IN THE SUPREME COURT

OF FLORIDA

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

Appellant,

v.

BETTY J. GILBERT,

Appellee.

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

BRIEF OF APPELLEE

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

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STATEMENT OF CASE

This case results from Husband Fenton L. Gilbert's failure to comply with the Final Judgment of Dissolution of Marriage entered April 24, 1981 (R-31) and affirmed on appeal by the Second District Court of Appeal Case No: 81-1065 (R-19). The Court also granted the Wife's Motion for Attorney's Fees because of the disparity in the parties' needs and ability to pay (R-34).

The Final Judgment of Dissolution of Marriage included a paragraph ordering the Husband to pay "all reasonable and necessary medical expenses of the Wife which are attributable to her multiple sclerosis" which she had contracted before the separation of the parties. After the Husband lost the original appeal he stopped paying medical expenses without the benefit of Court order and then stopped paying alimony and refused to pay Wife's attorney's fees and suit money (R-70).

The Wife obtained a judgment for alimony arrearage on October 30, 1981 (R-41). On the 3rd day of November, 1981, a Motion for Garnishment was filed by the Wife, stating that the Southeast Bank, N.A., formerly known as Southeast Bank Trust Company, was indebted to the Respondent in an undetermined amount under the Fenton L. Gilbert Agency account (R-39). The motion set forth that $3,500 was due the Wife pursuant to the aforementioned Judgment dated October 30, 1981, and that there was also due the Wife's attorneys the sum of $24,750 and $300.00. A similar Motion for Garnishment was also filed against Merrill Lynch Pierce Fenner & Smith, Inc., in Sarasota (R-37). A Writ of Garnishment

was entered for each of the garnishees on the 3rd day of November, 1981 (R-42 and R-44). In addition, on the 6th day of November, 1981, the Wife filed a Petition for Restraining Orders and other relief (R-46), setting forth that the Husband had:

a. Transferred without consideration to his girlfriend, Claire D. Carey, the Whispering Sands Condominium free and clear.

b. Transferred without consideration to Omega Industries, Inc., a corporation controlled by Ms. Carey (R-50), which was not registered in any way with the Secretary of State of the State of Florida, his one-half interest in Lot 1, Siesta Cove.

c. Withdrawn all funds from the Fenton L. Gilbert Agency account (R-58).

d. Withdrawn all assets from the estate of Augusta Jean Gilbert as personal representative of the estate except $190,000, said $190,000 being in the process of being disbursed to said Fenton L. Gilbert at his direction as personal representative as of the time of the preparation of the Petition.

A Restraining Order was entered by the Court on the 6th day of November, 1981 (R-51), granting to the Husband an opportunity to appear before the Court on the 12th day of November, 1981, to show cause, if there be any, why the Restraining Order should not remain in full force and effect until further order of this Court.

The Garnishee, Southeast Bank, filed an Answer on the 9th day of November, 1981 (R-57), stating that it was indebted to the Defendant in the sum of

$318.09. The Wife then filed a Notice of Lis Pendens (R-53) on the sixth day of November, 1981, forwarding copies of same to the Southeast Bank, Omega Industries, Inc., Claire D. Carey and Fenton L. Gilbert, individually, and Fenton L. Gilbert as personal representative of the estate of Augusta Jean Gilbert.

The Southeast Bank filed an Answer to the Petition for Restraining Order filed by the Wife (R-58), stating that the Husband had previously had an agency account with a balance in excess of $100,000.00 prior to July 2, 1981, and further admitted that Fenton L. Gilbert was then acting as personal representative of the estate of Augusta Jean Gilbert which had a value in excess of $600,000.00. In addition, it was admitted that the Husband had withdrawn all the monies from the Fenton L. Gilbert Agency account.

A further hearing was had on the 24th day of November, 1981, at which time the Husband was represented as personal representative of the estate of Augusta Jean Gilbert by the law firm of Lewis & Spalding, the Husband having failed to appear personally or by further representation. The Court at that time continued the Restraining Order signed by the Court on November 6, 1981, until such time as bond or security was posted for the payment of future alimony and the Judgment for suit money and fees previously entered was paid.

