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. 64,160 DISTRICT COURT OF APPEAL, 4th DISTRICT - No. 81-941

Appeal from the District Court of Appeal, Fourth District

PETITIONER'S BRIEF ON THE MERITS

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PREFACE

This is an appeal from the Fourth District Court of Appeal. Petitioner, Florida National Bank of Palm Beach County, shall be referred to as "Florida National". Respondent, Ann Cleary Genova, shall be referred to as "Mrs. Genova". The remainder beneficiaries, Daniel, Grant, Stacy, and Lisa Ann Semanskee, shall be referred to as the "Semanskees".

The following symbols wil be used:

(R) Record on Appeal.

(T) Transcript of Testimony at Trial.

Ex. Exhibit.

STATEMENT OF THE FACTS AND OF THE CASE

Mrs. Genova created the Ann Cleary Genova Revocable Trust on January 30, 1979 (Genova's Ex. 1), naming the Bank and herself as Trustees. Under the terms of the trust, she reserved the income for her life and provided for numerous pecuniary gifts to take effect upon her death with the residuary passing in equal shares to her grandniece and grandnephews, the Semanskees. She created the trust to consolidate her assets to make sure they would be held in safekeeping, conserved for her sole benefit, and could not be transferred upon her signature alone to any other third party. (T 156). She amended the trust three times: on May 15, 1979, reducing the pecuniary gift to Mark Genova from $100,000 to $25,000; on August 27, 1979, completely eliminating the pecuniary gift to Mark Genova; and on May 12, 1980, changing the name of the trust to the "Ann C. Cleary Revocable Trust" (T 157-8, Genova's Ex. 1).

Mrs. Genova is an eighty-one year old woman with a history of mental and physical problems. She was an alcoholic (T 35, Semanskees' Ex. 4, p. 8) and was hospitalized on the following occasions: from May through July of 1976 for psychiatric treatment (Semanskees Ex. 4, pp. 13-14) ; October of 1978; in April through May of 1979 for agitated depression, hypertension, and malnutrition (Semanskees' Ex. 4, pp. 13-14); and in December of 1980 for congestive heart failure (T 13,15). She currently suffers from chronic anxiety and depression. (T 21). Mrs. Genova is a lonely woman whose spells of depression were aggravated by the deaths of her sister in 1976 and her

friend, Mrs. McManus, in January, 1980. (Semanskees' Ex. 4, p. 11). She often visited her physician's office "to seek friendship and fellowship just primarily with the girls". (Semanskees' Ex. 4, p. 11). Because of her emotional and physical state, her former physician held the opinion that Mrs. Genova would be subject to the designs of an individual who offered her a loving relationship. (Semanskees' Ex. 4, pp. 10-11).

Mrs. Genova, then Ann Cleary, first married Mark Genova on September 5, 1978. At the time she was seventy-six and Mark was thirty-two years old. After their marriage, Mrs. Genova transferred her bank accounts, Treasury notes, and certificates of deposit into their joint names. (T 332). On October 28, 1978, Mark Genova withdrew $17,000 from his wife's passbook account and bought himself a Rolls Royce which he titled in his corporation's name. (T 336-7). On October 30, 1978, while Mrs. Genova was in the hospital, Mark unsuccessfully attempted to cash a $55,000 Treasury Note belonging to Mrs. Genova to purchase a liquor license (T 338). Although she was normally a frugal person who rarely spent money on herself (T 94, 120, 161), on January 3, 1979, while drunk and in Mark's presence, Mrs. Genova signed a "Resolution and Affidavit" agreeing to buy a restaurant for Mark for $305,000 (T 341-347).

