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IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,181

ADRIANA BACARDI,

Petitioner,

vs.

ROBERT B. WHITE, Trustee,
and LUIS FACUNDO BACARDI,

Respondents.

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# RESPONDENT LUIS FACUNDO BACARDI'S ANSWER BRIEF

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## TOPICAL INDEX TO BRIEF


| | PAGES |
|---|---|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF THE CASE | 1 |
| STATEMENT OF THE FACTS | 4 |
| POINT ON APPEAL<br>WHETHER CIRCUMSTANCES CAN EXIST WHICH WOULD ALLOW THE INVASION OF SPENDTHRIFT TRUSTS FOR UNPAID ALIMONY | 5 |
| ARGUMENT<br>CIRCUMSTANCES CAN EXIST WHICH WOULD PERMIT THE INVASION OF SPENDTHRIFT TRUSTS FOR ALIMONY BUT SUCH CIRCUMSTANCES ARE NOT PRESENT IN THIS CASE | 6 |
| CONCLUSION | 15 |
| CERTIFICATE OF SERVICE | 16 |

# TABLE OF AUTHORITIES


| CASES | PAGES |
|---|---|
| Dillon v. Dillon, 244 Wis.122, 11 N.W.2d 628 (1943) | 10 |
| Gilbert v.Gilbert, 447 So.2d 279, (Fla. 2nd DCA 1984) | 2,8,11,13 |
| Phillips v. Osborne, 444 F 778, (9th Cir.1971) | 7 |
| Safe Deposit & Trust Co. of Baltimore v. Robertson, 65A 2d 292 (Md.1949) | 10 |
| Shelley v. Shelley, 354 P.2d 282, (Ore.1960) | 10 |
| United States v. Egelak, 173 F.Supp.206, (D.C. Alaska 1959) | 7 |
| Waterbury v.Munn, 32 So.2d 603, (Fla.1947) | 8,9,12,14 |
| White v. Bacardi, 446 So.2d 150, (Fla.3rd DCA 1984) | 2 |


## OTHER AUTHORITIES


| | |
|---|---|
| Florida Statutes | |
| Sec. 61.12 | 6,9 |
| Sec. 61.08 | 9 |
| Sec. 61.13 | 9 |
| Florida Rules of Apellate Procedure | |
| Rule 9.110 | 1 |
| Florida Constitution | |
| Art. V | 2 |

| | PAGE |
| --- | --- |
| Restatement (Second) of Trusts, Sec. 157 (1959) | 10 |
| 2 Scott _Law of Trusts_, Sec. 157.1 (3d ed.1967) | 10,12 |

## PREFACE

R. - Record

## STATEMENT OF THE CASE

This is a dissolution of marriage action which was litigated in the Eleventh Judicial Circuit in and for Dade County, Florida (R.1-24). Jurisdiction of the Third District Court of Appeal was properly invoked under Rule 9.110 Fla. Rules of Apellate Procedure to appeal an order entered by the trial judge upon numerous pending motions regarding the enforcement of the final judgment of dissolution of marriage (R.282-282). The appealed from order directed garnishment of a spendthrift trust income for judgments for unpaid alimony and attorneys fees and imposed a continuing writ of garnishment against the trustee and the trust for future alimony as it comes due. (R.282-283).

The Third District Court of Appeal reversed and remanded, holding in part that

> "...a former wife of a spendthrift trust beneficiary may not reach the income of that trust for alimony before it reaches the beneficiary unless she can show by competent and substantial evidence that it was the settlor's intent that she participate as a beneficiary."
> 446 So.2d 150,156 (Fla.3d DCA 1984).

Recognizing this to be a case of first impression in

Florida, the Third DCA specifically did not decide whether spendthrift trust income may be reached where there is no dissolution of marriage, where there are dependent children, or where equitable circumstances are present, noting that no special circumstances were presented in the case at bar. (446 So.2d 150,156 fn.7).

