2016 DELAWARE TRUST CONFERENCE

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[1] In drafting portions of this outline, the author, with the permission of Alyssa Feder, Esq., relied upon Ms. Feder's outline titled "Directed Trusts in Florida." Ms. Feder is a Managing Director with J.P. Morgan Private Bank in Palm Beach, Florida.

I. DIRECTED TRUSTS IN FLORIDA

A. GENERALLY

A directed trust is a trust which provides that a trustee or trust advisor may direct another trustee (the "directed trustee") to perform certain acts with respect to the administration of the trust, such as the investment or distribution of trust assets. Directed trusts have become increasingly popular in recent years as trust grantors have sought to divide the responsibilities for administering a trust among the various trustees, each of whom brings different skills or relationships.

B. FLA. STAT. §736.0703(9)

A new version of Florida's directed co-trustee statute, Fla. Stat. §736.0703(9), was enacted, effective July 1, 2014. The newly amended statute gives greater protection to the directed trustee than did the prior version of the statute. The amended statute relieves the directed trustee of liability for acts done in reliance on the direction of a co-trustee having the authority to direct it in the trust document. Florida's approach differs from the approach in the Uniform Trust Code (the "UTC") and in the Delaware Trust Advisor Statute (Del. Code tit. 12, § 3313) in that it permits a directed trust only if the person giving the direction is also a trustee.

The amended statute §736.0703(9) states:

"If the terms of a trust instrument provide for the appointment of more than one trustee but confer upon one or more of the trustees, to the exclusion of the others, the power to direct or prevent specified actions of the trustees, the excluded trustees shall act in accordance with the exercise of the power. Except in cases of willful misconduct on the part of the excluded trustee, an excluded trustee is not liable, individually or as a fiduciary, for any consequence that results from compliance with the exercise of the power. An excluded trustee does not have a duty or an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of the power. The trustee or trustees having the power to direct or prevent actions of the excluded trustees shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustees were not in office and shall have the exclusive obligation to account to and to defend any action brought by the beneficiaries with respect to the exercise of the power. The provisions of s. 736.0808(2) do not apply if the person entrusted with the power to direct the actions of the excluded trustee is also a co-trustee."

C. MAIN HIGHLIGHTS OF FLA. STAT. §736.0703(9)

The amended statute emphasizes that only a person acting as a co-trustee may direct another trustee to take (or refrain from taking) any particular action. This results in the trustee(s) with the power to direct being subject to full fiduciary liability. The new statute also clarifies that an excluded trustee (i.e., a trustee being directed to take or refrain from taking a particular action) has no duty to monitor the activities of the trustee providing the direction (the "directing trustee"). The excluded trustee is fully exonerated from the actions of and the directions provided by the directing trustee except in cases of the excluded trustee's own willful misconduct.

Note that in order for an excluded trustee to be fully exonerated from liability under the amended statute, the directing party must be a co-trustee. In Delaware, for example, trustees are fully exonerated when taking direction even from trust advisors (e.g., investment advisors or distribution advisors) who are not also trustees.

The last sentence of the amended statute clarifies that an excluded trustee (excluded trustee) has no liability under Fla. Stat. §736.0808(2), which addresses trustee liability when directed by a trust advisor as opposed to a co-trustee. Under that statute, the power to direct a trustee does not completely exonerate a directed trustee from liability for following the direction, but the person giving the direction is limited to a fiduciary standard of good faith, rather than being subject to liability as a trustee.

II. DUTY TO INFORM AND ACCOUNT, ACCOUNTING STATUTE OF LIMITATIONS AND DESIGNATED REPRESENTATIVES

A. DUTY TO INFORM AND ACCOUNT

Under Fla. Stat. §736.0813(1), the trustee is required to keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration. Specifically, the trustee must

a. give notice to the qualified beneficiaries of the acceptance of the trust and the full name and address of the trustee within 60 days after acceptance;

b. give notice to the qualified beneficiaries of the existence of an irrevocable trust, the identity of the settlor or settlors, the right to request a copy of the trust instrument, and the right to accountings, within 60 days of learning of the creation of the trust or that a formerly revocable trust has become irrevocable;

c. provide the qualified beneficiaries with a copy of the trust instrument upon reasonable request;

d. provide annual accountings and a final accounting on termination of the trust or when there is a change in trustee; and

e. provide the qualified beneficiaries with "relevant information about the assets and liabilities of the trust and the particulars relating to administration."

