O/a 6-8-84

IN THE SUPREME COURT OF FLORIDA

FLORIDA NATIONAL BANK OF
PALM BEACH COUNTY, a
national banking institution,

Petitioner,

vs.

ANN CLEARY GENOVA,

Respondent
_____/

CASE NUMBER: 64,160

Fourth District Court of Appeal Case Number: 81-9411
Genova vs. Florida National Bank of Palm Beach County, 433 So.2d 1211 (Fla. App. 4DCA 1983)

RESPONDENT'S ANSWER TO PETITIONER'S BRIEF ON THE MERITS

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PREFACE

This is Respondent, ANN CLEARY GENOVA's Answer to Petitioner's, FLORIDA NATIONAL BANK OF PALM BEACH COUNTY, A NATIONAL BANKING INSTITUTION, Brief on the Merits.

The following symbol shall be used :

(R) = Record-on-Appeal

STATEMENT OF THE CASE

This action was before the trial court on Respondent, ANN CLEARY GENOVA's Petition for Mandamus and Petitioner, FLORIDA NATIONAL BANK OF PALM BEACH COUNTY, A NATIONAL BANKING INSTITUTION's (hereinafter referred to as BANK), Petition for Instructions. The other parties at the trial court were RESIDUARY BENEFICIARIES SEMANSKEES (hereinafter referred to as SEMANSKEES).

The matter centered around Respondent's attempt to revoke the Ann Cleary Genova Revocable Trust, which was created by a January 31, 1979 Trust Agreement between Respondent as Settlor and Co-Trustee and Petitioner BANK is Co-Trustee. (R 21-55). Said Trust Agreement created a revocable trust to which Respondent delivered assets valued in excess of $475,187.60, and provided that Respondent be the sole beneficiary of said revocable trust during her lifetime (subject to her right to direct otherwise). Respondent modified said Trust Agreement by written agreements dated May 15, 1979,

August 27, 1979 and May 12, 1980. (R 21-55).

On July 8, 1980, Respondent delivered a letter to Petitioner BANK in which she directed that the trust assets be transferred to another bank. (R 29). Petitioner BANK refused to follow the directions of Respondent. On July 9, 1980, Respondent executed a Power of Attorney in favor of her attorney, ordering the transfer of the trust assets to a second bank. (R 40). Petitioner BANK refused to comply. On July 11, 1980, Respondent and her attorney advised Petitioner BANK by letter that Respondent had revoked the Ann Cleary Genova Revocable Trust. (R 21-55). Petitioner BANK refused to perform as was its duty under the Trust Agreement and surrender the assets to Respondent.

Respondent then filed a Petition for Writ of Mandamus requesting the entry of an Order compelling Petitioner BANK to surrender the trust assets to Respondent. (R).

Petitioner BANK then filed a Petition for Instructions. (R 21-55). In said Petition for Instructions, Petitioner BANK referred to a 1979 dissolution of marriage proceeding in which Respondent was a party. The Final Judgment of Dissolution therein had found that a document Respondent had executed was void as having been procured under undue influence, although other transactions were upheld.

Trial was held on January 6, 1981. Petitioner BANK called four witnesses, three employees of Petitioner BANK and a manager of an apartment building in which Respondent had at

one time resided. The SEMANSKEES introduced the deposition of Respondent's prior treating physician and four other witnesses, including Respondent. Respondent called two witnesses, two physicians, one of whom specialized in psychiatry.

The trial judge entered a Final Judgment on February 13, 1981 dismissing Respondent's Petition for Writ of Mandamus and granting Petitioner BANK's Petition for Instructions. Petitioner BANK was instructed to continue to administer the trust pursuant to the terms of the Trust Agreement. (R 249).

Respondent appealed said Final Judgment. Petitioner BANK filed an Answer and Respondent a Reply. SEMANSKEES failed to file an answer.

The Fourth District Court of Appeal, in its February 2, 1983 Opinion written by Judge Glickstein and concurred in by Judge Walden, reversed the Final Judgment of the trial court and remanded with direction to grant Respondent's Writ of Mandamus. Genova vs. Florida National Bank of Palm Beach County, 433 So.2d 1211 (Fla. 4DCA 1983).

