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 APPELLANT

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

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PREFACE

The following symbols will be used in the body of this brief:

(R) for Record on Appeal;

(A) for Appendix.

STATEMENT OF THE CASE

The Appellant, Garnishee in the Circuit Court and Appellant in the District Court of Appeals for the Second District, was served with a Writ of Garnishment on February 3, 1982, seeking collection of the former wife's attorneys' fees which had previously been reduced to two separate judgments in favor of the wife's attorneys against the former husband with execution authorized (R 2-4). Thereafter, the former wife caused a "Continuing Writ of Garnishment" to be served upon Appellant on February 19, 1982, seeking collection of one past due monthly installment of alimony together with certain medical expenses which had previously been reduced to judgment, and, in addition, seeking future continuing garnishment of monthly alimony payments and other lump sum payments and attorneys' fees as they became due in the future (R 8-9). Appellant filed an Amended Answer disclosing certain amounts of undistributed income and principal it held as trustee for the benefit of the former husband under a revocable trust established by Emily H. Gilbert as settlor, and raising as a defense the spendthrift provisions of the trust (R 10-11).

The Circuit Court ultimately entered an Order on April 11, 1983, making certain findings as fact and law to the general effect that the former husband's undistributed income and principal was subject to garnishment for alimony and attorneys' fees notwithstanding the spendthrift provisions embodied in the trust document (R 22-23; A 32-33). On the same day, a separate Judgment in Garnishment was entered against Appellant as trustee, directing payment to the former wife of all arrearages in alimony, directing payment to the former wife's attorneys of all unpaid attorneys' fees and costs, and affirming the Continuing Writ of Garnishment in favor of the former wife for all future installments of monthly and lump sum alimony which the former husband had originally been ordered to pay to the former wife (R 24-25; A 34-35). Appellant/Trustee filed a Notice of Appeal in the District Court of Appeals for the Second District of

Florida on April 19, 1983, (R 26-27), and, the District Court filed its opinion January 27, 1984, (A 1-13), affirming the Circuit Court. A second opinion was filed March 21, 1984, on Motion for Rehearing and Certification (A 14-16).

Thereafter, Appellant timely filed its Notice to Invoke Discretionary Jurisdiction on April 14, 1984, (A 36).

STATEMENT OF THE FACTS

Appellant is corporate trustee serving as trustee under a revocable trust agreement established by Emily H. Gilbert for the benefit of various beneficiaries, one of whom is the former husband, Fenton L. Gilbert, (R 10, 14, 22; A 37-68). The Emily H. Gilbert trust contains the following provision:

> 5.2 - 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 (R 22; A 47).

On July 2, 1981, and on October 30, 1981, judgments were entered against the former husband, Fenton L. Gilbert, in favor of the former wife's attorneys, Ginsburg, Byrd, Jones and Pflaum, for attorneys' fees totalling Twenty-five Thousand Fifty Dollars ($25,050.00). In an effort to collect these judgments out of the former husband's beneficial interest in the Emily H. Gilbert trust the former wife's attorneys caused a Writ of Garnishment to be served February 3, 1982, upon the trustee (R 2-4, R 5-6).

Shortly thereafter, the former wife obtained issuance of a "Continuing Writ of Garnishment" against the trustee, seeking collection of a judgment of arrearages in alimony and medical expenses dated February 1, 1982, in the amount of Three Thousand Four Hundred Fifty-seven Dollars and 55/100 ($3,457.55), and, in addition, seeking payment of her continuing claim of monthly alimony in the amount of Two Thousand Five Hundred Dollars ($2,500.00) per month together with certain lump sum payments as they become due under the original Final Judgment of Dissolution of Marriage which had been entered April 22, 1981, (R 8-9).

In its Amended Answer filed after a judgment on the first Writ of Garnishment had been set aside by the Court (R 16), the trustee disclosed that it held an income distribution from the trust to which the former husband was entitled in the

amount of Four Thousand Seven Hundred Seventeen Dollars and 49/100 ($4,717.49). In addition, the trustee held an undistributed principal distribution due to the former husband in the amount of Fifty Thousand Dollars ($50,000.00), (R 10).