A qualified beneficiary may waive, in writing, the trustee's duty to account or withdraw a waiver previously given. Withdrawals of prior waivers are effective only with respect to accountings for future periods. Fla. Stat. §736.0813(2).

While a trust is revocable, the trustee's duties under Fla. Stat. §736.0813 extend only to the settlor. Fla. Stat. §736.0813(4). The statute applies to trust accountings rendered for accounting periods beginning on or after July 1, 2007. Fla. Stat. §736.0813(4).

B. ACCOUNTING STATUTE OF LIMITATIONS

The trustee must render a full and accurate record and accounting of its trusteeship to the beneficiaries of the trust and must maintain adequate records. After the trustee renders its accounting to the beneficiaries, and provided that accounting adequately discloses all matters, the 4-year statute of limitations for breach of fiduciary duty begins to run.

The trustee may shorten this 4-year statute of limitations to six months by providing a limitation notice with the trust accounting. Fla. Stat. §736.1008(4)(c) describes a "limitation notice" as follows:

> A written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later.

A form for the notice appears in the statute. A limitation notice may, but is not required to be, in the following form:

> An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee may be a subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney.

If an accounting is not provided to the beneficiaries, then the statute of limitations never begins to run.

C. DISCLOSURE NOTICE

A "trust disclosure document" is another way for a trustee to trigger the shorter 6-month statute of limitation for claims by the beneficiaries against the trustee. Fla. Stat. §736.1008(2) limits proceedings against trustees to a period of 6 months after trust beneficiaries have received a trust disclosure document, which means a trust accounting or any other written report of the trustee, disclosing the matter.

Thus, if the trustee provides to the beneficiaries a written report which "adequately discloses" a potential claim, the statute of limitations begins to run. Pursuant to Fla. Stat. §736.1008(4)(a), a claim is adequately disclosed if the document provides sufficient information so that the beneficiaries know of a claim or reasonably should have inquired into the existence of a claim with respect to that matter.

D. REPRESENTATION

The Florida Trust Code (the "FTC") includes all of the representation provisions of the UTC. Under the FTC, notice, information, accountings, and reports sent to a representative have the same effect as those sent to the person being represented. Fla. Stat. §736.0301(1). Further, actions taken by a representative bind the person being represented to the same extent as actions taken by the person being represented. Fla. Stat. §736.0301(2).

For example, all rights to notice required to be provided to a beneficiary under Fla. Stat. §736.0813 may be asserted by a legal representative of the beneficiary. Hence, the 60-day notice required under Fla. Stat. §736.0813(1), when provided to a representative of a beneficiary, will bind that beneficiary.

The FTC recognizes the following categories of representation:

a. Fiduciary – a guardian of the property may represent a ward, an attorney-in-fact may represent a principal, a trustee or personal representative may represent the beneficiaries of a trust or estate, and a parent may represent and unborn or minor child if no guardian of the property has been appointed. Fla. Stat. §736.0303.

b. Virtual – a minor, incapacitated, unborn, unascertainable, or unlocatable person may be represented by another person having a substantially identical interest. Fla. Stat. §736.0303.

    i. Example – the representation of minor beneficiaries of a class gift by other adult members of the class.

c. Court-appointed – the court may appoint a representative for a person the court determines is not otherwise adequately represented.

ii. Example – a court-appointed guardian ad litem would be an example of this category of representation.

d. Designated Representative - Fla. Stat. §736.0306 allows a settlor to name in the trust instrument a person or persons (the "designated representative(s)") to represent and bind a beneficiary and receive any notice, information, accounting, or report. Thus, using this statute, the settlor can limit disclosures of some or all trust information to some or all trust beneficiaries by sending notices, information, accountings and reports to the designated representative that would otherwise go to the trust beneficiary.

The statute provides certain limitations. First, a designated representative has to be either nominated in the trust instrument expressly by name or the trust has to provide a mechanism by which the designated representative may be appointed. Fla. Stat. §736.0306(1). Second, the designated representative cannot be the trustee and the trustee cannot appoint the designated representative. Fla. Stat. §736.0306(2). Third, a beneficiary may only serve as the designated representative if he or she is either expressly nominated in the trust or is a grandparent or descendant of a grandparent of the represented beneficiary. Fla. Stat. §736.0306(3).

