

0/a 11-6-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,181

FILED

SID J. WHITE

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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

ADRIANA BACARDI,

Petitioner,

vs.

ROBERT B. WHITE,
etc., et al.,

Respondents.

BRIEF OF PETITIONER
ON THE MERITS

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 Respondents. :
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 _____ :

I.

STATEMENT OF THE CASE AND FACTS

On October 4, 1979, Adriana Bacardi filed a Petition for Dissolution of Marriage and Emergency Relief. Attached to the Petition was a Property Settlement Agreement dated August 24, 1979. The parties had been married for two years. There were no children of the marriage. (R. 1-12.) Under the terms of the Property Settlement Agreement, Mr. Bacardi was to pay Mrs. Bacardi \$2,000 a month until her remarriage or death or his death. A Final Judgment of Dissolution of Marriage was entered on May 27, 1980, which incorporated by reference the Property Settlement Agreement. (R. 74-75.) Subsequently, a Corrective Final Judgment of Dissolution of Marriage was filed on June 5, 1980. (R. 76-77.)

Luis Bacardi is a beneficiary of a spendthrift trust created by his father in 1971. (R. 142-146, 239-248.) The trust instrument contains the following language in Paragraph Nine:

"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."

Mr. Bacardi did make some alimony payments to his former wife pursuant to the Property Settlement Agreement. In June or July, 1981, he stopped. Numerous motions were filed seeking to enforce the terms of the Final Judgment.

On September 14, 1981, the trial court signed an executable judgment for \$6,000 in Mrs. Bacardi's favor representing unpaid alimony. (R. 131.) A Motion for Garnishment After Judgment (R. 136-136A) and a Writ of Garnishment served on Robert B. White, Trustee (R. 140-141) were filed on September 25 and October 1, 1981, respectively. Mrs. Bacardi's attorney also filed a Motion for Garnishment, or, Alternatively Freezing of Accounts to enforce the prior orders of the trial court (R. 147-152). A¹ Motion to Dissolve Writ of Garnishment was filed. (R. 153-175.)

These motions resulted in the order appealed to the Third District Court of Appeal which

- 1) Permitted garnishment of the spendthrift trust for a total of \$15,000;²
- 2) Permits a continuing writ of garnishment against the trust and trustee for \$2,000 a month. (R. 282-283.)

¹ Subsequent to these various garnishment motions, Mrs. Bacardi obtained another judgment for \$8,000 representing unpaid support for September, October, November and December, 1981. (R. 226.)

² The \$15,000 is comprised of \$6,000 from the September judgment; \$1,000 fee award by the Third District Court of Appeal in an appeal to interpret the Property Settlement Agreement; and \$8,000 for the December 29, 1981 judgment for arrearages.

Both Mr. Bacardi and the trustee appealed this order. Recognizing this to be a case of first impression in Florida, the District Court of Appeal held that the former wife of a spendthrift trust beneficiary may not reach the income of the trust to pay alimony before it reaches the beneficiary unless she can show by competent and substantial evidence that it was the settlor's intent she participate as a beneficiary. In a dissent, Chief Judge Schwartz asserted that the majority should adopt the view of the Restatement (Second) of Trusts and the majority of other jurisdictions that spendthrift trust income should not be immune from garnishment for an alimony claim. This conclusion, writes Judge Schwartz, accords with prior authority of that court. The decision is published at 446 So.2d 150.

Three days after the Bacardi decision, the District Court of Appeal, Second District, issued the opinion in Gilbert v. Gilbert, 447 So.2d 299 (Fla. 2d DCA 1984) holding that spendthrift trusts can be garnished for the collection of alimony arrearage. Because of the obvious conflict of decisions, the Gilbert case was certified to this Court (Case No. 65,205).

Jurisdiction has been accepted in the instant case. This brief is submitted on the merits to convince the Court to accept the majority position which permits garnishment of a spendthrift trust to satisfy claims for alimony arrearage.

II.

POINT ON APPEAL

WHETHER INCOME TO BE PAID THE BENEFICIARY OF A SPENDTHRIFT TRUST SHOULD BE SUBJECT TO GARNISHMENT FOR ALIMONY ARREARAGE.

III.

ARGUMENT

INCOME TO BE PAID THE BENEFICIARY OF A SPENDTHRIFT TRUST SHOULD BE SUBJECT TO GARNISHMENT FOR ALIMONY ARREARAGE.