Petitioner BANK filed a Motion for Rehearing, Motion for Rehearing En Banc, Motion for Consolidation and Withdrawal of Opinion and Motion for Certification.

SEMANSKEES now sought to join, and filed a Motion to Intervene and Motion for Rehearing.

Respondent filed replies to Petitioner BANK's and to SEMANSKEES Motions, and further filed Supplemental Replies to the same. SEMANSKEES filed a Reply to Respondent's Supplemen-

tal Reply as well as an Addendum to its own Reply. Respondent filed a Motion for Sanctions against SEMANSKEES. Petitioner BANK filed a Reply to Respondent's Supplemental Reply. Further pleadings were also filed.

On July 27, 1983, the Fourth District Court of Appeal denied Petitioner BANK's Motion for Rehearing and SEMANSKEES Motion to Intervene, as well as Respondent's Motion for Sanctions. Said court failed to grant Petitioner BANK's Motion for Certification.

Petitioner BANK filed a Notice to Invoke Discretionary Jurisdiction with the Supreme Court, together with a Brief on Jurisdiction. Respondent filed an Answer to Said Brief. The Supreme Court accepted jurisdiction.

STATEMENT OF THE FACTS

Respondent was born on March 10, 1902. She has been a resident of Florida since 1926. (R58). Respondent and her husband Mark Genova were married to each other on 1978. He was thirty-four years old at the time. Respondent divorced her husband in 1979 and remarried him in 1980. She is presently married to Mr. Genova.

Respondent entered into the Ann Cleary Genova Revocable Trust with Petitioner BANK on January 30, 1979. At the time, she was nearly seventy-seven years of age, and was married to Mark Genova. Said Trust Agreement, drafted by Petitioner BANK, provided that Respondent act as Settlor and Co-Trustee and

that Petitioner BANK serve as Co-Trustee. Respondent, by paragraph four of said Trust Agreement, reserved the following powers:

> 1) To withdraw property from this trust in any amount and at any given time upon giving reasonable notice in writing to TRUSTEES.
>
> 2) To add to the trust other property acceptable to the TRUSTEES by intervivos transfers.
>
> 3) To amend the trust under this Agreement in any other respect, and in whole or in part.
>
> 4) To revoke the trust under this Agreement in its entirety.

Paragraph 3 of said Trust Agreement further provided the circumstances under which Respondent would relinquish control of the trust:

> 3. During the lifetime of the SETTLOR, and unless this Trust Agreement shall have been otherwise revoked or amended, the TRUSTEES shall retain and administer the property comprising the TRUST ESTATE in the manner following:
>
> (a) Unless the SETTLOR shall be or become incapacitated as defined in Subparagraph (b) hereinafter, the TRUSTEES shall retain and safeguard the property comprising the TRUST ESTATE, shall collect the income therefrom and shall pay to the SETTLOR or apply to her benefit, the net income derived therefrom in quarterly installments, or upon direction of the SETTLOR shall pay and distribute such net income to such person, or persons, and in such proportions as the SETTLOR may direct. During such times, the SETTLOR shall be solely and entirely responsible for the investment of the properties comprising the TRUST ESTATE, and any changes in investment or purchases or sales of the Trust assets shall be made by the TRUSTEES only at the written direction of the SETTLOR; and the TRUSTEES' sole duties hereunder shall consist of the holding and administration of

the TRUST ESTATE, maintaining accurate and appropriate records, the collection and distribution of income and the performance of such other ministerial duties in connection therewith as shall be deemed proper in their sole discretion.

(b) Upon the occurrence of any one or more of the following events, TRUSTEES shall assume full responsibility of the management and investment of the TRUST ESTATE:

(1) The receipt by the TRUSTEES from the SETTLOR of a signed statement requesting and directing that the TRUSTEES assume full management and investment of the TRUST ESTATE, and the acceptance of such direction by the TRUSTEES.

