IN THE SUPREME COURT OF FLORIDA

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,

Petitioner,

vs.

LORRAINE E. ZRILLIC,

Respondent.

Case No. 73,639

District Court of Appeal
Fifth District No. 88-49

ESTATE OF LORRAINE E. ROMANS,

Petitioner,

vs.

LORRAINE E. ZRILLIC,

Respondent.

Case No. 73,640

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

AMENDED
RESPONDENT, LORRAINE E. ZRILLIC'S, ANSWER BRIEF

PEGGY TRIBBETT GEHL, ESQ.
Co-counsel for Respondent
Florida Bar No. 222437
1322 S.E. Third Avenue
Ft. Lauderdale, Fl 33316
(305) 463-6600

LINDA CHAMBLISS, ESQ.
Co-counsel for Respondent
Florida Bar No. 259683
707 S.E. Third Avenue
Ft. Lauderdale, Fl 33316
(305) 524-1401

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STATEMENT OF THE CASE AND FACTS

Respondent, LORRAINE E. ZRILLIC, accepts the Statement of the Case and Facts as set forth in Petitioner, SHRINER'S, initial brief.

Respondent herein, however, disagrees with the Statement of the Case contained in Petitioners, LLOYD, ERDMAN and MERRICK's initial brief in the following respects:

1. Regarding Item 2 of said Statement of the Case, Section 732.803, Florida Statutes speaks for itself and contains more language than is set forth by these Co-Personal Representatives.

2. These Petitioners, the Co-Personal Representatives of this estate, failed to file a Motion for Rehearing of the Fifth District's October 20, 1988 opinion, and therefore, are barred from further appellate proceedings before this Court. This argument was made by Respondent's Motion to Dismiss filed in this Court and dated March 6, 1989, which motion was denied March 9, 1989.

This argument was further pursued in Respondent's Amended Brief on Jurisdiction, and is further inserted here. Petitioners/Co-Personal Representatives cannot ride the coat tails of Petitioner SHRINER's, which timely filed a Motion for Rehearing.

> A motion for rehearing or for clarification of decision, or for certification, may be filed within 15 days of an order or within such other time set by the court. Rule 9.330(a) Fla.R.App.P.

Additionally, Petitioners/Co-Personal Representatives assert argument in their Statement of the Facts. Respondent disagrees

with said statement and alleges that the Statement of the Case and Facts set forth by Petitioner SHRINER's is accurate.

HISTORICAL BACKGROUND

Section 732.803, Florida Statutes, which limits the testator's rights to dispose of his or her property to charitable, benevolent, educational, literary, scientific, religious or missionary institutions or purposes, is commonly called a statute of mortmain. However, Florida's Statute is specifically not a mortmain act:

> Our statute is not a mortmain act. The Legislature never intended by the enactment of the statute to place any restriction upon the right of benevolent, charitable, educational or religious institutions to take and hold property; but only to place a limitation upon the right of the testators to dispose of their property to such institutions when the conditions that are detailed in the statute exist. The purpose of the statute is clear: it is to protect the widow and children from improvident gifts made to their neglect by the testator; the design of the statute being obviously to prevent testators who may be laboring under the apprehension of impending death from disposing of their estates to the exclusion of those who are, or should be, the natural objects of the testator's bounty. Taylor v. Payne, 154 Fla. 359, 17 So.2d 615, 618 (Fla. 1944); app. dis. 323 U.S. 666, 65 S.Ct. 49, 89 L.Ed. 541 (1944), reh. den 323 U.S. 813, 65 S.Ct. 113, 89 L.Ed. 647 (1944).

"Mortmain" derives its name from the Latin term in mortua manu, literally "in dead hand." Chase, Blackstone's Commentaries on the Laws of England (4th ed. 1938), Chapt. VIII at 198. The purpose of early mortmain statutes was to prevent the transfer of land by deathbed gifts to religious organizations. Also, corporations, usually ecclesiastical bodies, purchasing lands were said to be "dead persons in law," as they were traditionally

unable to transfer land, and therefore land held by such entities was said to be held "in mortua manu." Chase, supra at 198-199.

The underlying reason for mortmain statutes was that land in the hands of the church yielded no rent or knight service. It was said "A dead hand yieldeth no service." This statement is attributed to Lord Coke. Jones, Blackstone's Commentaries on the Laws of England, supra at **1071**, n. **2**.

Mortmain statutes were enacted in the reign of nearly every British monarch from Henry III [9 Hen. III, c. **36**, 1225] to George II [9 Geo. 11, c. **36**, 1736]. They were a part of the continuing power struggle between church and state. The king sought to retain control of the land and the church sought more land and property by evading the statutes.

The underlying principles of the mortmain statute is present today since charitable organizations are usually tax exempt.

While knight service is no longer **a** concern, the reduction of the tax base is a serious problem in the United States and the State **of** Florida, particularly with regard to religious organizations. The statute **of** George II [9 Geo. 11, c. **36**, **17361** is the model for rnortmain statutes in the United States. Approximately four **(4)** states have these statutes in one form **or** another -- Florida, Georgia, Idaho and Mississippi.

In the nineteenth and twentieth centuries, mortmain statutes extended their purposes to protecting close relatives -- spouse and children -- from improvident dispositions of property by a will executed a short time prior to death. Section **732.803**, Florida Statutes (formerly Section **731.19**, Florida Statutes) is

of this type. See Taylor v. Payne, supra.

Mortmain statutes have always been legislative matters and remain legislative matters to this day. Brief for Appellee at 4-5, Arthritis Foundation v. Beisse, 456 So.2d 954 (Fla. 4th DCA 1984) (No. 84-236).