Several factual matters must be noted before proceeding to the legal arguments which support petitioner's position:

- 1) Alimony in the sum of \$2,000 a month was determined by agreement of the parties;
- 2) No payments have been made since July, 1981;
- 3) The trust instrument does not specifically exclude claims for alimony;
- 4) The former husband has removed himself from the jurisdiction;
- 5) The former husband's income from the trust exceeds \$500,000 a year. (R. 1-12, 182-202.)

With these facts in mind, the former wife of trust beneficiary Luis Bacardi asks this Court to resolve the conflict which now exists and pronounce the law of Florida to be that spendthrift trust income is not immune from garnishment for alimony arrearage. While not specifically discussed other than in this case and Gilbert v. Gilbert, 447 So.2d 299 (Fla. 2d DCA 1984), the sought-after determination conforms to the public policy of Florida already evident in its statutes and case law;

the majority of decisions from other jurisdictions; legal treatises and the applicable provision of the Restatement (Second) of Trusts.

There will be no attempt to "re-invent the wheel" in this brief. The scholarly majority opinions, dissent and special concurrence in this and the Gilbert case cite and discuss decisions and other authorities from around the country which have treated the same question. There is a split of authority. For example see, Safe Deposit & Trust Co. of Baltimore v. Robertson, 192 Md. 653, 65 A.2d 292 (1949), permitting garnishment of a spendthrift trust for payment of alimony arrearage; ³ Lippincott v. Lippincott, 349 Pa. 501, 37 A.2d 741 (1944), prohibiting garnishment of a spendthrift trust for payment of alimony arrearages.

The majority of jurisdictions which have considered the question allow garnishment. See, Annot., 91 ALR 2d 262 (1963). The applicable Restatement allows garnishment. Restatement (Second) of Trusts § 157 (1959). More important, however, the

³ Commenting on this decision, the author of an article in the Maryland Law Review stated:

"The result of the decision in the instant case is to place Maryland. . .squarely in line with the growing number of jurisdictions which hold that the income from spendthrift trusts may be reached by the wife for alimony. . . . This is sound because spendthrift trusts, which required special favor of the law to be enforceable at all, should not have that favor extended to defeat the social policy of the State that a husband must support his wife and children." 10 Maryland L.Rev. 365 (1949).

announced 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, particularly under the circumstances of this case.

In a very general context, it is axiomatic that the law favors enforcing the intent of a settlor of a trust. Knauer v. Barnett, 360 So.2d 399 (Fla. 1978). There are obviously limits on what a settlor can do which would include violating the public policy of the state. See, Cartinhour v. Houser, 66 So.2d 686 (Fla. 1953).

It is clearly the public policy of this state that means must be afforded to enforce orders awarding child support and alimony. See, 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), cert. denied, 334 So.2d 604 (Fla. 1976). See also, Buzzard v. Buzzard, 412 So.2d 388 (Fla. 2d DCA 1982), rev. denied, 419 So.2d 1195 (Fla. 1982).

Several Florida statutes are specifically directed to securing payment of child support and alimony in recognition of the public policy requiring a means to enforce such payments. Section 61.11, Florida Statutes (1983) makes the remedies of repleat and injunction available to secure payment of alimony. Section 61.12, Florida Statutes (1983) makes the money due for personal service ⁴ or otherwise subject to attachment or

⁴ There is certainly a rational basis for arguing that this includes money due the beneficiary of a spendthrift trust.

garnishment to enforce court orders for alimony and child support.

The public policy of the state reflected in its statutes has been strengthened through various statutory amendments by the 1984 Legislature governing collection of alimony and child support. Chapter 84-110, Laws of Florida (1984), effective January 1, 1985, amends Sections 61.08 and 61.13 to provide more effective means to enforce and collect alimony and child support orders by providing, inter alia, for income deduction orders, payment through county depositories, and the purchase of life insurance to secure an alimony award. Chapter 84-135, Laws of Florida (1984), effective July 1, 1984, enlarges the garnishment and attachment remedies of Section 61.12 to enforcement and satisfaction of orders and judgments.

These statutes and amendments exist for one purpose only-- enforcement of alimony and/or child support awards so that a husband or father cannot avoid his duty to support his ex-wife and children no matter what the source of his income. Common sense, as well as common law, dictates that a person should not be entitled to enjoy the benefits of a trust while at the same time refusing to respond to obligations arising out of a marriage and out of an agreement signed by him to pay support money to his ex-wife.