An additional Motion for Garnishment was filed by the Wife on the first day of February, 1982 (R-63), and a Writ of Garnishment was issued to Southeast Bank on the same date. An Order was entered by the Court on the first day of February, 1982 (R-61), granting judgment in favor of the Wife and ordering that the Southeast Bank was released from the injunction enjoining them from releasing funds to the extent that said funds could be released on the alimony,

attorney's fee, and suit money and medical expenses owed. The Garnishee answered that it held $50,000.00 for the Defendant and knew of no other person indebted to or who may have had in his possession any property of the Defendant on the 9th day of February, 1982 (R-65).

The Wife filed a Motion for Continuing Writ of Garnishment, which was granted by the Court on the 18th day of February 1982 (R-66). Southeast Bank then filed an Amended Answer of the Garnishee stating that they had intangible personal property of the Husband, Fenton L. Gilbert, in the amount of $54,725.49, but that his interest as beneficiary of the Trust was not subject to garnishment (R-10).

The Wife filed an additional Motion for Contempt on the 25th day of February, 1982 (R-70), and a previously-scheduled deposition of Defendant, Febton L. Gilbert, was necessarily continued because of his failure to appear and his filing of his Motion for Protective Order on February 26, 1982, wherein he claimed Fifth Amendment rights (R-72). On the first day of March, 1982, the Southeast Bank filed its Motion to Set Aside Judgment, Amend Answer, and Dissolve Garnishment (R-12).

The Wife's Motion for Contempt was heard, and the Husband was found to be in contempt and was sentenced to 5 1/2 months in jail. The Husband would be allowed to purge himself of his contempt by paying the arrearage due (R-73).

The Southeast Bank on the 4th day of March, 1982, filed an Answer to Continuing Writ of Garnishment in which it set forth the amounts of money it was holding for Fenton L. Gilbert, to-wit $54,717.49, but stated that it was without knowledge as to whether or not it was indebted to him as a result of a spendthrift provision in the Emily H. Gilbert Trust. The defense raised was

that the interest of a beneficiary of the trust was not subject to garnishment.

An additional judgment for attorney's fees for representation of the Wife on Appeal before the Second District Appellate Court in Case No. 81-1065 was entered on the 17th day of March, 1982 (R-75). The Wife filed another Motion for Contempt against the Husband for non-payment of alimony and attorney's fees, and an additional Order of Contempt and Sentencing was entered by the Court on the 7th day of July, 1982 (R-78). Wife filed a Petition for a Writ of Ne Exeat on the 21st day of July, 1982, and the Writ was issued on the same date (R-80 and R-82).

A Notice of Hearing was filed on the seventh day of April, 1983, setting the matter for an establishment of additional alimony arrearage and the entry of a Judgment in Garnishment (R-83). An affidavit was filed setting forth the Husband's total alimony arrearage in the amount of $44,500.00 as of the 8th day of April, 1983. An Order denying the spendthrift claims defense and a Judgment granting Garnishment was entered on April 11, 1983 (R-22 and R-24).

The Southeast Bank then filed a Motion for Stay Pending Review on the 19th day of April, 1983 (R-17). An Order on that Motion was entered on the 23rd day of May, 1983 (R-21) granting the Wife periodic alimony pending appeal, to be paid from the trust, which has been paid. It is in reference to the Judgment in Garnishment, the Order on the Validity of Spendthrift Provision and Garnishment and the Order on Motion for Stay Pending Review that the Garnishee, Southeast Bank, appealed to the Second District Court of Appeals, and the Husband filed a Brief as an Appellee. The lower court was affirmed. The Second District Court of Appeals on rehearing certified the case to the Supreme Court due to conflict with White v. Bacardi, 446 So.2d 150 (Fla. App. 3rd DCA 1984) (A141).

STATEMENT OF THE FACTS

The Statement of the Facts has to some extent been included in the Statement of the Case.

The parties' lengthy marriage was dissolved by Final Judgment of Dissolution on the 22nd day of April, 1981. The Wife had been diagnosed as having multiple sclerosis before the separation of the parties. In the Final Judgment of Dissolution, the Wife was granted permanent periodic alimony of $2,500.00 per month, lump sum alimony in the amount of $35,000.00, payable $3,500.00 every six months for five years, together with transfer of the Husband's ownership in the house and automobile and some personal property. In addition, the Husband was ordered to be responsible for all reasonable and necessary medical expenses of the Wife which were attributable to her multiple sclerosis (R-31).

