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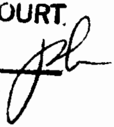

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IN THE SUPREME COURT OF FLORIDA

ADRIANA BACARDI	:	
Petitioner,	:	CASE No. 65,181
vs.	:	
ROBERT B. WHITE, Trustee	:	
and L. F. BACARDI,	:	
Respondents.	:	
	:	

BRIEF OF RESPONDENT R. B. WHITE ON THE MERITS

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STATEMENT OF THE CASE

Respondent R. B. White accepts the statements of the case as submitted by both Petitioner and Respondent L. F. Bacardi as being materially correct.

STATEMENT OF THE FACTS

This case arises from a factual situation which has been adequately set forth by the Court below and the attorneys for Petitioner and Respondent Bacardi in their papers. We emphasize only a few important points.

As the Court below set out at footnote five of its opinion, a trustee of any trust is charged with the protection of both the trust corpus and the income beneficiary's interest. The trustee must take care to carry out such duties as are imposed by the instrument which, as to the spendthrift provision in this trust, could not be clearer:

> "No part of the interest of any beneficiary of this trust shall be subject to hypothecation, pledge, transfer or subject to any debt of said beneficiary or any judgment of said beneficiary or process in aid of execution of said judgment".
> (R. 153-175).

The trust at issue was created by Bacardi's father in 1971 --six years prior to the marriage which gave rise to these proceedings-- and acquired a Florida situs because the settlor wanted the protection of the laws of a jurisdiction which respected

spendthrift trusts. (R. 239-248, 142-46). At that time, Respondent Bacardi was married to his first wife who was given a share of trust income by the settlor equal to his son's. All income is required to be distributed at least annually. (R. 153-175).

The first agreement we know of between Petitioner and Respondent Bacardi occurred in 1977 when these two mature adults decided to marry. It was a second marriage for each of them. A very short time later they grew weary of the benefits and burdens of that bargain and determined --after both had consulted with counsel-- to strike a second agreement which divided their property and income.

Petitioner was content then to sign an agreement in which some obligations could be satisfied immediately (e.g. the receipt of his one-half interest in the marital abode and $32,500.00 in cash) while some others were of a continuing nature (e.g. the promise of Respondent Bacardi to pay Petitioner $2,000.00 per month so long as she remained unmarried).

It now appears that Bacardi has discharged several --but not all-- of his obligations arising from the property settlement agreement. The basic questions presented by this case are simply these: Notwithstanding that certain contractual obligations are rooted in a short-term marriage, should this court abrogate the clear intent of the settlor and create a retroactive exception to the trust law of Florida by allowing

garnishment of a spendthrift trust interest? Or, alternatively, should the courts leave an ex-spouse who is not likely to become a public charge to her own devices in pursuing her former spouse once the trust income has been paid over to him?

ISSUE

Whether the Judgment Debtor's interest in the income of a spendthrift trust is subject to garnishment by an ex-spouse for alimony arrearages and attorney's fees.

ARGUMENT

INCOME TO BE PAID THE BENEFICIARY OF A SPENDTHRIFT TRUST IS NOT SUBJECT TO EXECUTION UNTIL IT REACHES HIS HANDS

It is well recognized under the applicable Florida case law that spendthrift trusts have been approved as a means of limiting the reach of creditor process. Waterbury v. Munn 159 Fla. 754, 32 So. 2d 603 (1947). Petitioner relies on no statute which expressly modifies this holding and does not argue that the legislature has created an exception to Waterbury.

The record here shows that Bacardi's father, the settlor of the trust at issue, was quite anxious to include a spendthrift clause in his trust agreement. In fact, advice he had received as to the validity of such trusts in Florida was one of the primary reasons he elected to create the relationship in this jurisdiction. (R. 239-248).

In this instance, the settlor had been concerned about the ability of his son and his son's then spouse to manage the property he intended to gift to them. He, therefore, created a trust naming his son and his daughter-in-law as income beneficiaries for their respective lives. Upon their deaths the trust corpus is to be distributed to the children of that marriage.

Not content to stop there, the settlor further directed that a spendthrift clause become a part of the trust agreement

so that his son's interest -- as well as the interests of the four other income beneficiaries -- could neither be pledged nor subject to the claims of any creditor. 1/

Courts such as those in Florida which uphold spendthrift trust clauses defer to the settlor's intent in disposing of his property as he sees fit. See Also In Re Morgan's Estate 223 Pa 228, 72A. 498 (1909). The beneficiaries of the L. J. Bacardi Trust certainly had no legal right to receive anything from the settlor, and he was under no obligation to provide anything to them. It necessarily follows that to uphold the spendthrift provisions of the trust as written does not imply approbation of Bacardi's conduct in refusing to honor his obligations arising from the separation agreement. It only acknowledges that the trust relationship at issue would not have arisen had such a clause been an ineffective condition upon the settlor's gift. Accord Martin v. Martin 54 Ohio St. 2d 101, 374 N.E. 2d 1384 (1978).