(2) The adjudication by a court of jurisdiction of the physical or mental incompetency of the SETTLOR.

(3) The receipt by the TRUSTEES of a certificate in writing executed by the attending physician of the SETTLOR certifying that the SETTLOR has become incapable of the management of her business and personal affairs by reason of physical or mental disability.

During such times as the SETTLOR shall have become incapacitated or disabled as defined in the foregoing paragraph, the corporate TRUSTEE shall exercise the management and investment of the TRUST ESTATE: provided, however, that the corporate TRUSTEE shall not change the assets then comprising the TRUST ESTATE during the first sixty (60) days of the SETTLOR's incapacity or disability, but may nevertheless use principal of the Estate, if necessary, and sell principal assets as required in order to provide adequately and properly for the support, maintenance, welfare and comfort of the SETTLOR. During such times of management and investment, the corporate TRUSTEE shall, in its sole discretion, use so much of the net income and any portion or all of the principal of the Estate for the support, comfort and welfare of the SETTLOR, and any income not so utilized shall be accumulated and added to principal. The SETTLOR acknowledges that the foregoing

> provision is made for her sole benefit and welfare, and she declares therefore that the corporate TRUSTEE shall not be under any liability or responsibility by reason of the exercise of their powers during such time, or times, as the SETTLOR is incapacitated or disabled and is unable to manage her financial affairs.
>
> (4) At such time as the SETTLOR has recovered from any illness or incapacity, she shall again assume the management and investment of the TRUST ESTATE.

Paragraphs 11-14 of said Trust Agreement provided that upon Respondent's death said Trust became irrevocable, and further provided for numerous testamentary gifts, including gifts to SEMANSKEES, residents of Seattle, Washington.

Respondent has never been adjudicated incompetent pursuant to section 744.331, Florida Statutes, nor have incompetency proceedings ever been brought against her.

Petitioner, on page two of its Brief on the Merits, states that Respondent "currently suffers from chronic anxiety and depression". Said statement is unsupported by the Record-on-Appeal.

Respondent vigorously participated in the trial court proceedings. (R 26-31, 46-82). At the time of her July 8, July 9 and July 11, 1980 actions, Respondent freely and voluntarily sought to regain control of her assets.

At said trial, Dr. Norman Silversmith, a physician specializing in psychiatry and experienced with geriatric patients, testfied on behalf of Respondent: (R 280-281)

"Q. Did you discuss generally the nature of her assets and where they were located?

A. Yes, I did. She was aware that the interview at the request of her attorney was because of some questions about her present assets. I did question her about those. She appeared to be fairly certain as to the amount, which I learned previous to the interview from her attorney, and she knew where they were presently being held and what some of the difficulties surrounding that situation were.

Q. Based upon your personal observations, your examination, your testing, did you arrive at an opinion as to her mental capacity at that time?

A. Yes, I did.

Q. What was that opinion, sir?

A. Based on my evaluation of Mrs. Genova at that time in September when I examined her, given all the factors, it was my professional opinion that she was not incompetent.

Q. Did you also arrive at an opinion as to whether or not she was generally aware of her assets and whether or not she could manage those assets?

A. Yes, I did.

Q. What was that opinion, sir?

A. I felt that she was able to manage her assets, that she was aware of the amount and that she could certainly - - or that she did certainly know the limits and extent of her bounties and assets."

Reverend John Fuller Magrum, Director of St. David's in the Pines Episcopal Church, was equally impressed with Appellant. Reverend Magrum testified that he witnessed the execution of Appellant's Will. (R 256).

"Q. Did she make any observations or comment concerning the contents?

A. Yes, sir. She absolutely flabbergasted me. I have an I.Q. of a hundred and sixty-four, which is not tiny. I have almost total recall of memory. But, she sat there without a peice of paper in front of her and corrected every section they went through. She dotted every i, she crossed every t. She was superb in her memory on things, and on two occasions insisted on codicils that would be generous to people who had been omitted from the will. She was totally alert.

