouse with a valid order of support;

It goes on to say that Florida’s public policy favoring spendthrift trusts protecting a beneficiary’s income “gives way to Florida’s strong public policy favoring enforcement of alimony and support orders. See *Gilbert v. Gilbert*, 447 So. 2d 299, 302 (Fla.2d DCA1984).”<sup>13</sup>

### Other Jurisdictions

As noted in my two earlier articles on this issue,<sup>14</sup> it was unclear whether the FTC codified or overrode *Bacardi*. Numerous drafting committee members for the FTC who were asked had very different recollections as to whether the FTC’s enactment was intended to override *Bacardi* or follow it.<sup>15</sup> In my opinion, there was no consensus on this issue. I suggested this question be addressed legislatively, so those drafting Florida trusts, and their clients, wouldn’t get caught unawares. *Berlinger* may have caught not only Bruce by surprise, but also members of the committee that drafted Florida Statutes Sections 736.0503 and 736.0504. Attorneys and politicians can debate whether *Bacardi* should continue to be

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Florida law or whether parents should be able to fully protect their children’s inheritances from claims of former spouses. However, as planners, attorneys drafting trusts for their clients need to advise them as to the state of the law, and clients who believe protecting their intended beneficiaries from situations such as *Bacardi* and *Berlinger* may want to create trusts in states where the law is more favorable to discretionary trust beneficiaries.

Four states—Alaska, Delaware, Nevada and South Dakota—currently appear to provide significantly greater protection for discretionary trust beneficiaries. In light of *Berlinger*, Florida, as well as other states that either: (1) haven’t clearly indicated whether a former spouse with a support judgment can reach discretionary trust assets; or (2) provide enhanced protection for exception creditors (such as for those creditors holding child support judgments or support judgments resulting from a dissolution of marriage), should determine if their state statutes need



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clarification and if so, what direction their state should go with respect to the conflicting policies of protecting discretionary trust beneficiaries, as compared to favoring enforcement of alimony and support orders.

### The Remedy

In light of *Bacardi* and *Berlinger*, practitioners should review state laws to determine whether a former spouse with a support judgment is likely to benefit from a continuing garnishment over assets contained in discretionary irrevocable trusts created by parents for their children. **If applicable state law has determined**

Until these issues are resolved, consider disclosing the *Berlinger* case to clients.

**public policy is in favor of the former spouse with the support judgment, then practitioners should advise clients of the potential benefits of moving the situs of the beneficiary's trust to a more protective state.**

### Best Option for Florida Residents?

Until Florida law and public policy regarding discretionary trusts and their protection (or lack thereof) from a beneficiary's former spouse who has a support judgment is determined, parents desiring maximum protection for their children should consider creating and administering discretionary trusts in Alaska, Delaware, Nevada or South Dakota. Those clients who've already informed their attorneys of such concerns and objectives should be advised of *Berlinger* and the benefits of updating their estate-planning documents by creating discretionary trusts in these states.

### Lessons Learned

Remedies provided to exception creditors of spendthrift and discretionary trusts vary from state to state. For those states that adopt Uniform Trust Code (UTC) Sections 503 and 504 without modification, trusts may be subject to claims of a spouse, former spouse or child.

Greater analysis is required for states, such as Florida, that adopted modified UTC Sections 503 and 504. In light of *Berlinger*, it appears that even states that modified the UTC to provide that exception creditors may not attach or otherwise reach discretionary trust assets may find that courts will follow the law existing as of enactment, unless the adoption provides the intent to modify existing law. Courts will go out of their way to protect spouses with support judgments if the law isn't absolutely clear. For these reasons, it's important to consider moving trusts to states such as Alaska, Delaware, Nevada and South Dakota.<sup>16</sup>

### Ability to Move Situs

One issue that's beyond the scope of this article but gives reason for concern, is whether the trustee of a discretionary trust in a jurisdiction that would permit a continuing garnishment in favor of a former spouse with a support judgment can move the trust situs, especially when the beneficiary isn't current on alimony or support obligations. In other words, is it possible that such a situs change of the trust could be considered a fraudulent conveyance? Best practice may be to ensure trust settlors are aware of the *Berlinger* and *Bacardi* attacks and leave it up to the settlor of the trust to decide whether to incur the expense and administrative burdens of creating a trust and then administering it in a protective state. Until these issues are resolved, consider disclosing the *Berlinger* case to clients and providing the options described above.


