IN THE SUPREME COURT

OF FLORIDA

SOUTHEAST BANK, N.A.,
formerly known as
SOUTHEAST BANK TRUST COMPANY,

Appellant,

vs.

BETTY J. GILBERT,

Appellee.

Case No.: 65,205
Second District Court of
Appeal Case No.: 83-821

BRIEF OF

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, FLORIDA CHAPTER AS AMICUS CURIAE

Appeal from the District Court of Appeal
for the Second District of Florida

A. Matthew Miller, Esquire
Miller and Schwartz, P.A.
4040 Sheridan Street
Post Office Box 7259
Hollywood, Florida 33021
(305) 962-2000
Attorney for Amicus Curiae
American Academy of
Matrimonial Lawyers,
Florida Chapter

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ARGUMENT

UNDISTRIBUTED INCOME AND PRINCIPAL IN THE HANDS OF A TRUSTEE UNDER THE TERMS OF A TRUST INCLUDING A PROPORTED SPENDTHRIFT PROVISION IS SUBJECT TO GARNISHMENT FOR ALIMONY AND CHILD SUPPORT.

Judge Grimes, in his well-reasoned majority opinion below, in Gilbert v. Gilbert, 447 So.2d 299 (Fla. 2nd DCA 1984), correctly states that the resolution of this issue involves a choice between competing interests:

> "The cardinal rule of construction in trusts is to determine the intention of the settlor and give effect to his wishes . . . thus, in refusing to permit the invasion of a spendthrift trust for alimony, it has been said that 'when unrestrained by statute, it is the intent of the donor, not the character of the donee's obligation which controls the availability and disposition of his gift.' (citations omitted)
>
> "On the other hand, there is a strong public policy argument which favors subjecting the interest of the beneficiary of a trust to a claim for alimony . . . As one court stated, the obligation to pay alimony 'is a duty, not a debt.'"

Judge Grimes then concludes:

> "The weight of authority permits the invasion of spendthrift trusts to collect unpaid alimony." (citing with approval 91 A.L.R.2d 262 [1963] and Scott, The Law of Trusts § 157.1 [3d ed. 1967])

Judge Ferguson, in his majority opinion in White v. Bacardi, 446 So.2d 150 (Fla. 3rd DCA 1984), although completely and fairly stating the conflicting interests and authorities, concludes that it appears to be both the modern trend and the best reasoned view to 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. Judge Ferguson's opinion acknowledges that spendthrift trust provisions are valid and enforceable in Florida, that Florida has enacted no legislation which limits or qualifies the validity of spendthrift trusts, and has not passed any law which specifically exempts spendthrift trust income from legal process, noting that Missouri and Pennsylvania have such legislation.

In distinguishing Buzzard v. Buzzard, 412 So.2d 388 (Fla. 2nd DCA), rev. denied, 419 So.2d 1195 (Fla. 1982) and Miami v. Spurrier, 320 So.2d 397 (Fla. 3rd DCA 1975), cert. denied, 334 So.2d 604 (Fla. 1976) he states that the significant and troublesome element in this spendthrift trust case is:

> "the subject property is originally that of a third person (settlor), who had no legal or moral obligation to the plaintiff-wife, and who gave legal title to the property to a

> trustee for the beneficial use of the defendant-husband with expressed and valid limitations on use. The pension fund cases do not present conflicting points of law and public policy, i.e. the obligation of a husband to support a wife versus the giving of force and effect to a legal spendthrift trust in accordance with the settlor's intent that the income not be subject to legal process for payment of a beneficiary's improvident debts."

Is alimony or child support an "improvident debt?" Weren't conflicting points of law and public policy present in both Buzzard v. Buzzard, supra, and Miami v. Spurrier, supra?

In Audubon v. Shufeldt, 181 U.S. 575 (1901), the United States Supreme Court, in defining the character of alimony stated:

> "Alimony does not arise from any business transaction, but from the relationship of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction . . . Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, then as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings . . . It may be enforced by imprisonment for contempt,without violating the constitutional provision prohibiting imprisonment for debt . . . Hence such alimony cannot be regarded as a debt owing from the husband to the wife, and, not being so, cannot be discharged by an order in the Bankruptcy Court."

The obligation of alimony and child support is the highest obligation recognized by law and is given corresponding priority with respect to enforcement, i.e. contempt, garnishment, attachment, sequestration, exemption from discharge in bankruptcy, exception from homestead exemption and so forth.

