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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,

-vs-

SALLY D. MOLDOFSKY,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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AUTHORITIES:

STATEMENT OF THE CASE AND THE FACTS

Although the "factual" recital of events contained in Petitioner's Brief may be largely correct historically, Respondent calls the attention of the Court to the undisputed fact that no testimony was heard by either Division of the Circuit Court when the rulings were made.

Although reference is made to the deposition of Respondent in Petitioner's Brief, the Record on Appeal will reflect that the deposition was not filed until July 5, 1983, well after the ruling in the Court (May 26, 1983 - Probate; June 23, 1983 - General).

Respondent can recite other "facts" which may or may not be of interest to this Court to counter-balance Petitioner's recital, which would only point up the complete lack of knowledge of the facts on the part of the Circuit Court. For example, decedent was a lawyer, who worked for one of New York City's legal departments; separate income tax returns were filed; decedent kept all financial information hidden from the Respondent; Respondent was a housewife, with little formal training or business experience.

Respondent emphasizes at the outset, the proceedings which occurred in the Circuit Court. This clearly reflects summary disposition in the Probate Division, by the striking of Respondent's election, as widow, to take an elective share, on Motion of the Petitioner, and the dismissal with prejudice, in the General Jurisdiction Division on Petitioner's Motion to Dismiss Respondent's Complaint seeking

to set aside a written instrument, which may or may not have been an Ante-Nuptial Agreement, inasmuch as it was executed by Respondent prior to the marriage and acknowledged by the decedent, after the marriage. There is, of course, no evidence whether the decedent signed the document before or after the marriage, or even if the parties had agreed to the terms of the document, as ultimately signed, prior to the marriage.

There are, however, certain facts evidenced by documents filed by Petitioner, which are not mentioned in Petitioner's Brief.

The Petition for Administration, sworn to by the Petitioner under penalty of perjury [R-3, 4] reflected assets consisting of stocks, cash in bank and other personal property of approximately $1,500.00. Although the Petition for Administration made reference to an Ante-Nuptial Agreement, the only relief sought was to admit the Will to probate and appointment of the Personal Representative. The Formal Notice of Administration [R-9, 11] was not served upon Respondent until December 2, 1982. This document, together with the Petition for Administration (already moot) and Letters of Administration (already issued on November 30, 1982) were all served upon Respondent at the same time.

A Non-Taxable Certificate was issued by the Department of Revenue, dated December 20, 1982. Although no copy of the

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"R" refers to the Record on Appeal in the Third District Court of Appeal

Preliminary Notice and Report was in the file, it is obvious that this document, which was also sworn to by the Petitioner, was consistent with the statement of assets contained in the Petition for Administration.

Respondent did not receive a copy of the Will until December 15, 1982. This came about only after a request by her attorney.

Nothing further was known to Respondent about the size of decedent's estate or progress in its administration until approximately two and one-half months after the first publication of the Notice of Administration had occurred. Not until February 28, 1983, was an Inventory filed (also under oath, with a copy represented as having been sent to the Department of Revenue). Simultaneously, a Preliminary Notice and Report was filed [R-18 through 22]. These documents, for the first time, listed assets having a net value of approximately $262,877.00, including $120,000.00 of Municipal Bonds, stocks, bank accounts and a list of jewelry. This is quite a difference from the initial statement of the value of the estate as being $1,500.00.

A cover letter from Petitioner's attorney, dated February 28, 1983 [R-17], which accompanied the Inventory and Preliminary Notice and Report, stated blandly that additional assets had been discovered and that a Federal Estate Tax Return would probably be required. There was no explanation given why the Petitioner (decedent's only daughter and the Personal Representative and beneficiary under the Will, who

had access to all of decedent's records from the date of death) did not know from the outset of the existence of these considerable additional assets. Decedent died on November 1, 1982, and it was not until approximately four months later that these assets were "discovered". Was this done to mislead the Respondent, as it did, in her belief up to that time that decedent, indeed, had "nothing", or had the decedent even hidden his assets from the Petitioner.

