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HOW SOMETHING CALLED THE UNIFORM TRUST CODE AFFECTS US

Every so often the state legislatures around the country decide to update their laws on certain matters. In order to escape reinventing the wheel, academic and professional groups rewrite “Uniform Codes” which the states then consider, on occasion make changes, and then adopt their own version.

Florida is currently considering adopting the Third Restatement of the Uniform Trust Code (“UTC”). The other day the Senate Judiciary Committee voted unanimously to send the full bill to the Florida Senate. The Florida version of the UTC changes some of the “standard” provisions that could have been troublesome for trusts, their beneficiaries and trustees.

While many aspects of the UTC are sound, Article Five of the UTC has serious flaws resulting in less asset protection for beneficiaries of trusts, and more liability to trustees. Under UTC §501 comments, for example, the Code appears to allow for judicial foreclosure sale of current beneficial interests in trusts as well as remainder beneficial interests in trusts. This negates what is commonly referred to as “spendthrift” protection for remaindermen beneficiaries, and puts all trustees at risk. What happens, for example, if a judicial foreclosure occurs over a remaindermen interest where the current income beneficiary (spouse) needs the income for the remainder of his or her life?

This is further complicated by the likely UTC definition that every beneficiary (whether it is a support trust or a discretionary trust) appears to have an enforceable right to a distribution. In other words, “discretionary” no longer exists, despite the language in the governing instrument.

This puts anyone serving as a trustee in harms way with any beneficiary that has a discretionary interest in trust. Further, because the discretionary interests are now deemed to be enforceable and subject to foreclosure, other beneficiary’s interests may be compromised where more than one beneficiary shares in a single trust.

In short, Article Five of the UTC is a plaintiff attorney’s dream. The plaintiff attorney can not only go after remainder interests in trust, he can sue trustees to make distributions

to discretionary beneficiaries. These laws present another opportunity for those who want to sue those who have wealth.

In my conversations with Laird Lile, a Naples attorney running for the Florida Bar Board of Governors in our Circuit, the Florida version of the UTC altered the troublesome paragraphs. Under both the new Florida Trust Code (FTC) and the UTC, spendthrift clauses are generally valid and enforceable. However, spendthrift clauses are not effective as to claims by certain “exception creditors” such as a claim by a former spouse or child for child support. The special status given to exception creditors under the FTC applies only to the basic effectiveness of spendthrift clauses.

According to Mr. Lile, the portion of the UTC that extends exception creditor rights to discretionary trusts was not included in the FTC. Hence, exception creditors may reach a beneficiary’s right to distributions from a trust, but they have no special status when a beneficiary’s interest in a trust is subject to a trustee’s discretion. Thus, FTC s. 736.0504(1) explicitly provides that whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion even if the discretion is subject to a distribution standard and even if the trustee has abused the discretion.

Under the UTC, exception creditors may proceed against a beneficiary’s trust interest as a first resort. Again, according to Mr. Lile, under the FTC, however, even where a beneficiary has a right to distributions from a trust, the exceptions provided for the beneficiary’s child or spouse, and for judgment creditors who have provided services for the protection of the beneficiary’s interest have been subjected to the “last resort” principal enunciated by the Florida Supreme Court in *Bacardi v. White*, 463 So.2d 218 (1985).

In short, it appears the folks working on the Florida Trust Code and its amendments are doing a fine job ensuring that the laws are effective and fair. We should commend their work.

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