

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 Case Number:
81-941

FILED

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RESPONDENT'S REPLY TO PETITIONER'S
BRIEF ON JURISDICTION

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PREFACE

This is Respondent's Reply to Petitioner's Brief on Jurisdiction. The following symbol shall be used: A = Appendix

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's Petition for Instructions. The other parties at the trial court were RESIDUARY BENEFICIARIES 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 Respondent as Trustee. Said Trust Agreement provided that Respondent be the sole income beneficiary of the Trust during her lifetime (subject to her right to direct otherwise).

On July 8, 1980 Respondent delivered a letter to Respondent in which she directed that the trust assets be transferred to another bank. Respondent refused to follow the directions of Respondent. On July 9, 1980 Respondent and her attorney advised Petitioner by letter that Respondent had revoked the Ann Cleary Genova Revocable Trust. Petitioner refused to perform as was its duty to do so 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 to surrender the trust assets to Respondent.

Petitioner then filed a Petition for Instructions. In said

Petition, Petitioner referred to an earlier 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 called four witnesses, three employees of Petitioner and a manager of an apartment building at which Respondent had at one time resided. The Residuary Beneficiaries 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's Petition for Instructions. Petitioner was instructed to continue to administer the trust pursuant to the terms of the Trust Agreement.

Respondent appealed said Final Judgment. Petitioner filed a Reply. Residuary Beneficiary Semanskees failed to file a Reply.

The Fourth District Court of Appeal, in its opinion filed February 6, 1983, reversed the Final Judgment and remanded with direction to grant Respondent's Writ of Mandamus.

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

Residuary Beneficiaries Semanskees now sought to join and filed

a Motion to Intervene and Motion for Rehearing.

Respondent filed Replies to Petitioner's and Intervenor's Motions and further filed Supplemental Replies to the same, subsequent to Fourth District Court of Appeal Order. Intervenors filed a Reply to Respondent's Supplemental Reply as well as an Addendum to its own Reply. Respondent filed a Motion for Sanctions against Intervenors Semanskees. Petitioner 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's Motion for Rehearing and Intervenors' Motion to Intervene, as well as Respondent's Motion for Sanctions. Said court failed to grant Petitioner's Motion for Certification.

Petitioner filed a Notice to Invoke Discretionary Jurisdiction with this court together with a Brief on Jurisdiction.

STATEMENT OF THE FACTS

Respondent was born on March 10, 1902. She has been a resident of Florida since 1926. Respondent and her present husband were married in 1978. He was then thirty-four years old. Respondent divorced her husband in 1979 and re-married him in 1980.

Respondent vigorously participated in the trial court proceedings.

Respondent has never been adjudicated incompetent pursuant to section 744.331, Florida Statutes.

JURISDICTIONAL POINT

THIS COURT IS WITHOUT JURISDICTION TO REVIEW
THE DECISION RENDERED BY THE FOURTH DISTRICT
COURT OF APPEAL IN THE INSTANT CASE AS IT FAILS

TO EXPRESSLY AND DIRECTLY CONFLICT WITH A
DECISION OF DISTRICT COURT OF APPEAL OR OF THIS
COURT ON THE SAME QUESTION OF LAW

ARGUMENT

The case of Hoffman v. Kohns, 385 So.2d 106 (2DCA 1980), relied on by Petitioner in support of its Brief on Jurisdiction, fails to support its claim of express and direct conflict with a decision of another district court of appeal or of this court on the same question of law.

Respondent refers to the February 6, 1983 and July 27, 1983 Opinions of the Fourth District Court of Appeal (copies of which are attached as A1-A2) wherein said court expressly denied Petitioner's arguments, raised in its Answer and Motions for Rehearing, Motion for Rehearing en Banc, Motion for Withdrawal of Opinion and Motion for Certification.

The court, in its February 6, 1983 Opinion, held

"We choose not to apply to the facts of this case the decision in Hoffman v. Kohns, 385 So.2d 1064 (Fla. 2DCA 1980), on which Appellee relies."

Hoffman v. 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 earlier been diagnosed as suffering from cerebral arteriosclerosis and senility.