In Killian v. Lawson, 387 So.2d 960 (Fla. 1980), this court held that a debtor who was divorced with no minor children but who was under court order to pay support to his former wife, which former wife was dependent upon that support, was entitled to the head of family exemption from garnishment of wages. In so holding, this court recognized that a man's legal duty to support his ex-wife through alimony payments is a legal duty arising out of the family relationship at law for purposes of "head of household" exemption, stating:

> "A husband has a common law duty to support his wife . . . When alimony or child support is awarded, this duty to support survives dissolution of marriage because public policy requires the doing of that which in equity and good conscious should be done . . . As this court has noted, the purpose of alimony is to prevent a dependent party from becoming a public charge or an object of charity." (emphasis added)

Judge Ferguson's distinction between an obligation owing to a wife and an obligation owing to an ex-wife with respect to the applicability of In re Moorehead's Estate, 137 A. 802 (Pa. 1927) and with respect to public policy considerations is in error. The husband's obligation to support the wife does

continue with the same cogency after a divorce, and the public policy arguments are as strong in relation to a divorced wife in Florida.

§ 61.001 of the Florida Statutes provides that this chapter shall be liberally construed and applied to promote its purposes, which are to preserve the integrity of marriage and to safeguard meaningful family relationships; to promote the amicable settlement of disputes that have arisen between parties to a marriage; and to mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage. In City of Jacksonville v. Jones, 213 So.2d 259 (Fla. 1st DCA 1968) the court stated:

> "The public policy of this state requires that judicial orders providing for payment of child support be enforceable. Otherwise, the children for whose benefit orders are rendered might well become public charges."

The public policy of this state regarding alimony is the same as the public policy of this state regarding child support.

Public policy requires that the courts promote, protect and preserve public health, safety, life, morals, property, and general welfare; inherent is the right to prevent a spouse or issue of a marriage from becoming a public charge if there is an alternate source of funds more properly responsive to the needs. It is a fundamental purpose of the judiciary to guard and enforce the state's public policy. The court may legitimately interfere

with constitutionally protected rights whenever that conduct materially and substantially impedes operation or effectiveness of the state's public policy. The objective of our legal system is to render justice between litigants upon the merits of a controversy rather than to defeat justice upon the basis of technicalities. The court should not permit form to override substance or procedural technicalities to defeat fairness and justice.

The interest to be protected in upholding a spendthrift trust provision is to secure the beneficiary against his own improvidence or incapacity for self-protection and to place the trust funds beyond a creditor's reach. The person to whom the obligation for alimony or child support is due is not a "creditor," and alimony and child support are not "improvident debts." The "modern trend to strong trust law" must give way to the compelling and overriding interests of the state's public policy in preserving the integrity and enforcement of support obligations arising out of the marital relationship. Public policy can move mountains. See Prout v. Prout, 415 So.2d 905 (Fla. 3rd DCA 1982) where the court held that the wife was not estopped to claim change of circumstances by her failure to appeal a provision of the original Final Judgment of Dissolution of Marriage. In Prout, the wife was awarded rehabilitative alimony in the amount of $100.00 per week

for a period of five (5) years after a childless marriage of twenty-five (25) years. The Final Judgment of Dissolution of Marriage did not contain a reservation of jurisdiction and provided that any change of the parties' circumstances will not be considered with respect to subsequent modification. The wife did not appeal the Final Judgment. Approximately five and one-half (5-1/2) years after the entry of the Final Judgment, the wife filed a Petition for Modification of Alimony upon a change in circumstances created by the recent onset of blindness caused by diabetes. The trial court granted the husband's Motion to Dismiss the wife's complaint for modification with prejudice, and the District Court reversed on public policy grounds, stating:

> "By the enactment of § 61.14, Florida Statutes (1979), the legislature has expressed the public policy of the state favoring a modification of alimony in accordance with the changed circumstances of the parties . . . That policy is strong enough, that even in the absence of a reservation of jurisdiction, the Circuit Court, upon application, may modify its award of alimony . . .
>
> "Because of this significant public policy and its expression in the Statute, we are compelled to reject the husband's contention that the wife is estopped to claim a change of circumstances. It is well settled law that estoppel cannot operate to displace a statute or public policy . . .

> To give effect to the husband's contentions, would be to ignore the expressed policy of this state."