Three days later, the Second District Court of Appeal issued an opinion in Gilbert v. Gilbert 447 So. 2d 279 (Fla. 2d DCA 1984) holding that spendthrift trusts can be garnished for the collection of arrearages in alimony and attorneys fees. Compelling equitable circumstances were presented in the record. The Second District Court of Appeal denied motions for rehearing and certified Gilbert to the Supreme Court of Florida as being in direct conflict with White v. Bacardi pursuant to Art.V Sec.3(b)(4) Fla.Const. and jurisdiction was accepted. Case No. 65,205.

In the instant case Appellee's motions for rehearing and rehearing en banc were denied. (R.295). Notice to invoke discretionary jurisdiction of the Florida Supreme Court was filed on April 11, 1984 by Appellee based on Art.V,Sec.3(b)(3) Fla.Const. alleging direct conflict between the Appeals Courts and

jurisdiction was accepted. Case No. 65,181.

This brief is being submitted on the merits.

## STATEMENT OF THE FACTS

This case involves the dissolution of a short term marriage of two years, a second marriage for each party, of which no children were born. (R.1-2,239-48,265-68). The Final Judgment of Dissolution of Marriage incorporated a property settlement agreement in which the Husband agreed to pay the Wife $2,000 per month until either the death or remarriage of the Wife or his death. (R.12). The Wife subsequently obtained judgments for unpaid alimony and attorney's fees totalling $15,000. (R.131,132,226). In aid of execution on the judgments Wife served a writ of garnishment on Robert White, one of three trustees for a spendthrift trust of which Husband is an income beneficiary. (R.140-141,153-175). The Wife also obtained an order imposing a continuing garnishment against the trust income for future alimony as it comes due. (R.282-283).

The spendthrift trust, of which Husband is an income beneficiary, was created by his father, the settlor, in 1971, six years prior to the marriage in question and during Husband's first marriage, after the

settlor consulted with counsel as to the validity of spendthrift trusts in Florida. (R.239-48,142-46). By its terms no part of Husband's beneficial interest is subject to execution to satisfy Husband's debts and the signatures of two of the three trustees are required for any disbursement. (R.153-175).

Wife receives $600 per month in benefits from her first husband's pension and "some interest" from monies accumulated prior to the marriage in question. (R.265-268). In the instant case, Wife received $32,500 plus Husband's interest in the marital home under the property settlement agreement, which home, public records indicate, Wife sold for $260,000. (R.74-77,142-146). In addition, since the dissolution of marriage public records indicate Wife has purchased two pieces of property for a total of approximately $130,000. (R.142-146).

## POINT ON APPEAL

WHETHER CIRCUMSTANCES CAN EXIST WHICH WOULD ALLOW THE INVASION OF SPENDTHRIFT TRUSTS FOR UNPAID ALIMONY

## ARGUMENT

CIRCUMSTANCES CAN EXIST WHICH WOULD PERMIT THE INVASION OF SPENDTHRIFT TRUSTS FOR ALIMONY BUT SUCH CIRCUMSTANCES ARE NOT PRESENT IN THIS CASE

It should be stated at the outset that the Third District Court of Appeal did not reach the questions of whether an order for alimony and attorneys fees reduced to judgment where execution is authorized is subject to the provisions of F.S.61.12 or whether a continuing writ of garnishment would be proper against the trustee of a spendthrift trust. Because the Third District Court of Appeal did not reach these issues, these issues are not before this Court and no attempt will be made to brief the merits of these issues.

Petitioner/Wife misstates the holding of the Third District Court of Appeal when she states that the decision below "exempts the proceeds of a spendthrift trust from garnishment to pay past due alimony". (Petitioner's Brief on the Merits,p.8). That simply is not the holding of the lower court, as is evident if the entire holding is read, including the footnote. The Third DCA held:

> We hold that a former wife of a spendthrift trust beneficiary may not reach the income of that trust for alimony before it reaches the beneficiary unless she can show by competent and substantial evidence that it was the settlor's intent that she participate as a beneficiary.[7]
>
> [7] We do not decide whether the income of a spendthrift trust may be reached to support a wife where there has been no dissolution of marriage or where there are dependent children. On these questions, public policy may be clearer. Neither do we decide whether there are any equitable circumstances where a spendthrift trust should be defeated, as a policy matter, in order to provide for an alimony-debtor ex-spouse. On the record before us no special circumstances are presented. (Emphasis added). 446 So.2d 150 at .