Thereafter, a Restraining Order was entered by Circuit Judge Evelyn Gobbie on November 6, 1981, restraining Appellant from making any further disbursements whatsoever to the beneficiary, Fenton L. Gilbert, (R 51-52; A 28-29).

On these facts, the Lower Court entered judgment against the trustee directing it to pay Betty J. Gilbert, the former wife, various arrearages in alimony and other expenses totalling Fifty Thousand Five Hundred Dollars ($50,500.00) together with interest thereon in an unspecified amount; and, in addition, judgment was entered against trustee in favor of the law firm of Ginsburg, Byrd, Jones and Dahlgaard in the amount of Eighteen Thousand Dollars ($18,000.00) together with interest at the legal rate from February 3, 1983. Issuance of legal execution was directed by the Court against the trustee on both amounts, being a total of Sixty-eight Thousand Five Hundred Dollars ($68,500.00) plus interest in an unspecified amount (R 24; A 34-35). In addition, the trustee was ordered, without limitation as to availability of funds from the trust, to make monthly payments of Twenty-five Hundred Dollars ($2,500.00) per month "as periodic alimony" to Betty J. Gilbert, the former wife, together with lump sum alimony payments of Three Thousand Five Hundred Dollars ($3,500.00) each on April 22, 1983, October 22, 1983, April 22, 1984, October 22, 1984, April 22, 1985, and October 22, 1985. Notwithstanding the fact that these orders were for future payments, the judgment directed that execution be issued against the trustee for these future payments (R 24-25, A 34-35).

ARGUMENT

THE UNDISTRIBUTED INCOME AND PRINCIPAL OF A SPENDTHRIFT TRUST SHOULD NOT BE SUBJECT TO GARNISHMENT BY A FORMER WIFE FOR ALIMONY.

This Appeal presents the issue of whether the prohibitions against alienation and claims of creditors common to "spendthrift trusts," in an otherwise valid trust established by a settlor other than the beneficiary himself, should be effective as to claims against the beneficiary for alimony. In an opinion filed January 24, 1984, the District Court of Appeals for the Third District, Judge Ferguson writing, held that the income from a spendthrift trust is exempt from legal process to enforce a court ordered payment of alimony and attorneys fees to an ex-wife. White v. Bacardi, 446 So.2d 150 (Fla. 3rd DCA 1984). Three days later, the Second District, Judge Grimes writing, addressed the identical issue and reached the opposite result, holding that spendthrift trusts can be garnished both for the collection of arrearages in alimony and court awarded attorneys fees and for future installments of alimony by means of a continuing writ. Southeast Bank N.A. v. Gilbert, _____So.2d. _____ (Fla. 2d DCA 1984). This direct conflict between the Second and Third District Courts in Florida graphically illustrates the long standing distinct split of authority in other jurisdictions on this question of trust law which has long perplexed the authorities; nevertheless, the most recent and better-reasoned cases support the holding of the Third District in Bacardi. Moreover, the public policy of the state of Florida will be best served by retaining the "strong fiduciary" characteristics of our existing trust and estate law.

The cardinal rule of construction in trusts, as in wills, is to determine the intention of the settlor and give effect to his wishes. Wallace v. Julier, 3 So.2d 711 (Fla. 1941); Cartinhouer v. Houser, 66 So.2d 686 (Fla. 1953). A spendthrift trust is created when the settlor manifests an intent to provide a fund for the maintenance of another, and at the same time to secure it against the beneficiary's own improvidence or incapacity for self

protection. Croom v. Ocala Plumbing and Electric Company, 57 So. 243 (Fla. 1911). It is clear that the Florida courts have long recognized as valid and enforcable spendthrift provisions in a trust whereby the trust income is protected by being made inalienable, either by the beneficiary's act or that of his creditors, during all or part of the life of the beneficiary. Waterbury v. Munn, 32 So.2d 603 (Fla. 1947).