Marriage is not a matter solely between the husband and the wife. The state has an overriding interest and regulates the issuance of marriage licenses, enforces the obligations of the marriage during the marriage, regulates the dissolution of the marriage and any continuing obligation surviving the dissolution of the marriage. The payment of alimony by a husband to his ex-wife is a personal duty to the ex-wife and to society generally. See Howard v. Howard, 118 So.2d 90 (Fla. 1st DCA 1960).

Scott, the Law of Trusts, and the Restatement (Second) of Trusts favor the garnishment of a spendthrift trust to satisfy alimony and child support obligations. In Scott on Trusts at page 1206 § 157, it is stated:

> "§ 157.1. Dependents of the beneficiary. Whether or not ordinary contract creditors can reach the interest of the beneficiary of a spendthrift trust, it has been held in a number of cases that his interest can be reached by his wife or children to enforce their claims against him for support . . .
>
> "In the first place, it has been held in a number of cases that a provision in the terms of the trust that the interest of the beneficiary should not be subject to the claims of creditors was not intended to apply to dependents of the beneficiary. They are not 'creditors' of the beneficiary, and the

liability of the beneficiary to support them is not a debt . . .

"Even though it is clear that the settlor intended to exclude the beneficiary's wife and children from enforcing their claims for support against his interest in the trust, it has been held in some cases that they are not thereby precluded from reaching the trust estate. This result has been reached on the ground that it is against public policy to permit the beneficiary to have the enjoyment of the income from the trust while he refuses to support his dependents whom it is his duty to support. The claim of a wife and dependent children to support is based upon the clearest grounds of public policy. They are in quite a different position from ordinary creditors who have voluntarily extended credit. It would be shocking indeed to permit a husband to receive and enjoy the whole of the income from a large trust fund and to make no provision for his needy dependents." (footnotes omitted) (emphasis added)

The Restatement (Second) of Trusts, § 157 states:

"Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached and satisfaction of an enforceable obligation against the beneficiary,

"(a) by the wife or child of the beneficiary for support, or by the wife for alimony;
"(b) for necessary services rendered to the beneficiary or necessary supplies furnished to him;
"(c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary;
"(d) by the United States or a State to satisfy a claim against the beneficiary."

In Pavlik v. Acousti Engineering Company of Florida, _____ So.2d _____ (Fla. 4th DCA 1984) (9 FLW 969, opinion filed April 25, 1984) Judge Glickstein's specially concurring opinion states:

> "I am more aware than ever . . . that all of judging is an expression of value judgments. At the appellate level, those judgments - in many 5-4 or 2-1 situations - after getting a seal of majority approval, enter into the orbit of judicial precedent.
>
> "I find it is equally true that we judges do not give enough attention to the theories of the law that appear in the restatements and in the various law reviews, but often accept precedent as gospel because it is convenient to do so. Cardozos, like unicorns, are rare animals; and we who are caught up in the trappings of our office often easily drift with the past without consideration of the 'why's.'
>
> "I have urged my students to call to the attention of the trial judges before whom they will appear the expressions of creative legal thinkers who are holding forth in the classroom and other resource centers such as the American Law Institute, to stimulate our colleagues' on the trial bench consideration of significant ideas that are floating around out there unseen or unheard as cannons going off in the desert."

In Shelley v. Shelley, 354 P.2d 282 (Or. 1960), the court's opinion quotes directly from the Restatement of Trusts stating that "The interest of the beneficiary in a spendthrift trust . . . can be reached in satisfaction of an enforceable claim against the beneficiary . . . by a wife . . . for alimony." The court continued:

> "The privilege of disposing of property is not absolute; it is hedged with various restrictions where there are policy considerations warranting the limitation . . . Not all of these restrictions

are imposed by statute. The rule against perpetuties, the rule against restraints on alienation, the refusal to recognize trusts for capricious purposes or for illegal purposes, or for any purpose contrary to public policy, are all instances of judge-made rules limiting the privilege of alienation . . . It is within the court's power to impose upon the privilege of disposing of property such restrictions as are consistent with its view of sound public policy, unless, of course, the legislature has expressed a contrary view. . .

"The question is whether a person should be entitled to enjoy the benefits of a trust and at the same time refuse to pay the obligation arising out of his marriage.