Ann and Mark Genova were divorced on October 10, 1979, and a Final Judgment regarding property rights was entered by Judge Sholts on April 28, 1980, (Semanskees' Ex. 3). In the Final Judgment, Judge Sholts held that the "Resolution and Affidavit" dated January 3, 1979, signed by Ann C. Genova, in which she agreed to buy a restaurant for Mark for $305.000 was

"effected through a continued course of undue influence practiced intentionally by the husband on his wife" and was therefore void and of no legal significance. According to her friends, Ann Wood, Kathryn Garner, and Marilyn Ward, Mrs. Genova was very happy and relieved after the Final Jugment was entered on April 28, 1980. (T 121, 145, 100). However, in June of 1980, she became very nervous and upset when she heard that Mark might appeal the judgment (T 101, T 122) and "seemed to deteriorate" and started acting "erratic" when she heard an appeal had been filed. (T 101, T 126). Marilyn Ward testified that around the second week in June, 1980, Mrs. Genova became very nervous and completely changed her whole life pattern (T 146-146). Mrs. Genova also started drinking again about this time. (T 147).

On July 3, 1980, Ann and Mark Genova were remarried. Since their marriage, Mrs. Genova has changed doctors (T 35, 363); lawyers (T 335, 374); churches (T 65); has moved to a different apartment building (T 67); and has stopped visiting her old friends (T 59). On July 8, 1980, Mrs. Genova wrote a letter to Robert J. Pflieger, a trust officer of Florida National, requesting that her trust be revoked. She wrote this letter in the presence of Mark Genova at his restaurant, the Alibi Bar, on the Alibi's stationery. (T 34, 351, Genova's Ex. 2) On July 9, 1980, Mrs. Genova signed a power of attorney prepared by Billy R. Jackson, an attorney introduced to her by Mark Genova (T 335, 374), directing the transfer of the trust assets to the account of Ann Cleary Genova in the Pan American Bank of Palm Beach County, Florida. (T 30, Genova's Ex. 3). On July 10, 1980, the Power of Attorney was presented by Billy R. Jackson to Brenda Earl, a trust officer of the Florida National

Bank. (T 177). Ms. Earl did not accept the Power of Attorney because she had reservations about it arising from her knowledge of the Final Judgment finding that Mark Genova had exercised undue influence on Mrs. Genova and of the Genovas' remarriage. (T 179). On July 11, 1980, Mrs. Genova and Billy R. Jackson advised Mr. Pflieger that Mrs. Genova wished to revoke the trust. (T 39, Genova's Ex. 4). Mr. Pflieger declined to revoke the trust because of his concern over Mrs. Genova's "capacity to understand". (T 215). His concern was based on his knowledge of Judge Sholts' final judgment, the parties' remarriage, and the fact that the request was a complete turnaround of everything that Mrs. Genova had tried to establish and create for her benefit.

On July 16, 1980, Mrs. Genova saw her regular physician, Dr. Adkins, for the last time (Semanskees' Ex. 4, p.5) and began seeing Dr. Chalal, a physician referred to her by Billy R. Jackson, Mark's attorney, (T 35, 363). A short time after July 16, 1980, Billy R. Jackson asked Dr. Adkins to sign a statement that Mrs. Genova was mentally competent. Dr. Adkins refused to sign this statement. (Semanskees' Ex. 4, p. 12). On August 5, 1980, Mrs. Genova deeded an interest in the Pan American Tire Company to Mark. (T 52). On the same day, she signed a letter to the Bank asking it to withdraw $45,000 from the trust (Florida National's Ex. 8). On August 16, 1980, Ann executed a will leaving her residuary estate to Mark (T 375-6).

Florida National did not revoke the trust as requested in the July, 1980, letters as it was aware of Judge Sholts' Final Judgment finding undue influence and was concerned that, since the parties had remarried, the attempted revocations had

also been effected through undue influence practiced by Mark on Mrs. Genova. Florida National was also concerned about the attempted revocations because they were so inconsistent with Mrs. Genova's estate plans as expressed in the Trust. In fact, prior to July 8, 1980, Mrs. Genova had made no complaints about Florida National's handling of the trust. (T 172-3). After her divorce from Mark Genova, she told Marilyn Ward that she was happy Florida National was handling the trust because she felt that was the only thing that kept Mark from getting everything she had. (T 149).