In the final analysis, the provisions of the spendthrift trust permit the donor or settlor, being the original true owner of the property or land involved, to place restraints and conditions on how his property is going to be used by his beneficiary. In this respect, the law is not concerned with the right of the beneficiary to deal with his interest as he sees fit. It makes no difference whether the beneficiary should desire to alienate his equitable interest to feed the starving poor in New Guinea, or race sailboats, pay off just creditors, or even to support his former wife. Rather, the law respects and confirms the right of the original owner of the property to place conditions upon his generosity and bounty. Cujus est dare, ejus est disponere: "whose it is to give, his it is to dispose." Lowell, Florida Law of Trusts, (2d Ed., 1976), page 308.

It is absolutely clear in the present case that the settlor, Emily H. Gilbert, did not intend to benefit Betty J. Gilbert, the wife of her grandson and beneficiary Fenton Gilbert. Her trust contained the following:

> 5.2 - 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.

Since the settlor obviously intended to exclude a spouse of a beneficiary from a right in the trust, the implication is inescapable that she also intended to exclude an ex-spouse from an interest in the trust. Certainly, there is nothing in the spendthrift language that suggests any intent whatsoever on the part of the settlor to make an exception for unpaid

alimony.

The question thus becomes whether Emily H. Gilbert's clear intent as to the disposition of her property should be overridden by some consideration of public policy. As as the opinions in both Bacardi and Gilbert, supra., point out, there is a clear split of authority among the states which have considered this question. Some of the earlier cases and The Restatement of Law of Trusts, Section 157 would ignore the intent of the settlor or testator and permit garnishment. Other cases upheld the intent of the settlor or testator. One of teh earliest cases which carefully considered both sides of the question was Bucknam v. Bucknam, 200 N.E. 918 (Mass. Sup. Jud. Ct. 1936), recognizing that the courts of some other states had stated that a decree for alimony does not create a debt or/creditor relationship, but, rather, represents a legal duty to support. Nevertheless, the Massachusetts Supreme Court held that a former wife's claim for alimony places her in no better position than any other creditor. Ibid., 921. The issue was revisited in the very recent case of Pemberton v. Pemberton, 411 N.E.2d 1305 (Mass. App. 1980), and it was again held that trust assets or income could not be reached by a husband's spouse seeking to recover for past due support.

In the eyes of at least some courts, the Massachusetts view is not only the correct view, but the majority view. The Supreme Court of Iowa, Roorda v. Roorda, 300 N.W. 294 (Iowa Sup. Ct. 1941), at page 296, states:

> However, the rule that spendthrift trusts are invalid as against allowances for alimony or support of children appears to be the minority rule. The majority holdings sustain their validity, generally upon the well settled doctrine that a testator has the right to dispose of his own property as his judgment may dictate and some of them in part upon the proposition that a decree for alimony or support does not differ from any other judgment. Erickson v. Erickson, 197 Minn. 71, 266 N.W. 161, 267 N.W. 426; Eaton v. Lovering, 81 N.H. 275, 125 A. 433, 35 A.L.R. 1034, and annotation; Bucknam v. Bucknam, 294 Mass. 214, 200 N.E. 918, 104 A.L.R. 774, and annotation; Gilkey v. Gilkey, 162 Mich. 664, 127 N.W. 715; San Diego Trust & Savings Bank v. Heustis, 121 Cal. App. 675, 10 P.2d 158.

> Many of the cases are discussed in Schwager v. Schwager, 7 Cir., 109 F.2d 754, a decision with a well considered majority and dissenting opinion. In that case the court found the trust provisions of the will could not be interpreted as providing for the support and maintanence of the divorced wife and children but showed an intention to the contrary. It was held testatrix had the right to dispose of her property as her judgment dictated and that the public policy that requires a husband to support his wife and children should not be permitted to destroy the trust. The opinion quotes at length from Erickson v. Erickson, 197 Minn. 71, 266 N.W. 161, 27 N.W. 426, which expressly declines to follow the rules stated in Section 157 of The Restatement of Trusts hereinbefore set out.