"We have no hesitation in declaring that public policy requires that the interest of the beneficiary of a trust should be subject to the claims for support of his children . . . Certainly the defendant will accept the societal postulate that parents have the obligation to support their children. If we give effect to the spendthrift provision to bar the claims for support, we have the spectacle of a man enjoying the benefits of a trust immune from claims which are justly due, while the community pays for the support of his children.

". . . We do not believe that it is sound policy to use the welfare funds of this state in support of the beneficiary's children, while he stands behind the shield of immunity created by a spendthrift trust provision. To endorse such a policy and to permit the spectacle which we have described above would be to invite disrespect for the administration of justice . . . One who wishes to dispose of his property through the device of a trust must do so subject to these considerations of policy and he cannot force the

courts to sanction his scheme of disposition if it is inimical to the interests of the state. The better reasoned cases in other jurisdictions support this conclusion. . .

"A majority of the cases . . . hold that a spendthrift provision will not bar a claim for alimony . . .

". . . The duty of the husband to support his former wife should override the restriction called for my the spendthrift provision. The same reason advanced above for requiring the support of the beneficiary's children will, in many cases, be applicable to the claim of a divorced wife; if the beneficiary's interest cannot be reached, the state may be called upon to support her. . .

"* * * In every civilized country is recognized the obligation sacred as well as lawful, of a husband to protect and provide for his family, and to sustain the claim of the husband in the case it would be to invest him with a right to be both a faithless husband and a vicious citizen. This case reaches beyond the concern of the immediate parties to it. It affects the status of the family as being the foundation of society and civilization, and hence in a very certain sense is of wide public concern." (quoting from In re Moorehead's Estate, 1927, 289 Pa. 542, 137 A. 802, 806, 52 A.L.R. 1251)

"The family is the foundation of society. The duty of a married man to support and protect his wife and children is inherent in human nature. It is a part of natural law, as well as a requirement of the law of every civilized country. It is not an ordinary indebtedness, such as a contractual obligation or a judgment for damages arising out of a tort. It is a responsibility far superior to that of paying one's debts, important as the latter obligation is. No part of a man's property or income should be exempt from meeting this liability,

for he is under at least as great a duty to provide shelter, clothing, and food for his immediate family as he is to furnish them for his own person. The law should not regard with complacency any man who repudiates or ignores this obligation, which is instinctive in mankind, and should not permit him to flout it with impunity." (quoting from Seidenberg v. Seidenberg, D.C. 1954, 126 F. Supp. 19, 23 aff'd 1955, 96 U.S. App. D.C. 245, 225 F.2d 545)

"The defendant bank argues that if a policy restricting the permissible scope of spendthrift trusts is desirable, that policy should be declared by the legislature and not by this court. The duty of making a choice of rules in accordance with public interest is shared by both the courts and the legislature. There is nothing about the problem of choosing the policy in this case which makes it any different than most of the cases which come before us. Since the legislature has not spoken, we are free to declare the rule which we think will serve the best interests of the public. This we have done."

CONCLUSION

True concept and purpose of a spendthrift provision in a trust is to protect the beneficiary from himself and his own improvidence. That purpose should not be perverted by the courts to enable the beneficiary to avoid the highest legal obligation known to man, the obligation to provide for his family, i.e. the obligation to pay alimony and child support. Overriding public policy considerations mandate that the undistributed income and principal in the hands of a trustee under the terms of a trust including a purported spendthrift provision be subject to garnishment for alimony and child support.

Respectfully submitted,

THE AMERICAN ACADEMY OF
MATRIMONIAL LAWYERS,
FLORIDA CHAPTER, as Amicus Curiae

By MILLER AND SCHWARTZ, P.A.
4040 Sheridan Street
Post Office Box 7259
Hollywood, Florida 33021
(305) 962-2000
Attorneys for American Academy
of Matrimonial Lawyers,
Florida Chapter

A. MATTHEW MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U. S. Mail to LARRY H. SPALDING, ESQUIRE, 6624 Gateway Avenue, Sarasota, Flroida 33581; EUGENE O. GEORGE, ESQUIRE, 22 South Tuttle Avenue, Suite 3, Sarasota, Florida 33577; ARTHUR D. GINSBURG, ESQUIRE, 1844 Main Street, Sarasota, Florida 33577; WILLIAM L. HYDE, ESQUIRE, Post Office Box 1794, Tallahassee, Florida 32302, and GEORGE R. MC LAIN, Post Office Box 2999, Sarasota, Florida 33578, this 5th day of June, 1984.

A. MATTHEW MILLER