

Summer 1985

Bacardi v. White, 463 So. 2d 218 (Fla. 1985)

Deborah Meyer Ezatoff

Follow this and additional works at: <https://ir.law.fsu.edu/lr>



Part of the Estates and Trusts Commons

Recommended Citation

Deborah M. Ezatoff, *Bacardi v. White*, 463 So. 2d 218 (Fla. 1985), 13 Fla. St. U. L. Rev. 433 (1985).
<https://ir.law.fsu.edu/lr/vol13/iss2/8>

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

**Trusts—GARNISHMENT OF SPENDTHRIFT TRUSTS FOR THE
ENFORCEMENT OF COURT-ORDERED ALIMONY OR CHILD SUPPORT: A
PUBLIC POLICY DECISION—*Bacardi v. White*, 463 So. 2d 218
(Fla. 1985)**

I. INTRODUCTION

In the recent case of *Bacardi v. White*,¹ the Florida Supreme Court was presented for the first time with the question of whether the assets of a spendthrift trust may be reached to satisfy claims by the trust beneficiary's former spouse for alimony or child support. The court was confronted with two well-established but competing public policies recognizing, on the one hand, a trust settlor's right to dispose of his property as he chooses by imposing spendthrift restraints on the disposition of the trust assets,² and, on the other hand, that alimony and child support orders be enforced.³ Finding the legal obligation of support more compelling, the Florida Supreme Court opined that, under certain limited circumstances, the former spouse of a beneficiary of a spendthrift trust may garnish trust disbursements to enforce the payment of court-ordered alimony or child support.⁴

The facts of the *Bacardi* case are typical of cases in this area. A beneficiary who is receiving a comfortable income from a spendthrift trust refuses to make court-ordered alimony or child support payments. In many of these cases, the beneficiary then flees the jurisdiction, removing all his assets from the state. The only assets remaining within the jurisdiction and amenable to legal process are the trust assets themselves.⁵

1. 463 So. 2d 218 (Fla. 1985).

2. English courts hold spendthrift provisions void as restraints on alienation and thus against public policy. Conversely, the vast majority of American jurisdictions recognize such restrictions as valid. See 2 A. SCOTT, *THE LAW OF TRUSTS* §§ 152, 152.1 (3d ed. 1967); Wicker, *Spendthrift Trusts*, 10 *GONZ. L. REV.* 1, 4 (1974).

3. 463 So. 2d at 222 (citing *Brackin v. Brackin*, 182 So. 2d 1 (Fla. 1966)) (public policy that a spouse or parent should do what he or she ought to do is the basis of alimony or support order); *City of Jacksonville v. Jones*, 213 So. 2d 259 (Fla. 1st DCA 1968) (state public policy requires that court ordered child support payments be enforceable); *accord City of Miami v. Spurrier*, 320 So. 2d 397 (Fla. 3d DCA 1975) (held against public policy to preclude the garnishment of fireman's city pension fund to satisfy an award of alimony and child support), *cert. denied*, 334 So. 2d 604 (Fla. 1976). *Contra Buzzard v. Buzzard*, 412 So. 2d 388 (Fla. 2d DCA 1982) (held state pension funds are by statute exempt from legal process to pay alimony).

4. 463 So. 2d at 220. The court also held that orders and judgments for attorney's fees awarded incident to the divorce or enforcement proceeding may be enforced in this manner. *Id.* at 220.

5. It is not clear from the facts set forth whether the husband in *Bacardi* did flee the

The parties in *Bacardi* entered into an agreement which was incorporated into the final judgment of dissolution whereby the husband was to pay the wife monthly alimony of \$2,000. After payments ceased, the former wife obtained three judgments for the arrearages and attorney's fees. In aid of execution, a writ of garnishment was served on the trustee of the spendthrift trust which had been created for the benefit of the husband by his father. A continuing writ of garnishment against the trust income was also obtained to ensure that future payments would be made as they came due.⁶

The Third District Court of Appeal quashed the garnishment order and held that the former wife of a spendthrift trust beneficiary could reach the trust income before it reached the beneficiary only if she could show that the settlor intended that she participate as a beneficiary.⁷ The court felt that the settlor's intent must prevail in the absence of a legislative pronouncement to the contrary.⁸

Three days after the *Bacardi* opinion was issued by the Third District Court of Appeal, the Second District in *Gilbert v. Gilbert*⁹ allowed a former spouse to garnish a spendthrift trust to satisfy her claim for alimony arrearages. In reaching its decision, the *Gilbert* court found that "in light of [Florida's] strong public policy toward requiring persons to support their dependents, . . . spendthrift trusts can be garnished for the collection of arrearages in alimony."¹⁰ Each of the courts in *Bacardi* and *Gilbert* concluded that it was following the prevailing view on the subject.¹¹ The resulting conflict of opinion reflects the fact that there is a split of authority on the issue of whether the assets of a spendthrift trust are subject to claims for alimony and child support. This Note discusses the various approaches taken by courts on this issue and analyzes the decision of the supreme court in *Bacardi*.

jurisdiction and remove his assets. But see the facts of *Gilbert v. Gilbert*, 447 So. 2d 299 (Fla. 2d DCA 1984), discussed at *infra* note 48 and accompanying text, where the husband did just that.