Q. Based upon your personal observations and conversations with her and other than the spiritual counselling, in your opinion is Mrs. Genova aware of the nature of her assets and of her natural beneficiaries of heirs?

A. Yes, sir. I am really convinced she is."

Reverend Magnum related his observations of Respondent's relationship with her husband. (R 257)

"Q. Could you describe, generally, their relationship?

A. Well, he was always very respectful to her in the conversations we had together, but where he was especially good was when she was in the hospital. Her heart attack deeply depressed her. I think she really faced for the first time what people face after a heart attack, their mortality, and she knew her limitations as a human being at that point.

He was tender with her, but he was also strong in helping her to realize she had to go on and she wasn't going to just curl up and die."

Respondent's step-son, John Ward Cleary, testified on behalf of Respondent.

"Q. How would you describe her attitude, reactions and relationship with Mark this time in her day-to-day living that you have seen her?

A. Very happy. Very much more outgoing toward the world at large."

A long-time friend of Respondent's, Frances Nicholas,

testified. (R 315).

> "Q. Now, how would you describe the relationship of Mr. and Mrs. Genova?
>
> A. I think Mark is good for her. He lights her cigarettes, takes her to dinner, treats her like a lady. If she says she is cold he gets her a sweater. He's very polite. Companionship is a marvelous thing."

SEMANSKEES introduced the deposition of Dr. William Adkins, a physician specializing in internal medicine, who had at one time been Respondent's treating physician. Dr. Adkins testified in said deposition that he had never met Mark Genova. (R 251, page 36 of said transcript). Dr. Adkins, in a February 26, 1980 note (attached to said deposition) admitted that he thought Mark Genova was a "scalawag". (R 251, Exhibit to said transcript), Respondent testified that she no longer visited Dr. Adkins as he had voiced disapproval of her marriage. (R 35)

Neither Petitioner BANK nor SEMANSKEES presented other expert medical testimony.

POINT ON APPEAL

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN ITS OPINION HOLDING THAT A SETTLOR WHO IS SOLE BENEFICIARY OF TRUST DURING HER LIFETIME (SUBJECT TO HER RIGHT TO DIRECT OTHERWISE) COULD NOT BE DEPRIVED PRIOR TO HER DEATH OF HER RIGHT TO REVOKE THE TRUST IN ABSENCE OF JUDICIAL DETERMINATION OR MEDICAL CERTIFICATION OF PHYSICAL OR MENTAL INCAPACITY

ARGUMENT

On page twelve of its Argument, Petitioner BANK states:

> "In its original Opinion and in its Opinion on Motions for Rehearing and to Intervene, the Fourth District Court of Appeal held that the principle of undue influence is inapplicable to the revocation of a trust."

Said statement misstates the Opinion.

The Fourth District Court of Appeal did not state that the principle of undue influence has no application in trust revocation. Said court ruled that under the instant facts, the time and person raising said issue were inappropriate.

Said court held that the determinative question, which it answered in the negative, was as follows:

> "Whether the settlor who is the sole beneficiary of the trust during her lifetime (subject to her right to direct otherwise) could be deprived, prior to her death, of her right to revoke the trust in the absence of judicial determination of her physical or mental incapacity." Genova vs. Florida National Bank of Palm Beach County, 433 So.2d 1211, 1213 (Fla. 4DCA 1983)

As the court stated, citing Restatement (Second) of Trusts, section 339, comment a, page 171, (1957) and Waldron vs. Commerce Union Bank, 577 S.W.2d 669, 674 (Tenn. App. 1978), there is considered authority for the position it adopted.

The Fourth District Court of Appeal, in its Opinion, further held:

> "Our focus is upon the the present settlor in her lifetime; and not upon the prospective beneficiaries who may benefit in the event of her death.
>
> . . .
>
> Let us assume that there never was a trust and the husband unduly influenced his present wife to give him $100,000.00. Could the court in that instance undertake to void the gift if one of the wife's relatives sued to do so, notwithstanding the absence of any dissolution proceeding or action by the wife to rescind the gift?" Genova vs. Florida National Bank of Palm Beach County, supra, page 1215

As Scott, The Law of Trusts, section 339, page 2699 (3d), referred to in footnote 1 of said Opinion, states:

> "At any rate, regardless of his wisdom or folly in creating the trust, since nobody but he has at any time any beneficial interest in the property, he should be permitted to do as he likes with it, if he is not under a legal incapacity."