After the Husband's appeal was denied, he commenced a course of conduct to try and defeat and avoid the effect of the Final Judgment. The Wife's multiple sclerosis became more severe, and her medical bills increased. The Husband complained about the amount of the medical bills and refused to pay some of them. He then, as is set forth in the Statement of the Case, began fraudulently conveying property to his girlfriend, withdrawing funds from his Agency account, from the estate for which he was personal representative, and from his Merrill Lynch account. The only reason he was unable to withdraw the $50,000.00 principal plus interest distribution due him on December 10 of each year from Southeast Bank is that an injunction was entered four days previous to that

distribution in 1981 and has been in effect since, so that there is presently distributable to him $100,000.00 plus interest and income. The Wife in a desperate attempt to preserve the remaining assets available in the State of Florida filed numerous pleadings and motions requesting injunctions, contempt, ne exeat bonds, and writs of garnishment. Many of these were granted, and the Husband has been held in contempt on numerous occasions and has not paid any funds voluntarily to the Wife for alimony, attorney's fees, suit money or medical expenses pursuant to the Final Judgment since December of 1981. He is secreting the $100,000.00 he took from his own account, the money from his Merrill Lynch Account, and the total of his half interest in the estate of Augusta Jean Gilbert, the value of that estate having been in excess of $700,000.00 at one time. There remains in that estate $190,000 which is due the Husband's sister as a beneficiary. The Husband has been sentenced for contempt to 5 1/2 months in the Sarasota County Jail on three occasions. A Writ of Ne Exeat had been issued against him, which was not served because the Husband left the country to reside in England.

The Court upon the request of the Wife has issued one Writ of Garnishment against Merrill Lynch and two Writs of Garnishment against the Southeast Bank. In addition, a Continuing Writ of Garnishment was issued. The Lower Court entered an Order April 11, 1983, that the portion of the Revocable Trust Agreement with Southeast Bank as Trustee, entitled "Spendthrift Provision", was not a bar to enforcement proceedings initiated by Petitioner for non-payment of arrearage, alimony, medical expenses, and attorney's fees and suit money. In the same Order, the previous Injunction ordering the Garnishee not to disburse funds it held ready for disbursement to Fenton L. Gilbert was left in force

(R-22). A separate Judgment in Garnishment was entered, granting the garnishment, together with a Continuing Writ of Garnishment (R-67). That Judgment and the Writ were appealed to the Second District Court of Appeals. The Lower Court was affirmed.

POINTS ON APPEAL

1. UNDISTRIBUTED INCOME AND PRINCIPAL IN THE HANDS OF A TRUSTEE UNDER THE TERMS OF A TRUST INCLUDING A SPENDTHRIFT PROVISION IS SUBJECT TO GARNISHMENT FOR ALIMONY ARREARAGE OF A FORMER WIFE.

2. IF THE COURT ANSWERS THE FIRST POINT ON APPEAL IN THE NEGATIVE THE LOWER COURT'S ORDERS AND THE SECOND DISTRICT COURT OF APPEAL'S OPINION SHOULD BE UPHELD ON OTHER GROUNDS.

A R G U M E N T

POINT ONE

UNDISTRIBUTED INCOME AND PRINCIPAL IN THE HANDS OF A TRUSTEE UNDER THE TERMS OF A TRUST INCLUDING A SPENDTHRIFT PROVISION IS SUBJECT TO GARNISHMENT FOR ALIMONY ARREARAGE OF A FORMER WIFE.

Public policy is the reason why most states allow the invastion of spendthrift trusts to satisfy the payment of alimony and child support.

It is clear that the public policy of the State of Florida is in favor of enforcing the Court's orders for the payment of alimony, child support and suit money against all sources available including the principal and income payable to the Husband from a spendthrift trust.

The 1984 Legislature has passed and the Governor has signed into law, CS/HB 114 & 158, Second Engrossed, what has been commonly referred to as the Child Support And Alimony Enforcement Act. (A149). In addition, the Legislature has passed SB 166 (A165) now enacted into law which expands FS 61.12 to allow for the garnishment and attachment of money due any person for any reason, to enforce the orders or judgments of this state for payment of alimony, child support, attorneys fees or suit money. The passage of these Bills clearly demonstrates that it is the public policy of this State to enforce the orders and judgments of this Court for the payment of alimony and child support from any available source without exception.