A designated representative is not a fiduciary and is not liable for any actions or omissions as long as the designated representative acts in good faith. Fla. Stat. §736.0306(4).

III. NONJUDICIAL METHODS OF MODIFICATION

A. NONJUDICIAL SETTLEMENT AGREEMENTS

a. ***Fla. Stat. §736.0111*** - Fla. Stat. §736.0111 allows parties to enter into nonjudicial settlement agreements, which allow the resolution of a dispute themselves, without the court. Parties enter into a contract – nonjudicial settlement agreement – that sets forth whatever agreement was reached. Then, if a future dispute arises about the trust, a court can step in and enforce the terms of the non-judicial settlement agreement.

Under Fla. Stat. §736.0111(4), nonjudicial settlement agreements can be used to resolve a wide variety of matters, including, but not limited to:

i. the interpretation of the terms of the trust;

ii. the approval of a trustee's report or accounting;

iii. the direction to a trustee to take or not to take a certain action;

iv. the resignation or appointment of a trustee and the determination of a trustee's compensation;

v. the transfer of a trust's principal place of administration; and

vi. the liability of a trustee for an action relating to the trust.

b. ***Limitations*** – A nonjudicial settlement agreement can be valid only to the extent the terms and conditions of the agreement could have been approved by the court if the dispute had actually been filed in the court. Also, a non-judicial settlement agreement will not be valid if it causes a result that is not authorized by other provisions of the Florida Trust Code. Fla. Stat. §736.0111(3).

B. DECANTING

a. ***Generally*** - "Decanting" is the legal term used to describe the distribution of trust property from one trust to another trust pursuant to the trustee's discretionary authority to make distributions to or for the benefit of one or more beneficiaries. Common law provides authority for trust decanting, but several states, including Florida, have codified the common law.

b. ***Fla. Stat. §736.04117*** - Fla. Stat. §736.04117 provides that unless otherwise stated in the trust instrument, a trustee who has "absolute power" under the terms of a trust (the "first trust") to distribute the principal of the trust to or for the benefit of one or more trust beneficiaries, may exercise that power to appoint property to a new trust (the "second trust") for some or all of the same beneficiaries of the first trust or may appoint for their benefit in continuing trust with different terms. The beneficiaries of the second trust may include only beneficiaries of the first trust and the second trust may not reduce any fixed income interest in the first trust.

c. ***"Absolute power"*** - Fla. Stat. §736.04117 applies only when the terms of a trust give the trustee the absolute power to invade trust principal. Although the trust instrument does not have to use the term "absolute," the trustee's invasion power must not be limited to a specific or ascertainable purpose. Therefore, a power to invade for a beneficiary's best interests, welfare, comfort or happiness is an absolute invasion power under the statute, but a power to distribute or invade for a beneficiary's health, education, maintenance, or support is not. Fla. Stat. §736.04117(1)(b).

d. ***Procedural Requirements*** - The exercise of the decanting power must be done by an instrument in writing, signed and acknowledged by the trustee and filed with the records of the first trust. Fla. Stat. §736.04117(2). Additionally, the trustee shall notify all qualified beneficiaries of the first trust, in writing, at least 60 days prior to the effective date of the trustee's exercise of the power to invade the principal and must set forth the manner in which the trustee intends to exercise the power. This requirement is satisfied if the trustee provides the qualified beneficiaries with a copy of

the proposed instrument exercising the decanting power within the 60-day notice period. Fla. Stat. §736.04117(4). That period can be waived if all qualified beneficiaries sign and deliver a written waiver to the trustee. The trustee's notice under this section does not limit the right of any beneficiary to object to the exercise of the trustee's power to invade the principal.

e. ***Substantive Requirements*** – Under Fla. Stat. §736.04117(1)(a), the decanting power may not be used to add new beneficiaries to the second trust or in a manner that reduces a beneficiary's fixed income, annuity, or unitrust interest or that would disqualify a trust for the marital or charitable deduction for federal income, gift or estate tax purposes. In addition, an exercise of the decanting power is considered to be an exercise of a special power of appointment. Thus, the decanting power may not be exercised to extend the perpetuities period otherwise applicable to the original trust. Fla. Stat. §736.04117(3).

f. ***New Proposed Fla. Stat. §736.04117*** – The new proposed Fla. Stat. §736.04117 significantly expands Florida's current decanting laws regarding a trustee's power to make discretionary distributions to decant trust assets, while also protecting the settlor's intent and the interests of the trust beneficiaries. It is hopeful and anticipated that the new statute will become effective in 2017.