Information was sought by Petitioner's attorney from Respondent as to the value of any jointly-held assets (actually only a condominium unit) for inclusion in the Federal Estate Tax Return, although no such information was requested by the estate in connection with the Preliminary Notice and Report, initially filed, and because of which a Non-Taxable Certificate had been issued. There is, of course, nothing in the record which would refute or tend to refute, Respondent's allegations of decedent's representations of his complete lack of financial worth at or prior to or immediately subsequent to the date of marriage.

It should be noted that this is hardly the type of case where the complaining wife waited until death had sealed the lips of the husband before she asserted fraud and fraud in the inducement. Here, giving the Personal Representative the benefit of the doubt, it seems that the decedent was so secretive about his assets throughout his lifetime, that his daughter was misled and obviously believed, based on information obtained from her father, that he died with no

assets (a mere $1,500.00).

The first publication of Notice of Administration occurred on December 17, 1982 [R-9]. On March 4, 1983, Respondent filed her Election to Take an Elective Share [R-23] well within three months, although four months are allowed by Statute, and only four days after receipt of the "Amended" Inventory and Preliminary Notice.

The Complaint filed in the Circuit Court sought cancellation of the Agreement upon the grounds of fraud and fraud in the inducement [R-180 through 190].

Appeals were filed in both cases, which were consolidated. The Third District Court of Appeal reversed the Circuit Court's Judgments.

POINTS ON APPEAL

I.

DOES SECTION 732.702, FLORIDA STATUTES (1983), WHICH ELIMINATES THE NEED FOR FAIR DISCLOSURE FOR A VALID ANTE-NUPTIAL AGREEMENT IN THE PROBATE CONTEXT, PRECLUDE THE SURVIVING SPOUSE FROM CHALLENGING SUCH AN AGREEMENT ON THE GROUNDS OF FRAUDULENT NON-DISCLOSURE.

II.

THE PROBATE PROCEDURES FOLLOWED BY RESPONDENT WERE PROPER AND SERVE NO BASIS TO BAR THE CLAIM.

ARGUMENT AND AUTHORITIES

I.

DOES SECTION 732.702, FLORIDA STATUTES (1983), WHICH ELIMINATES THE NEED FOR FAIR DISCLOSURE FOR A VALID ANTE-NUPTIAL AGREEMENT IN THE PROBATE CONTEXT, PRECLUDE THE SURVIVING SPOUSE FROM CHALLENGING SUCH AN AGREEMENT ON THE GROUNDS OF FRAUDULENT NON-DISCLOSURE.

Respondent is in accord with Judge Nesbitt's statement in his opinion that the above constitutes the sole question presented by Section 732.702, Florida Statutes (1983) and this case.

Stated even more bluntly, the question presented herein is whether the Florida Legislature, in enacting this Statute, intended to legalize or condone fraud and to prevent a surviving spouse from attacking such an Agreement where, although the decedent had the right to remain silent and to make no disclosure of his assets, he chose instead to falsely represent that he had no assets.

Petitioner's argument (page 5 of Petitioner's Brief) that if there is no duty to disclose, how can non-disclosure be fraudulent, completely ignores this rather simple issue.

In short, the Legislature's obvious intent was to eliminate, in a probate setting, that portion of the common law rule which required a party to make a fair and full disclosure of his assets, prior to execution of the Agreement. There was certainly no intent, express or implied, to rule out fraud.

The Statute states quite clearly that "no disclosure

shall be required for an agreement, contract or waiver executed before marriage". It does not state that if a disclosure is made, it is legally ineffective, and the other party has no right to rely upon it. In short, it merely states that no disclosure is required, but it does not state that if a false disclosure is made, it will be treated by the Courts as a nullity.

It is stretching the mind to believe that by Statute, in Florida, a party, who has obtained by fraud an Ante-Nuptial Agreement, may, after death, cause his estate to reap the benefits of his fraud and bear no responsibility therefor.

It should not be necessary to cite any legal precedents or authority for the proposition that no Legislature would ever concede that it intended to enact a law that would legalize or condone fraud in any situation, and most certainly, not where a marriage is about to take place based upon misrepresentation.

If it is the function of this Court to determine legislative intent, it would seem obvious that the Legislature did not intend to abrogate the defense of fraudulent disclosure, nor to condone fraudulent disclosure. This Court has recognized on innumerable occasions that it is the function of the Legislature to enact laws, but it is not the function of the Court to legislate laws or to go beyond the statutory language.