The Child Support And Alimony Enforcement Act provides that its provisions for income deduction shall be in addition to, and not in lieu of, any and all existing civil or criminal remedies to enforce alimony or child support obligations, (F.S. 61.181 (4). One of the remedies previously in existance beside F.S. 61.12 as amended by SB 166 is F.S. 61.11 which states as follows:

> 61.11 Effect of judgment of alimony.--A judgment of alimony granted under s. 61.08 or s. 61.09 releases the party receiving the alimony from the control of the other party, and the party receiving the alimony may use his alimony and acquire, use, and dispose of other property uncontrolled by the other party. When either party is about to remove himself or his property out of the state, or fraudulently convey or conceal it, the court may award a ne exeat or injunction against him or his property and make such orders as will secure alimony to the party who should receive it. (emphasis ours).

The Second District Court of Appeal in its opinion in this case (A166) stated that the lower court could use 61.11 for the purpose of entering a Continuing Writ of Garnshment to enforce orders for alimony and child support. In addition, it is the contention of the Appellee that 61.11 and 61.12 did allow the action taken by the Court in invading the spendthrift trust even before the passage of the new Child Support And Alimony Enforcement Act. The passage of the new act, which is similar to pending federal legislation, indicates the state and the nation's concern with an epidemic of derelict husbands and fathers who have refused in the past to obey the orders and judgments of the courts of this state and nation for the support of ex-spouses and children. The Supreme Court Commission On Matrimonial Law has singled out the collection and enforcement of payment of child support and alimony as a significant area of concern

and recommends a major strengthening of procedures for enforcement. See Family Law Commentator Vol. VIII, No.2, May, 1983, pg. 23. (A-139). In the case of City of Jacksonville v. Jones, 213 So. 2d 259 (Fla. 1st DCA 1968), the court said,

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

The same reasoning should apply to ex-wives and alimony due them or to orders with combined amounts for alimony and child support.

On the question of whether or not the Wife is a creditor, see City of Miami v. Spurrier, 320 So. 2d 397 (Fla. 3d DCA 1975), a case in which garnishment was attempted against a city employee where the city ordinance exempted the funds in the pension from garnishment. The Court stated as follows:

> "[W]e adopt the reasoning of those cases from other jurisdictions which hold that, even in light of an exemption statute or ordinance, such as here, pension benefits payable to a divorced spouse may be reached by garnishment to satisfy an award of alimony, child support and maintenance."

The Court goes on further to say that

> "[i]n these cases, many of the courts seem to find that a true debtor-creditor relationship does not exist whereby the exemption would relieve the person exempt from the pressure of claims hostile not only to his own essential needs but also to those of his dependents. We agree, and feel that the purpose of the exemption statute or ordinance is served when the fund is preserved for the use of the pensioner and those legally dependent on him or her for support and maintenance."

Certainly it could not be the law that an individual could establish an exemption which is more effective than a city ordinance.

Other Florida cases stand for the clear proposition that alimony owed to a Wife is not merely a debt of the Husband but is more of a personal duty owed not

only to the divorced Wife but also to society generally. See Howard v. Howard, 118 So. 2d 90 (Fla. 1st DCA 1960). The Howard case determined that a Wife's claim for alimony was the only claim that could constitutionally be effective against a Husband's interest in a tenancy by the entireties with the Wife who was making the claim.

An exemption often used by debtors to defeat true creditors in Florida is Homestead Exemption, which bars homestead property from the claims of creditors. This exemption, however, was held not to exclude a Husband's ownership in a homestead house from the Wife's claim for support for herself and her children. In the case of Anderson v. Anderson, 44 So. 2d 652 (Fla. 1950), the Supreme Court stated that the purpose of the exemption statute is to protect not only the Husband but also his family from destitution and becoming a public charge, and the exemption statute will not be construed to enable a Husband to claim its benefits against the very persons to whom he owes the obligation of support and maintenance. To construe the statute otherwise would at least, in part, defeat its avowed object. The Courts generally have held that statutes exempting property from legal process in the enforcement of a claim for a debt are not applicable against a claim for alimony or support, since such a claim is not a debt, and an award of alimony does not create a debtor/creditor relationship between the former spouses. 26 Fla. Jur. 2d §768.

The Court in Page v. Page, 371, So. 2d 543 (Fla 3d DCA 1979), stated that the assets and income from a spendthrift trust must be considered in determining the amount of child support to be paid from the beneficiary. Surely the Court would allow enforcement against the same trust assets or income, or its order would be unenforceable if the only funds available were trust funds.