6. 463 So. 2d at 220.

7. *White v. Bacardi*, 446 So. 2d 150 (Fla. 3d DCA 1984).

8. *Id.* at 156.

9. 447 So. 2d 299 (Fla. 2d DCA 1984); *aff'd sub nom.* Southeast Bank, N.A. v. Gilbert, 463 So. 2d 223 (Fla. 1985).

10. *Id.* at 302.

11. In *Bacardi*, 446 So. 2d at 156, the Third District Court of Appeal aligned itself with "what appears to be . . . the modern trend," whereas in *Gilbert*, 447 So. 2d at 301-02, the Second District Court of Appeal found that the "majority rule" is to allow the interest to be reached by the beneficiary's wife and children to enforce support claims.

II. REACHING THE ASSETS OF A SPENDTHRIFT TRUST

A. An Overview

Generally, the interest of a trust beneficiary may be reached by a spouse and children to satisfy claims for alimony, separate maintenance, and child support.¹² This is in accordance with the general rule that the interest of a beneficiary under a trust may be alienated by the beneficiary and may be reached by creditors in satisfaction of the beneficiary's debts and obligations. However, if a statute or the trust instrument so provides, the trust assets may be protected from dissipation by the beneficiary and from seizure by "creditors,"¹³ including a spouse or child seeking the enforcement of support claims.

Such spendthrift trust provisions¹⁴ have long been recognized as valid and enforceable in Florida¹⁵ as well as in a majority of other jurisdictions.¹⁶ This widespread acceptance of the validity of spendthrift trusts is primarily attributed to the Anglo-American notion that a property owner has the right to do as he chooses with his property.¹⁷

Although widely accepted, spendthrift trusts have been criticized for a number of reasons.¹⁸ One of the most pointed criticisms is the fact that the equitable property interest is immune to claims of the beneficiary's creditors, enabling the beneficiary-debtor to "enjoy the advantages of wealth without bearing its responsibilities."¹⁹ This criticism has been countered by the argument that creditors

12. *Sefton v. San Diego Trust & Sav. Bank*, 106 P.2d 974 (Cal. Ct. App. 1940); *Morton v. Morton*, 147 A.2d 150 (Pa. 1959); see also Annot., 91 A.L.R.2d 262, 266 (1963).

13. *Preston v. City Nat'l Bank*, 294 So. 2d 11 (Fla. 3d DCA 1976); 56 FLA. JUR. 2d *Trusts* § 36 (1985). Once the benefits of the trust pass to the beneficiary, the protection afforded ceases and the assets are reachable by creditors.

14. The term "spendthrift" has been said to indicate the settlor's wish "to protect the beneficiary against his own foolishness, incapacity or misadventure." Wicker, *supra* note 2, at 1. For a general discussion of spendthrift trusts, see E. GRISWOLD, *SPENDTHRIFT TRUSTS* (2d ed. 1947); Note, *Spendthrift Trusts*, 22 U. FLA. L. REV. 402 (1949); Annot., 34 A.L.R.2d 1335 (1954).

15. See *Waterbury v. Munn*, 32 So. 2d 603 (Fla. 1947); *Croom v. Ocala Plumbing & Electric Co.*, 57 So. 243 (Fla. 1911) (defining spendthrift trusts).

16. See *supra* note 2.

17. See *Nichols v. Eaton*, 91 U.S. 716 (1876) (spendthrift provision recognized based on belief that property owner must have complete freedom to dispose of his property as he wishes); see also Powell, *Freedom of the Alienation—For Whom? The Clash of Theories*, 2 REAL PROP. PROB. & TRUST J. 127, 130 (1967); Wicker, *supra* note 2, at 2-3.

18. J. GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* vi (2d ed. 1895) (spendthrift restraints encourage the accumulation of fortunes by a single person, take property out of commerce, and permit the evasion of just debts); see also Powell, *supra* note 17, at 132-33.

