O/a 1-27-86

IN THE
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

REPLY BRIEF OF PETITIONERS ON THE MERITS

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STATEMENT OF THE FACTS

In their Statement of the Facts the Respondents allege, "Additionally, in 1980, Ernest Krause executed [a] deed to the property to Richard Krause and Margaret Mackin." There is no record citation for the deed and, in fact, no such deed was ever introduced in evidence. Richard Krause filed the original probate petition in this matter and alleged that the property in question was an asset of the estate [R. 2].

ARGUMENT

A SUBSEQUENT LIMITATION IN A WILL ON A DEVISE OF REAL PROPERTY GOVERNS THE DISTRIBUTION OF THE PROPERTY BECAUSE IT IS THE LAST EXPRESSION OF THE TESTATRIX'S INTENT.

In their brief the respondents contend that the rule of Roberts v. Mosely, 100 Fla. 267, 129 So. 835 (1930) does not apply because the subsequent limitation was not valid. This claim is simply not supported by the record.

The language of the subsequent limitation in Marie Krause's will was certainly valid, clear and decisive. See, In re Rogers' Estate, 180 So.2d 167, 171 (Fla. 2d DCA 1965). It was the very clarity of the language which required the Fifth District to delete the language from the will in order to reach its conclusion.

The Respondents' contention [BR. 2-3] that "the Fifth District made a finding of fact that the inclusion of the word 'real' in Paragraph 5 was merely a 'scrivner's error'," overlooks two significant principles. First, of course, the district courts are not in the business of making "findings of fact." Secondly, the determination of whether a will contains a scrivner's error is wholly dependent upon the intent of the testator.

For instance, in Albury v. Albury, 63 Fla. 329, 58 So. 190 (1912) the court refused to void a devise of real property with an erroneous legal description because it clearly appeared that the testatrix wished to leave all the

real property she owned to the named heirs. The court refused to allow an error in a legal description to frustrate this clear intent, particularly where the legal description of the will did not describe any property owned by the testatrix, and which in fact described completely nonexistent property.

The legal principles of the other cases relied upon by the Respondents are completely in accord with Robert Elliott's position in this case, for they all rely upon the intention of the testator in construing the will.

In fact, the decision in In re Rogers' Estate limited a prior specific bequest of property in order to give effect to the testator's expressed intention in the residuary clause. 180 So.2d at 171.

Similarly in Hulsh v. Hulsh, 431 So.2d 658 (Fla. 3d DCA 1983), rev. den., 440 So.2d 352 (Fla. 1983), the court looked at the intention of the testator and was able to reconcile conflicting provisions of the will, thereby giving effect to the intent of the testator.

In this case, though, the Fifth District edited the will and defeated the intent of the testatrix, even though the Fifth District recognized that Marie "expected her one-half interest in the lot would pass to [Elliott]." 490 So.2d at 957. The Fifth District's failure to give effect to the testatrix's intent, as set forth in her last will and testament, is contrary to the principles of estate administration which have been long established by this Court.

Marie Krause's intent that her family receive half of her property upon her husband's death is stated in Paragraph 5. This paragraph is quite clearly the residuary clause of what was originally a joint will. The "scrivner's error" was not in the inclusion of the word "real" in this paragraph, but rather in the form in which the paragraphs were set out. This intent expressed in the will was reinforced by Marie's letters, stipulated into evidence [R. 40; 42; 45], telling Robert Elliott that he was to receive one-half of the property after Marie and Ernest Krause died.

The Respondents' final authority, In re Estate of Rice, 406 So.2d 469 (Fla. 3d DCA 1981), rev. den., 418 So.2d 1280, and rev. den. sub nom. Greenberg v. Rice, 418 So.2d 1279 (Fla. 1982), contains the best refutation of the Fifth District's reasoning in the present case. In Rice, the court refused to edit a will to reach a particular result stating:

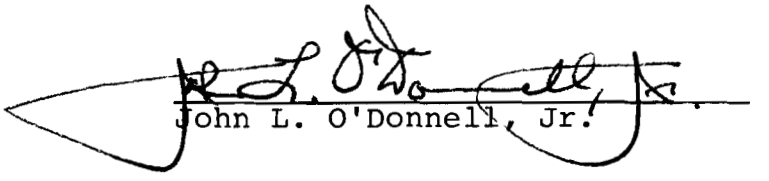
> Were we to hold to the contrary, we would violate the very purpose of the testator in drafting a will which is to ensure that his desires will be effectuated as opposed to being reformed by the courts to accomplish a different objective than the testator had in mind at the time he made his will. Id. at 476.

It is this principle which the Fifth District should have followed. The Fifth District's contrary decision to reform Marie Krause's will; to eliminate her family, and to distribute her property contrary to her expectations should be reversed.

CONCLUSION

The decision of the Fifth District Court of Appeal ought to be reversed, and the case remanded with instructions for the Fifth District to reverse the order of the Circuit Court and instruct the Circuit Court to order distribution of the real property in accordance with Marie Krause's will.

Respectfully submitted,



John L. O'Donnell, Jr.

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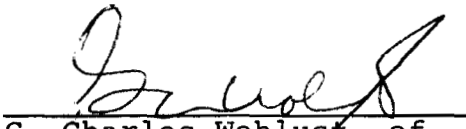

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the reply brief has been furnished by mail to C. John Coniglio, Esq., Post Office Box 1119, Wildwood, Florida 32785, this 25th day of November, 1986.

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