The great majorty of decisions and writings on the question of whether or not an ex-Wife can obtain support for herself and/or her children from her former Husband's interest in a spendthrift trust, absent a contrary statute, are in favor of the ex-Wife.

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 intrest 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 benficiary 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 ours)

In Safe Deposit & Trust Co. of Baltimore v. Robertson, 65 A.2d 292 (Md. 1949) as cited in 10 Maryland Law Review 359 (1949), it was stated:

> The Court of Appeals in the instant opinion, in holding that the spendthrift beneficiary's income may be reached by an alimony

claimant...said in part: "In such situations the wife is a favored suitor, and her claim is based upon the strongest grounds of public policy. The fact that, as against a resident husband, an award may be enforced by imprisonment for contempt, is no argument against the exercise of a less drastic remedy in a proper case. In the case at bar it is the only remedy available....We rest our decision upon grounds of public policy, not upon any interpretation of the instruments in question, which are not broad enough to authorize payments by the trustee for the benefit of a divorced wife."

Leading text writers an the Restatement of Trusts are in complete accord with this position. (footnotes omitted)

In 44 California Law Review 615 at page 616, it is stated:

"The Seidenberg case, in allowing the wife to prevail against her husband's interest, adopted the rule suggested by section 157 of the Restatement of Trusts: Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary, (a) by the wife or child of the beneficiary for support, or by the wife for alimony;

....

Most of the writers in the field similarly advocate this rule." (footnotes omitted)

Further, other claims have been held not be excluded from attacking a spendthrift trust. In the same California Law Review article, it is stated:

"The spendthrift trust is by no means completely immune from attack. It has been held that an attorney who brought suit on behalf of the beneficiary to preserve the latter's interest in the trust was entitled to an attorney's lien for his services. A state or subdivision furnishing support to the beneficiary is entitled to reimbursement from the trust. A federal tax lien may fasten on the cestui's interest. Property held by a trustee for the benefit of an alien enemy is subject to seizure by the Alien Property Custodian. A physician may recover the reasonable value of his services rendered to the beneficiay, as may others who furnish necessaries of life to the beneficiary with the knowledge and tacit consent of the trustee. Lastly, in Louisiana, by statute, a tort claimant may reach the interest of the spendthrift beneficiary to satisfy his judgment.

The wife and minor children of the beneficiary should similarly enjoy such prferred status.

> The marriage contract once entered into, becomes a relation, rather than a contract, and invests each party with a status toward the other, and society at large, involving duties and responsibilities which are no longer matter for private regulation but concern the commonwealth. [Coy v. Humphreys, 142, Mo.App. 92, 96, 125 S.W. 877, 879 (1910)] The wife is not a mere creditor, and the husband's duty to provide for his family rests on the foundation of public policy."
> (footnotes omitted)

That since the presentation of this case to the Second District Court of Appeal, the Appellee has discovered that California now falls within those states that provides for the invasion of spendthrift trusts for support. Contrary to the brief of the Appellant bank, Southeast Bank, N.A., San Francisco and Los Angeles no longer fall within the financial centers which would uphold the spendthrift trust provision against a child support or alimony arrearage claim. In fact, of the financial centers listed by the Appellant, three (3) of them are in Ohio, one (1) in Illinois, one (1) in Massachusetts and one (1) in Minnesota. Some other states not mentioned herein which allow spendthrift trust invasion for alimony and/or support are New York, see In Re: Chusid's Estate 301 N.Y. Sup. 2d 766 (1969) Alabama, Howard vs Spraggins 350 So.2d 318, Ala. (1977); Michigan & Missouri Hurley v. Hurley, 309 N.W. 2d 225.

In the case of Parscal v. Parscal, 196 Cal. Rpt. 462, (Cal. App. 1 Dist., 1983), the Court noted that those spendthrift trusts are generally valid in California and previous decisions of its own had upheld spendthrift trusts against attack for arrearage in support. The correct rule, however, is that a spendthrift trust does not bar execution upon a judgment against its beneficiaries for child support. The California court, after listing numerous

case citations, and text and law review citations, notes that the privilege of disposing of property is not absolute but is hedged with various restrictions where there are policy considerations warranting the limitation. It cites the authorities as stating that where a general creditor has achieved his status merely by voluntarily extending credit to the beneficiary, support is a duty owed by the beneficiary and is based upon solid grounds of public policy. The California court reversed its prior restrictive ruling and allowed the child support arrearage to be collected against a spendthrift trust stating that the Legislature has twice in its recent civil procedure changes emphasized the primacy of child support collection. The Florida Legislature has clearly indicated its intention to facilitate and encourage the enforcement of the orders of the courts of this state for the attainment of alimony and child support.

