



### Family Matters: Family Law Considerations In Estate Planning

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People create irrevocable trusts for a variety of reasons including qualifying for government benefits, inheritance purposes, and creditor protection. The last of these uses has recently been accosted from an unlikely direction; domestic support obligations, better known as exceptions to spendthrift provisions. Estate planning attorneys must be cognizant of their client's entire legal situation when drafting irrevocable trusts for the purpose of asset and creditor protection.

Fla. Stat. § 736.0503(2) states that there are some exceptions to a spendthrift provision of a trust in Florida.<sup>1</sup> Specifically, these provisions will be unenforceable against:

- (1) "a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance";
- (2) "a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust"; and
- (3) "a claim of this state or the United States to the extent a law of this state or a federal law so provides."<sup>2</sup>

What does this really mean in plain terms? Just because you have a trust with a spendthrift provision does not mean that you can get away with not paying alimony or child support! Fla. Stat. § 736.0503(3) goes on to state that a claimant to whom one of these exceptions applies, "may obtain from a court or pursuant to the Uniform Interstate Family Support Act, an order attaching present or future distributions to or for the benefit of the beneficiary."<sup>3</sup> However, the order must limit relief to what is necessary under the specific circumstances and this form of remedy is only available for the court to award as a "last resort" option.<sup>4</sup> The claimant must first show that traditional methods were used and insufficient to attempt to enforce the court order before pursuing the exception to the spendthrift provision.<sup>5</sup>

In *Bacardi v. White*, the Supreme Court of Florida held that disbursements may be made from a spendthrift trust in certain circumstances to enforce court orders or judgments of alimony and such funds may be given to the alimony recipient before they were to reach the beneficiary of the trust.<sup>6</sup> Mr. Bacardi was the beneficiary of a trust containing a spendthrift provision,

which he refused to use to pay alimony to Mrs. Bacardi, despite having previously agreed to pay her alimony until death or until she remarried. The court reasoned that the state of Florida has had a stronger public policy in favor of enforcement of alimony and child support than it did for upholding spendthrift provisions of trusts.<sup>7</sup>

The Second District Court of Appeal decided similarly in *Berlinger v. Casselberry*, where the parties were divorced and agreed to the payment of permanent alimony by the former husband to the former wife.<sup>8</sup> The former husband had been paying for his living expenses out of a trust containing a spendthrift provision but stopped all alimony payments in the years following the divorce.<sup>9</sup> The court held that, under Florida Statutes, a court order enforcing alimony outweighs the enforcement of a spendthrift trust, and therefore the court granted the former wife's motion for continuing writs of garnishment.<sup>10</sup>

In that same vein, special needs trusts can also be subject to domestic support obligations. In *Alexander v. Harris*, the Second District Court of Appeal found that the existence of a spendthrift special needs trust did not bar the enforcement of a child support order.<sup>11</sup> The mother, who had previously been awarded child support from the father, sought to garnish these payments from the father's special needs trust, which contained proceeds resulting from a catastrophic injury sustained in a car accident when he was a child.<sup>12</sup> The court held that discretionary disbursements are not protected from the continuing garnishment for payment of child support and the mother had exhausted all traditional options for enforcing the child support order.<sup>13</sup> Because the father's only means of making the child support payments was through distributions from his special needs trust, a writ of garnishment was appropriate.<sup>14</sup>

As a rule of thumb, estate planning attorneys should always counsel their clients as to the limitations of the protections built into irrevocable spendthrift trusts. Indeed, planners should be on the lookout when drafting for a client who has

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been divorced or has child support obligations as these issues create yet another vulnerability in the traditional irrevocable spendthrift trust. The Courts in Florida continue to rule against litigants attempting to shirk their domestic support obligations. In their rulings, they have said that public policy far outweighs the enforcement of spendthrift provisions, and this trend shows no sign of reversing. **■**

### **Endnotes**

- 1 Fla. Stat. §736.0503(2). (2019).
- 2 *Id.*
- 3 Fla. Stat. §736.0503(3). (2019).
- 4 *Id.*
- 5 *Id.*

- 6 *Bacardi v. White*, 463 So.2d 218, 220 (Fla. 1985).
- 7 *Id.* at 221.
- 8 *Berlinger v. Casselberry*, 133 So.3d 961, 962 (Fla. 2d DCA 2013).
- 9 *Id.* at 965.
- 10 *Id.* at 966.
- 11 *Alexander v. Harris*, So.3d 1, 3 (Fla. 2d DCA 2019).
- 12 *Id.*
- 13 *Id.*
- 14 *Id.*