Respondent argues that the Fourth District Court of Appeal has clearly stated that under the facts of the case, Respondent had an absolute right to revoke said Trust Agreement, in the absence of judicial determination or medical certification of physical or mental incapacity.

Respondent cites the following authorities in support of her argument: Bogert, Trusts and Trustees, Second Edition Revised, section 1004 Termination Where Settlor is Sole Beneficiary ("If the settlor makes himself the sole beneficiary of a trust created by transfer, the question of termination is of

easy solution, even though the settlor reserved no power to revoke or alter or even expressly declare the trust irrevocable."): Stewart vs. Merchants National Bank of Aurora, 278 N.E. 2d 10,14 (Ill. App. 2d 1972) ("If the settlor is the sole beneficiary of a trust, he can compel the termination of the trust, although the purposes of the trust have not been accomplished."): Johnson vs. First National Bank of Jackson, 386 So.2d 1112, 1115 (Miss. 1980) ("Mere fact that person has done or attempted to do something with her money which is considered foolish by society is not sufficient reason for equity court to invoke its power."): Weymouth vs. Delaware Trust Co., 45 A.2d 427,428 (Court of Chancery of Delaware 1946) ("Generally, where settlor is sole beneficiary and is not under an incapacity, he may compel termination of trust which he created.")

Petitioner BANK, on pages 12 through 14 of its Brief on the Merits, relies on Hoffman vs. Kohns, 385 So.2d 1064 (Fla. 2DCA 1980) and Rich vs. Halliman, 143 So.2d 292 (1932) in support of its demand that the Supreme Court reverse the Fourth District Court of Appeal Opinion in Genova vs. Florida National Bank of Palm Beach County, supra.

Said court addressed the issues raised by Petitioner BANK in its Answer to Respondent (Appellant's) Brief, and held:

> "We choose not to apply to the facts of this case the decision of Hoffman vs. Kohns, 385 So.2d 1064 (Fla. 2DCA 1980), upon which Appellee relies." Genova vs. Florida National Bank of Palm Beach County, supra, page 1215

Hoffman vs. Kohns, supra, concerned a conflict between the surviving spouse and neice over the validity of a will, a marriage and a revocation of a trust of a decedent who had been diagnosed as suffering from cerebral arteriosclerosis and senility prior to his death. The proceeds of the revoked trust had been directly delivered to decedent's spouse prior to his death. Furthermore, the neice, a Co-Trustee of the revoked trust, had a personal interest in the outcome, as her children were beneficiaries of said trust. The instant facts differ markedly. Respondent vigorously participated in the trial proceedings. (R 26-31, 46-82). Respondent was free of like physical and mental disabilities at the time of her July, 1980 actions in which she sought to regain control of the trust assets.

Rich vs. Halliman, supra, concerned an action to set aside an assignment of a note and mortgage brought by the assignor herself against the assignee, her former employee, based on the grounds that the assignor had been under the undue influence of said employee at the time the transaction took place.

Respondent, during her lifetime, is the sole beneficiary of the trust of which she is Settlor and Co-Trustee. The terms of the Trust Agreement provide for delivery of the trust assets, upon revocation, to Respondent alone. There was no evidence presented at the trial that showed where Respondent's husband, the alleged "exerciser of undue influence"

stood to be directly benefited.

Respondent is not deceased nor has she brought action, relying on the doctrine of undue influence, to set aside her revocation.

Respondent, at trial, at length and with vigor, attacked the actions of Petitioner BANK in refusing to deliver the assets of the Ann Cleary Genova Revocable Trust to Respondent.