Florida Law of Trusts §27-2, page 310, states:

> It is universally recognized that once the beneficiary has received the income it can be levied on by creditors.
>
> The Restatement of Trusts 2d §157 takes the following position: "Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim 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."

An exhaustive study of the then-current law was set forth in Shelley v. Shelley, 354 P.2d 282 (Or. 1960). The Shelley Court quoted 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 went on to say, at page 285:

> 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 reconize 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.

Not only have Florida Statutes not expressed a contrary view, Florida Statute 61.11 and 61.12 and the newly enacted Child Support And Alimony Enforcement Act indicate that the legislative policy in this state is consistent with allowing garnishment or attachement of a contemptuous ex-spouse's interest in a spendthrift trust.

The Oregon Court goes on to say, at page 286:

> 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 obligations 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. <u>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.</u>
>
> ... <u>We do not believe that it is sound policy to use the welfare funds of this state in support of the beneficiary's children,</u>

while he stands behind the shield of immunity created by a spend thrift 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 interest 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 by 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 obliation, 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 at bar 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. If 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 responsiblity 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.

In the Federal Court case of Levine v. Levine, 209 F. Supp. 564 (D. Del. 1962), it is stated:

> "Generally, the duty of a husband to support his wife and children is ground on the public policy. As said in 41 C.J.S. Husband and wife § 15, p. 406:"
>
> > "The obligation of the husband to support his wife, or the right of the wife to receive support cannot be accurately defined. It arises out of the marital relationship, is provided for by law as a matter of public policy, and is not dependent on contract***."

The Court, after citing several other cases, which hold that the duty to support a wife is not based on contract, states, "[T]he obligation sued on ...was not a debt...."

Similar language is contained in the case of Wife J.B.G., Plaintiff, v. Husband, P.J.G., and Bank Of Delaware in 286 A.2d 256 (Del. Ch. 1971). This case clearly holds that a wife is not a creditor and that a spendthrift provision in the trust is not a bar to her claim for support because to allow such a bar would be against public policy. The Court further stated that the overwhelming weight of authority is to the same effect.

In the case of O'Connon v. O'Connor, 141 N.E.2d 691 (Oh. Ct. of C.P. 1957), the Court quotes language from Scott on Trusts set out above and makes the following observation at page 697:

> To deny dependents the right to invade and to adopt a rule that would remit them to their right to reach funds only after they are paid to the beneficiary would serve no useful purpose. It would more likely serve to defeat the dependents altogether. For one thing, while a trustee, especially a corporate trustee, may be presumed to remain stationary, the opposite may be expected of many beneficiaries.... (emphasis ours)
>
> ....
>
> ...On the contrary, it seems clear there is an affirmative public policy authorizing invasion for the benefit of wife and children. While this doctrine appears never to have been enounced in any reported Ohio case, frankly we are writing at this length in a nisi prius case in the hope Ohio will evenually line up on the side that looks right ethically, socially and legally."

It is illogical and amounts to form over substance to withhold from the grasp of the Wife funds which would become subject to her claims merely by the trustee carrying out the simple act of delivering a check to the Appellant Husband. The case of Knettle v. Knettle, 84 P.2d (Wash. 1938) states at page 997:

> ..."accrued income, ready for distribution to be cestui, constitutes a dry or passive trust, and is subject to seizure in satisfaction of his debts...."

The Court further went on to say at page 998:

> ...Even a spendthrift trust may be subjected to the support of a wife or child, or for alimony awarded to the divorced wife of the beneficiary....
>
> ....
>
> ...therefore, the trustees had performed every active duty imposed upon them in connection with the distribution of net income. All that remained to be done was merely to deliver the check and the account.

The rule that spendthrift trust funds cannot be reached by beneficiary's wife is an action to enforce beneficiary's obligation to support his wife and minor children does not prevail in Wisconsin. Dillon v. Dillon, 11 N.W. 2d 628 (Wisc. 1943).

As early as 1901 the U.S. Supreme Court in Audubon v. Schufeldt, 181 U.S. 575, 577, 21 S.Ct. 735 stated, "Alimony does not rise from any business transaction but from the relationship of marriage. It is not founded on contracts, expressed or implied, but on the natural and legal duty of the husband to support the wife."