With all due respect, the statement of the majority opinion in the District Court of Appeal decision that a clear public policy in this regard is not expressed in the statutes and judicial opinions of Florida is not correct. The public policy of

Florida expressed in its statutes and cases is contrary to the decision rendered below which exempts the proceeds of a spendthrift trust from garnishment to pay past due alimony.

One expressed basis for excluding a former wife from looking to the income of a spendthrift trust is the "clear intent of a settlor" set forth in the exemption provision of a trust. No such "clear intent" exists in the Bacardi trust instrument. Mr. Bacardi Senior exempted the interest of a beneficiary from a debt or judgment or process in aid of execution. Not specifically⁵ exempted is a claim for alimony or child support.

Making the income of the Bacardi spendthrift trust subject to a claim for alimony can be accomplished without violating the expressed intent of the settlor since he did not expressly refer to a claim by the beneficiary's wife.⁶ Furthermore, the desired aim will bring Florida law in line with the majority view expressed by the Restatement (Second) of Trusts § 157 (1959); 2 Scott Law of Trusts § 157.1 (3d ed. 1967); and the judicial deci-

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This distinguishes this case from Gilbert v. Gilbert, supra. There the interest of the beneficiary was to be free from "control or interference" of "any spouse of a married beneficiary." This would certainly include the claim of an ex-spouse. The Gilbert concurring opinion recognizes that the ex-wife is separately and directly excluded from benefits of the trust and need not be presumed to be included in a general category. Notwithstanding an express exclusion, the public policy of Florida required garnishment of trust income.

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A claim for alimony is not a "debt" of the beneficiary which is specifically exempted. See, Audobon v. Shufeldt, 181 U.S. 575, 21 S.Ct. 735 (1901); Gilbert v. Gilbert, supra.

sions of other jurisdictions.⁷

The reasoning of the Gilbert decision which correctly recognizes the overwhelming public policy reasons for making the income of a spendthrift trust amenable to garnishment for alimony and child support should become the law of Florida. Six appellate judges in Florida have considered the question. Four out of six would permit income of a spendthrift trust to be garnished for the collection of arrearages in alimony.

The principal argument for adopting this view is nowhere better expressed than in Judge Lehan's concurrence to the Gilbert decision:

"The obligation to pay alimony has been said to be not a debt, therefore the ex-wife is in a status entirely different from that of creditors. The legal unity of marriage has been said to impose a duty transcending mere contractual obligations which are rejected by the spendthrift provision. Most compelling is the argument that it would be not only unjust but would shock the conscience of the court and of any right-minded person to enable the beneficiary, as here, to enjoy the benefits of wealth without being subject to the responsibility to support those whom it is his legal obligation to support and who have no source for the payment of that obligation except the trust." Gilbert v. Gilbert, supra at page 305.

IV.

CONCLUSION

For the reasons and under the authorities set forth above,

⁷ See for example, Safe Deposit & Trust Co. v. of Baltimore v. Robertson, 192 Md. 653, 65 A.2d 292 (1949) and cases cited; Shelley v. Shelley, 354 P.2d 282 (Ore. 1960); Dillon v. Dillon, 244 Wis. 122, 11 N.W.2d 628 (1943).

it is respectfully requested that this Court rule the spendthrift provisions of a trust not be given effect to bar claims of a beneficiary's wife for alimony. Such ruling can easily be accommodated within the accepted principle that the privilege of disposing of property is not absolute but is limited by overriding policy considerations which can be judicially enforced consistent with the court's view of sound public policy. The decision of the District Court of Appeal, Third District, should be quashed and the cause remanded with directions to affirm the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Steven Naclerio, Esquire, 2100 Biscayne Boulevard, Miami, Florida 33137; Roger D. Haagenson,

Esquire, 601 Cumberland Building, 800 East Broward Boulevard, Ft. Lauderdale, Florida 33301; Ginsburg, Byrd, Jones & Dahlgaard, 1844 Main Street, Sarasota, Florida 33577; George R. McLain, Esquire, P.O. Box 2999, Sarasota, Florida 33578; Larry H. Spalding, Esquire, 6624 Gateway Avenue, Sarasota, Florida 33581, A. Matthew Miller, Esquire, 4040 Sheridan Street, Hollywood, Florida 33021; and William L. Hyde, Esquire, P.O. Box 1794, Tallahassee, Florida 32301, this 18th day of July, 1984.