The salient rule of construction in trusts is to determine the intention of the settlor and give effect to his wishes. Cartinhour v. Houser 66 So. 2d 686 (Fla. 1953). From what has been shown, there is simply no means available wherein Petitioner could ever demonstrate that it was the settlor's intent that she participate as a beneficiary. Consequently, without statutory or direct precedental support, Petitioner (and the Second District Court of Appeals in Gilbert v. Gilbert, 447 So.

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1/ The full text of the Trust Agreement is set out at pages 156-175 of the Record.

2d 299 (Fla. App. 1984)) attempt to discover "public policy" which supports a decision contrary to the published law of this State.

As Judge Ferguson so aptly said: "Public policy, although often used loosely, means the law of the state, whether found in or clearly implied from its constitution, statutes or judicial decisions." Building Services Employers International Union v. Gazzam 339 U.S. 532, 537, 70 S. Ct. 784, 787, 94 L. Ed. 1045, 1050 (1950). While there may be public policy which favors the payment of alimony as needed to support those who cannot do so otherwise, there is no disclosed public policy in Florida which states that a continuing post-marital obligation must be satisfied at the expense of overruling valid decisional precedents such as the ones which were relied upon to create the spendthrift trust at issue. The Court below could not find a clear public policy different from its holding because none exists.

Petitioner now asks this Court to declare such public policy and negate the clear intent of the settlor from:

1. Lower Court decisions which involve pension funds (City of Jacksonville v. Jones 213 So. 2d 259 (Fla. 1st DCA 1968); City of Miami v. Spurrier 320 So. 2d 397 (Fla. 3d DCA 1975) that have been created by a Husband's employment efforts.

2. Statutes, and amendments thereto (e.g. F.S. §§ 61.11 and 61.12 (1983)) which nowhere suggest anything except that they should be read in harmony with decisions of this Court

such as Waterbury, supra and Croom v. Ocala Plumbing & Electric Co. 62 Fla. 460, 57 So. 243 (1911). As the Third District Court of Appeals has said in Vanner v. Goldshein 216 So. 2d 759 (Fla. 1968):

> "The general rule is that statutes are to be construed with reference to appropriate principles of the Common Law, and when possible, they should be so construed as to make them harmonize with existing law and not conflict with long-settled principles". Id at 760.

The Waterbury rule is undoubtedly a well established principle of the common law of Florida. If it is to be changed after all these years, it is a job for the legislature. Sorrells v. United States 287 U.S. 435 (1932).

As the Court below so correctly stated in footnotes seven and eight of its Opinion, no special, equitable or extra-ordinary circumstances are present which aid this Petitioner. Insofar as the trustee was able to determine and Mrs. Bacardi cared to disclose:

1. Petitioner receives pension income of $600.00 per month and "some interest income";

2. In 1981, Petitioner conveyed the marital abode for consideration which we calculated to be in excess of $260,000.00;

3. Petitioner served as President and a Director of a corporation known as Bacardi Landscaping Inc.;

4. Petitioner engaged in several other sizeable real estate transactions as reflected in the public records of Dade County. (White Appendix pp. 1-18).

Undoubtedly due to the above and the absence of a record of extreme hardship, the Court below determined that Petitioner is unlikely to need the assistance of the people of this State to support herself. She is simply not the kind of the needy spouse who is characterized in the cases upon which she seeks to rely. It was a short marriage and no minor children are involved here. And the procedural history of this matter coupled with the small amount of record activity aimed against her debtor strongly suggests the absence of "special, equitable or extraordinary" conditions. Accordingly, it is submitted Petitioner's interest in having the trust agreement rewritten ought fail in her present circumstances.

Should this Court determine to affirm the holding of the Court below, Petitioner is not without her remedies. As was judicially noted some time ago: "There are methods of reaching the beneficiary directly". San Diego Trust v. Savings Bank v. Heustis, 121 Cal. App. 675, 10 P. 2d 158, 156 (Dist. Ct. App. 1932). We suspect that should Petitioner conclude that "the game is worth the candle", she will have her judgments satisfied in short order once the distraction of these proceedings is removed.

CONCLUSION

For the reasons expressed herein as well as those contained in the briefs submitted by Southeast Bank, N.A. and the Florida Bankers Association in Case No. 65,205, the holding of the Third District Court of Appeals should be affirmed. [2/]

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2/ Should the Court hold otherwise, the case should be remanded to the District Court for its consideration of those important issues which it did not reach in its Opinion of January 24, 1984.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Roger D. Haagenson, Esq., 601 Cumberland Building, 800 East Broward Boulevard, Fort Lauderdale, Florida 33301; Joe N. Unger, P.A., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130 and Nard S. Helman, P.A., 1401 Brickell Avenue, 11th Floor, Miami, Florida 33131, this 13th day of August, 1984.

Steven Naclerio