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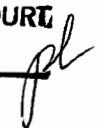
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IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 64,160

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

Appeal from the District Court of Appeal, Fourth District

PETITIONER'S REPLY BRIEF

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P R E F A C E

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 will be used:

(R) Record on Appeal.

(T) Transcript of Testimony at Trial.

Ex. Exhibit.

ARGUMENT

Mrs. Genova asserts throughout her brief that she "vigorously participated" in the trial court proceedings. Mrs. Genova was present at the trial court proceedings but much of her testimony reflects that she was confused over important issues and may not have understood what was going on around her. For example, she testified that she thought the trial court proceedings were to have her declared mentally incompetent and that they were brought by the Semanskees. (T 62) Her physician, Dr. Richard Chalal, testified that she would become quite anxious and upset with prolonged interrogation and recommended that she could only handle herself for between 30-45 minutes per court session. (T 17).

Mrs. Genova did not remember that during her divorce proceedings she contested the Resolution and Affidavit in which she promised to give Mark Genova \$350,000 for a restaurant nor did she remember whether Judge Sholts awarded the \$350,000 to Mark. (T 50). She testified that she married Mark for the first time on July 3, 1978, and for the second time on September 5, 1979. (T 48-49), when in fact they were married September 5, 1978 and July 3, 1980. (Semanskees Ex. 3, Florida National's Ex. 7), She also got confused over when she met Billy Ray Jackson (T 47-8) and testified that she never wanted Florida National to transfer her trust account to the First National Bank of Riviera Beach (T 72-3), although she requested Florida National to transfer her trust account there in her July 8, 1980, letter. (Genova's Ex. 2).

Contrary to Mrs. Genova's statement in her brief that she did not suffer from chronic anxiety and depression, Dr. Chalal testified that he placed her on Serax, a medication to quiet her anxiety, (T 13), and that she suffers from depression (T 21). Mrs. Genova's arguments that the revocations were not procured through the undue influence of Mark Genova rely heavily on testimony by a psychiatrist, Dr. Silversmith, and a clergyman, John Fuller Mangrum. Both Dr. Silversmith and Reverend Mangrum were referred to Mrs. Genova by Billy Ray Jackson (T 275, 259), who had been introduced to her by Mark Genova (T 335).

Mrs. Genova also argues that no evidence presented at trial showed that Mark Genova stood to be directly benefitted from a revocation of the trust. The strongest evidence of how Mark Genova will benefit from a revocation of the trust is that under the terms of the trust instrument, he is to receive nothing from the trust on Mrs. Genova's demise. (Genova's Ex. 1). Further, while the assets are held in trust, they cannot be reached by Mark Genova.

Mrs. Genova argues that the Fourth District did not hold the principle of undue influence to be inapplicable to trust revocations but instead ruled that under the instant facts, "the time and person raising said issue were inappropriate." However, the fourth District stated in its February 2, 1983, Opinion that "we believe this court would be overstepping its bounds by becoming, in essence, the settlor's guardian - not withstanding the absence of her incapacity - in its application of the principle of undue influence to the revocation of a trust of which she alone is the sole settlor and beneficiary." Genova v. Florida National Bank of Palm Beach County, 433 So.2d 1211, 1215, (Fla.

4th DCA 1983), and stated in its July 27, 1983, Opinion on Motions for Rehearing and to Intervene that undue influence is insufficient to thwart the revocation of the trust. 433 So.2d 1217.