The purpose of the proposed revisions is to improve, update, and modernize the current Florida decanting statute in three ways:

i. authorize a trustee to decant principal to a second trust pursuant to a power to distribute that is limited by an ascertainable standard (i.e., health, education, maintenance and support);

ii. authorize a trustee to decant principal to a supplemental needs trust when the beneficiary is disabled; and

iii. expand the notice requirements that apply to a trust decanting done pursuant to Fla. Stat. §736.04117.

Subsection (1) of the proposed statute defines terms used throughout the statute. One important change is the definition of "authorized trustee." Trustees under Fla. Stat. §736.04117 currently have full authority to decant, regardless of whether the trustee is a settlor or a beneficiary. To avoid any potential transfer tax issues and conflicts of interest, the definition of "authorized trustee" has been added to specifically exclude a trustee who is a settlor or a beneficiary from exercising decanting authority.

Subsection (2) of the proposed statute is based upon existing Fla. Stat. §736.04117(1) and authorizes decanting when an authorized trustee has an

absolute power with respect to discretionary distributions of principal. Subsection (2) expands upon current law by clarifying the permissible or impermissible modification of certain trust provisions. For example, it specifically provides that the second trust may omit, create or modify a power of appointment.

Currently, decanting is only permitted in Florida if the trustee's discretionary distribution authority is absolute. The new subsection (3) modifies current law by specifically authorizing decanting when an authorized trustee has a power to invade principal which is not an absolute power, but a power limited to an ascertainable standard.

Under the current Florida decanting statute, if a trust beneficiary is disabled, the trustee cannot decant the assets to a supplemental needs trust unless the trustee has absolute power to invade the trust principal for the benefit of the disabled beneficiary. The new subsection (4) specifically authorizes a decant for supplemental needs purposes regardless of whether the authorized trustee has an absolute discretionary power or discretionary power limited to an ascertainable standard.

Current Section 736.04117(1)(a)3. provides that certain tax benefits associated with the first trust, such as qualification for the federal estate tax marital deduction, must be maintained in the second trust. Subsection (5) adopts the current section and expands it by adding additional tax provisions, such as: direct skip treatment for generation-skipping transfer tax purposes, the gift tax annual exclusion and any and all other tax benefits for income, gift, estate or generation-skipping transfer tax purposes.

Subsections (6) and (7) are expanded versions of the current Section 736.04117(2) and 736.04117(3), respectively.

Subsection (8) is consistent with Section 736.04117(4) and contains various notice provisions, adding another requirement that the notice provided by the authorized trustee should also include copies of both the first and second trusts. The purpose of this additional requirement is to allow each notice recipient the opportunity to review the differences in the two trust instruments.

Subsections (9) and (10) fully incorporate Section 736.04117(5) and expand the provisions to incorporate the ability to decant pursuant to a trustee's non-absolute power.

The full language of the proposed Fla. Stat. §736.04117 reads as follows:

736.04117 Trustee's power to decant.

(1) DEFINITIONS. As used in this section, the term:

(a) “Absolute power” means a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term “absolute” is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes.

(b) “Appointive property” means the property or property interest subject to a power of appointment.

(c) “Authorized trustee” means a trustee who has the power to invade the principal of a trust other than (i) the settlor or (ii) a beneficiary.

(d) “Internal Revenue Code” means the Internal Revenue Code of 1986, as amended.

(e) “Beneficiary with a disability” means a beneficiary of the first trust who the authorized trustee believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated incapacitated.

(f) “Current beneficiary” means a beneficiary that on the date the beneficiary’s qualification is determined is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

(g) “Governmental benefits” means financial aid or services from any state, federal or other public agency.

(h) “Power of appointment” means a power of appointment as defined in s.731.201(30).

(i) “Presently exercisable power of appointment” means a power of appointment exercisable by the powerholder at the relevant time. The term:

1. includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

(a) the occurrence of the specified event;

(b) the satisfaction of the ascertainable standard; or

(c) the passage of the specified time; and

2. does not include a power exercisable only at the powerholder’s death.

(j) “Substantially similar” means that there is no material change in a beneficiary’s beneficial interests or in the power to make distributions. A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

1. the distribution is applied for the benefit of a beneficiary;

2. the beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under this code; or

3. the distribution is made as permitted under the terms of the first trust instrument and the second trust instrument for the benefit of the beneficiary.