It is clear that the great majority of decisions, absent statute to the contrary, allow the invasion of spendthrift trust principle and income due a beneficiary for the support of his wife or ex-wife and children and for the collection of attorney's fees and suit money incident to the collection. Harrison v. Harrison, 178 So.2d 889 (Fla. 2d DCA 1965); DeFrances v. Knowles, 244 So.2d 168 (Fla. 2d DCA 1970); Heitzman v. Heitzman, 281 So.2d 578 (Fla. 4th DCA 1973); Young v. Young, 322 So.2d 594 (Fla. 4th DCA 1975); 9 Family Law Reporter, March 29, 1983, at 2329; opinion In Re Fred Kaytes, entered by United States Bankruptcy Court for the Southern District of Florida in Case No. 82-01064 on the 15th day of March, 1983; and Whitehurst, Debtor,- and Leonhardt, Plaintiff, v. Whitehurst, 10 B.R. 229 (M.D. Fla. 1981).

A R G U M E N T

POINT TWO

IF THE COURT ANSWERS THE FIRST POINT ON APPEAL IN THE NEGATIVE THE LOWER COURT'S ORDERS AND THE SECOND DISTRICT COURT OF APPEAL'S OPINION SHOULD BE UPHELD ON OTHER GROUNDS.

Even if the Court rules in favor of the Appellant on the question of whether the income and disbursable principal from a spendthrift trust is available for the collection of court ordered alimony arrearage, the lower court's decision could be upheld on the basis that it reached the correct decision, though the reasons for reaching the decision were erroneous. Choctawhatchee Electric Cooperative, Inc., v. Ray E. Green, 132 So.2d 556, (Fla. Sup.Crt. 1961).

Firstly, as was stated by Judge Schwartz in the case of Bacardi v. White, Id. the Husband is the real party in interest in this action. Should the court grant the Husband the relief requested by the Appellant, the Southeast Bank, N.A. would have no choice but to turn over to the Husband the $100,000.00 plus interest and income due him. This, of course, would remove the funds from the country and place the Wife in a position to sell her assets at a great loss, as she has already done, to stay alive, and then to turn to welfare. The Husband has been found to be in clear contempt of court, has been ordered incarcerated, has had Ne Exeat bonds and Injunctions issued against him, and has had an opportunity to purge himself of his contempt voluntarily which he has refused to do.

The right to be heard on appeal may be lost by a party's voluntary act of putting himself in contempt of court and by evading the power and process of law

and the courts. Where an Appellant Husband, such as in the case at Bar, remains beyond the Court's jurisdiction leaving the Court powerless to enforce any decree it might render, the Court will not determine the correctness of the action of the lower court (3 Fla. Jur. 2d, Appellate Review, §23, page 53). Also see Conde v. Full House, Inc., 206 So.2d 22 (Fla. 3d DCA 1967) and Morris v. Rabara, 145 So.2d 265 (Fla. 2d DCA 1962). Also Bronk v. Bronk, 35 So. 807 (Fla. 1903).

The real party in interest here should not be allowed to hide behind a technicality and obtain over $100,000.00 of available funds while he is flounting the orders of this Court in refusing to appear and do justice. By forcing the filing of this appeal by the Southeast Bank, N.A., he is attempting to make the Southeast Bank, N.A., the law and the Court his co-conspirators in his inequitable, unconscionable and illegal conduct. This should not be allowed.

The Appellant for the first time in any of these legal proceedings has finally presented to a Court the entire Trust Agreement in question.

The Appellant Southeast Bank, N.A. and Appellee Fenton L. Gilbet did not provide the Trial Court with the entire instrument in which the alleged spendthrift trust provision appears. They provided only a single paragraph. There is no indication in the record that the Court had an opportunity to read the Trust Agreement. The attorneys for Southeast Bank, N.A. and for the Husband did not introduce into the garnishment proceeding any evidence of settlor's intention. See Cartinhour v. Hauser, 66 So.2d 686 (Fla. 1953) in which it is stated that the Court must read every provision of a Will to attempt to determine what the testator intended to do and give effect to it unless some settled