19. Wicker, *supra* note 2, at 3-4.

have only themselves to blame if they extend credit to the beneficiary without first determining whether the trust assets may be reached in satisfaction of the debt.²⁰ However, this argument is not applicable to classes of claimants, such as dependents, which have not voluntarily extended credit to the beneficiary.²¹ Because of the strong equity of claims such as these and the public interest in their enforcement, specific classes of claimants have been allowed to reach the beneficial interest despite an express or implicit intent of the settlor to the contrary.²² In a number of jurisdictions, the spouse and children of the beneficiary have been given such preferred status by statute²³ or by judicial decision.²⁴

B. Alimony and Support Claims: Divergent Authority

As evinced by the opinions of the Second and Third District Courts of Appeal, there is a division of authority and rationale concerning the issue of whether the assets of a spendthrift trust are reachable in satisfaction of alimony or support claims.²⁵ While some courts, like the Third District Court of Appeal, have refused to allow a spouse to reach the funds absent a showing that such was the clear intent of the settlor, others, relying upon a number of different theories, have allowed the beneficiary's interest to be reached without such a showing.

C. Settlor's Intent

The hard-line position of the Third District Court of Appeal, that a former spouse may not reach the trust income unless it is shown that such was the clear intent of the settlor, is the view taken by several courts which have defended the property rights of

20. 2 A. SCOTT, *supra* note 2, § 157; *see also Nichols*, 91 U.S. at 726.

21. 2 A. SCOTT, *supra* note 2, § 157.

22. *See Griswold, Reaching the Interest of the Beneficiary of a Spendthrift Trust*, 43 HARV. L. REV. 63 (1929); RESTATEMENT (SECOND) OF TRUSTS § 157 (1959).

23. *See, e.g., Mo. ANN. STAT. § 456.080(1)* (Vernon Supp. 1985) (spendthrift trust provisions void as against claims of wife or children for alimony, maintenance, and support); 20 PA. CONS. STAT. ANN. § 6112 (Purdon 1975) (income of spendthrift trust subject to claims for support by anyone whom the income beneficiary shall be under a legal duty to support).

24. *Seidenberg v. Seidenberg*, 225 F.2d 545 (D.C. Cir. 1955); *O'Connor v. O'Connor*, 141 N.E.2d 691 (Ohio C.P. 1957); *Shelley v. Shelley*, 354 P.2d 282 (Or. 1960); *see generally Annot., supra* note 12, at 274-280 (discussing cases in which dependents were allowed to reach spendthrift trust assets).

25. The Third District Court of Appeal concluded that there appears to be "a total absence of uniformity" on this issue. 446 So. 2d at 153. *See generally* 2 A. SCOTT, *supra* note 2, § 151; *Annot., supra* note 12 (discussing the split of authority).

the settlor as against those with alimony or support claims.²⁶ Where an intent that the trust assets be used for the support of the claimant is evidenced by a reference in the trust instrument to the beneficiary's spouse, children, or "family," the claimant has been allowed recovery as an intended beneficiary of the trust with a direct equitable right to share in the trust income.²⁷

While some courts have steadfastly required a showing of clear intent from the four corners of the trust instrument,²⁸ other courts, in an attempt to reach an equitable result, have labored to find a favorable intent on the part of the settlor. By indulging in a loose construction of the trust instrument, some courts have deduced that, in the absence of express terms to the contrary, the settlor did not intend to bar the spouse or children from the benefits of the trust.²⁹ The granting of preferred status to the beneficiary's

26. See, e.g., *Burrage v. Buckman*, 16 N.E.2d 705 (Mass. 1938) (trust created in "plain words" for benefit of beneficiary would not be construed to include support of wife); *Erickson v. Erickson*, 266 N.W. 161, 164 (Minn. 1936) ("The donee's obligation to pay alimony or support money, paramount though it may be, should not . . . transcend the right of the donor to do as he pleases with his own property and to choose the object of his bounty."); *In re Campbell's Trusts*, 258 N.W.2d 856 (Minn. 1977) (reaffirming *Erickson*, holding claims of alimony and support are not excepted from the protection offered by spendthrift provisions—unambiguous intent of testator to ban all claims precludes claims for alimony and support); *Martin v. Martin*, 374 N.E.2d 1384 (Ohio 1978) (if language of trust instrument does not show intent of settlor that trust income be used for payment of alimony, such intent will not be imputed); see also *In re Estate of Dodge*, 281 N.W.2d 447-540 (Iowa 1979) (spendthrift trust funds not subject to claims for alimony and support); *In re Bucklin's Estate*, 51 N.W.2d 412 (Iowa 1952); *Pemberton v. Pemberton*, 411 N.E.2d 1305, 1312 (Mass. App. Ct. 1980) (settlor's intent afforded particular deference in face of strong public policy favoring recovery).