The Iowa Supreme Court recently revisited the issue of spendthrift trusts in Matter of Estate of Dodge, 281 N.W.2d 447 (Sup. Ct. Iowa 1979), and affirmed its earlier view:

> ... We have not previously been faced with the position stated by Restatement Section 157 (b), although we in the past rejected Section 157 (a) which would make available support or spendthrift trust funds for the support or alimony of the beneficiary's children or wife... In so doing we acknowledged the power of the donor to limit or place conditions on the disbursement of trust funds.(p. 450)

The Supreme Court of Minnesota has approached the question in two (2) comprehensive and well written opinions, Erickson v. Erickson, 266 N.W. 161 (Minn. Sup. Ct. 1936); and In re: Moulton's Estate, 46 N.W.2d 667 (Minn. Sup. Ct. 1951). In the latter case, the court affirmed that once it has established that a spendthrift trust exists, the beneficiary's interest can no more be reached in the hands of the trustee for alimony or support and for any other debt or obligation. The court reaffirmed its reasoning set forth in the Erickson case: "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."

An early Illinois case quoted approvingly from Restatement of Law of Trusts, Volume 1, Section 157, which takes the position that the interest of the beneficiary in a spendthrift trust may be reached by the wife or child of the beneficiary for support, or by the wife for alimony. Keller v. Keller, 1 N.E.2d 773 (Ill. App. 1st Dis. 1936). Keller

limited its application of the Restatement, however, to spendthrift trusts which by their terms did not disclose any contrary intent to the beneficiary's ex-wife reaching his interest, ibid., page 777. Subsequent to Keller, statutory law was enacted in Illinois which provided that a trust created in good faith by, or proceeding from, some third person other than the beneficiary is excepted from discovery or execution. Ill. Rev. Stat. 1971, Ch. 22, para. 49. The most recent Illinois cases on the subject have therefore held that a wife's claim for alimony and support is not collectable from a spendthrift trust created by someone other than the husband. Dinwiddie v. Baumberger, 310 N.E.2d 841 (Ill. App. lst 1974); In re: Marriage of Degener, 458 N.E.2d 46 (Ill. App. 2d 1983).

While Illinois statutory and case law would prohibit garnishment of the spendthrift trust for alimony, statutes in Pennsylvania and Missouri specifically permit garnishment for alimony. Mo. Ann. Stat. Section 456.080 (Vernon 1956); 20 Pa. Cons. Stat. Ann. Section 6112 (Purdon 1975). Florida has not such statute, so cases arising out of Missouri and Pennsylvania are irrelevant.

Some cases which speak approvingly of the right of a former wife to reach assets of a spendthrift trust reach that result on the basis of statute. Dillon v. Dillon, 244 Wis. 122, 11 N.W.2d 628 (Wis. Sup. Ct. 1943), construes a testementary trust made in Pennsylvania as being intended by the testatrix to permit garnishment under the Pennsylvania statute. The Wisconsin Court distinquishes Schwager v. Schwager, 109 F.2d 754 (C.A.7th 1940), which reached an opposite result under Wisconsin law, on the basis that the Schwager trust evidenced a clear intent not to benefit the former wife, whereas the Dillon trust was silent as to spouses and ex-spouses. The same result was reached in Michigan, applying the Missouri statute to a Missouri will probated in Michigan. Hurley v. Hurley, 309 N.W.2d 225 (Mich. Sup. Ct. 1981). Obviously, these cases are inapplicable since Emily H. Gilbert clearly intended not to provide for the spouse of any beneficiary.

