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IN THE SUPREME COURT

OF FLORIDA

BETTY J. GILBERT,

Appellee,

v. CASE NO. 65,205

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

Appellant.

BRIEF OF AMICUS CURIAE

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

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PREFACE

For purposes of this brief, Southeast Bank, N.A., shall be referred to as the "Southeast Bank." To eliminate any possible confusion between Betty J. Gilbert and the case bearing her name, Mrs. Gilbert shall be referred to as "Respondent."

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the Florida Bankers Association, accepts the statement of the case and the statement of the facts offered by the Appellant, Southeast Bank, N.A.

ISSUE

Whether the undistributed income and principal of a spendthrift trust should be subject to garnishment by an ex-spouse for alimony arrearages.

THE UNDISTRIBUTED INCOME AND PRINCIPAL OF A SPENDTHRIFT TRUST SHOULD NOT BE SUBJECT TO GARNISHMENT BY AN EX-SPOUSE FOR ALIMONY ARREARAGES.

It is not the intent of this brief to reiterate the rather extensive case law on the issue of whether the assets of a spendthrift trust may be garnished for alimony arrearages. That task has been more than adequately accomplished by Judge Ferguson in the majority opinion in White v. Bacardi, 446 So.2d 150 (Fla. 3d DCA 1984), by Judge Lehan in his special concurrence and dissent to Gilbert v. Gilbert, 447 So.2d 299 (Fla. 2d DCA 1984), and by Southeast Bank in its initial brief to the Court. The determinative inquiry of this brief shall be whether the courts' interests in enforcing a dissolution judgment are sufficient to outweigh considerations of well-established Florida case law, of overriding the clear intent of a settlor regarding the ultimate disposition of his or her property, and of the courts' infringing upon public policy issues best left to the legislature, not to mention the possibly profound economic consequences on Florida's trust industry should the holding of Gilbert v. Gilbert be approved and that of White v. Bacardi be rejected. We believe that due consideration of all the factors here involved will lead this Court to adopt the holding of White v. Bacardi.

As has been duly observed, the courts of this state have long recognized as viable and enforceable spendthrift provisions in a trust. See e.g. Waterbury v. Munn, 159 Fla. 754, 32 So.2d 603 (1947). This recognition is primarily founded upon the principle

cujus est dare ejus est disponere: "whose it is to give, his it is to dispose." This doctrine or principle has a particular application to the spendthrift trust situation:

> It allows the donor [of the trust] to condition his bounty as suits himself so long as he violates no law in so doing. When a trust of this kind has been created, the law holds that the donor has an individual right of property in the execution of the trust; and to deprive him of it would be a fraud on his generosity.

In Re Morgan's Estate, 223 Pa. 228, 230, 72 A. 498, 499 (1909).

Respondents would nevertheless suggest, and the District Court of Appeal, Second District, agreed, that this principle is or should be secondary to the public policy against so restraining the alienation of property where an ex-spouse's alimony rights are involved. While there may be respectable foreign authority for this proposition, it is not supported by the case or statutory law in Florida, Respondent's and the Second District's arguments notwithstanding.

As noted by the Second District, the cardinal rule of construing a trust, any trust, is to determine the settlor's intention and to give effect to his or her wishes. Gilbert, 447 So.2d at 301, citing Cartinhour v. Houser, 66 So.2d 686 (Fla. 1953). But, that Court says, there is an "inclination," or tendency in Florida decisional law to override that principle concerning alimony awards. 447 So.2d at 302. Both cases it cites for this "inclination," however, are inapposite.

City of Miami v. Spurrier, 320 So.2d 397 (Fla. 3d DCA 1975), cert. denied 334 So.2d 604 (Fla. 1976), merely holds that one's

pension may be reached by the ex-spouse to satisfy court-ordered alimony and child support claims. That, however, involves legal process against one's own property (i.e., the pension), whereas the assets of a spendthrift trust were originally that of a third person, the settlor, who has or had no legal obligation to the ex-spouse. White v. Bacardi, 446 So.2d at 152, fn.2. The legal title to the spendthrift trust is then transferred to the trustee for the beneficial use of the beneficiary, subject to the settlor's expressed limitations on use. Id.