27. See *Howard v. Spragins*, 350 So. 2d 318 (Ala. 1977) (children allowed to reach trust corpus as direct beneficiaries where trust provided for benefit of son and "his lawful children"); *Clarke v. Clarke*, 19 So. 2d 526 (Ala. 1944) (children of beneficiary entitled to reach trust income where trust instrument provided for maintenance of beneficiary and "his family"); *Board of Charities & Correction v. Moore*, 6 Pa. C. 66 (1888) (will creating spendthrift trust for benefit of son also provided for maintenance of wife and minor children of the son); see generally *Annot.*, *supra* note 12, at 276-77.

28. See *Schwager v. Schwager*, 109 F.2d 754, 759-61 (7th Cir. 1940) (intent must be construed from four corners of trust instrument).

29. See, e.g., *Keller v. Keller*, 1 N.E.2d 773 (Ill. App. Ct. 1936) (implicitly recognizing public policy, court held that the settlor intended the wife and children of the beneficiary to have a claim on trust income for alimony and child support unless express terms to the contrary appear in the trust instrument); *Hurley v. Hurley*, 309 N.W.2d 225 (Mich. Ct. App. 1981) (court held that settlor did not intend to exclude child support claims because state law in effect at the time of creation provided that spendthrift restrictions are void as against claims for alimony and child support); *Eaton v. Lovering*, 125 A. 433 (N.H. 1924) (court concluded that since settlor knew beneficiary had wife and child dependent upon him, he must have intended trust for benefit of both beneficiary and dependents); *Matthews v. Matthews*, 450 N.E.2d 278 (Ohio Ct. App. 1981) (settlor knew beneficiary had not held a job, thus settlor apparently intended to provide for all of beneficiary's expenses including care of

spouse and children has also been rationalized on the grounds that the restrictive provisions immunizing the beneficiary's interest from claims of his creditors were not intended as a bar to their claims because support claims are not "debts" and these claimants are not "creditors" in the conventional sense.³⁰

Courts that struggle with the concept of "intent" have been criticized for "extend[ing] themselves at great length to ascertain a favorable intent on the part of the settlor and, in fact, in some of the cases hav[ing] indulged in a reasoning indicative of the desire sought to be achieved."³¹ Allowing the income to be reached on the basis of such a strained analysis has enabled courts to maintain the illusion of promoting both the settlor's right to control the use of his property and society's interest in ensuring that the beneficiary lives up to his support obligations.³²

Although in many cases an equitable result may be reached by indulging in these "compromise approaches," where the claimant is expressly excluded by the terms of the trust both the "intent" and "debt" theories are logically inappropriate.³³ Thus, under either of these approaches, a claimant who is expressly excluded from reaching the trust assets is denied recovery. This disparity in result occurs despite the fact that the public interest in ensuring compliance with support orders is as strong in cases where the claimant is expressly excluded as it is in those in which the claimant is merely excluded as being within the general class of "creditors."³⁴ The

his children); *In re Stewart's Estate*, 5 A.2d 910 (Pa. 1939) (court recognized spendthrift trusts are against public policy to the extent that they operate to defeat claims of wife for maintenance and support, but still felt compelled to base holding on conclusion that settlor had no intention to exclude wife); *In re Moorehead's Estate*, 137 A. 802 (Pa. 1927) (although no express mention of wife in trust instrument, court concluded that under the circumstances the settlor must have intended to provide for her).

30. See, e.g., *Garretson v. Garretson*, 306 A.2d 737 (Del. 1973) (wife claiming support payments not creditor barred by spendthrift provision); *Safe Deposit & Trust Co. of Baltimore v. Robertson*, 65 A.2d 292 (Md. 1949) (ex-wife not creditor in the ordinary sense of a contract claimant); *Marsh v. Scott*, 63 A.2d 275 (N.J. Ch. 1949) (obligation to support child not debt within meaning of spendthrift clause); *In re Moorehead's Estate*, 137 A. 802, 806 (Pa. 1927) (support payments are legal obligations distinct from debt). But see *Erickson v. Erickson*, 266 N.W. 161, 164 (Minn. 1936) (court determined that obligation to pay alimony and child support is an obligation in the nature of a debt, stating, "[I]t is the intent of the donor, not the character of the donee's obligation, which controls the availability and disposition of his gift.").

31. *Schwager v. Schwager*, 109 F.2d 754, 757 (7th Cir. 1940).

32. Note, *Claims for Support and Alimony against the Beneficiary's Interest in a Spendthrift Trust*, 28 VA. L. REV. 527, 535 (1942).

