O/a 1-27-87

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 THE MERITS

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STATEMENT OF THE CASE AND FACTS

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

The joint 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. Additionally, in 1980, Ernest Krause a executed deed to the property to Richard Krause and Margaret Mackin.

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 will provision limiting a devise in a prior provision, because it found that no such limitation existed in the will.

ARGUMENT

WHETHER THE DISTRICT COURT OF APPEALS WAS CORRECT IN REFUSING TO GIVE EFFECT TO A SCRIVENER'S ERROR IN A WILL

The crux of this duspute over the Fifth's District's decision is not whether the Fifth District did or did not refuse to give effect to a valid limitation on a devise contained in a prior will provision. It is the validity of this subsequent limitation which is in question. Unless that limitation is valid, the rule of Roberts v. Mosely, 100 Fla. 267,129 So. 835 (1930) and Sanderson v. Sanderson, 70 So. 2d 364 (Fla. 1954), that a subsequent valid provision may limit a prior devise will not apply.

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 made a finding of fact that the

inclusion of the word "real" in Paragraph 5 was merely a "scrivener's error." 490 So. 2d at 956.

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.2d 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.2d 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. This is in accordance with the principle that the intention of the testator should be the guiding factor in interpreting a will.

To require that scrivener's errors in a will provision be given legal effect to limit a devise in a prior provision would have the net effect of frustrating the testator's intent. Here, the Fifth District, after considering all the evidence before it, including that as to the testatrix's intent, concluded that the word "real" was a mere scrivener's error, and should be disregarded.

CONCLUSION

The Fifth District, after considering all the relevant evidence, concluded that the word "real" in Paragraph 5 was merely a scrivener's error. Accordingly, the court refused to give that error effect in determining the proper distribution of property under the will. This decision was in accordance with prior decisions of the Court and with other districts courts. The decision should therefore be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail to G. CHARLES WOHLUST, ESQ., and JAMES R. PALMER, ESQ., 1475 Hartford Building, 200 East Robinson Street, Orlando, Florida 32801 this 7th day of November, A.D., 1986.

ATTORNEY