Page v. Page, 371 So.2d 543 (Fla. 3d DCA 1979), holds only that the assets of a spendthrift trust should be considered by the trial court in determining child support. Particular note must be made that this decision does not authorize invasion of the trust, just consideration of it in determining an equitable level of child support. More to the point, the provisions of that instrument were so broad that the minor child would be eligible under the broad provisions of the trust, 371 So.2d at 544, whereas the provisions of Emily Gilbert's trust make it all too clear that Respondent was not so intended to be a beneficiary. Obviously, spendthrift trusts are dependent upon their own peculiar provisions, so one is hard pressed indeed to extrapolate some precedential value from Page v. Page. In relying on these two cases, then, the Second District has contrary to Judge Lehan's warning 447 So.2d at 304, indulged in reasoning indicative of the result sought to be achieved rather than upon the law as it stands.

To the extent there is any Florida case law bearing upon this particular consideration, it is supportive of White v. Bacardi.

As previously noted, the Florida courts have long recognized as valid and enforceable spendthrift trusts. Waterbury v. Munn, supra. As also noted, the primary rule in construing a trust is to determine the settlors intentions and give effect to them, Cartinhour v. Houser, supra, and here Emily Gilbert's intentions are clear and unequivocal:

> Spendthrift Provision: the interest of each beneficiary in the income or principal of each trust hereunder shall be free from the control or interference of any creditor of a beneficiary or of any spouse of a married beneficiary and shall not be subject to attachment or susceptible of anticipation or alienation.

The conclusion is inescapable that since Emily Gilbert intended to exclude the spouse of a benficiary, so did she intend to exclude an ex-spouse from any interest in the trust. See Gilbert v. Gilbert, 447 So.2d at 304, fn.1.

Further, one cannot overlook the somewhat parallel situation involving a "special equity" in property at dispute in marriage dissolution proceedings. It is well-settled that where all the consideration for property held as tenants by the entireties has been supplied by one spouse from a source clearly unconnected with the marital relationship, such as an inheritance, that property should be awarded to that spouse in the absence of evidence that a gift was intended to the other. E.g. Ball v. Ball, 335 So.2d 5 (Fla. 1976). Similarly, we have here no evidence of intent to make a gift to Respondent; quite the contrary. More importantly, a tenancy by the entireties necessarily assumes a joint-ownership

of the disputed property, and still this Court concluded the contributing spouse should have sole and undisputed ownership upon divorce. Here, Respondent has never had anything approaching an ownership interest in the trust assets or income.

In another analogous situation, the Florida courts have long protected property owners relying upon existing zoning laws from requirements imposed when those laws are amended. See e.g., Fortunato v. City of Coral Gables, 47 So.2d 321 (Fla. 1950). If the courts have been and continue to be so solicitous to the vested rights of real property owners, so too should they not casually abrogate the legitimate and justified expectations of settlors regarding the ultimate disposition of their, and no one else's, property.

The very fact that the Florida Legislature in its comprehensive enactments regarding trust law, chapters 737 and 738, Florida Statutes (1983), has not seen fit to address this particular issue also speaks worlds. Not only does it undermine Respondent's implicit contention that the issue is so compelling and topical that it deserves immediate judicial redress. It also affirmatively implies that in this reasonably debateable area regarding a public policy issue ordinarily left to the Legislature, our elected representatives are well content with the status quo. Inaction, after all, does not necessarily mean indifference.

Moreover, to the extent the Legislature has touched upon the general subject area, its actions belie Respondent's claims. For example, it is a third degree felony for a man to desert and willfully withhold from his wife the means of support. §856.04(1),

Fla. Stat. (1983). However, if the man has provided support for his issue, if there are any, then he is exempted from this penalty should there be at the time of desertion or withholding such cause as is recognized as grounds for divorce by this state. Id. One might therefore safely infer from this criminal statute the Legislature has placed special significance on the support of one's children and deserted, not divorced, spouses, perhaps implying a legislative intent to breach a spendthrift trust for and on behalf of such persons. Compare In Re Moorehead's Estate, 289 Pa.542, 137 A.802 (1927) (finding the deserted wife's status alone sufficiently compelling to authorize invasion of trust). However, one can surely not infer from section 856.04(1) a legislative, and hence societal, judgment or finding that divorced spouses are so entitled to protection under the criminal laws of this state that those possible criminal sanctions override or displace the otherwise legitimate intentions and expectations of the settlor of the trust. Thus, and contrary to this perceived "inclination" in Florida law to so permit the invasion of such a trust, Florida law is if anything supportive of the conclusion that spendthrift trusts of the sort here involved may not be garnished to satisfy alimony payments.