The instant facts differ markedly. Respondent is the sole income beneficiary of the trust during her lifetime. The term of the Trust Agreement provided for delivery of the trust assets to Respondent alone upon revocation of the trust, thereby failing to produce a result indicating undue influence. 25 Am.Jur.2d Duress and Undue Influence,

section 36.34 Fla.Jur.Wills, section 90. Respondent vigorously participated in the trial proceedings. She was free of like debilitating physical and mental illnesses. At the time of her actions of July, 1980 she freely, voluntarily and actively sought to regain control of her assets. Respondent's one-time physician who testified at the trial stated that he had no personal knowledge of Respondent's drinking in recent years and to his surprise, Respondent's health improved as time passed.

The Fourth District Court of Appeal stated as follows:

"Our focus is upon the present settlor in her lifetime; and not upon the prospective beneficiaries who may benefit in the event of her death."

The court held that the determinative question in the case on appeal was:

". . . 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 or medical certification of her physical mental incapacity, We answer that question in the negative."

Said Court, quoting paragraph 3 of the Trust Agreement, held that said Agreement itself provided for management of the trust assets during Respondent's lifetime.

"The foregoing language is plain that appellant intended to relinquish control of the trust to her co-trustee only under two circumstances; namely (1) when she said so (2) when she was medically or judicially determined to be incapacitated. Such independence is reflective of Modell's cartoon in The New Yorker many years ago where-

in the attorney is shown reading the will to the heirs. Underneath, the caption recites:
'His will read as follows: Being of sound mind and disposition, I blew it all!'

Petitioner further relies on Rich V. Halliman, 143 So.292 (1932) in its Brief on Jurisdiction. Examination of said Supreme Court case reveals a complete absence of express and direct conflict with the Fourth District Court of Appeal Opinion. Rich v. Halliman, supra, concerned a presumption of undue influence allegedly practiced upon Respondent (Settlor and Co-Trustee of a trust under which she was the sole income beneficiary during her lifetime) by her lawful husband towards whom no petition for dissolution had been filed. There was no evidence presented at the trial that Respondent's husband would directly benefit upon the revocation of said Trust. The terms of the Trust Agreement provided for delivery of the trust, thereby failing to produce a result indicating undue influence.

Further, in Rich v. Halliman, supra, the donor herself sought to cancel the transactions (an assignment of a note and mortgage) entered into between herself and the donee, whereas Respondent in the instant case, at length and with vigor, has attacked the actions of Petitioner in attempting to prevent the exercise of her free will.

Hoffman v. Kohns, supra, and Rich v. Halliman, supra, are both distinguishable in controlling factual elements from the instant case and further the points of law settled by the former cases and the latter are not the same, therefore no conflict arises which would authorize Supreme Court jurisdiction on the ground of direct conflict as alleged by Petitioner. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962).

Petitioner, on page 8 of its Brief on Jurisdiction states "Further, the decision creates dangerous precedent, contrary to public policy, under which a victim of undue influence cannot apply to the courts to prevent the exerciser of undue influence from being unjustly enriched by his predatory acts."

Respondent asks this court to consider the following. If by "victim of undue influence" Petitioner refers to Respondent, the term is ironically used. Respondent has attacked the prevention of the exercise of her free will by Petitioner since 1980. If by said phrase Petitioner refers to the Residuary Beneficiaries, Respondent directs this court's attention to the Fourth District Court of Appeal Opinion of July 27, 1983. Said Opinion, denying Petitioner's Motion for Rehearing, has stated that Respondent's "rights and dignity as an individual should override the interest of prospective beneficiaries in (her) assets." With reference to Petitioner's description of Respondent's husband as standing to be unjustly enriched by his "predatory acts", Respondent argues that the record fails to reveal where said alleged "exerciser" of undue influence stands to be directly benefitted.

Yet, Respondent truly is a victim. She is a victim of the manifest unfairness of being deprived of the comfort of her assets during her final years and of being subject to attack by dilatory and baseless pleadings.

As the Fourth District Court of Appeal held, in its February 6, 1983 Opinion

"When does the court stop being a judicial forum and turn into an Orwellian Big Brother."

CONCLUSION

Petitioner's request to invoke discretionary jurisdiction of this Court to review the decision of the Fourth District Court of Appeal in the instant case should be DENIED as it fails to expressly and directly conflict with a decision of another district court of appeal or of this court on the same question of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to the following on this the 5th day of September, 1983: Victoria F. Peet, Esq., Post Office Box 1629, West Palm Beach, Florida 33402 and to Richard A. Kupfer, Esq., Post Office Box 3466, West Palm Beach, Florida 33402.

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