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IN THE SUPREME COURT OF FLORIDA

FLORIDA NATIONAL BANK OF)
 PALM BEACH COUNTY, a)
 national banking institution,)
)
 Petitioner,)
)
 v.)
)
 ANN CLEARY GENOVA,)
)
 Respondent.)

CASE NO.

 FOURTH DISTRICT

 CASE NO. 81-941

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF CITATIONS.....ii

PREFACE.....iii

STATEMENT OF THE CASE AND OF THE FACTS..... 1

ARGUMENT

JURISDICTIONAL POINT

THIS COURT HAS JURISDICTION TO REVIEW THE
DECISION RENDERED BY THE FOURTH DISTRICT
COURT OF APPEAL IN THE INSTANT CASE AS
IT EXPRESSLY AND DIRECTLY CONFLICTS WITH
A DECISION OF ANOTHER DISTRICT COURT OF
APPEAL OR OF THIS COURT ON THE SAME
QUESTION OF LAW..... 5

CONCLUSION..... 9

CERTIFICATE OF SERVICE..... 9

TABLE OF CITATIONS

<u>Cases</u>	<u>Page (s)</u>
Ford Motor Company v. Kikis 401 So.2d 1341 (Fla. 1981).....	5
Hoffman v. Kohns 385 So.2d 1064 (Fla. 2d DCA 1980).....	5, 6, 7
In Re Estate of Krieger 88 So.2d 497 (Fla. 1956).....	8
Kauffmann v. Kauffmann 150 So.2d 251 (Fla. 1963).....	8
Kyle v. Kyle 139 So.2d 885 (Fla. 1962).....	7
Peacock v. DuBois 90 Fla. 162, 105 So. 321 (1925).....	8
Rich v. Hallman 106 Fla. 348, 143 So. 292 (1932).....	5, 6, 7, 8
 <u>Other Authorities</u>	
Constitution of the State of Florida Article V, Section 3(b)(3).....	5

P R E F A C E

The Petitioner, Florida National Bank of Palm Beach County, will be referred to as "Petitioner", and the Respondent, Ann Cleary Genova, will be referred to as "Respondent".

The following symbol will be used:

A - Appendix

STATEMENT OF THE FACTS AND OF THE CASE

This case centered around attempts in July of 1980 by Respondent, Ann Cleary Genova, to revoke a revocable trust which she created on January 31, 1979, naming herself and Petitioner, Florida National Bank of Palm Beach County as co-trustees. All of Respondent's assets are in the trust. Respondent is to receive the income from the trust for her life and numerous pecuniary gifts are to take effect upon her death, with the residuary passing in equal shares to her four grandnieces and grandnephews, the Semanskees. Respondent's husband, Mark Genova, will receive nothing from the trust on Respondent's death.

Respondent is an eighty-one year old woman with a history of depression and alcoholism. She first married Mark Genova, who is forty-five years her junior, on September 5, 1978. This marriage was dissolved on October 10, 1979, and on April 28, 1980, the Honorable Thomas Sholts of the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, entered a Final Judgment finding that an agreement executed by Respondent in which she agreed to purchase a restaurant for Mark Genova for \$350,000.00 was void as having been procured through the undue influence of Mark Genova.

Respondent and Mark Genova were remarried on July 3, 1980. Five days later, Respondent attempted to revoke her trust by letter signed in the presence of Mark Genova at his restaurant, the Alibi Bar. On July 9, 1980, Respondent gave a power of

attorney directing the transfer of the trust assets to another bank to Billy Ray Jackson, an attorney introduced to her by Mark Genova. On July 11, 1980, Respondent and Billy Ray Jackson advised Petitioner that she wanted to revoke her trust.

At the time of these revocation attempts, Petitioner was aware of Judge Sholts' Final Judgment finding that Mark Genova had unduly influenced Respondent. Petitioner was also aware that Respondent and Mark Genova had remarried. Petitioner did not honor the revocation requests because it was concerned that they had also been procured through Mark Genova's undue influence. Therefore, in fulfillment of its fiduciary duty to all beneficiaries of the trust, Petitioner petitioned the Probate Division of the Fifteenth Judicial Circuit for instructions regarding the revocations. At about the same time, Respondent filed a Petition for Writ of Mandamus requesting the entry of an Order directing Petitioner to revoke the trust. After a three-day trial on the Petitions at which considerable evidence and testimony on the issue of undue influence was presented, the Honorable Hugh MacMillan entered his Final Judgment of February 13, 1981, finding that Respondent's attempts to revoke her trust were invalid and of no legal significance as having been procured through the use of undue influence practiced intentionally on Respondent by Mark Genova and dismissing Respondent's Petition for Writ of Mandamus.