Both the Fourth District and Mrs. Genova cite Restatement (Second) of Trusts, Section 339, comment a, page 171 (1957); Waldron v. Commerce Union Bank, 577 S.W. 2d 669 (Tenn. Ct. App. 1978, and Scott, The Law of Trusts (3d), Section 339, page 2699, as standing for the proposition that undue influence is insufficient to thwart the revocation of a trust by a settlor who is also the sole beneficiary. Mrs. Genova also cites Bogert, Trusts and Trustees, 2d Ed. (Rev), Section 1004, Stewart v. Merchants National Bank of Aurora, 278 N.E. 2d 10 (Ill. App. Ct. 1972), Johnson v. First National Bank of Jackson, 386 So.2d 427 (Miss. 1980) and Weymouth v. Delaware Trust Company. 45 A.2d 427 (Del. Ch. 1946) in support of her argument. All of these authorities are directed to the situation in which a settlor attempts to revoke an irrevocable trust. These authorities state that the settlor, who is also the sole beneficiary, can revoke the trust even though it is expressly irrevocable. For example, in Johnson, the trustor sued the trustee for termination of an irrevocable trust; in Stewart, the settlor petitioned to revoke a spendthrift trust in which no power of revocation was reserved; and in Weymouth, the settlor attempted to revoke a trust which expressly provided that it was irrevocable. These authorities are not applicable to the instant case as Mrs. Genova expressly reserved the power to revoke her trust in the trust instrument and are of no assistance in the resolution of this case as the problem

to which they are directed to wit, revocation of an irrevocable trust, is not involved here.

Mrs. Genova's argument that "the time and person raising the issue" of whether the trust revocations were invalid because of undue influence "were inappropriate" implies that the principle of undue influence is applicable to trust revocations but that Florida National, as trustee, could not raise the issue of whether the revocations were procured through undue influence even though it had knowledge that Mrs. Genova had once before been found to be subject to the undue influence of Mark Genova. This argument also implies that Florida National should have blindly accepted the revocations, allowed the trust to be terminated, and delivered the trust assets to Mrs. Genova. However, if Florida National had done this when it had serious doubts as to whether the revocations were the free and voluntary act of Mrs. Genova, it would have breached its fiduciary duty owed to Mrs. Genova and the other beneficiaries of the trust if the revocations were found to be invalid as having been procured through undue influence. Cloud v. United States National Bank of Oregon, 280 Or. 83, 570 P.2d 350 (1977), Hughes v. First National Bank in Oakland, 47 Cal.App. 2d 547, 118 P.2d 309 (1941).

Chapter 737, Part III, of the Florida Statutes (1983) sets forth the duties and liabilities of trustees. Section 737.302 (1983) provides:

Except as otherwise provided by the trust instrument, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent trustee dealing with the property of another.

This high standard of care requires that a trustee not accept a revocation when it doubts the validity of the revocation because of its knowledge that the settlor was found to be subject to the undue influence of her husband, whom she had recently remarried. Bogert, Trusts and Trustees 2d Ed. (Rev.) 1001 provides: "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 exists and is being properly exercised, and he should resist improper efforts at termination." Bogert, Section 993 provides that the exercise of a power of modification may be voidable, if there was an invalidating cause, for example fraud or incompetency of the person attempting to exercise it. Note 28 to Section 993 provides that "a trustee is not obliged to abide by an amendment of the trust made by the settlor when he lacked mental capacity and was acting under undue influence." Horgan v. City Trust & Savings Bank of Kankakee, 300 Ill.App. 613, 20 N.E. 2d 809 (1939)." Bogert, Section 581, provides that a trustee has a duty to defend the integrity of the trust, if he has reasonable ground for believing that an attack on the trust is unjustified or if he is reasonably in doubt on the subject. Therefore, contrary to Mrs. Genova's assertion that Florida National, as trustee, was the inappropriate party to obtain court instructions as to the validity of the trust revocations, the Florida Statutes and general trust law cited above impose a duty on a trustee in this situation to resist a revocation when it has doubts as to its validity and Florida Statutes Section 737.201(1)(c) (1983) gives the court power to instruct trustees in this situation.