The odyssey of the appellate courts of Ohio is perhaps most indicative of the

modern trend to strong trust law which would prohibit garnishment of spendthrift trusts for alimony. In 1956, the Franklin County Court of Common Pleas of Ohio considered the issue and wrote as follows:

> We believe that a person having the absolute title to money or personal property has the right to dispose of it as he wishes, either during his lifetime, or at his death through proper testementary disposition, and this power of disposition is limited only by some lawful prohibition or as being against public policy. Within these limits such person can impose any restrictions on such disposition as he desires, and may do so by the use of such instruments as a trust indenture or a will. If such person makes restrictions which are lawful and not against public policy they will protected by the Court, so as long as the intent of the donor or testator is clearly set forth and can be ascertained. It follows that a person can give his property to anyone he chooses to give it to, and subject to such limitations as he thinks proper, so long as they are not unlawful or against public policy. ...
>
> Surely it is not unlawful to make gifts to specified individuals, selected solely by the donor or testator, and regardless of the needs of the beneficiary ...
>
> ...In some jurisdictions the Courts have held that claims of a wife and children are in a different category from ordinary creditors and cannot be excluded. While there is considerable merit to such a position we do not believe it is against public policy for the donor or testator to limit the gift, or proceeds derived from the gift, to designated beneficiaries and exclude others, even members of their own families, from any participation in the trust funds ... This intent and direction should be protected and carried out without interference McWilliams v. McWilliams, 140 N.E.2d 80 (Ohio Ct. Com. Pl. 1956), pp.82-83.(emphasis supplied)

The following year, another Court of Common Pleas in Ohio reached the opposite conclusion. O'Connor v. O'Connor, 141 N.E.2d 691 (Ohio Ct. Com. Pl. 1957). In 1963, McWilliams and O'Connor were reviewed by a third Court of Common Pleas. This court, relying on the Restatement, and on A. Scott, The Law of Trusts, as does the Lower Court in the present case, sided with O'Connor, holding that the interest of a beneficiary in a spendthrift trust can be subjected to claims for support and maintenance of a wife and children, concluding that that holding appears to come within the spirit of the majority

view. Payer v. Orgill, 191 N.E.2d 373 (Ohio Ct. Com. Pl. 1963).

Faced with the direct conflict of the three (3) lower court decisions, the Supreme Court of Ohio resolved the issue in favor of strong trust law in Martin v. Martin, 374 N.E.2d 1384 (Ohio Sup. Ct. 1978). The trust in question specifically provided for the distribution of income or principal for purposes of education, care, comfort or support of the beneficiary or such beneficiary's spouse and/or issue (p. 1389, emphasis supplied). The court then construed this language to mean that a divorced spouse was not intended by the settlor to receive support in the form of alimony. The Court then considered the Restatement of Trusts 2d, Section 157(a), together with the comment thereon, which provides:

> ... Even if the (spendthrift) clause is construed as applicable to claims of his dependents for support, it is against public policy to give full effect to the provision. The beneficiary should not be permitted to have the enjoyment of his interest under the trust while neglecting to support his dependents.

The Supreme Court of Ohio then rejected the position of the Restatement, adopting instead the position that the intent of the testator should control:

> Inasmuch as the trust instrument here provides for the support of the beneficiary's issue, the question of whether the trust income is reachable for child support is not presented. The pertinent language of the trust instrument does not show intention on the part of the settlor that trust income be used for the payment of alimony. For this Court to hold the trust income can be devoted to alimony in such circumstances with go beyond the terms of the trust as established by the settlor and, in effect, engraft additional terms to the trust and impute an intention to the settlor not warranted from the trust instrument itself...
>
> ...In the absence of language in the trust instrument showing an intention on the part of the settlor that trust income for support of the beneficiary be used for the payment of alimony, this Court is unwilling to hold such income as reachable by judgment creditor for that purpose. (Martin v. Martin, supra., p. 1390)

In the opinion presently under appeal, the District Court states that the weight of authority permits the invasion of spendthrift trusts to collect unpaid alimony, citing the

annotation found at 91 A.L.R.2d 262 (1963). This statement may have been true at the time the annotation was written, but it is not true today. The annotation includes the Lower Court decisions rendered in Ohio and Illinois in the "majority" column; whereas, the Supreme Courts in those states, as cited above, would now put those states in the annotations "minority" column. Moreover, since the writing of the annotation, the California Supreme Court has clearly refuted and rejected the old Restatement position, reaffirming the holding in San Diego Trust & Savings Bank v. Heustis, 121 Cal. App. 675, 10 P.2d 158 (Cal. 4th DCA 1932). In Ogle v. Heim, 442 P.2d 659 (Cal. Sup. Ct. 1968), a unamimous court, Chief Justice Traynor concurring, succinctly commented:

> Spendthrift trusts effectively bar dependants as well as other creditors.