33. See Note, *supra* note 32, at 536, 538.

34. The former wife in *Gilbert*, 447 So. 2d. at 300, was expressly excluded by a provision in the trust instrument, whereas the instrument in *Bacardi* excluded creditors in general.

strained reasoning and logical pitfalls attendant to theories which are based on the settlor's intent or the nature of the claim have been avoided by a growing number of courts which have expressly based recovery on public policy.

D. Public Policy

The most compelling argument for allowing the beneficiary's spouse and children to reach the trust income is that public policy would abhor enjoyment by the beneficiary of the trust income while he refuses support to those to whom a legal obligation of support is owed.³⁵ This apparent injustice has been expressly recognized by a growing number of courts which have taken the straightforward position espoused by the Second District Court of Appeal that spendthrift trust provisions are void as against public policy to the extent that they preclude claims for alimony, separate maintenance, or child support.³⁶ These courts have concluded that the beneficiary's legal duty to comply with support orders outweighs the policy of recognizing the settlor's right to impose spendthrift restraints on the disposition of trust assets.

A public policy approach is advocated by the majority of com-

463 So. 2d at 220.

35. 2 A. SCOTT, *supra* note 2, § 157.1.

36. See *Seidenberg v. Seidenberg*, 225 F.2d 545 (D.C. Cir. 1955) (public policy recognizes invasion of spendthrift trust for support of minor children); *Safe Deposit & Trust Co. of Baltimore v. Robertson*, 65 A.2d 292 (Md. 1949) (spendthrift trust provision should not be allowed to exclude former wife's claim for alimony as she is a favored suitor and her claim is based upon the strongest grounds of public policy); *Coverston v. Coverston*, 357 N.W.2d 705, 709 n.2 (Mich. Ct. App. 1984) (based on public policy and RESTATEMENT (SECOND) OF TRUSTS § 157(a) (1959), assets of spendthrift trust may be reached to satisfy alimony and child support claims); *O'Conner v. O'Conner*, 141 N.E.2d 691 (Ohio C.P. 1957) (beneficiary's legal duty to support wife and minor children more compelling than property owner's right to dispose of his property as he pleases); *Shelley v. Shelley*, 354 P.2d 282 (Or. 1960) (public policy requires that interest of the beneficiary of trust be subject to claims for child support and alimony); *Lucas v. Lucas*, 365 S.W.2d 372 (Tex. Civ. App. 1962) (it is against public policy to deprive former wife of right to support while beneficiary of spendthrift trust is well taken care of); see also *In re Marriage of Parscal*, 196 Cal. Rptr. 462 (Cal. Ct. App. 1983) (spendthrift trust does not bar execution on judgment for child support); *Swink v. Swink*, 6 N.C. App. 161 (N.C. Ct. App. 1969) (spendthrift trust income may be reached to satisfy alimony and child support claims); accord *Howard v. Spragins*, 350 So. 2d 318, 323 (Ala. 1977) (although children were allowed to reach trust assets as direct beneficiaries of trust, court recognized that support claims are "based upon the clearest grounds of public policy."); *In re Chusid's Estate*, 301 N.Y.S.2d 766, 770 (N.Y. Sur. Ct. 1969) (although children were named beneficiaries of trust, court recognized that it would be "against public policy" to immunize trust assets from child support claims), *aff'd*, 314 N.Y.S.2d 354 (N.Y. App. Div. 1970); *Erickson v. Bank of Cal.*, 643 P.2d 670, 673 (Wash. 1982) (in dicta, court points out that spendthrift trusts are subject to support and alimony claims).

mentators in the area³⁷ and appears to be the approach taken in section 157 of the *Restatement (Second) of Trusts*, which provides: "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, . . . by the wife or child of the beneficiary for support, or by the wife for alimony" ³⁸ Courts which follow the *Restatement* and allow the beneficiary's interest to be reached on the basis of public policy have taken a more realistic approach to the problem by promoting society's interest in ensuring that support orders are enforced while avoiding the limitations present in either the "intent" or "debt" approaches. Most significantly, under a public policy approach, an equitable result may be reached even in cases in which the claimant is expressly excluded in the trust instrument.³⁹

III. A DECISION ROOTED IN PUBLIC POLICY

A. Garnishment: A "Last Resort" Remedy

Although the *Bacardi* decision was based on Florida's strong policy favoring the enforcement of alimony and child support orders,⁴⁰ the court noted that only under limited circumstances will this state interest be considered paramount to the settlor's right to impose restraints on the disposition of the trust income. Concluding that the scales should be tipped in favor of garnishment "only as a last resort," the court limited the garnishment remedy to cases in which traditional state enforcement methods are ineffective.⁴¹