(k) "Supplemental needs trust" means a trust the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary with a disability is eligible for governmental benefits.

(l) "Vested interest" means:

1. a current unconditional right to receive a mandatory distribution of income, a specified dollar amount or a percentage of value of a trust, or a current unconditional right to withdraw income, a specified dollar amount or a percentage of value of a trust, which is not subject to the occurrence of a specified event, the passage of a specified time, or the exercise of discretion; or

2. a presently exercisable general power of appointment.

A beneficiary's interest in a trust is not a vested interest if the trustee has discretion to make a distribution of trust property to a person other than such beneficiary.

(2) DISTRIBUTION TO SECOND TRUST IF ABSOLUTE POWER.

(a) Unless the trust instrument expressly provides otherwise, an authorized trustee who has absolute power under the terms of a trust to invade the principal of the trust, referred to in this section as the "first trust," to make current distributions to or for the benefit of one or more beneficiaries, may instead exercise such power by appointing all or part of the principal of the trust subject to such power in favor of a trustee of one or more other trusts, whether created under the same trust instrument as the first trust or a different trust instrument, including a trust instrument created for the purposes of exercising the power granted by this section, each referred to in this section as the "second trust," for the current benefit of one or more of such beneficiaries; provided:

1. The beneficiaries of the second trust may include only beneficiaries of the first trust; and

2. The second trust may not reduce any vested interest.

(b) In an exercise of absolute power, the second trust may:

1. Retain a power of appointment granted in the first trust;

2. Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

3. Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust;

4. Create or modify a power of appointment if the powerholder is a beneficiary of the first trust who is not a current beneficiary, but the exercise of the power of appointment may take effect only after the powerholder becomes, or would have become if then living a current beneficiary; and

5. Extend the term of the second trust beyond the term of the first trust.

(c) The class of permissible appointees in favor of which a created or modified power of appointment may be exercised may be broader than or different from the beneficiaries of the first trust.

(3) DISTRIBUTION TO SECOND TRUST IF NO ABSOLUTE POWER. Unless the trust instrument expressly provides otherwise, an authorized trustee who has a power (that is not an absolute power) under the terms of a first trust to invade principal to make current distributions to or for the benefit of one or more beneficiaries may instead exercise such power by appointing all or part of the principal of the first trust subject to such power in favor of a trustee of one or more second trusts. If the authorized trustee exercises such power:

(a) The second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficial interests of the beneficiary in the first trust.

(b) If the first trust grants a power of appointment to a beneficiary of the first trust, the second trust shall grant such power of appointment in the second trust to such beneficiary and the class of permissible appointees shall be the same as in the first trust.

(c) If the first trust does not grant a power of appointment to a beneficiary of the first trust, then the second trust may not grant a power of appointment in the second trust to such beneficiary.

(d) Notwithstanding paragraphs (a), (b), and (c) of this subsection, the term of the second trust may extend beyond the term of the first trust, and for any period after the first trust would have otherwise terminated, in whole or in part, under the provisions of the first trust, the second trust may with respect to property subject to such extended term also:

1. Include language providing the trustee with the absolute power to invade the principal of the second trust during such extended term; and

2. Create a power of appointment if the powerholder is a current beneficiary of the first trust or expand the class of permissible appointees in favor of which a power of appointment may be exercised.

(4) DISTRIBUTION TO SUPPLEMENTAL NEEDS TRUST.

(a) Notwithstanding the provisions of subsections (2) and (3), unless the trust instrument expressly provides otherwise, an authorized trustee who has the power under the terms of a first trust to invade the principal of the first trust to make current distributions to or for the benefit of a beneficiary with a disability, may instead exercise such power by appointing all or part of the principal of the first trust in favor of a trustee of a second trust which is a supplemental needs trust if:

1. The supplemental needs trust benefits the beneficiary with a disability;

2. The beneficiaries of the second trust include only beneficiaries of the first trust; and

3. The authorized trustee determines the exercise of such power will further the purposes of the first trust.

(b) Except as affected by any change to the interests of the beneficiary with a disability, the second trusts, in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to such beneficiary's beneficial interests in the first trust.

(5) TAX RELATED PROVISIONS.

