SUPREME COURT OF THE STATE OF FLORIDA

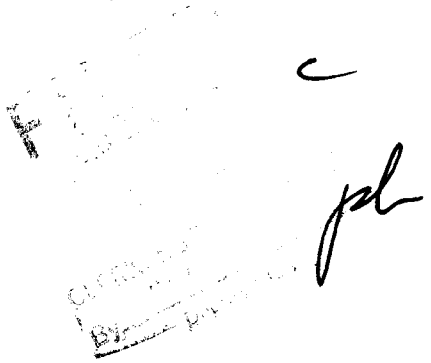
ROBERT E. ELLIOTT and LINDA J. ELLIOTT,

Petitioners,

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 RESPONDENTS ON JURISDICTION

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ISSUE

WHETHER THE DECISION OF THE FIFTH DISTRICT IN REFUSING TO GIVE EFFECT TO A SCRIVENER'S ERROR IN A WILL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL.

STATEMENT OF THE CASE AND FACTS

In addition to the facts stated in Plaintiff's brief, the following facts are relevant:

The will was divided into three sections. The second section dealt with testamentory disposition and was further divided into two subsections, "A. Real Estate", and "B. Personal Property." Subsection A consisted of one paragraph which dealt exclusively with real estate. Subsection B consisted of six paragraphs, five of which specifically dealt exclusively with personal property. The remaining paragraph under Subsection B, Paragraph 5, is the one in which the Fifth District found the word "real" to be a scrivener's error.

SUMMARY OF ARGUMENT

It has long been established that courts may disregard scrivener's errors and similar mistakes in interpreting wills. The Fifth District found such an error here, based on the facts before it, and refused to consider this error in interpreting the will. The Fifth District never reached the issue of the effect of a limitation on a previous devise, because it found that no such limitation existed there. Thus, even if this factual determination was erroneous, there could be no conflict with decisions such as Roberts v. Mosely, 100 Fla. 267, 129 So. 835(1930) or Sanderson v. Sanderson, So.2d 364(Fla. 1954), because the issues raised in those cases were not required to be addressed by the Fifth District in its opinion.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT DID NOT DIRECTLY AND EXPRESSLY CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS

The Fifth District was faced with the problem of resolving an apparent conflict between Subsection "A. Real Property, and Paragraph 5, under Subsection "B. Personal Property." While Subsection A left all the real estate to the survivor of Marie and Ernest Krause, Paragraph 5 purported to leave "whatever property, real, personal, tangible or intangible", (emphasis added),owned by the survivor at his or her death, to Robert Elliot and Richard Krause equally. After carefully considering the record, which included the fact that Paragraph 5 was part of Subsection B, and the fact that the other five paragraphs of Subsection B specifically and exclusively dealt with personal property, the Fifth District concluded that the inclusion of the word "real" in Paragraph 5 was merely a "scrivener's error." (OP. 3).

It is well settled that scrivener's errors need not be given effect in legal documents, including wills. For example, in Albury v. Albury, 63 Fla. 329, 58 So. 190 (1912), this Court refused to follow an error in the legal description of property devised in a will. A similar principle has also been applied in a number of cases dealing with the effect of a will provision that apparently conflicts with a prior provision. The lead case on the subject is In Re: Rogers' Estate, 180 So.2nd 167 (Fla. 2nd DCA 1965) in which the court stated that:

> An absolute gift of a property interest cannot be cut down by subsequent provisions unless words are used which are as clear and decisive as the words making the conveyance.

This quote has been cited approvingly in a number of cases, including Hulsh v. Hulsh, 431 So.2nd 658, at 664, n 4. (Fla. 3d DCA 1983), and In Re: Rice's Estate, 406 So.2d 469,474,475 (Fla. 3d DCA 1981).

Thus, the Fifth District did not simply ignore the principle that a subsequent limitation may limit a preceeding provision in a will. Instead, it took the position that where such a limitation is merely a scrivener's error or is otherwise unclear, it should not be given effect.

Even if the Fifth District was incorrect in its determination that the apparent conflict between the two provisions was a scrivener's error, there was no direct and express conflict with decisions such as Roberts v. Mosely, 100 Fla. 267, 129 So. 835 (1930), and Sanderson v. Sanderson, 70 So.2d 364 (Fla. 1954). Those cases dealt with the validity of will provisions that purported to limit devises in earlier provisions. The Fifth District took no position on the validity of such limitations because, based on the facts before it, it found that no such limitation existed. Accordingly, there could be no conflict with cases such as Roberts and Sanderson, since the issue with which those cases were concerned, the effect of subsequent limitations, was never even required to be considered. Thus, there was no direct and express conflict between the decision of the Fifth District and that of this Court or any other district court as required for this Court's jurisdiction.

CONCLUSION

Since the decision of the Fifth District was not that will provisions limiting the estate devised in earlier provisions are not valid, but only that where such apparent limitations are the result of scrivener's errors they would not be given effect, there is no conflict with either prior decisions of this Court or of other district courts. Therefore, this Court does not have jurisdiction.

We respectfully request this Court to decline jurisdiction and to deny the petition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to John L. O'Donnell, Jr., Esquire, 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida 32801, by U.S. Mail this 7 day of July, A.D., 1986.

Attorney