

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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Nos. 93-2083 and 93-2289  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

NICHOLAS BACHYNSKY,

Defendant,

ELISABETH BACHYNSKY,

Claimant-Appellant.

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Appeals from the United States District Court  
for the Southern District of Texas  
(CR-H-88-364-FOR)

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(August 10, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:<sup>1</sup>

Elisabeth Bachynsky challenges the district court's grant of summary judgment in favor of the government. We affirm.

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<sup>1</sup> Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Dr. Nicholas Bachynsky pled guilty to conducting the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), and to conspiring to defraud the Internal Revenue Service in violation of 18 U.S.C. § 371. **See United States v. Bachynsky**, 934 F.2d 1349, 1352 (5th Cir.) (en banc), **cert. denied**, 112 S.Ct. 402 (1991). As part of his plea agreement, Dr. Bachynsky agreed to forfeit multiple properties and interests as set out in the forfeiture section of the indictment. Included in the list of forfeited assets was the Nicholas and Judith Ann Bachynsky Children's Trusts and the Nitilo Corporation. The district court sentenced Dr. Bachynsky to a term of imprisonment and supervised release of thirteen years and one month, and we affirmed. **See United States v. Bachynsky**, 949 F.2d 722 (5th Cir. 1991), **cert. denied**, 113 S.Ct. 150 (1992) ("**Bachynsky II**").

The government sought forfeiture of the properties that Dr. Bachynsky agreed to forfeit, and the district court ordered the properties forfeited. Charles Dupuis, in his capacity as co-trustee of the Nicholas and Judith Ann Bachynsky Children's Trusts,<sup>2</sup> filed a petition pursuant to 18 U.S.C. § 1963(b)(2) to contest the district court's order of forfeiture. In the petition, Dupuis alleged that Dr. Bachynsky did not have authority to waive

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<sup>2</sup> The beneficiaries of the trusts were Timothy Max Bachynsky, Ashton Carlo Bachynsky, Bart G. Bachynsky, and Elisabeth Ann Bachynsky.

the interest of the Children's Trusts or the beneficial property interests.

Following a hearing, the district court determined that Karen M. Zuckerman, the guardian ad litem who had been appointed by the bankruptcy court to represent the interest of the children, should be substituted in place of the attorney who represented the Trusts. The district court found that the Trusts were "a sham" and granted Ms. Zuckerman 60 days to establish the amounts and claims under the Trusts which were untainted. Ms. Zuckerman filed a claim on behalf of Elisabeth Bachynsky,<sup>3</sup> objecting to the forfeiture of approximately \$28,500 in cash and the assets originally used to capitalize the Nitilo Corporation and its subsidiaries. Following a preliminary hearing, the district court issued an order instructing the children that, in order to avoid the forfeiture, they must prove: "(a) they had superior right, title or interest in the asset to that of Dr. Bachynsky; (b) the trust was legally valid; (c) the assets are untainted by Dr. Bachynsky's illegal acts and were so at the time the assets were placed in the trust; and (d) the asset remained untainted once placed in the trust."

The government then moved for summary judgment. The district court found that the trust itself was a sham because "it was handled and used and manipulated by an individual that violated all of the terms and conditions that are set up by a trust." The district court concluded that Dr. Bachynsky demonstrated his

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<sup>3</sup> Carlo and Bart filed a **pro se** claim objecting to the forfeiture. Timothy forfeited claims to the assets as part of his plea agreement.

intentions and motivations concerning the trust in his guilty plea, and that thus, "the prima facie case regarding whether or not [the assets of the trust are] forfeitable or not has already been made by Dr. Bachynsky's confession." The district court was willing to consider evidence that "there were certain assets in that sham trust that shouldn't be forfeited to the Government."

Following another hearing, the district court granted the government's motion for summary judgment, concluding "that the illegal activities of Bachynsky leave no doubt that the assets that were transferred to Nitilo in 1982, which became the subject of the bearer stock certificates, were forfeitable assets because they were the proceeds of Bachynsky's illegal activities." The district court held "that except for the \$27,444.05 plus interest accruing from 1988, . . . all assets held by any corporation or trust to include the Children's Trust was [sic] owned by Bachynsky and are forfeited." The district court entered a final judgment awarding the children \$27,444.05 plus interest and costs. The district court also issued a final order of forfeiture giving the government title to all property forfeited by the amended order of forfeiture.

## II.

Proceeding **pro se**, Elisabeth Bachynsky argues that the district court erred in granting the government's motion for summary judgment because there are disputed fact issues. She contends that the children have a superior title to the assets in the Trusts, that the Trusts were established for a legitimate estate-planning purpose, and that the assets of the Trusts remained

untainted. We review a grant of summary judgment **de novo**, using the same standards as the district court. **See Amburgey v. Corhart Refractories Corp.**, 936 F.2d 805, 809 (5th Cir. 1991).

Under 18 U.S.C. § 1963(a), any person who violates the criminal provisions of RICO forfeits to the United States any interest the person acquired or maintained in violation of RICO. A petitioner asserting an interest in the forfeited property must establish by a preponderance of the evidence that (1) the petitioner has a superior right, title, or interest in the property or (2) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and had no reason to believe at the time of purchase that the property was subject to forfeiture. 18 U.S.C. § 1963(1)(6)(A) and (B). It is undisputed that the Children's Trusts are not bona fide purchasers for value; therefore, the question is whether the Trusts had a superior right, title, or interest in the property.