There are no enactments by Congress or any Legislature of the 50 States of the Union which condone, approve or

legalize fraud. The Probate Division of the Circuit Court, in interpreting Florida Statute 732.702(2), has ruled that:

> "As a matter of public policy, that statute disallows actions to rescind antenuptial agreements after the death of a spouse based on matters relating to disclosure."

That Court concluded that since Respondent's counsel has asserted that the basis of fraud relates to fraudulent disclosure, no amendment would cure the defect, and, therefore, the case was dismissed on Motion.

In Estate of Roberts, 388 So2d 216 (Fla. 1980), this Court acknowledged that Section 732.702 abrogated the disclosure requirement in a probate context. This was also held to be correct by this Court in Weintraub v. Weintraub, 417 So2d 629 (Fla. 1982).

This Court noted, however, that:

> "(t)he legislature has not abolished the wife's right to sue; it has only altered one of the elements that the court may consider in determining the validity of the antenuptial agreement."

Estate of Roberts, supra.

This Court further stated in Roberts:

> "The right to have an antenuptial agreement set aside still exists. For example, if a wife were able to show that her signture on such an agreement had been coerced or otherwise improperly obtained or that she was incompetent at the time she signed, section 732.702(2), would not bar her challenge to the validity of the agreement."
>
> (underscoring supplied)

Contrast these statements of this Court with the public policy declaration as announced by the Probate Division.

In Roberts, there was no allegation of fraud. All that was claimed was that Mr. Roberts did not make a fair disclosure of his wealth.

The question which was before the Court and which was determined by the Third District Court of Appeal in this case was whether the elimination of the disclosure requirement includes fraudulent non-disclosure.

While simple non-disclosure would not normally constitute actionable fraud at common law, however, where a party undertook to disclose facts where he may not have had a duty to make any disclosure, he was then required to disclose the whole truth. Ramel v. Chasebrook Construction Co., 135 So2d 876 (2d DCA 1961); Sutton v. Crane, 101 So2d 823 (2d DCA 1958).

Where a party voluntarily assumed the duty to disclose, any suppression of the true facts or dissemination of untrue information would render the matter actionable. Kitchen v. Long, 67 Fla. 72, 64 So. 429 (1914); Nessim v. DeLoache, 384 So2d 1341 (3d DCA 1980).

The Third District Court of Appeal correctly distinguished the situation where a party voluntary assumed the duty of disclosure as being quite different from remaining silent, where there was no duty to disclose. If Florida Statute 732.702 only eliminated the requirement of disclosure, as it did, that would not insulate the decedent

from liability for making a false promise or improper disclosure where he voluntarily assumed the duty to disclose. The Statute does not insulate him or his estate from making an improper disclosure to the spouse who is misled into contracting the marriage.

The concern of the Courts in statutory interpretation is to ascertain and to vindicate, if that is proper, the legislative intent. Flagship National Bank of Miami v. King, 418 So2d 275, 278 (3d DCA 1982).

The legislative purpose in adopting Florida Statute 732.702(2) was to abrogate the long-established, common law rule which required fair disclosure prior to execution of pre-marital contracts, as had previously been enunciated by this Court in DelVecchio v. DelVecchio, 143 So2d 17 (Fla. 1962). This is borne out by this Court's opinion in Estate of Roberts and Weintraub, supra.

The Legislature never could have intended that the Statute would preclude a challenge of a contract fraudulently executed. As has been pointed out elsewhere in this Brief, if the Legislature had intended to abrogate fraudulent non-disclosure, as well as simple non-disclosure, it would have done so expressly. However, if this had been done, it would certainly have caused the Statute to be completely contrary to our system of jurisprudence.

The basic grounds for setting aside any contract are the use of fraud, duress or undue influence in obtaining assent. 11 Fla. Jur.2d 328, Contracts, Section 335. This Court in

Roberts in finding Section 732.702 constitutional, reiterated the foregoing statement by specifically stating grounds upon which a wife may challenge the validity of an Ante-Nuptial Agreement. See also Ellis First National Bank of West Pasco v. Downing, 443 So2d 337 (2d DCA 1983).