Second, should this court approve the rationale of Gilbert v. Gilbert, especially where the spendthrift provision is as clear and unambiguous as here presented, it would be giving its imprimatur to a result which Emily Gilbert, or any other similarly situated settlor, expressly directed should not occur. Gilbert v. Gilbert, 447 So.2d at 304. This would fly square in the face of

the rule that ordinarily the consent of the settlor is necessary to terminate or extinguish the spendthrift terms without ending the trust itself. See Liberty Trust Company v. Weber, 200 Md. 491, 522-523, 90 A.2d 194, 208 (1952). It therefore follows that where the settlor dies without otherwise expressly delegating that power to another, the spendthrift trust cannot be terminated. A Rationale for the Spendthrift Trust, 64 Colum. L. Rev. 1324, 1334 (1964). Without any claim to legal or equitable title in the trust's assets, however, Respondent would have the Court abrogate unto itself that power and thereby not only effectively terminate the trust but defeat "the justified expectations of other settlors who have irrevocably committed themselves under prior Florida law to (such) provisions." Gilbert v. Gilbert, 447 So.2d at 306.

Such a result, which may on first glimpse contain some elements of fairness, becomes all the less just and equitable when one considers that this drastic remedy of seizure by execution on the income of a spendthrift trust, contrary to the express wishes of the settlor, is by no means the only way in which to accomplish the desired result. As noted by one court, "[t]here are methods of reaching the beneficiary directly." San Diego Trust & Savings Bank v. Heustis, 121 Cal. App. 675, 10 P.2d 158, 165 (Dist. Ct. App. 1932). For example, when each installment of income is paid to the beneficiary, it becomes his unqualified property and can be reached by any of his creditors. Note, Trust: Limitations on the Immunities of Spendthrift Trust: Support and Alimony Claims, 44 Calif. Law Rev. 615 (1956); RESTATEMENT (SECOND), TRUSTS §152, comment j. (1959).

Third, whether the previously recognized public policy of enforcing such trust provisions should give way to a newly perceived public policy placing primary emphasis on the duty to support a former spouse is by no means susceptible to a clear and convenient answer. As one court has succinctly stated: "It is easy to see that the courts are hopelessly divided on the issue." In Re Trust Created by Moulton, 233 Minn. 286, 46 N.W. 2d 667, 675 (1951). The decisions, both pro and con, have usually been based in terms of a conflict between the rights of the settlor and a duty, framed by societal mores, to support one's ex-spouse and/or dependents. But, that is just the beginning of the divergence of opinion. For example, some courts find a husband's duty to support a deserted wife sufficiently compelling to justify invasion of the trust, In re Moorehead's Estate, supra, while others purport to extend that privilege to the divorced spouse as well. See, e.g., Safe Deposit & Trust Company of Baltimore v. Robertson, 192 Md. 653, 65 A.2d 292 (1949), and other cases cited in White v. Bacardi, 446 So.2d at 153-154. There have been advanced varying reasons for so permitting an invasion of the trust, ranging from the fiction that the settlor would not have intended to allow the beneficiary to deprive his ex-spouse of necessary care and support, Dillon v. Dillon, 244 Wis. 122 11 N.W.2d 628 (1945), that the legal unity of husband and wife somehow transcends discrimination authorized by the spendthrift provisions, Keller v. Keller, 284 Ill. App. 198, 1 N.E.2d 773 (1936), to the notion that ex-spouses and dependents cannot be considered mere creditors. England v. England, 223 Ill. App. 549 (1922). Judge Lehan, for

his part, finds particularly compelling the notion that it would shock the conscience to allow the beneficiary to enjoy the fruits of the trust while avoiding his judicially decreed obligation to support his ex-spouse. Gilbert v. Gilbert, 447 So.2d at 305.