Because of its doubts as to the validity of the July, 1980, revocation attempts and in fulfillment of its fiduciary duty, on July 18, 1980, Florida National petitioned the Probate Division of the Fifteenth Judicial Circuit for instructions as to how to proceed regarding the trust revocations. (R 21). On the same date, Mrs. Genova filed a Petition for Writ of Mandamus in the Civil Division of the Fifteenth Judicial Circuit Court requesting a writ of mandamus ordering Florida National to transfer everything to the Pan American Bank and damages. (R 173). On July 18, 1980, the Honorable Robert S. Hewitt issued an Alternative Writ of Mandamus directing the transfer of the trust assets unless good cause was shown. (R 209). On July 23, 1980, Florida National filed its Return to Alternative Writ of Mandamus containing the affirmative defenses that the revocations were invalid as having been procured through the undue influence of Mark Genova or, alternatively, that Mrs. Genova lacked sufficient capacity to validly revoke the trust. (R 215). On August 1, 1980, Judge Hewitt entered his orders consolidating the two cases and transferring the consolidated

case to Probate Judge Hugh MacMillian. (R 221).

On August 29, 1980, Ann Wood, a beneficiary of the trust, answered the Petition for Instructions alleging that Mrs. Genova was incapacitated and that Florida National should take measures to protect the trust and Mrs. Genova, (R 89). On September 11, 1980, the Semanskees filed their answer to the Petition for Instructions alleging that the revocations were procured through the undue influence of Mark Genova and were not the free and voluntary expression of the wishes or intent of Mrs. Genova. The Semanskees also alleged that Mrs. Genova was not capable of revoking her trust due to physical and mental problems. (R 112).

On September 19, 1980, Mrs. Genova filed her response to the Petition for Instructions denying that she was subject to Mark Genova's undue influence. (R 112). On December 15, 1980, a default was entered against eight of the trust beneficiaries. (R 148).

A three day trial beginning January 6, 1981, was held before the Honorable Hugh MacMillian. Mrs. Genova called seven witnesses, including herself, her new lawyer, her new doctor, her new clergyman, and her husband, Mark Genova. Florida National and the Semanskees each called four witnesses including the two trust officers responsible for the trust, Mrs. Genova, and three former friends of Mrs. Genova. The Semanskees also introduced the testimony of Mrs. Genova's former physician, Willian R. Adkins, M.D. (Semanskees' Ex. 4).

On February 13, 1981, the Honorable Hugh MacMillan entered his Final Judgment granting Florida National's Petition for Instructions and dismissing Mrs. Genova's Petition for Writ of Mandamus. The court found that the final judgment entered in

the dissolution proceedings recognized that Mark Genova had previously procured an agreement from Mrs. Genova through undue influence; that Mark Genova is forty-five years younger than Mrs. Genova; that a July 8, 1980, letter attempting to revoke the trust was written by Mrs. Genova in the presence of Mark Genova at his Alibi Bar on the bar's stationery; that on July 9, 1980, Mrs. Genova signed a power of attorney directing transfer of the trust assets to Pan American Bank; that on July 10, 1980, Billy R. Jackson presented the power of attorney to Brenda Earl; that on July 11, 1980, Mrs. Genova and Billy R. Jackson advised Robert J. Pflieger that Mrs. Genova wished to revoke that trust; that in the month following the attempted revocation of the trust, Mrs. Genova transferred her only asset not in trust, a commercial rental property, to Mark Genova reserving the right to rents and profits during her lifetime; that shortly thereafter Mrs. Genova executed a new will leaving her residuary estate to Mark Genova; that during this same period of time Mrs. Genova signed a real estate contract to purchase a residence for one hundred fifty thousand dollars ($150,000.00); and that Mrs. Genova's attempts to revoke the trust were effected through the use of undue influence, practiced intentionally by Mark T. Genova upon Mrs. Genova and were therefore determined invalid and of no legal significance (R 172).