Elisabeth argues first that the Children's Trusts had superior title to cash in the amount of \$28,918.81 because these assets were untainted and title had vested in the Trusts. This argument need not be addressed, however, because Elisabeth has received the relief she sought. The district court entered a final judgment awarding the children \$27,444.05 plus interest and costs.

Elisabeth argues next that the common stock of the Nitilo Corporation could not have been involved in her father's RICO activity prior to the time the Trusts acquired the stock because the Trusts received the shares upon Nitilo's creation. Moreover,

she asserts that the assets of Nitilo, from its inception, included 96,154 shares of Ortel and various parcels of real property. Elisabeth contends that the real property is not tainted because it was purchased by her parents prior to January 1, 1981, the date that the indictment alleges that the RICO activity began. In short, she argues that there was no RICO activity involving Nitilo prior to September 1982 because Nitilo did not exist; thus, Nitilo and the assets acquired by Nitilo were untainted and vested in the Trusts at the corporation's inception.

The government argues that the grant of summary judgment was proper; it points to Bachynsky's forfeiture of the assets as part of the plea agreement and our affirmance of a factual basis for the forfeiture of the properties and entities named in the plea agreement. **See Bachynsky II**, 949 F.2d at 730-31. The government also argues that the Trusts were "a sham" because Bachynsky transferred assets in and out of Nitilo and the Trust, back-dated documents to hide the assets and his criminal activity, and used the Trust as a part of the RICO enterprise. In support of this assertion, the government presented a transcript of a recorded conversation between Bachynsky, Ron Day, and Attorney Abe Friedman which demonstrated how the various assets were manipulated.<sup>4</sup>

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<sup>4</sup> N. Bachynsky: [T]hese bearer shares that your [sic] holding, I think I'll get you to, you know, I'd say right now, if anybody asks you are holding those in trust for one [of] the trusts, O.K.? An we'll figure out what trust to put, ah.

Abe Friedman: See, the other problem is, is, was the trust in existence [sic]?

Elisabeth has presented no evidence supporting her assertion that there is a dispute concerning title to the assets of Nitilo. She makes only conclusory statements and emphasizes the legitimacy of the Trusts at their inception as proof of the Trusts' superior title to the assets.

There is no dispute that the proper documents were executed to create the Trusts. However, Dr. Bachynsky's plea agreement established that he did not create the Trusts for his children's benefit. **See Citizens Nat'l Bank of Breckenridge v. Allen**, 575 S.W.2d 654, 658 (Tex. Civ. App. -- Eastland 1978, **writ ref'd n.r.e.**) (intent of parties is ultimate controlling factor in

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N. Bachynsky: Oh yeah, they were in existence since 1982. It might be one of the kids trusts, o.k. We'll put it in, and I think that way there'll be no question about who owns those bearer shares, huh.

. . .

N. Bachynsky: So I think what we'll do is Tims [sic] trust will own, yeah, Tims trust which is already set-up is gonna own Roneal and then Roneal will own ATI which will in then turn own all of the subsidiaries. You follow me?

Abe Friedman: Yeah.

. . .

Tom McCaffrey: O.K.. the only other one that were [sic] not doing anything, the Nitilo one, is that right?

N. Bachynsky: The Nitilo one, you know Nitilo Corporation as of '87 I don't know. . .

Abe Friedman: What happened, you know it's suppose to own all these assets.

N. Bachynsky: We may have to resurrect that thing.

Abe Friedman: You know, we've been talking about that for months now.

creation of trust). The transcript of Dr. Bachynsky's conversation with his advisors further supports the government's position that he maintained control over the Trusts and transferred assets at will.

Elisabeth argues that Dr. Bachynsky's guilty plea has no controlling effect with regard to establishing the children's interest in the property at issue. She contends that neither the Trusts nor the children were parties to the criminal proceedings, and that therefore due process requires that they be permitted to assert their interest in the forfeited properties and to challenge the validity of the forfeiture.

However, Elisabeth does not address Dr. Bachynsky's acknowledgment that he owned and controlled the Children's Trusts and Nitilo. Moreover, she ignores the government's evidence of conversations showing that the assets were tainted because Bachynsky controlled the property that was transferred to the Trusts. Elisabeth argues that, once Dr. Bachynsky transferred title of the common shares of Nitilo to the Trust, title to the shares vested in the Trusts and they were no longer subject to forfeiture. She argues that whether title vested in the Trusts presents a genuine issue of material fact.

To the extent that Elisabeth seeks to relitigate whether the Trusts were "a sham," her argument is meritless. At the hearing on the forfeiture claim, the district court stated that it had concluded (and we affirmed) that the Trusts were "a sham." Although this finding does not preclude a showing that there were



legitimate funds in the Trusts, Elisabeth has not shown that there were untainted funds in the Trusts. **See United States v. Reckmeyer**, 836 F.2d 200, 207-08 (4th Cir. 1987).

III.

We agree with the district court that no genuine issue of material fact remained regarding whether the Children's Trusts had a superior interest in the common stock of the Nitilo Corporation. We therefore affirm the district court's grant of summary judgment in favor of the government.

AFFIRMED.