

IN THE SUPREME COURT  
IN AND FOR THE STATE OF FLORIDA

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SUSAN M. STREGACK, as Personal  
Representative of the Estate of  
MANUEL MOLDOFSKY, Deceased,

Petitioner/Appellee

vs.

CASE NO. 65,499

SALLY D. MOLDOFSKY,

Respondent/Appellant.

\_\_\_\_\_ /

BRIEF ON JURISDICTION  
IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW  
DIRECTED TO THE THIRD DISTRICT COURT OF APPEALS CASES 83-1725 & 1754

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STATEMENT OF FACTS AND CASE

Manuel Moldofsky of New York, remarried. His bride, Sally Goldberg of New Jersey, prior to this marriage Sally, (her second) caused her attorney to prepare a Pre-Nuptial Agreement, dated November 17, 1966, which the parties executed. (CA-8). The agreement provided waiver and recital that Manual Moldofsky has real and personal property and Sally had personal property.

Manuel died in Florida on November 1, 1982 after 16 years of marriage and Sally obtained the Condominium Unit by operation of law. Manuel left a Will leaving his estate to his daughter and reciting the Pre-Nuptial Agreement. (A-3) A Petition for Administration (A-1) reciting the waiver and Pre-Nuptial Agreement and an order appointing the daughter as Personal Representative was formally served on Sally. Sally made no response within the 20 days' service, but several months later filed a claim for Elective Share. (A-5)

The Personal Representative objected to the Election and moved to Strike the Claim based on the Ante-Nuptial Agreement, (A-6) which Motion was granted by the Probate Judge after the hearing. (A-14)

Sally also filed a separate action in the General Jurisdiction Division, which was likewise dismissed. (A-32) denied (A-39) a Motion to Dismiss the Probate Appeal based on Jurisdiction (A-36) and subsequently entered an opinion reversing

The main issue presented was, does Florida Statutes preclude an action and claim for fraudulent disclosure in a Probate Context so as to avoid a waiver of a Pre-Nuptial Agreement, The Third District Court of Appeal in a 2 to 1 decision held that the Supreme Court rulings and the statute did not preclude the same. The case also involves the effect of the formal notice to the probate and the time for appeal of an Order Striking Claim for Elective Share.

The Estate brings this request for the discretionary review contending that the majority of the Third District opinion conflicts with other opinions of Sister District Courts and the Supreme Court on the principal as well as ancillary issues.

This Brief is confined to the Jurisdictional issues of conflict.

THE FLORIDA SUPREME COURT HAS JURISDICTION

ARGUMENT

The Opinion in this case by a majority of a panel of the Third District Court of Appeal conflicts with the decisions of other Appellate Courts and of the Supreme Court and the Supreme Court therefore has jurisdiction.

This Court has based jurisdiction on the principle of "express conflicts", i.e. "to represent in words", Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

It is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review...Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970). The change from certiorari to discretionary review still permits the Supreme Court to review decisions as reflected by the majority opinion entered in this case (A-40).

The principal questions as stated by Judge Nesbitt in the majority opinion is "whether Section 732.702 F.S. (1983) which eliminates the need for fair disclosure for a valid Ante-nuptial Agreement in the probate context, precludes the surviving spouse from challenging such an agreement on the grounds of fraudulent non-disclosure." The majority opinion held it did not.

This view directly conflicts with the 1st DCA opinion in Coleman v. Estate of Coleman, 439 So. 2d 1016 (Fla. 1st DCA 1983). "Appellant argues her husband affirmatively misled her as to his worth and this situation is not encompassed within the

"Non-Disclosure rule". The Appellate Court affirmed, since no disclosure is required in order for an Ante-nuptial Agreement to be valid in the probate context, and Appellants arguments all focused on disclosure. Even Judge Nesbitt on recognizing the existence of the potential conflict wrote "to the extent that Coleman may be interpreted to condone fraudulent non-disclosure under Section 732.702 (2), we elect not to follow it."

The majority opinion further conflicts with the holdings of the Florida Supreme Court In Re: Estate of Roberts, 388 So. 2d 216 (Fla. 1980) and Weintraub v. Weintraub, 417 So. 2d 629 (Fla. 1982). Those cases acknowledged the constitutionality of the statute in abrogating disclosure as a requirement or basis of attack on an Ante-nuptial Agreement in the probate context. The attempt by Judge Nesbitt to distinguish these cases, the statute and the public policy consideration falls far short and constitutes only semantic attack that challenges and places form over substance and creates a direct conflict. The public policy consideration was stated in Weintraub. The validity of the agreements in a probate context "... can be understood in part, as a result of the difficulty the estate might encounter in proving disclosure after the death of the wealthier spouse."

Coleman supra involved an attack on an Order Granting a Motion to Strike the Claim for Elective Share and the discussion of the Dead Man's Statute was only a reinforcement of the underlying public policy determination in the context of denying a Motion to

Amend. However, the wait of 16 years and the inability by death of Manuel to testify underlines the policy consideration in refusing to open the door which policy was followed by the trial judges, relying on the opinion of this Court.

As indicated by Judge Barkdull in his dissent the trial orders should have been sustained on the basis of Weintraub, supra; Coleman, supra; and Ellis First National Bank of West Pasco v. Downing, 443 So. 2d 337 (Fla. 2d DCA 1983).

The majority opinion conflicts with Ellis supra, which involved a marriage of only 1½ years, where the 2nd DCA's opinion held:

In reversing a denial of a Motion to Strike an Election to take Elective Share, that the argument of inadequacy of disclosure does not apply in the Probate context and aligned itself with Coleman, supra "The statute overrides the guideline of Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962)." The guidelines did not even require complete disclosure, but merely a showing that the wife "had a general knowledge of the husband's assets" Ellis, supra.

The agreement itself, as Judge Barkdull pointed out, in his dissent showed Manuel had real and personal property and Sally only had personal property.

Since Sally signed an agreement that gave her nothing based on the fact that Manuel was going to provide for his daughter and do nothing for her, the Third District's opinion conflicts and further constitutes an incorrect interpretation of the statutory law.



This further conflict occurs because the majority construes the right of a spouse to waive by Ante-nuptial Agreement should be governed by common law. Since the rights being waived in the probate context are rights created by statute the waiver is governed by statute. The opinion thus creates a direct conflict with the holding of the Supreme Court In Re Ginsbergs Estate 50 So.2d 539 (Fla 1951) that "we have previously held that dower is a creature of statute."

The conflict is further emphasized since In Estate of Roberts, 388 So.2d 216 (Fla. 1980) the Court held that the legislature had "altered one of the elements (fair disclosure of his wealth) that the Court may consider in determining the validity of the Ante-nuptial Agreement." Since Del Vecchio's guidelines were abrogated in the Probate context by statute, the opinion further conflicts with In Re Estate of Reed, 354 So.2d 864 (Fla. 1978) in attempting to re-establish Del Vecchio's guidelines in part.

Since the matter is of statutory construction and the Supreme Court has affirmed that disclosure is not an element to be considered it is clear that a conflict exist by asserting that "fraudulent" disclosure is a basis of attack in a probate context.

For the above reasons the Court has jurisdiction to make a determination of the conflicting positions and settle the law.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Jurisdiction was mailed this 29th day of June, 1984 to SHORENSTEIN & LEWIS, Attorneys for Respondent/Appellant, 799 Brickell Plaza, #702, Miami, Florida 33131-2704.

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