Fraud is a long-standing ground for setting aside a contract, and it would appear obvious that this Court, in Estate of Roberts, supra, meant for fraud to be encompassed within the phrase "or otherwise improperly obtained". In Flagship National Bank, supra, the Third District Court of Appeal had previously indicated that the intention of the Legislature in inserting the writing requirement in Section 732.702 was to safeguard against fraudulent claims. It is, therefore, apparent that fraud is still a relevant consideration under the Statute.

The case which appears to be reasonably close factually to the case at bar, and which, on its face, is in conflict with this case, is Coleman v. Estate of Coleman, 439 So2d 1016 (1st DCA 1983). In Coleman, however, the Court did not go so far as to state that Florida Statute 732.702 precluded a challenge to an Ante-Nuptial Agreement on the ground of fraudulent disclosure in a probate context. Instead, the Court chose to hold that the challenge to the Ante-Nuptial Agreement was foreclosed because the only available proof thereof was barred by the Dead Man's Statute, Section 90.602, Florida Statutes (1983). The Court in Coleman, therefore, simply held that fraudulent disclosure could not be proven in

that case. The Third District Court of Appeal in the case at bar correctly chose not to follow Coleman because in this case there was nothing before the Court here to reflect what proof was available to Respondent in establishing fraud.

II.

THE PROBATE PROCEDURES FOLLOWED BY RESPONDENT WERE PROPER AND SERVE NO BASIS TO BAR THE CLAIM.

There is no merit to Peitioner's Point II, which states that based on the probate procedures, the claim was properly barred.

This Point deals with the claimed legal effect of service upon the Respondent of a Formal Notice of the Petition for Admnistration and the Notice of Administration, as shortening the time within which Appellant was required to contest the matters recited therein and to press her Election for an Elective Share.

Despite reference to various statutory provisions, Petitioner has failed to indicate any authority for her assertion that the filing and service of a Formal Notice has the legal effect of shortening the time in which to file for an Elective Share.

The Elective Share Statute 732.212 affords to the widow rights different than that of a creditor and is intended to protect the widow in asserting her rights after she has had an opportunity to ascertain the nature of the decedent's estate.

As has been set forth previously in this Brief under Statement of the Case and Facts, the relief sought in the Petition for Administration had already been granted before Respondent received it. The Will had been admitted to probate, and the Personal Representative had been appointed

and bond waived. There was nothing which required an Answer within the twenty days, as set forth in the Formal Notice. There was no basis to attack the Will as to execution, competency or undue influence. The widow's only remedy where she does not approve of the terms of the decedent's Will is the right to elect against the Will. The decedent had the right to make any statement he chose to place in his Will, whether it was true or false. If it was, in fact, false, could the widow attack the Will as invalid because of that? The answer obviously is that that is no basis to contest a Will.

The decision in the Probate Division, as well as the decision in the General Jurisdiction Division, was based largely, if not wholly, upon the lower Court's interpretation of Florida Statute 732.702(2). The Third District Court of Appeal correctly stated in its opinion that the sole question presented is whether Section 732.702, which eliminates the need for fair disclosure for a valid Ante-Nuptial Agreement in the probate context, precluded the surviving spouse from challenging such an Agreement on the grounds of fraudulent non-disclosure. This is a correct statement of the matters being presented to this Court by this Appeal.

CONCLUSION:

For the reasons set forth above, it would appear obvious that an Ante-Nuptial Agreement can be challenged on the ground of fraudulent disclosure, and such a challenge is not barred in a probate context by the non-disclosure provisions of Section 732.702(2), Florida Statutes (1983). It is inconceivable that the Legislature intended to approve or permit fraudulent non-disclosure or fraudulent disclosure in the execution of an Ante-Nuptial Agreement. In furtherance of the obvious legislative intent, the defense of fraud has not been abrogated by this Statute.

There can be no public policy which legalizes or condones fraud. The opinion of the Third District Court of Appeal in this case is correct, and it should be affirmed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Answer Brief on the Merits was mailed to AINSLEE R. FERDIE, ESQUIRE, Ferdie and Gouz, Attorneys for Petitioner, 717 Ponce deLeon Boulevard, #215, Coral Gables, Florida 33134, this 11 day of February, A. D. 1985.

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