The footnote is part of the holding and must be read and included in order to understand the holding of the case. A footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect. United States v. Egelak 173 F.Supp.206 (D.C. Alaska 1959). See also Phillips v. Osborne 444 F.2d 778 (9 Cir. 1971).

Thus the holding of the lower court does not exempt the proceeds of a spendthrift trust from garnishment to pay alimony as the Petitioner states in

her brief. Rather, the holding bars the Petitioner from the spendthrift trust under the facts of her particular case, but clearly leaves the door open for other wives to get at a spendthrift trust for alimony, given the right circumstances.

It is, of course, important to recognize the exact holding of the case as it bears strongly on two matters under consideration. First, as to whether this Court should even take jurisdiction, the limited holding of the Third District Court Appeal in the case at bar is not really in conflict with the Second District Court of Appeal case, Gilbert v. Gilbert 447 So.2d 279 (Fla.2d DCA 1984). This case and the Gilbert case are saying the same thing: Given the right circumstances (a very needy ex-wife with a serious medical condition in danger of becoming a ward of the State, and virtually without other remedy, as in the Gilbert case) a spendthrift trust can be attached for unpaid alimony. Thus, Respondent contends there is no conflict between the District Courts and the Court should reconsider the taking of jurisdiction. These two cases can stand in harmony.

Second, the holding of the lower court in the instant case is so limited to the facts of the case that the public policy considerations necessary to override the announced rule of law in Waterbury v. Munn 32 So.2d 603 (Fla.1947) are simply not present. The Third DCA is saying that in another case factors may be present to override Waterbury, supra, but that the facts of this particular case do not rise to the level of overriding an established rule of law.

Petitioner states in her brief that public policy of the State of Florida strongly favors a rule of law which would permit garnishment of a spendthrift trust for payment of alimony. In support of this statement, Petitioner sets forth several statutes favoring the collection of alimony and the 1984 enlargement of Section 61.12, Florida Statutes (Petitioner's brief, pp. 5-7). However, it is interesting to note that when Sections 61.08, 61.12 and 61.13 were amended, spendthrift trusts were not included. If the publlic policy of Florida is as clear as Petitioner would lead us to believe, certainly the legislature would have provided for the garnishment of spendthrift trusts for alimony and child support in the recent extensive revisions.

In support of her position that garnishment of spendthrift trusts should be permitted, Petitioner cites various cases, the Restatement (Second) of Trusts, Sec. 157 (1959) and 2 Scott Law of Trusts, Sec. 157.1 (3d ed. 1967). Respondent contends that the present case can be squared into each of these authorities when the full holding, including footnote 7, is taken into consideration.

All of the authorities cited by Petitioner speak to the needs of the wife in allowing garnishment of spendthrift trusts. Scott on Trusts speaks of "needy dependants". The Restatement of Trusts, in the comment on Clause (a) states that it should be discretionary with the court as to how much of an alimony decree should be awarded to a wife out of a spendthrift trust income. Even the cases cited by Petitioner speak to a weighing of the needs of the wife in allowing garnishment of a spendthrift trust. For example, Shelley v. Shelley354 P.2d 282,282 (Ore.1960) "to the extent to which court deemed it reasonable under the circumstances..."; Dillon v. Dillon 11 N.W.2d 628 (Wis.1943) (wife of 12 years with four minor children);

Safe Deposit & Trust Co. of Baltimore v. Robertson 65 A 2d 292 (Md.1949) - alimony in Maryland is an "award made by the court for food, clothing, habitation and other necessaries for the maintenance of the wife." P.296.

The Third District Court of Appeal decision below suggests that given equitable circumstances not present in the instant case, the court would permit garnishment of a spendthrift trust for alimony. Undoubtedly the equitable circumstances would be the very factors the authorities and cases have set forth above, such as long term marriages, a showing of need, dependancy, and minor children. These factors are not present in Petitioner's case and it is very probable that Petitioner would not have prevailed in the jurisdictions cited by Petitioner.