On February 29, 1981, Mrs. Genova filed a Motion for Rehearing (R 176) and an Alternative Motion for Clarification requesting the court to clarify whether the final judgment was a ruling on mental competency. (R 175). On April 15, 1981, Judge MacMillan denied both motions.

Mrs. Genova timely appealed Judge MacMillan's final

judgment to the Fourth District Court of Appeal. Briefs were filed by Mrs. Genova and Florida National addressing the issue of whether the trial court's findings of undue influence were correct. On March 16, 1982, the Fourth District ordered that there would be no oral argument.

On February 2, 1983, the Fourth District filed its opinion reversing and remanding the case to the trial court. The court held that undue influence alone is insufficient to invalidate a trust revocation and that until Mrs. Genova was declared incompetent, she could revoke the trust, regardless of whether the revocation was procured through undue influence. The court made no holding as to whether the trial court's finding of undue influence was correct. The Honorable George Hersey's dissenting opinion stressed that the issue of whether Mrs. Genova validly exercised her right to revoke the trust remains and the determination of this issue would depend upon whether the revocation attempts were procured through undue influence. His opinion pointed out that the principle of undue influence is applicable to contracts, gifts, and deeds, and that trust revocations enjoyed no insulation from its application. He also stated that the trial court's finding of undue influence was based on competent and substantial evidence and the final judgment should be affirmed.

Florida National timely filed a Motion for Rehearing of the February 2, 1983, Opinion in which it called to the Court's attention that in a case involving revocation and amendment attempts subsequent to the final judgment in the instant case, the Honorable Thomas Johnson entered a Final Judgment finding that Mrs. Genova lacked sufficient capacity to

revoke or amend her trust in February, March, and November, 1980, or alternatively, those revocations were invalid as having been procured through the undue influence of Mark Genova. The Semanskees also filed a Motion for Rehearing and a Motion to Intervene and Mrs. Genova filed replies to these motions. On July 27, 1983, the Fourth District filed its Opinion on Motions for Rehearing and to Intervene in which it again stated that undue influence alone is insufficient to thwart the revocation of a trust. Judge Hersey dissented without opinion. This Court accepted jurisdiction of this case based on conflict between the Fourth District's decision and decisions from another district court of appeal and the Florida Supreme Court.

As stated in Florida National's jurisdictional brief previously filed herein, 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, Mrs. Genova again attempted to revoke and amend her trust. As Florida National had serious doubts as to the validity of the revocation and amendment attempts, which occurred in February of 1980, less than ten days after Judge MacMillan's final judgment was entered, March, 1980, and November 1980, it filed another Petition for Instructions with the Probate Division of the Fifteenth Judicial Circuit Court. Mrs. Genova 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, referred to above, finding that the revocation and amendment

attempts were invalid because of mental incapacity and/or undue influence by Mark Genova. Mrs. Genova appealed the Amended Final Judgment to the Fourth District Court of Appeal where it is currently pending. All proceedings in that appeal have been stayed pending the outcome of this appeal. Additionally, pursuant to a separate Order entered by Judge Johnson, First American Bank has been appointed successor corporate trustee to the trust to administer the trust pursuant to the trust agreement.

ARGUMENT

POINT ON APPEAL

WHETHER THE PRINCIPLE OF UNDUE INFLUENCE IS APPLICABLE TO THE REVOCATION OF A TRUST?

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. In reaching its holding, the Fourth District chose not to apply the decision in Hoffman v. Kohns, 385 So.2d 1064 (Fla. 2d DCA 1980), to the facts in this case. In Hoffman, a trust revocation was invalidated as having been procured through undue influence. It is respectfully submitted that based upon the Hoffman decision, cases from other jurisdictions holding that a trust revocation procured through undue influence is invalid, and the abundant Florida law applying the principle of undue influence to wills, trusts, gifts, contracts, deeds, joint bank accounts, and insurance, the Fourth District's Opinion is incorrect and the principle of undue influence is applicable to the revocation of a trust.

