

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,181

FILED

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ADRIANA BACARDI,

By 
Chief Deputy Clerk

Petitioner,

vs.

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

Respondents.

PETITIONER'S BRIEF IN
SUPPORT OF JURISDICTION

LAW OFFICES OF JOE N. UNGER, P.A.
606 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 374-5500

and

NARD S. HELMAN, P.A.
1401 Brickell Avenue
11th Floor
Miami, Florida 33131

BY: JOE N. UNGER
Counsel for Petitioner

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 Petitioner, :
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 : SUPPORT OF JURISDICTION
 ROBERT B. WHITE, Trustee, :
 and LUIS FACUNDO BACARDI, :
 :
 Respondents. :
 _____ :

I.

INTRODUCTION

Petitioner seeks to have this Court invoke its discretionary jurisdiction in accordance with Article V, § 3(b)(3), Florida Constitution, in that the decision rendered by the District Court of Appeal of Florida, Third District, in the instant case expressly and directly conflicts with a decision of another district court of appeal on the same question of law.

Petitioner submits that under the acknowledged test for "conflict jurisdiction" such jurisdiction unquestionably exists.

II.

JURISDICTIONAL CONFLICT EXISTS BETWEEN THE INSTANT CASE AND THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT, IN GILBERT v. GILBERT, ___ So.2d ___ (Fla. 2d DCA 1984), 9 FLW 290, BOTH DEALING SPECIFICALLY WITH THE QUESTION OF WHETHER A SPENDTHRIFT TRUST IS IMMUNE FROM GARNISHMENT FOR PAYMENT OF ALIMONY TO AN EX-SPOUSE AND COMING TO DIRECTLY OPPOSITE DETERMINATIONS.

On January 24, 1984, rehearing denied March 19, 1984 (Appendix A and B), the District Court of Appeal of Florida,

Third District, decided the instant case in which a former husband, beneficiary of a spendthrift trust, and one of the trustees of the trust appealed an order of the trial court which directed that trust income be garnished to satisfy a provision of a dissolution judgment requiring the husband to pay \$2,000 per month alimony. The order of the trial court also provided for a continuing writ of garnishment for future alimony payments without order of court. The issue framed by the appellate court was whether the income from a spendthrift trust is exempt from legal process to enforce court-ordered payment of alimony and attorney's fees to an ex-wife. The court, after an examination of authorities, determined that a spendthrift trust was exempt from legal process to enforce court-ordered payment of alimony and attorney's fees.

The opinion recognized that there were no reported Florida cases which had addressed this precise question. Various authorities from other jurisdictions are examined, including the contrary position taken by the Restatement (Second) of Trusts § 157 (1959).

Notwithstanding, the Third District Court of Appeal chose to ". . . align with what appears to be both the modern trend and the best reasoned view." As such, the court held 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. Judge Nesbitt joined in the majority opinion authored by Judge

Ferguson. Chief Judge Schwartz dissented and would hold that the court should adopt the view expressed by the Restatement, which is also the majority view that a spendthrift trust should not be immune from garnishment upon an alimony claim.

Three days after issuance of the opinion in the instant case, the District Court of Appeal, Second District, issued its opinion in Gilbert v. Gilbert, ___ So.2d ___ (Fla. 2d DCA 1984), 9 FLW 290, not knowing at that time of the issuance of the Bacardi decision. The Second District opinion states that for the first time in Florida it was dealing with the question of whether the assets of a spendthrift trust could be garnished for arrearages in alimony. In the Gilbert case, the trial judge had entered a judgment in garnishment against the bank as trustee of a spendthrift trust of which the former husband was the beneficiary for arrearages in alimony, medical expenses and attorney's fees. The trial court had also entered a continuing writ of garnishment directing the bank to pay out of the trust the periodic and lump sum alimony as it became due.

Many of the same cases cited in Bacardi are also discussed in Gilbert, including the Restatement. The court thereafter concludes that in light of the strong public policy towards requiring persons to support their dependants, spendthrift trusts can be garnished for the collection of arrearages in alimony, as well as attorney's fees awarded incident to the divorce. This determination is directly contrary to the result announced in the instant case. Judge Schoonover concurred with the majority opinion of Judge Grimes. Judge Lehan concurred in part and dis-

sented in part, concurring with the decision to permit invasion of a spendthrift trust but specifying that the majority decision should limit the application to the trust before the court, to other existing spendthrift trusts which were revocable and could be changed, and to spendthrift trusts created after the date of the decision. Judge Lehan did not concur with permitting retroactive application of the decision. (Appendix C.)

On March 21, 1984, the Second District Court of Appeal entered its order on motion for rehearing and certification. (Appendix D.) This order recognizes that three days before the issuance of its opinion, and unknown to the court at that time, the Third District Court entered a "split decision" holding that the income from spendthrift trusts is exempt from legal process to enforce court-ordered payment of alimony and attorney's fees to an ex-wife, citing the White v. Bacardi decision. The Second District states its belief that its opinion, as well as Judge Schwartz's dissent, represent the better view which is consistent with the weight of authority in other jurisdictions. While denying the motions for rehearing, the Second District certified its decision to this Court as being in direct conflict with the White¹ decision of the Third District Court of Appeal.

By pure coincidence, two decisions were rendered by different district courts of appeal which, on basically the same operative facts, have reached directly contrary results. Thus,

¹ As of the date of writing of this brief, there has not been filed in the Second District Court of Appeal a notice to invoke discretionary jurisdiction in Gilbert v. Gilbert.

the decision in the instant case creates classic conflict with the Gilbert decision in that it announces ". . . a decision on a point of law which, if permitted to stand, would be out of harmony with a . . . decision of . . . another Court of Appeal on the same point of law. . . ." Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962).

Which of the two decisions announced within three days of one another is correct is not the issue in these jurisdictional proceedings. Classic conflict exists and it is clearly necessary for the Supreme Court of Florida to resolve this conflict and announce a uniform rule for application throughout the state. Accordingly, this Court should issue its order accepting jurisdiction in the instant case so that the matter can proceed on the merits.

Respectfully submitted,

LAW OFFICES OF JOE N. UNGER, P.A.
606 Concord Building
66 West Flagler Street
Miami, Florida 33130
(305) 374-5500

and

NARD S. HELMAN, P.A.
1401 Brickell Avenue
11th Floor
Miami, Florida 33131

BY: 

JOE N. UNGER
Counsel for Petitioner

III.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief in Support of Jurisdiction and Appendix thereto was served by mail upon Roger D. Haagenson, Esquire, 601 Cumberland Building, 800 East Broward Boulevard, Ft. Lauderdale, Florida 33301; and Steven Naclerio, Esquire, 2100 Biscayne Boulevard, Miami, Florida 33137, this 19th day of April, 1984.


