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

REPLY BRIEF OF APPELLANT

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

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ARGUMENT IN REPLY

The attorneys for Mrs. Gilbert have utterly failed to recognize and address the clear distinction in the cases and statutory law between a fund of money which is derived from and represents the earned income of a former husband (which is, and should be subject to the alimony claims of a former wife), and a fund of money which is derived from and represents the assets of some other person who has set up a donor trust (which is not, and should not be subject to the alimony claims of the former wife). Because of their failure to recognize this distinction, Mrs. Gilbert's attorneys have cited statutes and cases from this and other jurisdictions which not only do not apply to the case at bar, but in some instances actually contradict her position.

It is certainly true that the Florida Legislature has enacted the Child Support And Alimony Enforcement Act for the purpose of enhancing the collectability of child support and alimony awards. A reading of the act, however, makes it clear that the legislature intended to enhance the remedies of reaching a recalcitrant spouse's earned income, including retirement benefits and royalty rights, while making no reference whatsoever to any rights such spouse may have in a donor spendthrift trust. The act specifies entities upon which an income deduction notice may be served:

> ...the depository shall serve an income deduction order by registered mail, return receipt requested, upon the responsible party's, employer or former employer, the Comptroller or disbursing officer of a pension fund, the State of Florida or a political subdivision thereof, or the United States to periodically deduct from all monies due and payable to the responsible party... FS Section 61.181 (3)(b)3.

It is clear from the foregoing that the expanded enforcement remedies are directed toward recovery out of the responsible spouse's earned income and retirement benefits. There is no provision for service of an income deduction order on a corporate trustee, such as appellant herein, as trustee of a donor spendthrift trust. The same subsection of the statute goes on to provide:

> The maximum part of the aggregate disposable earnings of the

> responsible party for any work week which is subject to an income deduction order, to enforce an order of alimony or child support shall not exceed 65% of the responsible party's disposable earnings for that week.

The lower court's order in this case enjoins the Southeast Bank from making any payments to the true beneficiary of the donor trust whatsoever, permitting only payments to the former wife for alimony, medical expenses and attorneys fees. The practical effect of the lower court's order deprives the beneficiary, Fenton Gilbert, from any rights in his grandmother's trust whatsoever.

It should finally be noted that the Child Support And Alimony Enforcement Act by its terms applies to final judgments entered and petitions for modification filed after January 1, 1985, which would make it inapplicable to the present case in any event (F.S. Section 61.08 (3)(a)-(b).

Appellee's broad assertion that the legislature "expands" F.S. Section 61.12 to allow for the garnishment and attachment of money "for any reason," is also without foundation. The only significant changes made by the 1984 legislature to F.S. Section 61.12 are at the end of sub-Section (2) relating to a finding of contempt against an employer who takes disciplinary action against an employee solely because of the service of a writ of garnishment. Once again, these legislative changes merely add to the conclusion that the application of the remedies of garnishment for collection of alimony were intended to reach the salary or pension rights due to an employee for his labor, from his employer. There is nothing in these legislative changes which would in any way imply any intent on the part of the legislature to radically affect the thousands of donor spendthrift trusts in place and operating in the State of Florida.

The case of City of Miami v. Spurrier, 320 So. 2d 397(Fla. 3rd DCA 1975), cited by Appellee, likewise stands for the proposition that pension rights can be reached by garnishment for the recovery of unpaid child support and alimony. We have no quarrel with this holding. The trust garnished therein represented the earned income of the former husband, derived through his personal labor over the years of the marriage. A

husband's duty to adequately provide for his wife and children is derived from his ability to provide for himself, and therefore a pension or profit sharing trust, being the fruit of his labor, is and should be subject to attachment or garnishment to enforce these claims.

The case is entirely different, however, when the funds sought to be garnished are in reality some other person's property, placed in trust by that person as a pure donor. In such a case the right of the former spouse to the support of her former husband runs squarely afoul of the rights of the donor of the property to own, enjoy, control of and dispose of his property, according to his own terms and conditions.