Hoffman v. Kohns, is the only other Florida case found regarding the application of undue influence to the revocation of a trust. The facts in Hoffman are strikingly similar to those in the instant case. In Hoffman, the Settlor created a revocable trust in 1969 of which he and his niece, Hoffman, were co-trustees. After 1969, the Settlor's condition began to deteriorate. In 1974, he was hospitalized and was diagnosed as suffering from cerebral arteriosclerosis, acute organic brain

syndrome, and senility. In August of 1975, Kohns was hired as a live-in housekeeper for the Settlor. On September 1, 1975, Kohns took the Settlor to his bank where they closed out his safe deposit box which contained all of the Settlor's assets. On September 22, 1975, the Settlor and Kohns were married. The Settlor was eighty-two and Kohns was fifty-five. On September 26, 1975, Kohns took the Settlor to her attorney where he signed a new will in her presence naming her as sole beneficiary. On October 3, 1975, after Kohns discovered the securities in the safe deposit box could not be transferred without a revocation or amendment of the trust, she took him back to her lawyer where he signed a revocation of the trust. The Settlor died on September 13, 1976.

Kohns had the September 26, 1975, will admitted to probate and Hoffman sought a revocation of probate on the ground that Kohns procured the will through undue influence. Hoffman also attacked the validity of the marriage and the revocation of the trust. The trial court held that the settlor was legally competent to make the September 26, 1975, will; to enter a valid marriage; and to revoke the 1969 trust. However, the court invalidated the will as having been procured through Kohns' undue influence but held that the marriage and revocation had not been procured through undue influence.

The appeals court affirmed the trial court's ruling that the will was procured through undue influence. However, it reversed the trial court's ruling that the trust revocation was not procured through undue influence. It held that the revocation of the trust was part of a continuing pattern of undue influence begun by Kohns immediately after the marriage.

The appeals court stated that although it found no Florida case directly referring to the revocation of a living trust, the Florida Supreme Court in Rich v. Hallman, 106 Fla. 348, 143 So. 292 (1932) held that a lifetime gift was invalid as having been procured through undue influence and that the degree of proof necessary to invalidate a will is much greater than that required to set aside an intervivos gift. Based on Rich v. Hallman, the appeals court held that the trust revocation was invalid as having been procured through undue influence.

In its February 2, 1983, Opinion the Fourth District suggests that the decision in Hoffman was not applicable to the facts in the instant case because the Second District invalidated the trust revocation only to prevent Kohns from inheriting the Settlor's entire estate through intestacy. A review of the Hoffman opinion shows that before reaching its decision the Second District carefully reviewed the evidence and the law on undue influence and determined: (1) the principle of undue influence is applicable to the revocation of a trust, and (2) the trust revocation had been procured through undue influence and was therefore invalid. The Second District did not, as the Fourth District's opinion suggests, twist the law to justify its Opinion. It instead made a studied determination that although no prior Florida case had decided whether the principle of undue influence is applicable to a trust revocation, based on this Court's holding in Rich v. Hallman, the principle of undue influence is applicable to a trust revocation.

Cases from other jurisdictions have held that not only is the principle of undue influence applicable to the revocation of

a trust but that a trustee may be liable to the trust beneficiaries if it allows a trust revocation which it knows or has reason to believe was procured through undue influence. According to Bogert, Trusts & Trustees 2d.Ed. (Rev.) s. 1001 (West 1983), where an attempt is made to revoke or otherwise terminate a trust, the trustee owes a duty to the beneficiaries to determine whether the power is being properly exercised and should resist improper efforts at termination. Florida Statutes Section 737.302 (1981) imposes a general duty on a trustee to observe the standards in dealing with the trust assets that would be observed by a prudent trustee dealing with the property of another. It is submitted that, based on Bogert, s. 1001, and the cases discussed below, this general duty would require a trustee to resist a revocation which it knows or has reason to believe was procured through undue influence as the revocation would be invalid.

