SUPREME COURT OF THE STATE OF FLORIDA

ROBERT E. ELLIOTT and LINDA J. ELLIOTT,

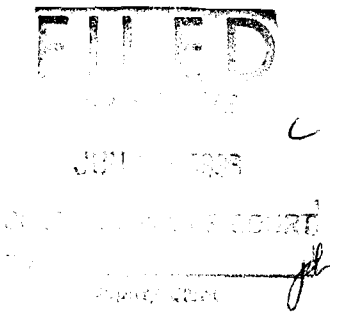
Petitoners,

vs. CASE NO. 68,911

RICHARD E. KRAUSE and MARGARET MACKIN,

Respondents.

_____/



ON PETITION FOR DISCRETIONARY REVIEW OF CONFLICT FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

BRIEF OF PETITIONERS ON JURISDICTION

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ISSUE

WHETHER THE DECISION OF THE FIFTH DISTRICT IGNORING SUBSEQUENT LIMITATIONS IN A WILL ON AN EARLIER DEVISE EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER DISTRICT COURTS OF APPEAL.

STATEMENT OF THE FACTS AND CASE

This case is a will contest in which the principal asset of the estate is a piece of real property.

Marie and Ernest Krause executed a joint will in January of 1955. A copy of the will is attached as part of the appendix to this petition.

The will had seven testamentary provisions. The first provided:

> A. Real Estate
>
> We bequeath, grant, give, transfer and convey to the survivor of the other herein all the real estate and appurtenance located thereon, regardless of whatsoever kind or nature regardless of wheresoever same is situated or located and regardless of the amount or value in fee simple that the deceased party herein has at the time of his or her death, to do with and handle as the survivor cares to do, including the selling of any portion or all of said real estate so left if such is de-sired by the survivor and beneficiary.

The last testamentary provision was paragraph 5 and provided:

> 5. At the death of the survivor of the undersigned whatever property, real, personal, tangible or intangible owned by either of them, said property is hereby bequeathed, granted, conveyed, set over, and transferred to Robert Elliott and Richard Krause, each to share equally in said properties; each receiving a one-half interest in same....

Robert Elliott is Marie's nephew and Richard Krause is Ernest's son.

In 1970 Marie and Ernest executed and recorded an agreement [R.4] which converted the ownership to a tenancy in common and provided:

> It is further the intent of the parties hereto, that should [Marie] predecease [Ernest], that [Ernest] shall have the right to use and occupy the above property during the term of his natural life, and that upon the death of [Ernest], [Marie's] ½ interest in said property shall descend and be distributed to [Marie's] heirs at law, or in accordance with her last Will and Testament.

The parties stipulated [R.40] into evidence two letters from Marie to Robert Elliott in which Marie told him he was to receive one-half the property after Marie and Ernest died. [R.41, 46].

In 1977, Marie died and later that year, Ernest executed a new will. Ernest died in 1982, and the Elliotts objected to the distribution of the real property under Ernest's new will.

The trial court entered a Final Order [R.81] that the joint will was revocable by Ernest and ruling that Marie's property passed under Paragraph A in fee simple to Ernest and not under Paragraph 5, and was therefore to be distributed in accordance with Ernest's will, one-half to Richard E. Krause and one-half to Margaret Mackin.

The Elliotts appealed and the Fifth District affirmed. On the first issue the Fifth District agreed with the trial court that the evidence did not support an agreement not to revoke the joint will. [Op. 2]

The second issue was whether the 1955 will, which was Marie's last will, conveyed her one-half interest in the property to Ernest in fee simple under Paragraph A, or whether the conveyance was limited by the later language of Paragraph 5 transferring one-half interest to Robert Elliott and to Richard Krause in whatever property was owned at the death of the survivor of Marie and Ernest. In reconciling the differences between Paragraph A and Paragraph 5, the Fifth District held:

> We conclude that the inclusion of the word, "real" in the paragraph labelled "Personal Property" was simply a scrivener's error. [Op.3]

The Fifth District affirmed the trial court's ruling.