(a) An authorized trustee may not distribute the principal of a trust under this section in a manner that would prevent a contribution to that trust from qualifying for or that would reduce the exclusion, deduction, or other federal tax benefit that was originally claimed or could have been claimed for that contribution, including:

1. the exclusions under s. 2503(b) or 2503(c) of the Internal Revenue Code;

2. a marital deduction under s. 2056, 2056A, or 2523 of the Internal Revenue Code;

3. a charitable deduction under s, 170(a), 642(c), 2055(a), or 2522(a) of the Internal Revenue Code;

4. direct skip treatment under s. 2642(c) of the Internal Revenue Code: or

5. any other tax benefit for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code.

(b) If S corporation stock is held in the first trust, an authorized trustee may not distribute all or part of that stock to a second trust that is not a permitted shareholder under s. 1361(c)(2) of the Internal Revenue Code. If the first trust holds stock in an S corporation and the first trust is, or but for provisions of this section other than this subsection, would be a qualified subchapter-S trust within the meaning of s. 1361(d), the second trust instrument may not

include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

(c) Except as provided in paragraphs (a), (b) and (d) of this subsection, an authorized trustee may distribute the principal of a first trust to a second trust regardless of whether the settlor is treated as the owner of either the first or second trust under ss. 671-679 of the Internal Revenue Code: however, if the settlor is not treated as the owner of the first trust, then the settlor may not be treated as the owner of the second trust unless the settlor has the power at all times to cause the second trust to cease being treated as owned by the settlor.

(d) If an interest in property that is subject to the minimum distribution rules of s. 401(a)(9) of the Internal Revenue Code is held in trust, an authorized trustee may not distribute the trust's interest in the property to a second trust under subsection (2), (3) or (4) if the distribution would shorten the maximum distribution period otherwise applicable to such property.

(6) EXERCISED BY A WRITING. The exercise of a power to invade principal under subsection (2), (3) or (4) shall be by an instrument in writing, signed and acknowledged by the authorized trustee, and filed with the records of the first trust.

(7) RESTRICTIONS. The exercise of a power to invade principal under subsection (2), (3) or (4):

(a) shall be considered the exercise of a power of appointment, other than a power to appoint to the authorized trustee, the authorized trustee's creditors, the authorized trustee's estate, or the creditors of the authorized trustee's estate,

(b) shall be subject to the provisions of s. 689.225 covering the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust.

(c) may be to a second trust created or administered under the law of any jurisdiction, and

(d) may not (i) increase the authorized trustee's compensation beyond the compensation specified in the first trust instrument or (ii) relieve the authorized trustee from liability for breach of trust or provide for indemnification of the authorized trustee for any liability or claim to a greater extent than the first trust instrument: provided, however, that the exercise of the power may divide and reallocate fiduciary powers among fiduciaries and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by any other section of this code or under another provision of law or under common law.

(8) NOTICE.

(a) The authorized trustee shall notify all of the following in writing, at least 60 days prior to the effective date of the authorized trustee's exercise of the authorized trustee's power to invade principal

pursuant to subsection (2), (3) or (4), of the manner in which the authorized trustee intends to exercise the power:

1. all qualified beneficiaries of the first trust,

2. if paragraph (c) of subsection (5) applies, the settlor of the first trust.

3. all trustees of the first trust, and

4. any person who has the power to remove or replace the authorized trustee of the first trust.

(b) To satisfy the trustee's notice obligation under this subsection, the trustee shall provide copies of the proposed instrument exercising the power, the trust instrument of the first trust and the proposed trust instrument of the second trust.

(c) If all of those required to be notified waive the notice period by signed written instrument delivered to the authorized trustee, the authorized trustee's power to invade principal shall be exercisable immediately.

(d) The authorized trustee's notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the authorized trustee's power to invade principal except as provided in other applicable provisions of this code.

(9) SPENDTHRIFT. The exercise of the power to invade principal under subsection (1) (2), (3) or (4) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(10) NO DUTY TO EXERCISE. Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power to invade principal conferred under subsections (2), (3) and (4).

(11) NO ABRIDGMENT OF COMMON LAW RIGHTS. The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust or under any other section of this code or under another provision of law or under common law.

Section 2. This act shall take effect upon becoming law. This act applies to all trusts created before, on, or after such date.