Hoffman vs. Kohns, supra and Rich vs. Halliman, supra are further both distinguished from the instant case in that the points of law settled by the former cases and the latter are not the same, therefore there is no direct conflict with a decision of a district court of appeal or of this court created by the Opinion of the Fourth District Court of Appeal. Kyle vs. Kyle, 139 So.2d 885 (Fla. 1962).

Petitioner BANK, in its Brief on the Merits, cites the following authorities in support of its argument. Cloud vs. United States National Bank of Oregon, 570 P. 2d 350 (1977); Horgan vs. City Trust & Savings Bank of Kanakee, 20 N.E.2d 809 (1939) and Hughes vs. First National Bank of Oakland, 118 P.2d 309 (1941).

Said cases concern conflicts arising subsequent to the death of settlors of trusts created by varying Trust Instruments and in addition contain other facts dissimilar to those of the instant case.

In Cloud vs. United States National Bank of Oregon,

supra, the Supreme Court expressly found that the decedent had been incompetent at the time she executed a document in question which directly delivered a portion of the trust assets to her granddaughter. Furthermore, in said case, the Court failed to address Restatement (Second) of Trusts, section 339, comment a, page 171. Instead, the court relied on Restatement (Second) of Trusts, section 226A, Liability for Payments Under an Invalid Trust. Further reading of said section itself reveals that it distinquishes between two factual situations, i.e., "comment d. Where the Settlor is Living" and "comment e. Where the Settlor is Dead".

Petitioner BANK, on page 17 of its Brief on the Merits, stated that the trial court determined a "very real and important issue which serves to protect not only the trustee but the settlor and beneficiaries as well".

Petitioner BANK had a fundamental duty of loyalty to Respondent as sole beneficiary of the trust during her life-time. In Re: Will of Wickman, 289 So.2d 788 (Fla. App. 2DCA 1974) as well as a duty to be faithful and efficient in conservation of the trust assets and the preservation of the trust property. Traub vs. Traub, 135 So.2d 243 (Fla. 2DCA 1961). It has been held in the case of N.L.R.B. vs. Amax Coal Co., 453 U.S. 322, 101 S.Ct. 2789, 69 L.Ed. 672 (1981) that a trustee must not have dividing loyalties. In said case, the Supreme Court held that:

"A trustee bears an unwavering duty of complete

> loyalty to beneficiary of the trust, to exclusion of interests of all other parties and to deter trustee from all temptation and to prevent all possible injury to beneficiary, rule against dividing loyalties must be enforced with uncompromising rigidity." page 2794

Respondent, an eighty-two year old woman, has witnessed the passage of two trials, two appeals, one Supreme Court action, four years and over $100,000.00 in costs disbursed from the trust in her effort to regain control of her assets.

Respondent argues that a finding that Petitioner BANK had a duty to remote beneficiaries to resist revocation of a trust by a settlor, sole beneficiary during her lifetime, and under no mental or physical incapacity, would be contrary to public policy as it would subject a trustee to liability for breach of said duty in a cause of action by such parties dissatisfied with a deceased Settlor's testamentary gift. Judicial ruling that said duty was owed by a trustee would subject the courts to a flood of claims against trustees as well as trustees' pleadings demanding judicial guidance.

CONCLUSION

The Opinion of the Fourth District Court of Appeal in Genova vs. Florida National Bank of Palm Beach County, 433 So.2d 1211 (Fla. App. 4DCA 1983), should be AFFIRMED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Victoria F. Peet, Esq., GIBSON & ADAMS, P.A., 303 First Street, Suite 400, Post Office Box 1629, West Palm Beach, Florida 33402, James Pressly, Jr., Esq., GUNSTER, YOAKLEY, CRISER & STEWART, P.A., First National Bank Building, 251 South County Road, Palm Beach, Florida 33480, and Richard Kupfer, Esq., CONE, WAGNER, NUGENT, JOHNSON, HAZOURI & ROTH, P.A., Service Center E. Bldg., Suites 300-400, 1601 Belvedere Road, West Palm Beach, Florida 33402 on this the 30th day of March, 1984.

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