In Florida, there is a wide variety of remedies available for the enforcement of support orders, including: (1) the institution of

37. See E. GRISWOLD, SPENDTHRIFT TRUSTS § 339, at 400 (2d ed. 1947) ("It should be recognized that it is against public policy to provide that a trust shall be wholly immune from the claims of a beneficiary's wife or children for support or alimony."); 2 A. SCOTT, *supra* note 2, § 157.1, at 1210; Powell, *supra* note 17, at 137 ("When the desires of the creator of a trust to do as he chooses with his wealth conflict with the requirements of decency as between the beneficiary and his family, society has a proper function to tip the scales in favor of decency."); see also Note, *Trusts: Limitations on the Immunities of Spendthrift Trusts: Support and Alimony Claims*, 44 CAL. L. REV. 615, 617 (1956) (advocating a public policy approach, concluding that public policy is the true basis for allowing funds to be reached); Note, *Trusts: Right to Reach Spendthrift Trust for Support of Minor Child*, 7 HAST. L.J. 220, 225 (1956) (same); Note, *supra* note 32, at 548 (same).

38. RESTATEMENT (SECOND) OF TRUSTS § 157(a) (1959).

39. See Note, *supra* note 32, at 540-41.

40. See *supra* note 3.

41. 463 So. 2d at 222; see also *Gilbert*, 447 So. 2d at 303 (Lehan, J., concurring). Judge Lehan argued that invasion of a spendthrift trust should be allowed only as "a last resort."

contempt proceedings;⁴² (2) resort to traditional enforcement remedies such as execution and garnishment after reducing arrearages to a judgment;⁴³ (3) garnishment of wages to satisfy claims for alimony and child support as provided by statute;⁴⁴ and (4) the issuance of a writ of *ne exeat* or other orders pursuant to statute.⁴⁵ The court stated that when these traditional methods of enforcement are available, "there would be no overriding reason to defeat the intent of the settlor."⁴⁶ However, "[w]hen these traditional remedies are not effective, it would be unjust and inequitable to allow the debtor to enjoy the benefits of wealth without being subject to the responsibility to support those whom he has a legal obligation to support."⁴⁷

The facts of the *Gilbert*⁴⁸ case are particularly illustrative of a "last resort" situation. Shortly after being ordered to pay his disabled wife permanent alimony of \$2,500 per month, lump sum alimony of \$35,000, plus her future medical expenses and attorney's fees, the husband ceased making the payments as ordered, fled the jurisdiction, and removed all his assets, effectively thwarting all efforts to collect arrearages.⁴⁹

B. Currently Disbursible Assets Reachable

Even in last resort situations, garnishment is further limited "to disbursements that are due to be made or which are actually made from the trust."⁵⁰ Thus, only so much of the trust corpus or income which is currently distributable under the terms of the trust is sub-

42. See, e.g., *Orr v. Orr*, 192 So. 466 (Fla. 1939). See generally 26 FLA. JUR. 2d *Family Law* §§ 770-784 (1981) for a discussion of contempt proceedings.

43. See, e.g., *Thompson v. Thompson*, 195 So. 571 (Fla. 1940). See generally 26 FLA. JUR. 2d *Family Law* §§ 754, 763-68 (1981) for a discussion of reducing arrearages to judgment and methods of enforcement.

44. See FLA. STAT. § 61.12(1) (1983); *Waddell v. Schwarz*, 405 So. 2d 978 (Fla. 1981); *Robinson v. Robinson*, 18 So. 2d 29 (Fla. 1944). See generally 26 FLA. JUR. 2d *Family Law* § 765 (1981).

45. See FLA. STAT. §§ 61.11, 62.12(1), 68.02 (1983); *Pan Am. Sur. Co. v. Walterson*, 44 So. 2d. 94 (Fla. 1950). See generally 26 FLA. JUR. 2d *Family Law* §§ 613-616 (1983); 13 *id.* *Creditors' Rights and Remedies* §§ 273-278 (1979) (discussing writ of *ne exeat*).

46. 463 So. 2d at 222.

47. *Id.* Since the garnishment of a spendthrift trust is available only as a "last resort," the claimant seeking a writ of garnishment should allege in a "Motion for Garnishment After Judgment" under FLA. STAT. § 77.03 (1983), that all other enforcement remedies have either been exhausted or are unavailable.

48. 447 So. 2d 299 (Fla. 2d DCA 1984), *aff'd*, 463 So. 2d 223 (Fla. 1985).

49. *Id.* at 300. The district court in *Gilbert* allowed garnishment of the spendthrift trust to satisfy a claim for alimony arrearages. *Id.*

50. 463 So. 2d at 222.

ject to garnishment at any one time.