C. NONJUDICIAL MODIFICATION AFTER SETTLOR'S DEATH

a. ***Fla. Stat. §736.0412*** – Fla. Stat. §736.0412 authorizes a nonjudicial modification of irrevocable trust that was created prior to January 1, 2001. Under Fla. Stat. §736.0412, an irrevocable trust can be modified after the settlor's death if there is unanimous agreement of the trustee and all trust beneficiaries.

b. ***Charitable Trusts Limitations*** – The statute cannot be used to modify an irrevocable trust for which a charitable deduction is allowed or allowable until termination of all charitable interests in the trust. Fla. Stat. §736.0412(4)(c).

c. ***Representation Limitations*** – If a conflict of interest exists or an interest is not otherwise represented, the trustee or any beneficiary needs to petition for the appointment of a guardian ad litem to represent the interest of any person having a beneficial interest in the trust who is unborn or unascertained, whose identity is not then known, or who is a minor or under a legal disability if the person does not have a legal guardian. The guardian ad litem then may approve the modification without a court approval.

D. COMMON LAW – PECK VS. PECK

In addition to statutory authority, practitioners in Florida may rely on common law for nonjudicial modification of irrevocable trusts. The recent case of *Peck v. Peck*, 133 So 3d 587 (Fla. 2d DCA, 2014), confirms that an irrevocable trust may be modified under common law if the settlor and all beneficiaries consent to the modification, even if the modification would be in conflict with the intentions of the settlor of the trust. See also *Preston v. City National Bank of Miami*, 294 So.2d 11 (Fla. 3d DCA 1974).

IV. (RELATIVELY) RECENT SIGNIFICANT CASE LAW INVOLVING ALIMONY PAYMENTS – BERLINGER v. CASSELBERRY

A. SIGNIFICANCE – *Berlinger v. Casselberry*, Case No. 2D12-6470, 6 (Fla. 2d DCA Nov. 27, 2013), was the first case to interpret the Florida Trust Code provisions regarding spendthrift and discretionary trusts since the Florida Trust Code became effective on July 1, 2007. Under Fla. Stat. §736.0504, the general rule is that a creditor cannot either compel a discretionary trustee to make a discretionary distribution or attach the beneficiary's interest. The *Berlinger* holding is very important because it seems to extend the intended scope of Fla. Stat. §736.0504 by allowing a former spouse to garnish her former husband's potential interest as a discretionary beneficiary of a third party discretionary trust.

B. HOLDING – In *Berlinger*, the Second Circuit of the Florida District Court of Appeals upheld a writ of garnishment against the trustee of a discretionary trust over any present and future distributions made to or for the benefit of a trust beneficiary.

C. FACTS – Bruce Berlinger ("Bruce") and Roberta Casselberry ("Roberta") were divorced in 2007. Under the terms of a marital settlement agreement that was incorporated into a final judgment of dissolution of marriage, Bruce agreed to pay to Roberta $16,000 per month in permanent alimony. After the divorce, Bruce and his new wife lived solely off distributions made from several discretionary

trusts created for his benefit by others. The trusts allowed distributions to or for the benefit of Bruce in the discretion of the trustees of the trusts. In May of 2011, Bruce stopped paying alimony, although he continued to receive the distributions from these third party trusts.

In addition to the third party trusts, Bruce in 2011 conveyed his two-third interest in his real property, including his residence (the Banyon Property), into a never-before-disclosed irrevocable life insurance trust. Bruce reported his two-third interest in the Banyon Property to be worth $1,386,000. Bruce never amended or supplemented his financial disclosures to make known the real property transfer or the existence of the irrevocable life insurance trust. Quite the opposite, Bruce gave a deposition few days after he established the life insurance trust and swore that there were no life insurance trusts.

Bruce was provided a Visa card from the then corporate co-trustee of the discretionary trusts to use for paying expenses not directly paid by the trusts. The trusts paid all Visa card bills, including expenses for travel, entertainment, clothing, medical expenses, gifts and Bruce's current wife's credit card bills.

Roberta filed a motion to enforce the alimony. Afterwards, Bruce and Roberta entered into a settlement agreement requiring Bruce to pay a certain amount of outstanding alimony to Roberta. However, after the settlement, a balance remained owing to Roberta. Roberta went to court to enforce the terms of the settlement, and the judge then issued writs of garnishment. The writs provided that all present and future distributions made to or for the benefit of Bruce by the trustees of any of the trusts of which Bruce was a beneficiary would instead be required to be made payable to Roberta. Roberta filed a motion for continued writs of garnishment against the trustees, alleging that traditional methods of enforcing alimony were insufficient.