Appellee's failure to recognize and address this distinction is most clearly apparent in her reliance on the case of Parscal v. Parscal, 196 Cal.Rptr. 462(Cal.App. 1st Dist., 1983). Appellee cites this case as authority that "California now falls within those states that provides for the invasion of spendthrift trusts for support." (Appellee Brief, pg. 16) The case does not stand for this proposition, nor does it overrule the prior California case law, San Diego Trust and Savings Bank v. Heustis, 121 Cal.App. 675, 10 P.2d 158(Cal. 4th DCA 1932), and Ogle v. Heim, 442 P.2d 659(Cal. Sup. Ct. 1968). The Parscal case simply reaches the same result under similar facts that the Florida 3rd District reached in Spurrier, that an employee's rights to a pension or welfare fund may be reached for alimony or support claims. The California Court clearly differentiates this set of circumstances from those involving the rights of a donor to dispose of his property as he sees fit under the terms of a donor spendthrift trust:

> But: "The doctrine that property may be made inalienable by such declaration of a spendthrift trust rests upon the theory that the donor has the right to give his property to another upon any conditions which he sees fit to impose, and that, inasmuch as such a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had the right to look for payment, they cannot complain that the donor has provided the property or income shall go or be paid personally to the beneficiary and shall not be subject to the claims of creditors." (McColgan v. Magee, Inc., 172 Cal. 182, 186, 155 P. 995.) "The validity of a spendthrift provision in a trust is predicated upon the consideration that a person is free to make any desired

> disposition of his property." (Estate of Johnston, 252 Cal.App.2d 923, 925, 60 Cal.Rptr. 852; and see Canfield v. Security First Nat. Bk., 8 Cal.App.2d 277,282-283, 48 P.2d 133; San Diego Trust etc. Bank v. Heustis, 121 Cal.App. 675, 684-685, 10 P.2d 158.) (Here it may not reasonably be said that there are such donor's rights to be protected.) (Parscal, pg. 464, emphasis supplied.)

In the present case, there are such donor's rights to be protected. These are the rights of the settlor of the trust Emily H. Gilbert, grandmother of the former husband, Fenton Gilbert. The funds in trust were clearly the property of Emily Gilbert. She entered into a revocable inter vivos trust in 1967, which is now made irrevocable by her death. It is clear from the spendthrift provisions of that trust that she intended that no one other than her named beneficiaries be able to reach the assets of the trust prior to distribution. Appellee has resorted in her Brief to an argument that other provisions of the trust document purport to make Betty Gilbert a named beneficiary of the trust, and that these provisions are susceptible of an interpretation that the settlor intended that Betty Gilbert be a beneficiary even should she become divorced from Fenton Gilbert. Even if such a construction could be placed upon the alternative gift to Betty Gilbert, it should be pointed out that the maximum gift made to Betty Gilbert under any circumstance is the sum of One Hundred Fifty Dollars ($150.00) per month. An examination of the trust document shows that this is, by far, the lowest gift made to any beneficiary of the trust under any circumstances. If it can be said, as Appellee argues at page 25 of her brief, that this proves the settlor intended to benefit Betty Gilbert, it may also be said that the settlor's intent was limited to $150.00 per month in the event of Fenton's death. The result reached by the lower court is to rewrite the settlor's trust on this point, expanding Betty's interest from $150.00 per month to $2,500.00 per month, plus extra installments of $3,500.00 every six months for five years, plus payment of medical expenses, plus payment of the wife's attorneys fees in the dissolution of marriage proceeding. To argue that this result is the intent of the settlor is ludicrous.

The true issue in this appeal is whether the purported "public policy" of overriding a donor's clear trust provisions for the purpose of providing full support to a divorced spouse of a beneficiary, is greater than the clear public policy in maintaining Florida as a state with strong trust and fiduciary law and policy, upon which its citizens can rely with confidence in planning their estates. One of the greatest fears and concerns expressed by clients seeking advice on wills and trust documents is whether a fund or income left to a favored child, grandchild, or other relative could ever be reached by that beneficiary's less - trusted spouse: precisely the issue confronting Mr. Bacardi! White v. Bacardi, 446 So.2d 150 (Fla.3d DCA 1984). If practioners can no longer assure their clients that spendthrift provisions of trusts in such situations will continue to be valid in Florida, it may safely be assumed that a significant portion of Florida's trust business will be lost to states which do uphold donor trust rights, such as California, Illinois, Ohio[1] and Massachusetts.

Respectfully submitted,

By: _____

George R. McLain
Counsel for Appellant

[1]In the case of Ohio, Appellee erroneously cites in her favor O'Connor v. O'Conner, 141 N.E.2d 691 (Ohio Ct. C.P. 1957), at page 21 of Appellee's brief. This case was effectively overruled subsequently by the Ohio Supreme Court in Martin v. Martin, 374 N.E.2d 1384 (Ohio Sup. Ct. 1978).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail 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. GINSUBURG, 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 16th day of July, 1984.

HARNDEN, McLAIN & DART,
CHARTERED

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