### Review State Laws

**State laws should be reviewed to see the likelihood that a former spouse could benefit from a continuing garnishment over discretionary trust assets.** If so, consider whether a parent or other settlor would be able to create a trust to protect a child or other beneficiary, such that the trust funds are held exclusively to benefit the beneficiary and specifically prohibit any distributions that would benefit a former spouse or any other exception creditor. If so, should the applicable statutes specifically provide that a trustee can make distributions for the benefit of the intended trust beneficiary and that continuing garnishments and other similar remedies are specifically prohibited?

It may be that the facts in *Berlinger* were simply



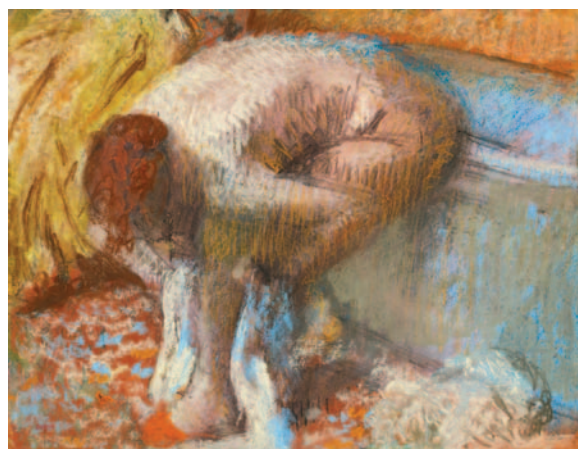
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too powerful for the Second District Court of Appeal of Florida to ignore; the trust assets allowed the beneficiary to live a luxurious lifestyle while refusing to satisfy his obligation to pay a support judgment held by an ex-spouse. This was a very compelling scenario for the court, and it used the opportunity to state its position on an issue that not all asset protection attorneys even felt was unclear. For better or worse, it's clear now, in Florida ... at least until another District Court of Appeal in Florida, presented with a different set of facts, rules otherwise or the legislature changes the law. Well, it's time for a drink. To be continued! 

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### Endnotes

1. See Barry A. Nelson, "Are Trust Funds Safe From Claims For Alimony or Child Support?" *Trusts & Estates* (April 2013) at p. 15.
2. *Ibid.* at p. 20.
3. *Berlinger v. Casselberry*, Case No. 2D12-6470 (Fla. 2d Dist.Ct.App. Nov. 27, 2013).
4. *Bacardi v. White*, 463 So.2d 218 (Fla. 1985).
5. *Ibid.* ("If disbursements are wholly within the trustee's discretion, the court may not order the trustee to make such disbursements. However, if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment.")
6. See Fla. Stat. Section 736.0504:
  - (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.
7. Barry A. Nelson, "Bacardi on the Rocks," 86 *Fla. Bar. J.* 21 (March 2012).
8. For a more detailed discussion on discretionary and spendthrift trusts under Article 5 of the Uniform Trust Code, see Nelson, *supra* note 1.
9. See *supra* note 3.
10. Fla. Stat. Section 736.0504(2).
11. *Berlinger*, *supra* note 3 at 9.
12. *Ibid.*
13. *Ibid.*
14. See Nelson, *supra* note 1 and Nelson, *supra* note 7.
15. See Nelson, *supra* note 7 at pp. 24, 26.
16. For the author's prior commentary on Nevada and South Dakota, see Nelson, *supra* note 1 at pp. 20-22. For extensive articles discussing the changes to Alaska law, see Jonathan G. Blattmachr, Bethann B. Chapman, Mitchell M. Gans, and David G. Shaftel, "New Alaska Law Will Enhance Nationwide Estate Planning-Part 1," 40 *Est. Plan. J.* 3 (September 2013) and Jonathan G. Blattmachr, Bethann B. Chapman, Mitchell M. Gans, and David G. Shaftel, "New Alaska Law Will Enhance Nationwide Estate Planning-Part 2," 40 *Est. Plan. J.* 20 (October 2013). See also 12 Del. Code Section 3536 (2013).



### SPOT LIGHT

#### Dry Wit

"Femme S'Essuyant Les Pieds" (18 in. by 22 7/8 in.) by Edgar Degas, sold for \$2,875,167 at Sotheby's recent Impressionist, Modern & Surrealist Art Evening Sale in London on Feb. 5, 2014. By bringing the traditional methods of a history painter to bear on contemporary subject matter, Degas became a classical painter of modern life.