In the case of a discretionary trust,⁵¹ the trustee may not be ordered to make a disbursement. The income or corpus under a discretionary trust is only subject to garnishment when the trustee decides to make a disbursement.⁵² This limitation is in accordance with what appears the majority rule that just as a beneficiary of a discretionary trust cannot compel the payment of any part of the trust, neither can his creditors compel payment.⁵³

C. Continuing Writ of Garnishment in Lieu of *Ne exeat*

In Florida, a continuing writ of garnishment may only be obtained to enforce orders for alimony and child support as provided under section 61.12(2), Florida Statutes. In both the *Bacardi* and *Gilbert* cases, a continuing writ of garnishment had been issued by the trial courts against trust income to ensure future payments as they came due.⁵⁴ In each case, the issuance of the continuing writ was met with objection on the ground that section 61.12(2) is only applicable to the garnishment of wages.⁵⁵ The supreme court accepted the reasoning of the Second District Court of Appeal in *Gilbert*, concluding that although a continuing writ of garnishment of a spendthrift trust cannot be justified under section 61.12(2), it can be justified under section 61.11.⁵⁶ Section 61.11 provides that a court may issue a writ of *ne exeat*⁵⁷ against a debtor or his property and may "make such orders as will secure alimony to the party who should receive it."⁵⁸ Quoting the Second District Court

51. *Id.* Under a discretionary trust, the beneficiary is given only as much of the income or principal as the trustee, in his sole discretion, sees fit. 2 A. SCOTT, *supra* note 2, § 155.

52. 463 So. 2d at 222.

53. See 2 A. SCOTT, *supra* note 2, § 155, at 1181 ("It is the character of the beneficiary's interest, rather than the settlor's intention to impose a restraint on its alienation, which prevents its being reached."). See generally Annot., *supra* note 12, at 281-82, 298.

54. *Bacardi*, 463 So. 2d at 220; *Gilbert*, 447 So. 2d at 302.

55. 463 So. 2d at 223; 447 So. 2d at 302. FLA. STAT. § 61.12(2) (1983) provides in part: "The provisions of Chapter 77 or any other provision of law to the contrary notwithstanding, the court may issue a continuing writ of garnishment to an employer to enforce the order of the court for periodic payment of alimony or child support or both." (emphasis added.) See generally 26 FLA. JUR. 2d *Family Law* § 765 (1981).

56. 463 So. 2d at 223; *Gilbert*, 447 So. 2d at 302.

57. See FLA. STAT. §§ 61.11, 68.02 (1983). *Ne exeat* is an extraordinary remedy which has been adopted by statute to ensure the enforcement of judgments for the payment of alimony or support. The purpose of a writ of *ne exeat* is to restrain the defendant from fleeing the jurisdiction until a claim against him has been satisfied. Pan Am. Sur. Co. v. Walteson, 44 So. 2d 94 (Fla. 1950); 26 FLA. JUR. 2d *Family Law* § 613 (1981).

58. FLA. STAT. § 61.11 (1983) provides in part:

When either party is about to remove himself or his property out of the state, or

of Appeal, the court stated: "The remedy is drastic but appropriate to cope with the husband's misconduct."⁵⁹ The continuing nature of the order was thus sustained as an "order in lieu of *ne exeat*."⁶⁰ However, the court cautioned that a continuing garnishment of a spendthrift trust in lieu of *ne exeat* is also a "last resort remedy."⁶¹

Where a continuing writ is issued against trust disbursements, court approval is required before any payments may be made to the beneficiary in excess of the alimony then due. Only if it is determined that sufficient assets remain in the trust to secure future payments will disbursements to the beneficiary be authorized.⁶² Thus, not only is the full amount due and owing the claimant at any one period payable from the trust assets then available to the beneficiary, but future payments must be guaranteed before any disbursements may be made to the beneficiary.

Other jurisdictions have avoided what at first glance may appear a rather harsh result by allowing a claimant to reach only so much of the trust income as the trial court determines reasonable under the circumstances, considering the needs of both the beneficiary and the claimant.⁶³ Under this intermediate approach, it is felt that while "the beneficiary is not permitted to live in luxury while his dependents starve [neither will his dependents] be permitted to live in comfort while he starves."⁶⁴

Such an intermediate approach is felt to be unnecessary when dealing with an alimony award set by a court after a hearing because such an award is presumed reasonable and may be modified upon a showing of changed circumstances.⁶⁵ This is particularly true where the trial court setting the award considered the trust

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.

59. 463 So. 2d at 223.