In reviewing all of the cases cited in the instant case and in the Gilbert case, where alimony or child support was permitted from spendthrift trusts, not one case had similar non-compelling facts as found in the present case. To allow the invasions of a spendthrift trust in this case where there was a very short term marriage, no showing or suggestion of need, no minor

children,and a property settlement agreement versus court ordered alimony would have the effect of allowing invasion of a spendthrift trust for alimony in virtually every case without consideration of any equitable circumstances. This would go beyond the Restatement, beyond Scott on Trusts and beyond all other jurisdictions without an express statute permitting invasion. It would in effect create a statute permitting garnishment of spendthrift trusts, something best left to the legislature.

In the final analysis, because of the complete absence of equitable considerations present in other cases, the debt that Petitioner is seeking to collect rises no higher than any ordinary debt even though it is called alimony. Petitioner is seeking to collect this debt contrary to the express intent of the settlor in the spendthrift trust. This should not be allowed.

There is no question that there is a split of authority in other jurisdictions on the question of the invasion of spendthrift trusts for alimony. Throughout the cases there has been a balancing of a settlor's right to distribute his property as he sees fit versus public policy considerations of a husband

supporting his wife and children. The lower court's decision in this case follows well established case law which upholds the validity of spendthrift trusts. Waterbury v. Munn, supra. There were no compelling equitable circumstances presented in this case requiring the creation of an exception to this recognized trust doctrine. Spendthrift trusts have been firmly established in Florida since the Waterbury decision in 1947 and the settlor in the Bacardi spendthrift trust relied on this precedent. (R.239-248). As discussed at length in the lower court opinions of this case and the Gilbert case, many jurisdictions have refused to permit the invasion of spendthrift trusts for alimony under any circumstances. The lower court decision in this case did not go that far. Although the court did not permit the invasion of the spendthrift trust in question, it left open the possibility of garnishment of spendthrift trusts in other cases. If the same compelling facts were present in this case as in the Gilbert case the Third District probably would have ruled differently, creating an exception to the Waterbury doctrine.

Respondent contends that the present case and the *Gilbert* case can be reconciled with each other, as set forth above, and therefore this Court should let both decisions stand.

<u>CONCLUSION</u>

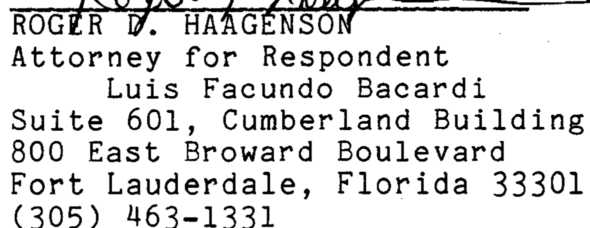
Based on the foregoing, the decision of the Third District Court of Appeal should be upheld. The decision is limited to the particular facts of the case and equitable considerations are not present to override the long-standing rule announced in <u>Waterbury v. Munn</u>, supra.

Respectfully submitted,

Roger D. Haagenson

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing Answer Brief was furnished by mail to JOE N. UNGER, ESQ., Law Offices of Joe N. Unger, P.A., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; NARD S. HELMAN, P.A., 1401 Brickell Avenue, 11th Floor, Miami, Florida 33131; STEVEN NACLERIO, ESQ., 2100 Biscayne Boulevard, Miami, Florida 33137; GINSBURG,BYRD, JONES & DAHLGAARD, 1844 Main Street, Sarasota, Florida 33557; GEORGE R. McLAIN, ESQ., P. O. Box 2999, Sarasota, Florida 33578; LARRY H. SPALDING, ESQ., 6624 Gateway Avenue, Sarasota, Florida 33581; A. MATTHEW MILLER, ESQ., 4040 Sheridan Street, Hollywood, Florida 33021; and WILLIAM L. HYDE, ESQ., P. O. Box 1794, Tallahassee, Florida 32301, this 6 day of August, 1984.



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