principle of law or public policy is violated. Though we are not here dealing with a Will, the same type of evidence should have been required before the Court could rule the intent of the settlor was not to allow alimony, and medical bills for the ex-wife to be paid from the proceeds due the Husband in the spendthrift trust. Now the Appellant attempts to cure its failure to prove the intention of the testator to the lower court by adding the Trust Agreement to the record on appeal to this court. The Appellee feels delayed introduction of the Trust Agreement is improper, but does note on page A44 of the Appendix to the Brief of the Appellant, Southeast Bank, N.A., the inclusion of the Wife, Betty Gilbert, as a beneficiary of the Trust under certain circumstances. It is, therefore, not true as is set forth on page 7 of the Appellant's Brief, that it was clear that the settlor did not intend to benefit Betty Gilbert. The Appellant in the trial court provided the lower court only with the one paragraph as is set out in the Appellant's Brief at page 7. The language of that provision in and of itself could have been found to be insufficient to prove any intention on the part of the deceased or could have been found lacking when applying it to a situation such as here where alimony of an ex-spouse is involved.

As now revealed by the Trust Agreement finally presented by Southeast Bank, N.A., Emily Gilbert did intend to provide for Betty Gilbert until her death or remarriage, if she survived Fenton. The Trust does not specifcally state that Betty had to be married to Fenton at the time of his death. Of course, the trial court and the Second District Court of Appeal did not have the benefit of the Trust Agreement since it was not introduced into evidence.

In addition to the questionable intention of the settlor, the language in

the subject spendthrift provision differs from other spendthrift provisions cited in cases on point in the Appellant's Brief and later in the Brief of the Appellee. Missing is such languge as "free from all legal process," "not subject to garnishment," "free from all the claims of an ex-spouse and children," "for alimony and support" and others.

Garnishment differs from attachment in that it is a process against the person who is holding the effects or assets of another while attachment is an action against the owner of property. See Creditors' Rights, 13 Fla. Jur 2d § 54. Anticipation is the act of doing or taking a thing before its proper time, and alienation involves only real property.

The language set forth in the paragraph in question falls short of excluding the claims of the case at bar. It states that the interest of each beneficiary in the income or principal of each trust is free from the control or interference of any creditor. It does not put a time limit on when that limitation might cease. Is the inference here that it is free from such control until such time as funds are distributable to the beneficiary Husband? It is not clear if the paragraph only refers to assets not distributable. Is the Wife here a creditor of a beneficiary or a spouse of a beneficiary? And is the beneficiary here married? Is the action sought here atachment, anticipation or alienation?

All of these questions must be answered in the negative.

CONCLUSION

The Trial Court and the Second District Court's opinion should not be disturbed. It should be, and in the opinion of the Appellee is, the law of this state that monies due a beneficiary of a spendthrift trust are available for enforcement of alimony, attorney's fees and suit money arrearage. This reason is the reasoning of 4 of 6 appellate judges that have heard this question below. Further, if the fact situation of the Gilbert case was presented to the Third District Court of Appeal it is the feeling of the Appellee here that that court's ruling would also have been in favor of the Wife.

The Second District Court of Appeals' opinion should not only be followed because it is the law of the State of Florida, as it is in a majority of jurisdictions, but because it is right.

Husbands who flaunt court orders and refuse to pay court-ordered alimony and child support are a major cancer in today's society. It is the obvious public policy of this state as a result of the state's legislative process and the statements of the Supreme Court Commission On Matrimonial Law that the Court should follow the sensible decision of the Second District Court of Appeal and Judge Swartz.

Should the Court find that it is more acceptable to follow the minority of decisions, the Court could still find that the Trial Court and the Second District Court of Appeals' decision in this case reaches the correct result by reason of the Appellant's failure to prove the intention of the settlor to eliminate the Appellee from the income of the trust. In addition, the real party

in interests here, the Husband, should not benefit from any technicalities in continuing his course of unethical, fraudulent and illegal conduct.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to George R. McLain, Esq., P.O. Box 2999, Sarasota, Florida 33578, Attorney for Appellant; Larry H. Spalding, Esq., 6624 Gateway Avenue, Sarasota, Florida 33581, Attorney for Husband; A. Matthew Miller, Esq., 4040 Sheridan Street, Hollywood, Florida 33021, Attorney for American Academy of Matrimonial Lawyers; and William L. Hyde, Esq., P.O. Box 1794, Tallahassee, Florida 32301; Attorney for Florida Bankers Association, this 19th day of June, 1984.

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By: _____
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