

IN THE SUPREME COURT IN AND
FOR THE STATE OF FLORIDA

CASE NO. 65,499

SUSAN M. STREGACK, as	* *
Personal Representative	* *
of the Estate of Manuel	* *
Moldofsky, Deceased,	* *
	* *
Petitioner/Appellee,	* *
	* *
-vs-	* *
	* *
SALLY D. MOLDOFSKY,	* *
	* *
Respondent/Appellant	* *
_____	* *

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ANSWER BRIEF ON JURISDICTION
IN OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW

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STATEMENT OF THE CASE AND THE FACTS

The "facts", as stated by Petitioner/Appellee, are not correct, according to the Record on Appeal, inasmuch as no testimony was taken, and the case was disposed of in the lower Court essentially without issue joined on pleadings.

In the Probate Division, Respondent/Appellant filed an Election to Take an Elective Share, to which a Motion to Strike was directed. In the General Jurisdiction Division a Complaint to Set Aside for Fraud an Agreement purporting to waive the right to inherit was filed, to which a Motion to Dismiss was directed. The only "facts" are those presented in these documents.

The Probate Division struck the Election to Take an Elective Share, and the General Jurisdiction Division dismissed the Complaint to Set Aside the Agreement, based on the decision in the Probate Division.

Although Formal Notice was served upon Respondent/Appellant, it merely advised her that a Petition for Administration had previously been filed seeking to cause the Will to be admitted to probate and to appoint the Personal Representative. It notified her that the relief sought in the Petition had already been accomplished. However, Respondent/Appellant had, up to that point, never been served with a copy of the Will, and a copy thereof was not received until the same had been requested by her attorney.

The Third District Court of Appeal, in its opinion, correctly ruled that the sole question presented by the

appeal:

"..is whether section 732.702, Florida Statutes (1983), which eliminates the need for fair disclosure for a valid antenuptial agreement in the probate context, precludes the surviving spouse from challenging such an agreement on the grounds of fraudulent nondisclosure..."

Further, although it is stated that this case involves the effect of the Formal Notice, the so-called "conflict cases" relied upon by Petitioner/Appellee deal solely with the question of legislative intent in enacting Florida Statute 732.702 and the cases interpreting said Statute. This Answer Brief is, therefore, directed solely to the jurisdictional issues which Petitioner/Appellee seeks to raise in her Petition for Discretionary Review.

In a Motion for Rehearing filed in the Third District Court of Appeal, Petitioner/Appellee requested that Court for an "en banc hearing and/or certification to the Supreme Court", which relief was denied without comment.

THERE IS NO BASIS FOR THE FLORIDA SUPREME COURT
TO EXERCISE ITS DISCRETIONARY JURISDICTION

ARGUMENT AND AUTHORITIES

The opinion issued by the Third District Court of Appeal is not in conflict with the decisions of this Honorable Court or other Appellate Courts and, therefore, there is no basis upon which this Court should exercise its discretionary jurisdiction.

This question is covered by Article V, Section 3, of the Florida Constitution, which was substantially revised, effective as of April 1, 1980.

Article V, Section 3(b)(3), with respect to review of conflicting decisions, provides:

"May review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.." (emphasis supplied)

Jenkins v. State of Florida, 385 So.2d 1356 (Fla. 1980) contains an in-depth recital of the history of certiorari to the Supreme Court, as the same existed prior to and subsequent to April 1, 1980.

The entire purpose of the amendment to the Constitution, as set forth in Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982), was to reiterate that the District Courts of Appeal are:

"..courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy."

Jenkins, supra, states (p. 1359):

"The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court..."

This Court, in Jenkins, further stated:

"Furthermore, the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the district court of appeal. As stated by Justice Adkins in Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970), '[i]t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari'." (emphasis in original)

In Whipple v. State of Florida, 431 So.2d 1011 (2d DCA 1983) the Court, in commenting upon Jenkins, noted that:

"The supreme court may no longer search into the "record proper" to determine whether a district court affirmance creates a necessary conflict."

In Dodi Publishing Company v. Editorial America, S. A., 385 So.2d 1369 (Fla. 1980), this Court held that:

"The issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion which is now cited for authority."

In State v. Wagner, 403 So.2d 1349 (5th DCA 1981) the Court, in commenting upon Jenkins, notes that the Supreme Court:

"set an example by following the constitutional scheme and declined to encroach upon the final appellate jurisdiction of the district courts of appeal."

Gibson, supra, cited by Petitioner/Appellee was decided prior to the Constitutional amendment. Nevertheless, it points up the rule that it is a conflict of decisions, not a conflict of opinions or reasons that supplies jurisdiction

for review.

There is no conflict, as urged by Petitioner/Appellee, with:

Coleman v. Estate of Coleman, 439 So.2d 1016 (1st DCA 1983) which, as Judge Nesbitt noted, precluded a challenge of an Ante Nuptial Agreement on the ground of fraudulent non-disclosure in a probate context. In Coleman, the Court based its decision upon the fact that affirmative non-disclosure was foreclosed because the only available proof thereof was barred by the Dead Man's Statute. The Court, in Coleman, held only that fraudulent non-disclosure could not be proven. It did not condone fraudulent non-disclosure.

Ellis First National Bank of West Pasco v. Downing, 443 So.2d 337 (2d DCA 1983) after a non-jury trial, the Court concluded that there was no valid relinquishment of the widow's right to claim an elective share. The Court of Appeal reversed, based upon the lower Court's findings concerning the inadequacy of the provisions for the wife and the absence of a fair disclosure, stating that the same did not support the trial Court's conclusion. This case, similar to Coleman, does not condone fraudulent non-disclosure.

In re Ginsberg's Estate, 50 So.2d 539 (Fla. 1951), this Court, in construing the Florida Dower Statute, indicates that legislative intent must be ascertained and effectuated in construction of a Statute. There is nothing to indicate that the Legislature intended in Florida Statute

732.702 to condone fraud.

In re Estate of Reed, 354 So.2d 864 (Fla. 1978) deals with the State's prior Family Allowance Statute and not Elective Share.

Estate of Roberts, 388 So.2d 216 (Fla. 1980) did not involve fraudulent non-disclosure, and it specifically provided that the right to challenge an Ante Nuptial Agreement had not been abrogated by Statute.

Weintraub v. Weintraub, 417 So.2d 629 (Fla. 1982), a divorce case, in which this Court held that the Statute was not intended to apply to dissolution proceedings.

DelVecchio v. DelVecchio, 143 So.2d 17 (Fla. 1962) established the common law rule that there must be a fair and full disclosure of assets prior to execution in order for an Ante Nuptial Agreement to be valid.

CONCLUSION:

In short, there is no decision that expressly and directly conflicts with the decision of the Third District Court of Appeal in the case at bar for this Court to exercise its discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief on Jurisdiction in Opposition to Petition for Discretionary Review was mailed to AINSLEE R. FERDIE, ESQUIRE, Ferdie and Gouz, Attorneys for Petitioner/Appellee, 717 Ponce deLeon Boulevard, #215, Coral Gables, Florida 33134, this 18 day of July, A. D. 1984.

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