In Cloud v. United States National Bank of Oregon, 280 Or. 83, 570 P.2d 350 (1977), the residuary beneficiaries of a revocable trust brought an action against the corporate trustee for an alleged breach of fiduciary duty. The beneficiaries' claims were based on the contention that the trustee acted on written disbursement instructions which had been procured through undue influence or, alternatively, had been executed after the settlor became incompetent. Although this decision involved withdrawals of principal from the trust and not a complete revocation, it is respectfully submitted that since a withdrawal and a revocation would have a very similar result, i.e., removing part or all of the trust property from the trustee's control and placing it in the hands of the settlor,

the principles set forth in Cloud would also be applicable to the revocation of a trust. The revocable trust contained a right of revocation and right of withdrawal very similar to that in the Genova Trust.

Before considering the validity of the withdrawals, the court discussed the duty of a trustee to its beneficiaries:

> The duty of a trustee to its beneficiaries is a heavy one, see e.g., Leahey et al v. Commission for Blind, 253 Or. 527, 456 P.2d 77 (1969), but the possibility that the settlor of a revocable trust could attempt to withdraw funds from the trust after having become incompetent or subject to undue influence puts that trustee in a difficult position. If the instrument is valid and the trustee refuses to allow the withdrawal, the trustee is in breach of contract with the settlor. If, on the other hand, the instrument is invalid, the trustee runs a serious risk of breaching its duty to the beneficiaries of the trust if the funds are released.

570 P.2d 354. This language leaves no room for doubt that a trust revocation procured through undue influence is invalid. The court in Cloud decided that a trustee is liable to the beneficiaries if it allows a withdrawal which it knows or should have known was procured through undue influence. It suggests that, in order to fulfill its fiduciary duty to the beneficiaries when faced with this situations, the trustee petition the court for instructions. 570 P.2d 354-5, note 7. This is exactly what Florida National did in the instant case when it doubted the validity of Mrs. Genova's revocation attempts based on its knowledge of the Final Judgment finding that Mrs. Genova had been unduly influenced by Mark Genova. If the trustee is precluded from applying to the court for instructions when it has doubts as to the validity of a

revocation, it is left to draw its own conclusions which may later be challenged in court by the beneficiaries. Far from acting as an "Orwellian Big Brother", a court in this situation is determining a very real and important issue which serves to protect not only the trustee but the settlor and beneficiaries as well.

In Hughes v. First National Bank in Oakland, 147 Cal.App.2d 547, 118 P.2d 309 (1941), a remainderman of a revocable trust sued the corporate trustee for breach of fiduciary duty on the ground that the trustee consented to a revocation knowing that it had been procured through undue influence. The suit was brought after the settlor's death and demanded enforcement of the trust, an accounting, and damages. The remainder beneficiary alleged that the revocation was procured through undue influence and that this fact was well known, or should have been well known, to the trustee. Based on this, the remainderman urged that no valid revocation of the trust had taken place; that the trust was still in existence; that the trustee unlawfully and improperly returned the trust estate to the trustor; and that the trustee is liable to the remainderman. The trial court first recognized that if a trust is revoked as a result of undue influence, the beneficiary may hold those who receive the property gratuitously from the trustor as constructive trustees, even though such persons did not participate in the undue influence. In this case, however, the remainderman was seeking to hold the trustee liable for allowing a revocation knowing that it had been procured through undue influence. The court held that the trustee owes some duty to a gratuitous remainderman but in this case the revocation had

not been procured through undue influence and even if it had been, the settlor had kept the trust assets for five years after ridding herself of the persons who exercised the undue influence.

It can be inferred from the Hughes decision that: (1) the principal of undue influence is applicable to a trust revocation; (2) a trust revocation procured through undue influence is invalid; and (3) a trustee can be held liable for allowing a revocation procured through undue influence if it knew or had reason to know of the undue influence.