On the other hand, some courts have held that the wife is in the same stead as any creditor, Erickson v. Erickson, 197 Minn. 71, 267 N.W. 426 (1936), or that as the legal "unity" dissipates on divorce, so too does the husband's duty to support his ex-wife not continue with the same cogency. Garretson v. Garretson, 306 A.2d 737 (Del. 1973). This multiplicity of rationales, both pro and con, reveals all too well that there is no consensus of opinion on this subject. As that is evidently so, the courts of this state should not take it upon themselves to declare a public policy that is best suited for the legislative processes. See, e.g., Hamilton v. State, 366 So.2d 8 (Fla. 1978); Davis v. Strine, 141 Fla. 23, 191 So.451 (1939). Indeed, the mere fact that two of this state's district courts of appeal have reached differing results on the same issue amply illustrates that the "public policy" has by no means been settled even in this state. Hence, this court should leave the matter to the constitutionally delegated arbiter of the public policy of Florida, the Legislature, for its action and resolution of the competing interests at stake. See Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L. Ed. 413 (1932) (where there is disagreement as to which of two conflicting public policies ought to prevail, the legislature is the final judge), cited approvingly in White v. Bacardi, 446 So.2d at 156.

Finally, before the Court rules on this matter it must well consider the possibly profound economic consequences of its decision, as trusts are an integral and important part of the texture of the banking community. This is particularly so in Florida because of its large population of senior citizens, the persons most likely to set up such trusts for the benefit of others.

One recognized authority in the field of trust law has noted: "[S]pendthrift trusts are in practice the rule and not the exception in the case of trusts which are drawn with professional assistance." G. G. Bogert & G. T. Bogert, THE LAW OF TRUSTS AND TRUSTEES §225 (2d Ed. 1965). Indeed, another observer has gone so far as to assert "there is reason to believe that in America more than half of all trust instruments contain spendthrift trust provisions." W. Wicker, Spendthrift Trusts, 10 Gonzaga L. Rev. 1, 1 (1974). Since that is the case, we are not dealing with some arcane legal issue of little or no consequence. Rather, an adverse decision could, in effect, rewrite many trust instruments in this state, with untoward consequences. The administering bank (or other trustee), which occupies a fiduciary relationship to the beneficiary and is thus charged with protecting the trust corpus and income, White v. Bacardi, 446 So.2d at 155, fn. 5, will find increased exposure to lawsuits for that very administration. More importantly, a decision upholding Gilbert v. Gilbert will in all likelihood cause those intending to establish a trust, and the attorneys giving them advice, to question whether Florida would be the most appropriate site for the trust. It should not be unexpected that an attorney faced with such a problem might well con-

clude that his or her client's best interests would be better served by establishing the trust in another state, and there are many, the law for which protects the spendthrift trust from such onslaughts. This would in turn have negative economic consequences for the state, as the assets comprising such trusts, with all their attendant economic benefits, would also leave the state. Admittedly, one could conclude that these economic costs are outweighed by other factors. But the courts are particularly ill-suited to render judgment on such issues of economic policy and cost/benefit analysis. Those questions are best suited for the legislative sphere, as has been previously argued.

In summation, then, and for the reasons set forth in this and Southeast Bank's briefs, this Court should, as the Third District did, align itself "with what appears to be both the modern trend and the best reasoned view" and "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." 446 So.2d at 156. Since Respondent has not done and cannot do so, her argument must fail and Gilbert v. Gilbert should be reversed.

REQUEST FOR RELIEF

Based on the foregoing reasons and authorities, this Court should adopt as the law of Florida the holding contained in White v. Bacardi, supra, and reject that enunciated in Gilbert v. Gilbert, supra.

Respectfully submitted,

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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, Florida 33581; Eugene O. George, Esquire, 22 South Tuttle Avenue, Suite 3, Sarasota, Florida 33577; Arthur D. Ginsburg, Esquire, 1844 Main Street, Sarasota, Florida 33577; A. Matthew Miller, Esquire, 4040 Sheridan Street, Hollywood, Florida 33021; and George R. McLain, Post Office Box 2999, Sarasota, Florida 33578, this 31st day of May, 1984.

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