Respondent appealed Judge MacMillan's Final Judgment to the Fourth District Court of Appeal. Petitioner and Respondent timely filed briefs which centered on the issue of undue

influence. The Court ordered that there would be no oral argument. On February 2, 1983, the Fourth District filed its Opinion reversing Judge MacMillan's Final Judgment and remanding with directions to enter a writ of mandamus directing Petitioner to revoke the trust. (A1-9). The Court held that the question of undue influence was not determinative and until Respondent was judicially declared or medically certified to be physically or mentally incapacitated, she could revoke her trust. The Court made no holding as to whether the trial court's findings of undue influence were correct and, in fact, ignored the issue of undue influence. The Honorable George Hersey filed a dissenting opinion in which he stated that the "very real issue" of whether Respondent validly exercised her right to revoke the trust remains and that the determination of this issue would depend upon whether the revocation attempts were procured through undue influence. Judge Hersey went on to point out that wills, deeds, and gifts are all invalid if procured through undue influence and that "the revocation of a trust enjoys no insulation from either the consequences or the rationale of that principle." (A9) It was his opinion that the evidence supporting the trial court's finding of undue influence was competent and substantial and the final judgment should be affirmed.

Petitioner timely filed a Motion for Rehearing of the February 2, 1983 Opinion. The Court filed its Opinion on Motions for Rehearing and to Intervene on July 27, 1983, in which it again stated that undue influence is insufficient to thwart the revocation of a trust (A10-13). Judge Hersey

dissented without opinion.

There are additional facts which were not a part of this Appeal but of which this Court should also be aware. While this appeal was pending, Respondent again attempted to revoke and amend her trust. As Petitioner had serious doubts as to the validity of the revocation and amendment attempts, it filed another Petition for Instructions with the Probate Division of the Fifteenth Judicial Circuit Court. Respondent filed a counterclaim requesting specific performance of the amendment which eliminated all beneficiaries but herself. After a five-day trial in which an enormous amount of evidence was presented both on lack of capacity and undue influence, the Honorable Tom Johnson entered his Amended Final Judgment on July 8, 1982, finding that the revocation and amendment attempts were invalid because of mental incapacity and/or undue influence by Mark Genova. Respondent appealed the Amended Final Judgment to the Fourth District and now asserts that the decision in the instant case would render the second appeal moot.

Petitioner requests this Court to invoke its discretionary jurisdiction to review the decision of the Fourth District as set out in its February 2, 1983, and July 27, 1983, Opinions as it directly and expressly conflicts with a decision of another district court of appeal or of this Court on the same question of law.

A R G U M E N T
JURISDICTIONAL POINT

THIS COURT HAS JURISDICTION TO REVIEW THE DECISION
RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL
IN THE INSTANT CASE AS IT EXPRESSLY AND DIRECTLY
CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT
OF APPEAL OR OF THIS COURT ON THE SAME QUESTION OF LAW.

Pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida, this Court may review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. It is not necessary that the district court explicitly indentify the conflicting district court or Supreme Court decision in its opinion in order to create an "express" conflict. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981). A discussion of the legal principles which the court applied would supply a sufficient basis for a petition for conflict review. Id at 1342. Petitioner respectfully submits that the Fourth District's decision in the instant case as set out in its February 2, 1983, and July 27, 1983, Opinions, expressly and directly conflicts with a district court decision, Hoffman v. Kohns, 385 So.2d 1064 (Fla.2d DCA 1980), (A14), and a Supreme Court decision, Rich v. Hallman, 106 Fla. 348, 143 So. 292 (1932), (A20).