In Horgan v. City Trust & Savings Bank of Kankakee, 130 Ill.App. 613, 20 N.E. 2nd 809 (1939), an action was brought to compel a corporate trustee to accept and abide by an amendment to the trust. The trustee defended on the grounds that the amendment was invalid because of lack of capacity and undue influence and the court held that dismissal was required under these defenses. Horgan not only implies that the principle of undue influence is applicable to a trust amendment but that a trustee can refuse to abide by a trust amendment procured through undue influence.

In the instent case, the Fourth District held that Mrs. Genova, as the settlor and sole beneficiary of her trust, could not be deprived of her right to revoke the trust in the absence of a judicial determination or medical certification of her physical or mental incapacity. In doing so, the Court, as Judge Hersey stated in his dissenting opinion, ignored the question of whether her right to revoke was validly exercised. There is no question that Mrs. Genova has the right to revoke her trust; she specifically reserved this right in the trust instrument.

However, in order to be valid, the revocation must be the exercise of her own free will and not the result of the undue influence of another. To draw an analogy, a will is subject to revocation by the testator at any time prior to his death. However, in order to be effective, the revocation, like the execution of the will, must be free from undue influence. Redfearn, Wills and Administration in Florida, s. 8.06, note 15 (1977); Thomas, Florida Estates Practice Guide ss. 13(2) (Bender 1983); 18 Fla.Jur.2d Decedents' Property s. 214, note 13 (1980). Further, if Mrs. Genova's trust had been procured through undue influence, she could bring an action to rescind it and have it declared null and void. Restatement (Second) of Trusts, s. 333; Bartsch v. Wirth, 115 So.2d 18 (Fla. 3d DCA 959), cert.den., 120 So.2d 442 (Fla. 1960); Bailey v. Finlayson, 25 Fla. 153, 6 So. 157 (1889). If in the creation of a trust the Settlor must be free of undue influence, should not the settlor also be free of undue influence when exercising her right to revoke the trust? As Judge Hersey stated in his dissenting opinion "the revocation of a trust enjoys no insulation from either the consequences or the rationale of" the principle of undue influence. It would be illogical and contrary to public policy to carve out an exception to the principle of undue influence which, as this court held in Rich v. Hallman, supra, "<i>s grounded on principles of the highest morality and reaches every case where confidence is reposed and betrayed or where influence is acquired and abused...". 143 So. 293.

The Fourth District cites Restatement (Second) of Trusts s. 339, comment a, page 17, (1957); Scott, The Law of Trusts (3d), s. 339, page 2649; and Waldron v. Commerce Union

Bank, 577 S.W.2d 669 (Tenn.App. 1978), in support of its decision that in the absence of judicial determination or medical certification of mental or physical incapacity, a settlor may revoke her trust at any time prior to her death, regardless of undue influence. It is respectfully submitted that these authorities do not support the Fourth District's decision that undue influence is inapplicable to a trust revocation. Both Restatement (Second) of Trusts s. 339 and Scott, The Law of Trusts, s. 339, are addressed to situations in which no power to revoke was reserved or the settlor attempted to create a spendthrift trust for his own benefit. There is no question that Mrs. Genova reserved the right to revoke her trust and could exercise that right even if the purpose of the trust was to preclude her from wasting her own assets. However, in exercising that right, she must act intelligently, understandingly, and voluntarily, and not be subject to the will or purpose of another.

Waldron v. Commerce Bank involved a negligence suit against a corporate trustee for allowing withdrawals from a revocable trust while the Settlor was allegedly incompetent. Undue influence was not raised as an additional ground for the action and the plaintiffs based their action solely on the settlor's alleged incompetence. The Court held that the Settlor was under no incapacity; that she understood the nature and effect of her actions; and that she fully intended to act precisely as she did. It can be implied from this opinion that if the settlor, by reason of duress, fraud, or undue influence, did not intend to act precisely as she did, her acts would be invalid.