Judge Sharp concurred on the first issue, but dissented from the affirmance of the judgment. Judge Sharp took exception to the majority's editing of the will to ignore the language actually employed by Marie, and pointed out that the conclusion of the majority conflicted with the decisions in Dutcher v. Estate of Dutcher, 437 So.2d 788, (Fla. 2d DCA 1983); Sanderson v. Sanderson, 70 So.2d 364 (Fla. 1964); and Roberts v. Mosely, 100 Fla. 267, 129 So. 835, 837 (Fla. 1930).

On May 27, 1986, the Fifth District denied the Elliotts' motion for rehearing, and on June 11, 1986, the Elliotts filed their notice to invoke discretionary jurisdiction because of express and direct conflict between the decision of the Fifth District and other decisions.

SUMMARY OF ARGUMENT

Prior decisions of this Court and the district courts of appeal have firmly established the rule that later provisions of a will devising a remainder interest in real property limit earlier provisions devising fee simple title and are to be enfored.

In this case, the Fifth District ignored the devise of the remainder by editing the devise out of the will, frustrating the testatrix's intent expressed not only in the will, but in the other documents in evidence.

Because the decision below reaches a result contrary to the established law and establishes a precedent contrary to earlier decisions of this Court and other district courts, the petition for review ought to be granted.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT DIRECTLY AND EXPRESSLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS.

The Fifth District's decision to ignore the language of the testatrix in a subsequent clause limiting the interest devised in real property to a life estate conflicts with this Court's decisions in Roberts v. Mosely, 100 Fla. 267, 129 So. 835 (1930) and Sanderson v. Sanderson, 70 So.2d 364 (Fla. 1954), and with the decision in Dutcher v. Estate of Dutcher, 437 So.2d 788 (Fla. 2d DCA 1983).

In construing the effect of Paragraph 5 on the earlier devise "in fee simple" to Ernest, the Fifth District struck the word "real" from the paragraph providing:

> At the death of the survivor of the undersigned whatever property, real, personal, tangible or intangible owned by either of them said property is hereby bequeathed... to Robert Elliott and Richard Krause....

The majority edited the will, describing the term "real" as a "scrivener's error," because the heading of a preceding paragraph read "Personal Property" and the Fifth District considered Paragraph 5 to be part of the earlier paragraph [Op. 3]. Paragraph 5, however, is the only paragraph disposing of the estate upon the survivor's death and is not part of Paragraph "B. Personal Property" either testamentarily or grammatically.

Whether Paragraph 5 is or is not a subpart of Paragraph B is not significant in determining jurisdiction for no rule of will construction permits a heading to govern over testamentary provisions, or words to be edited out to avoid conflict between testamentary provisions.

The decision of the Fifth District ignoring the later limitation on the fee simple devise directly conflicts with the rule of construction most recently reiterated in Dutcher v. Estate of Dutcher, 437 So.2d 788, 790 (Fla. 2d DCA 1983):

> If there is an irreconcible conflict between two provisions in a will, the latter provision will usually prevail as being the last expression of the intention of the testatrix where the

> provisions refer to the same subject matter.

This Court has itself dealt with the very same problem presented here. In Roberts v. Mosely, 100 Fla. 267, 129 So. 835 (1930) the will provided first that the wife was to "receive in fee simple, all of my property, real, personal, and mixed." 129 So. at 836. Subsequently, the will provided that if the wife owned any of the property at her death:

> upon her said death, my sister... shall have and receive in fee simple, one-half of my said property... and that my said wife's half-sisters... shall each have and receive in fee simple, one-fourth.... Id.

The wife's new husband argued that she received the entire estate in fee simple under the first paragraph and that the second paragraph giving one-half to the testator's sister was void for repugnancy.