Mrs. Genova argues that by refusing to accept the revocations until it received court instructions when it had doubts as to their validity, the Bank breached its duty of loyalty to Mrs. Genova. Mrs. Genova cites National Labor Relations Board v. Amax Coal Company, 453 US 322, 69 L.Ed 2d 672, 101 S.Ct. 2789 (1981) in support of her argument. However, National Labor is inapplicable as it held that an employer-selected trustee of a union pension and welfare trust fund established under 29 USCS Section 186(c)(5) owed a duty only to the beneficiaries of the trust, not to the employer who appointed him. This case is not on point as it involves the influence of a third party, who is not a beneficiary of the trust, on the trustee. There is no suggestion in the instant case that Florida National was influenced by a third party to the trust and the facts show that it acted only in the interests of Mrs. Genova and the other beneficiaries. Further, by resisting the revocations, which the trial court found to have been invalid because of undue influence, Florida National fulfilled its duty of loyalty to Mrs. Genova and to the other beneficiaries of the trust. Had it accepted the revocations when it knew about a prior judicial finding of that Mrs. Genova was subject to the undue influence of Mark Genova and that Mark and Mrs. Genova had remarried, it would have breached its fiduciary duty to Mrs. Genova and the other beneficiaries of the trust. If it accepted the revocations which were invalid as having been procured through undue influence, Mrs. Genova or another beneficiary could bring an action for breach of duty. Cloud v. United States National Bank of Oregon, 280 Or. 83, 570 P.2d 350 (1977); Hughes v. First National Bank in Oakland, 147 Cal.App.2d

547, 118 P.2d 309 (1941); Bogert, Trusts and Trustees, 2d Ed.Rev., Section, 861, note 36. Mrs. Genova argues that Florida National owed a duty solely to her, not to the other trust beneficiaries. However, Restatement (Second) of Trusts, Section 232, provides "If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests." Thus, Florida National owed a duty to both Mrs. Genova and the successive beneficiaries to protect and preserve the trust property and their interests therein.

Mrs. Genova also attempts to distinguish Hoffman v. Kohns, 385 So.2d 1064 (Fla. 2d DCA 1980), and Rich v. Hallman, 106 Fla. 348, 143 So. 292 (1932), from the instant case on the grounds that the settlor in Hoffman was deceased when the action was brought and the assignor in Rich brought the action herself. The fact that the settlor in Hoffman was dead at the time the trust revocation was challenged as opposed to living as in the instant case is not a sufficient distinction to require that the holding in Hoffman not be applied to the instant case. In fact, the trial court in the instant case had the benefit of observing Mrs. Genova and hearing her testimony in rendering its decision that the trust revocations were procured by undue influence practiced on her by Mark Genova, an opportunity lacking in Hoffman. Further, Mrs. Genova's statement that in Hoffman the proceeds of the revoked trust had been directly delivered to the settlor's spouse prior to the settlor's death mistates the facts as set forth in the court's Opinion. The Opinion indicated that the trust assets were transferred to the spouse subsequent to the

revocation, not delivered directly to the spouse by the trustee upon termination of the trust. Mrs. Genova also argues that the co-trustee in Hoffman "had a personal interest in the outcome, as her children were beneficiaries of the trust." It is unclear from the Opinion in what capacity Hoffman brought the action, as beneficiary of the trust, Co-Trustee, or Personal Representative in a prior will. Regardless, Florida National, as trustee in the instant case had not only the authority but the fiduciary duty to petition the court for instructions regarding the revocations. Although Mrs. Genova may not have suffered from identical ailments as the settlor in Hoffman, the record is replete with evidence of her anxiety, depression, chronic alcoholism and confusion.

The fact that in Rich v. Hallman the assignor herself brought an action to set aside the assignment would not affect the application of the principle stated therein that the equitable doctrine of undue influence "reaches every case when confidence is reposed and betrayed or where influence is acquired and abused, and is ever active and searching, when dealing with gifts." 143 So. 293. Florida National, as trustee, was the party presented with the revocations and took steps necessary to determine its validity.