In its desire to provide for the needs of the former Mrs. Fenton Gilbert, the lower court totally ignored the property rights of Emily H. Gilbert and her expressed intent not to benefit her grandson's spouse. The funds held by the Southeast Bank were the property of Emily H. Gilbert, legal title was transferred to the Southeast Bank which was charged with the responsibility of administering the funds according to Emily H. Gilbert's direction. Any equitable interest in those funds pertaining to Fenton Gilbert was the result of his relative's generosity. He did nothing to earn it. Certainly Betty Gilbert did nothing that would entitle her to a share in Emily H. Gilbert's trust estate. In short, the funds were Emily H. Gilbert's, to do with as she pleased. She could have given the funds to somebody else or to charity. She could have given funds directly to Betty, had she so intended and desired. She could have left the funds in trust to Fenton, placing a condition on them that if he should ever become divorced, his interest would terminate. Or, she could have done what she did do, which was to leave funds in trust for her beneficiary's under the terms of a spendthrift trust restricting alienation, voluntary or involuntary. As Judge Lehan in his dissent to the opinion observed:

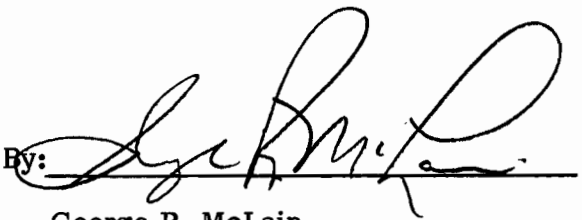
> This Court is approving precisely what the settlor directed should not happen. When the settlor incorporated those provisions into her will she had every reason under Florida law to believe that her wishes would be carried out. The very fact that Emily H. Gilbert is deceased and cannot appear or argue on her own behalf presents a persuasive argument for respecting her wishes.

In such financial centers as Boston, Columbus, Chicago, Cleveland, Cincinnati, Los Angeles, San Francisco, and Minneapolis, the intent of Emily H. Gilbert would be upheld, and the ex-spouse would not be permitted to override the spendthrift provisions of the trust. Florida, with its myriad of retired persons and concurrent strong trust industry, should remain aligned with these other strong fiduciary states and financial centers. Unless and until the legislature alters this public policy, the intent of Emily H. Gilbert as to the disposition of her property should control.

CONCLUSION

Based on the foregoing reasons and authorities, the trial court's Judgment in Garnishment and the opinion of the District Court of Appeals for the Second District should be reversed, and the trial court's Continuing Writ of Garnishment should be dissolved.

Respectfully submitted,

By: 

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Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to LARRY H. SPALDING, ESQUIRE, 6624 Gateway Avenue, Sarasota, Florida 33581, Attorney for Husband, EUGENE O. GEORGE, ESQUIRE, 22 South Tuttle Avenue, Suite 3, Sarasota, Florida 33577, Co-counsel for Petitioner, ARTHUR D. GINSBURG, ESQUIRE, 1844 Main Street, Sarasota, Florida 33577, Attorney for Respondent, A. MATTHEW MILLER, ESQUIRE, 4040 Sheridan Street, Hollywood, Florida 33021, Attorney for American Academy of Matrimonial Lawyers, and WILLIAM L. HYDE, ESQUIRE, Post Office Box 1794, Tallahassee, Florida 32301, Attorney for Florida Bankers Association this 14th day of May, 1984.

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