In Hoffman v. Kohns, supra, on facts very similar to those in the case at bar, the Second District held that a revocation of an inter vivos trust of which the grantor was sole income beneficiary, was invalid as having been procured through undue influence. In Hoffman, the grantor transferred

all of his assets to a revocable trust of which he and his niece were co-trustees. When the grantor was eighty-three years old, he married his fifty-two year old housekeeper who immediately took him to her lawyer where he executed a new will naming her as sole beneficiary and a revocation of the trust. The grantor died a year later and the validity of the revocation of the trust, the will, and the marriage were attacked on the basis of undue influence. Recognizing that there was no Florida case directly referring to the revocation of a living trust, the Second District applied this Court's decision in Rich v. Hallman, supra, that an inter vivos gift would be invalid if procured through undue influence to the revocation of an inter vivos trust and held that the revocation was invalid as having been procured through undue influence practiced intentionally on the grantor by his wife.

The Fourth District referred to Hoffman in its February 2, 1983, opinion but chose not to apply that decision to the facts in this case. The Fourth District did not distinguish the cases on the basis that undue influence was present in Hoffman but not in the instant case; as stated previously it held that the issue of undue influence was not determinative. Instead, the Fourth District stated a new principal of law in its decision, to wit, that the principal of undue influence is inapplicable to the revocation of an inter vivos trust and is insufficient to invalidate the revocation of an inter vivos trust and that until a person is judicially declared or medically certified to be lacking in physical or mental capacity, he can revoke his trust regardless of whether his acts were

procured through undue influence. This decision is out of harmony with that in Hoffman and, if permitted to stand, will generate conflict and instability between the districts. Now, in the Fourth District, based on the decision in the instant case, a grantor can revoke an inter vivos trust, even if the revocation is procured through undue influence, as long as he has not been judicially determined or medically certified to lack physical or mental capacity. But, in the Second District, a grantor cannot revoke an inter vivos trust if the revocation is procured through undue influence. It is respectfully submitted that this conflict meets the test of this Court's jurisdiction to review a district court's decision as set out in Kyle v. Kyle, 139 So.2d 885 (Fla. 1962) that:

[J]urisdiction to review because of an alleged conflict requires a preliminary determination as to whether the Court of Appeal has announced a decision on a point of law which, if permitted to stand, would be out of harmony with a prior decision of this Court or another Court of Appeal on the same point, thereby generating confusion and instability among the precedents. We have said that conflict must be such that if the later decision were rendered by the same Court the former would have the effect of overruling the latter. Id. at 887

It is also submitted that the decision in the instant case conflicts with the decision of this Court in Rich v. Hallman, 106 Fla. 348, 143 So. 292 (1932). In Rich, a gift was invalidated on the grounds of undue influence. In its opinion, this Court stated:

The equitable doctrine of undue influence is grounded on principles of the highest morality. It reaches every case where confidence is reposed and betrayed

or where influence is acquired and abused, and is ever active and seaching, when dealing with gifts. Id. at 293.

The Fourth District's decision insulating the revocation of a trust from the application of the doctrine of undue influence is in direct conflict with this Court's decision in Rich which applies the doctrine of undue influence to "every case where confidence is reposed and betrayed or where influence is acquired and abused."

Although the Fourth District did not certify it as such, it is respectfully submitted that the decision in the instant case passes upon a question of great public importance. It is further submitted that, although the Fourth District may have sympathized with Respondent, its decision is very likely incorrect. If a trust revocation procured through undue influence is valid, why should not a deed, gift, will, or other contract, procured through undue influence also be valid? The decision is in irreconcilable conflict with the large body of case law in Florida in which wills, deeds, gifts, trusts and other contracts, have been invalidated on the grounds of undue influence. e.g., Peacock v. DuBois, 90 Fla. 162, 105 So. 321 (1925); Kauffmann v. Kauffmann, 150 So.2d 251 (Fla. 2d DCA 1963); In Re Estate of Krieger, 88 So.2d 497 (Fla. 1956). As stated in Judge Hersey's dissent, the Fourth District should have made a determination of whether Respondent validly exercised her right of revocation or if her acts were invalid as having been procured through undue influence. Further, the decision creates a 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.

C O N C L U S I O N

This Court is respectfully requested to invoke its discretionary jurisdiction to review the decision rendered by the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to ELAINE F. MILLER, Esq., 1501 Old Okeechobee Road, West Palm Beach, Florida 33409, Attorney for Respondent, Ann Cleary Genova, and RICHARD A. KUPFER, Esq., Cone, Wagner, Nugent, Johnson, Hazouri & Roth, P.A., Servico Center East Suite 300-400, 1601 Belvedere Road, West Palm Beach, Florida, 33402, Guardian ad Litem, this 25th day of August, 1983.

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