Mrs. Genova attempts to distinguish Cloud v. United States National Bank of Oregon 280 Or. 83, 570 P.2d 350 (1977), from the instant case on the basis that the settlor was found to be incompetent at the time one of the trust withdrawals was executed. The trustee was found to be liable because it knew or should have known of the settlor's incompetency and should not have accepted the instrument with this knowledge. The court states that a

trustee would run a serious risk of breaching its duty to the beneficiaries of the trust if the funds are released and the instrument is invalid because of the settlor's incompetency or because the settlor was subject to undue influence. Based on the court's opinion, had the withdrawal been procured through undue influence, it would have been invalid and if the trustee knew or had reason to know of the undue influence and allowed the withdrawal anyway it would have breached its duty to the beneficiaries. Mrs. Genova argues that "the Court failed to address Restatement (Second) of Trusts, Section 339, comment a, page 171." It is respectfully submitted that the court in Cloud did not address that section because it was inapplicable to the facts in the case as the settlor reserved a right of revocation and withdrawal and the Court had no need to turn to the provisions of Section 339 to determine if the trust was revocable.

The Court in Cloud, in determining whether a trustee would be liable for allowing a withdrawal when the withdrawal was found to be invalid because the settlor was incompetent or subject to undue influence, applied Restatement (Second) of Trusts, Section 226A and held that the trustee's liability turns on his actual or constructive knowledge of the incompetency or undue influence. If, like in the instant case, the trustee allowed a withdrawal or revocation when it knew or had reason to know that the settlor was incompetent or subject to undue influence, it would be liable to the beneficiaries for breach of duty. The distinction between where the settlor is living and where the settlor is dead set forth in Comments d and e to Section 226A would not change the trustee's duty when it knew or had reasonable doubts as to the

validity of the revocation or withdrawal, as indicated by Comment d to Section 226A.

The Fourth District's Opinion on Motions for Rehearing and to Intervene states that the Bank never pled the issue of Mrs. Genova's mental capacity. Genova v. Florida National Bank of Palm Beach County, 433 So.2d 1211, 1217 (4th DCA 1983). This is erroneous as the Bank in its Return to Alternative Writ of Mandamus raised the affirmative defenses that the revocations were invalid as having been procured through undue influence or, alternatively, that Mrs. Genova lacked capacity to revoke the trust (R 215). The Semanskees and Ann Wood also alleged in their answers to the Bank's Petition for Instructions that Mrs. Genova was not capable of revoking her trust. (R 89, R 104-108). The trial court invalidated the trust revocations on the ground that they were procured through undue influence practiced intentionally on Mrs. Genova by Mark Genova. (R 172). The trial court denied Mrs. Genova's Alternative Motion for Clarification which requested the Court to clarify whether the final judgment was a ruling on mental competency. (R 175, 181). Thus, the issue of capacity was raised but the trial court made no ruling thereon. Of course, once it found that the revocations had been procured through undue influence, it invalidated the revocations on that basis, without having to make additional findings on the question of capacity.

In its February 2, 1983, Opinion the Fourth District raised the question whether a court could invalidate a gift from Mrs. Genova to Mark Genova procured through undue influence on the suit of one of Mrs. Genova's relatives. The facts in the Fourth District's question are different from those in the instant case

as Mrs. Genova's property is in a trust of which her relatives are beneficiaries and the trustee had a duty to determine the validity of the revocation when it had doubts thereof. Further, even under the facts presented in the Court's question, if the relatives become heirs or beneficiaries of Mrs. Genova's Estate, they could challenge the gift on the basis of undue influence, 28 Fla.Jur.2d, Gifts, Section 29 (1981).

CONCLUSION

It is respectfully submitted that the principle of undue influence is applicable to the revocation of a trust and the Fourth District's decision in Genova v. Florida National Bank of Beach County, 433 So.2d 1211 (4th DCA 1983) should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Elaine F. Miller, Esq., 340 Clematis Street, West Palm Beach, Florida 33401; James Pressly, Jr., Esq., First National Bank Building, 251 So. County Road, Palm Beach, Florida 33480; and Richard Kupfer, Esq., Servico Center E. Building, Suites 300-400, 1601 Belvedere Road, West Palm Beach, Florida, on April 20, 1984.

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