60. *Id.*

61. A continuing writ of garnishment against future disbursements should be sought by a "Motion for Continuing Writ of Garnishment in Lieu of *Ne exeat*" pursuant to FLA. STAT. § 61.11 (1983). It would appear that at least one of the grounds set forth in § 61.11 for the issuance of orders in lieu of *ne exeat* must be alleged along with the allegations required for a standard postjudgment writ of garnishment under FLA. STAT. § 77.03 (1983). The motion must also allege that the writ is sought as a "last resort."

62. 463 So. 2d at 223.

63. See, e.g., *Shelley v. Shelley*, 354 P.2d 282 (Or. 1960); see also 2 A. SCOTT, *supra* note 2, § 157.1, at 1212.

64. 2 A. SCOTT, *supra* note 2, § 157.1.

65. See *White v. Bacardi*, 446 So. 2d 150, 156 n.6 (Fla. 3d DCA 1984); see also *Safe Deposit & Trust Co. of Baltimore v. Robertson*, 65 A.2d 292, 296 (Md. 1949).

income when determining the husband's ability to pay.⁶⁶ However, in a case where the award is part of a settlement agreement which is incorporated into the divorce decree and thus can be modified only if the agreement so provides,⁶⁷ an approach which only allows so much of the income to be reached as is reasonable under the circumstances would protect the beneficiary from the enforcement of "an agreement for alimony that may have been unreasonable *ab initio*."⁶⁸ In response to this concern which was expressed by the Third District Court of Appeal, one may question whether the courts should intervene to protect a spouse from the lawful consequences of his voluntary acts.⁶⁹ The Florida Supreme Court appears to have answered this question in the negative, affording no special protection to beneficiaries whose legal support obligations are based on the underlying settlement agreement of the parties.

IV. CONCLUSION

All spendthrift trusts established in Florida are susceptible to garnishment as set forth in the *Bacardi* opinion. The court did not limit its decision to the trust before it or to those to be created in the future. Therefore, disbursements from spendthrift trusts which were in existence prior to the *Bacardi* decision are also reachable in satisfaction of alimony and child support claims.⁷⁰

In *Bacardi*, the Florida Supreme Court wisely chose to straightforwardly base its decision on public policy rather than to engage in the kind of strained analysis employed by some courts to reach favorable results while insisting on maintaining the appearance of

66. See *Page v. Page*, 371 So. 2d 543 (Fla. 3d DCA 1979) (trial judge was directed to take into consideration the income received from a spendthrift trust in determining the proper amount of child support); *Athorne v. Athorne*, 128 A.2d 910 (N.H. 1957) (trust income considered in fixing alimony award).

67. See *White v. Bacardi*, 446 So. 2d at 156 n.6 (citing *Grabow v. Grabow*, 442 So. 2d 262 (Fla. 3d DCA 1983)).

68. 446 So. 2d at 155.

69. See 446 So. 2d at 157 (Schwartz, C.J., dissenting).

70. See *Southeast Bank, N.A. v. Gilbert*, 463 So. 2d 223 (Fla. 1985) (garnishment of spendthrift trust in existence prior to *Bacardi* decision affirmed).

Such retroactive application has been criticized by Judge Lehan of the Second District Court of Appeal, who stated in *Gilbert*:

I feel that the strength of prior Florida law approving spendthrift trusts evidences well-justified past reliance by settlors upon Florida law for the expected effectiveness of spendthrift trust provisions

. . . .
 . . . I don't favor the idea of changing principles of law governing wills and trusts after it is too late for testators and settlors to change their wills and trusts. *Gilbert*, 447 So. 2d at 308 (Lehan, J., concurring in part, dissenting in part).

promoting the settlor's intent. Under the *Bacardi* approach, the settlor's intent will be respected unless there is no other enforcement alternative available to the claimant. Further, in such "last resort" situations the restrictive provisions which immunize trust assets from the reach of the beneficiary's "creditors" and those which directly exclude the claimant⁷¹ will be considered void to the extent such provisions would exclude claims for alimony or child support. The Florida Supreme Court has thus set forth a realistic approach to a problem which requires the weighing of competing public policies. This balancing formula avoids a wholesale abandonment of the settlor's intent while equitably ensuring that a beneficiary will not be allowed to enjoy the benefits of a trust income while ignoring his legal support obligations.

Deborah Meyer Ezatoff

71. See *Southeast Bank, N.A. v. Gilbert*, 463 So. 2d 223 (Fla. 1985). In *Gilbert*, the garnishment order was sustained even though the trust instrument expressly excluded the claimant from reaching the trust assets. See *Gilbert*, 447 So. 2d at 300 (reciting spendthrift provision).