In further support of its decision, the Fourth District quotes language from the trust agreement providing that Florida National is to assume full responsibility of the management and investment of the trust only if (1) Mrs. Genova says so or (2) Mrs. Genova is medically or judicially determined to be incapacitated. It states that in the absence of Mrs. Genova's incapacity, she could revoke her trust at any time, regardless of undue influence. The trust language is not directed to the revocability of the trust but to the management and investment of the trust estate. The right of revocation was set forth in a separate section. Further, on April 16, 1980, Mrs. Genova gave written notice to Florida National that it was to assume full investment responsibility. (T 159, Florida National's Ex. 3). The Fourth District's interpretation of the trust language regarding management and investment responsibility goes far beyond what was intended. The decision suggests that by placing this language in a revocable trust the settlor can prevent the application of the principal of undue influence to revocations of the trust. This result is illogical and contrary to the strong public policy behind the principle of undue influence.

The principle of undue influence has been applied to wills, s. 732.5165 Fla.Stat. (1981), In Re Estate of Brannan, 213 So.2d 725 (Fla. 4th DCA 1968), In Re Estate of Krieger, 68 So.2d 497 (Fla. 1956); gifts, Rich v. Hallman 106 Fla. 348, 143 So. 29 (1932); deeds, Pratt v. Carns, 80 Fla. 243, 85 So. 681 (Fla. 1920); contracts, 11 Fla.Jur.2d Contracts s. 46 (1979); joint bank accounts, s. 658.56 Fla.Stat. (1981), Cripe v. Atlantic First National Bank of Daytona Beach, 422 So.2d 820 (Fla. 1982)); and insurance beneficiary changes, 31 Fla.Jur.2d Insurance s. 921 (1981)). There is no basis for

exempting a trust revocation from its application. Surely, considering the consequences of a trust revocation, it should require no less free will or voluntariness on the part of the actor than the execution of a will, deed, or contract, creation of a trust, or the making of a gift. Suppose, a settlor, acting subject to the undue influence of another, revokes her trust and obtains possession of the trust assets. Supose she is then unduly influenced to make a gift of the trust assets, or execute a deed conveying the trust assets, or make a will devising the trust assets. Would the revocation be valid but the gift, deed, or will, also procured through the same undue influence, be invalid? This would be the result under the Fourth District's opinion. It is respectfully submitted that this result is not only inconsistent but contrary to public policy and common sense.

In holding that the principle of undue influence is inapplicable to a trust revocation, the Fourth District did not decide if the evidence supported a finding of undue influence, although both Florida National's and Mrs. Genova's briefs were directly solely to this issue. A trial court's findings with reference to undue influence are clothed with a presumption of correctness and will not be overturned on appeal if supported by competent, substantial evidence. In Re Estate of Nelson, 232 So.2d 222 (Fla. 1st DCA 1979); Bartsch v. Wirth, 115 So.2d 18 (Fla. 3d DCA 1959). cert.den., 120 So.2d 442 (Fla. 1960). It is respectfully submitted that should this Court also consider whether the trial court was correct in finding that the revocation attempts were invalid as having been procured through the undue influence of Mark Genova, a review of the record,

transcript, and briefs previously submitted will show that the evidence supporting a finding of undue influence was both competent and substantial and the final judgment should be affirmed.

CONCLUSION

It is respectfully submitted that the principle of undue influence is applicable to the revocation of a trust. Should this Court also consider whether the evidence supported the trial court's findings of undue influence, it is further submitted that the Final Judgment was correct and should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Elaine F. Miller, 1501 Old Okeechobee Road, West Palm Beach, Florida 33409; James Pressly, Jr., First National Bank Building, 251 So. County Road, Palm Beach, Florida 33480; and Richard Kupfer, Servico Center E Building, Suites 300-400, 1601 Belvedere Road, West Palm Beach, Florida, on March 12, 1984.

Victoria F. Peet

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