Ruling against this argument, this Court held:

> We think the better rule to be that the devise of an estate in fee simple may be limited by a subsequent valid provision that the estate shall go over to others upon the happening of a named contingency or that it may be restricted by subsequent provisions in the will so that in effect it becomes an estate for life as to the remainder. 129 So. at 837.

The decision of the Fifth District in this case that Ernest received a full fee estate regardless of the limitation of Paragraph 5 directly and expressly conflicts with this Court's decision in Roberts.

In Sanderson v. Sanderson, 70 So.2d 364 (Fla. 1954), this Court had before it a joint and mutual will of a husband and wife which provided:

> [T]he entire estate of the one passing away first shall belong in its entirety to the one still living to use and enjoy as they wish to do.... Any residue of the estate left after both husband and wife have passed away... shall be divided equally between [the sons]. Id. at 365.

In that case, this Court said:

> [I]t is clear that this provision must be construed, under Roberts v. Mosely, supra, as restricting the otherwise broadly stated devise to the widow so that in effect it becomes an estate for life as to the remainder. Id. at 366-367.

The decision of the Fifth District in this case refusing to give effect to the limitations of Paragraph 5 restricting the devise in Paragraph A directly conflicts with Sanderson.

This Court should grant review in this case because the decision of the Fifth District conflicts with the decisions in Dutcher, Roberts, and Sanderson. Because of that conflict, the decision of the Fifth District, if unreviewed, stands as precedent for giving controlling effect to the first testamentary disposition of property, in spite of later, limiting provisions, contrary to the principles of will construction which have been previously laid down by the Court.

The Fifth District's departure from these principles in this case has resulted in the very evil the principles are designed to prevent -- frustration of the testatrix's intent. Under this decision, Marie's family gets nothing from her share of the property in spite of her desire that Robert Elliott get one-half of her interest upon her husband's death. Marie's intent was expressed in her will, and in the 1970 agreement and the letters of 1968 and 1971 which had been received in evidence by stipulation. Such a result is directly contrary to this Court's pronouncement in Roberts, 129 So. at 836:

> The canons of testamentary construction are few and unambiguous; the cardinal one being that, in the interpretation of a will, the intention of the testator must be given effect, provided it be not inconsistent with the rules of law. The intent of the testator should be determined by a consideration of the whole instrument. If there are expressions in the will difficult to reconcile, the posture of the testator, the ties that bind him to the legatee, the motives that prompted him to make the will he did make, and the influences that wrought on him, may be considered in arriving at the purpose of the testator.

The decision of the Fifth District in this case conflicts with these principles and ought to be reviewed.

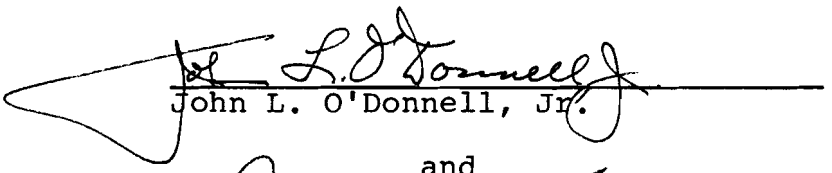
CONCLUSION

Because the decision of the Fifth District refusing to give effect to the provisions of a later clause limiting the

estate devised in an earlier clause conflicts with prior decisions of this Court and other district courts, this Court has jurisdiction.

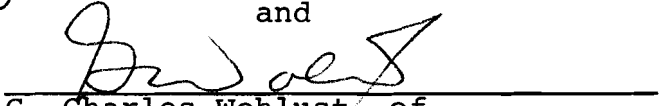
We respectfully request this Court exercise its jurisdiction, grant the petition, and review the decision of the Fifth District.

Respectfully submitted,



John L. O'Donnell, Jr.

and



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to C. John Coniglio, Esq., Post Office Box 1119, Wildwood, Florida 32785, this 23rd day of June, 1986.

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