The hearing was held and the evidence revealed that Bruce and his new wife continued to live in the Banyon Property and that the mortgage loan for the property remained in Bruce's name. Neither Bruce nor his wife were employed and neither of them intended to look for work. All of their expenses were paid by the discretionary trusts directly to the creditors, including Bruce's and his current wife's health insurance, their personal expenses, all household expenses and Visa card bills. It was done that way to avoid direct distributions to Bruce from the discretionary trusts.

The trial court entered the order granting Roberta's motion for continued writs of garnishment. The order provided that all distributions made directly or indirectly to, on behalf of, or for the benefit of Bruce by the trustees of all of the trusts would be made payable to Roberta unless, at the time of any future distributions, there was no alimony owed to her.

ANALYSIS – Bruce appealed the trial court's order and argued that Fla. Stat. §736.0504 prohibited the attachment of distributions made to Bruce because the

trusts were discretionary. The Florida District Court of Appeal disagreed with Bruce and, citing the Florida Supreme Court's decision in *Bacardi v. White*, 463 So. 2d 218 (1985) and Fla. Stat. §736.0503, stated "The Florida Supreme Court concluded that, in support cases, the restraint of spendthrift trusts should not be an absolute bar to the enforcement of alimony orders . . . it would be unjust and inequitable to allow the debtor to enjoy the benefits of wealth without being subject to the responsibility to support those whom he has a legal obligation to support."

Although a very well-known *Bacardi* case dealt with a support trust, the *Bacardi* court specifically discussed discretionary distributions and stated that "if the trustee exercises its discretion and makes a disbursement, that disbursement may be subject to the writ of garnishment." The *Berlinger* court concluded that *Bacardi* controls here.

The *Berlinger* court further used Fla. Stat. §736.0503 as authority to grant the writ of garnishment. According to Fla. Stat. §736.0503(2)(a), a spendthrift provision is unenforceable against a beneficiary's former spouse who has a judgment or court order against the beneficiary for support or maintenance and permits the former spouse to obtain a court order attaching present or future distributions to or for the benefit of the beneficiary. However, the former spouse's rights are limited by Fla. Stat. §736.0504, which prevents the former spouse from compelling a distribution when that distribution is subject to the trustee's discretion.

The *Berlinger* court, citing Fla. Stat. §736.0503(3), held that although the court may not compel distributions by a trustee of a discretionary trust, any distributions made by the trustee may be subject to a writ of garnishment. Fla. Stat. §736.0503(3) allows this remedy "only as a last resort upon an initial showing that traditional methods of enforcing the claim are insufficient." In *Berlinger*, Bruce deliberately evaded paying alimony, failed to update his financial statements and did not disclose material items at his deposition. The *Berlinger* court seemingly stretched the meaning of "last resort" to possibly mean a situation where a spouse is not paying alimony and having a trust with plenty of assets and/or not being truthful about his or her assets.

D. CONSEQUENCES – As a result of the *Berlinger* holding, discretionary trust distributions may be subject to garnishment by a former spouse of a beneficiary of a Florida trust. The holding created a potentially devastating situation, when a trust created by a parent or grandparent for the benefit of a loved one would be exposed to post-divorce claims of an ex-spouse. Although the *Berlinger* holding potentially goes beyond the express terms of Fla. Stat. §736.0504, until it is overturned, the holding represents the current law in Florida.

Courts that address this issue in the future may decide that the *Berlinger* case should be limited to its specific and egregious facts. As the *Berlinger* court determined that Bruce and his new wife were living a lavish lifestyle from various spendthrift discretionary trusts, hiding property within those trusts, and refusing to

pay court awarded support obligations, it may have been public policy that necessitated the garnishment. On the other hand, future courts could decide that the *Berlinger* case should apply to allow all creditors, not just a former spouse or other exception creditors, to garnish distributions from a discretionary trust, which is not a very likely proposition.

In the meantime, practitioners who continue drafting discretionary trusts governed by Florida law might want to include certain provisions in the trusts to address the concerns created by the *Berlinger* holding. These provisions might include (1) giving a trustee the power to move a trust to another jurisdiction; (2) giving a trustee the power to make decanting distributions to another trust in a more favorable state; (3) giving an independent party the power to add or remove beneficiaries (additional beneficiary could be a spouse of the debtor-beneficiary), which would allow the beneficiary to live through his or her spouse while facing creditor issues.