In 1957, the Florida Legislature substantially reduced the scope of Section 731.19, Florida Statutes (the section found constitutional by this Court in Taylor v. Payne, supra), by eliminating institutions of higher learning from its application. Section 57-243, Laws of Florida (1957).

Thereafter, the Florida Legislature adopted the Uniform Probate Code in 1975 when, in its wisdom, it renewed and re-enacted the "mortmain" provision and its present application to all charities.

The statute has not been changed by the Legislature since 1975, and, as the Fifth District Court of Appeal correctly stated in this case:

> While the statute may be broader than the defined purpose of protecting the surviving spouse and lineal descendants from improvident charitable bequests, such restrictions of scope is a problem for the Legislature to cure. (emphasis added) R.9.

SUMMARY OF ARGUMENT

I. SECTION 732.803 OF THE FLORIDA PROBATE CODE IS NOT UNCONSTITUTIONAL

The trial court concluded that Section 732.803, Florida Stautes (1985) violated the equal protection clause of the Fourteenth Amendment to the United States Constitution and Section 9 of the Declaration of Rights of the Florida Constitution.

The Fifth District Court of Appeal disagreed, reversed, and declared that Section 732.803 is rationally related to its purpose of protecting those who are, or should be, the natural objects of the testator's bounty from improvident gifts made to their neglect by a testator laboring under the apprehension of impending death. Taylor v. Payne, supra, at 618.

This is a legitimate state objective and in this day of television ministry and scandal, remains rationally related to its legitimate state objective.

In 1944, when this Honorable Court upheld the constitutionality of the predecessor statute, Section 731.19, it did so on both equal protection and due process grounds. Taylor v. Payne, supra, at 617.

Since then, the Legislature has provided the further safeguards of providing a "savings clause", Section 732.803(i)(e), and a time limitation for filing an avoidance, thus rendering the current statute's gifts voidable rather than void. The current statute, as the Fifth District Court of Appeal pointed out, may be broader than this defined purpose of

protection of close family members from improvident gifts, but such a restriction of scope is for the Legislature to cure. (R. 9).

The Fifth District Court of Appeal must be affirmed.

11. RESPONDENT ZRILLIC HAS STANDING TO FILE THE PETITION TO AVOID CHARITABLE DEVISE

Pursuant to Section 732.803, Florida Statutes, the test for standing in order to file a Petition to Avoid a Charitable Devise is that the Petitioner must be:

(1) a lineal descendant or a spouse; and

(2) a lineal descendant or a spouse who would receive any interest in the charitable devise, if avoided.

The Respondent, LORRAINE E. ZRILLIC, as the only daughter of the deceased, meets the criteria above. Thus, the lineal descendant, Respondent ZRILLIC, would take her intestate share upon the avoidance or absence of the residuary clause. Since there was no named taker in default of the residuary, the residuary must pass by intestacy.

The limiting language of Article EIGHTH of the will has no bearing on the application of Section 732.803, Florida Statutes. The application of this statute is in the nature of strict liability. Intent is irrelevant. Ruppert v. Hasting's Estate, supra.

> In order to cut off an heir's right to succession, a testator must do more than merely evince an intention that the heir should not share in the estate -- he must make a valid disposition of his property. In Re: Estate of Levy, 196 So.2d 225, 229 (Fla. 3rd DCA 1967).

Therefore, without a complete and valid disposition of all of her property, the residuary would necessarily pass by intestate succession to Respondent, LORRAINE E. ZRILLIC, as the deceased's lineal descendant.

ARGUMENT

I. SECTION 732.803 OF THE FLORIDA PROBATE CODE IS NOT UNCONSTITUTIONAL

In 1944 this Supreme Court declared Section 731.19 (now Section 732.803), Florida Statutes, constitutional in Taylor v. Payne, supra.

In its Final Order (Petitioner SHRINER's App. B), the trial court specifically declared Section 732.803, Florida Statutes unconstitutional:

> ORDERED AND ADJUDGED as follows:
> 1. That Section 732.803, Florida Statutes, is unconstitutional because it denies the Shriner's Hospital for Crippled Children equal protection of the laws under Section 1 of the 14th Amendment to the U.S. Constitution, and under Article 1, Section 9, of the Declaration of Rights in the Florida Constitution (Pet. App. B).

The Fifth District Court of Appeal properly reversed the trial court (R. 8-9).

In Taylor v. Payne, supra, this Court clearly explains that there are no constitutional limitations afforded testators or legatees. The right to dispose of property or to receive property is statutory, and does not emanate from the organic law. Therefore, only the Legislature in its legislative capacity can change or abolish the Statute:

> The right to receive or dispose of property by last will and testament **is** not an inherent right, nor is it one that is guaranteed by the fundamental law. Nowhere in the Federal Constitution is there any attempt to treat of the matter **of** disposition of property by will, no reference being made to the subject of testamentary alienation **of** property, either directly or by implication. And except as the power to will property has been

> limited indirectly by Article X of the Constitution of Florida, which inhibits the alienation of homestead property by will where the owner thereof has children in esse, no effort at constitutional regulation of the subject has been made by the people of the State of Florida. Therefore, the right of the testamentary disposition of property does not emanate from the organic law, as contended by counsel, but is a creature of the law derived solely from statute without constitutional limitation. Accordingly, the right is at all times subject to regulation and control by the legislative authority which creates it. The authority which confers the right may impose conditions thereon, such as limiting disposition to a particular class or fixing the time which must ensue subsequent to the execution of the will before gifts to a particular class shall be deemed valid; or the right to dispose of property by will may be taken away altogether, if deemed necessary, without private or constitutional rights of the citizen being thereby violated. Taylor v. Payne, supra, at 617 (emphasis added).

Both Petitioner SHRINER's and the trial court erroneously rely upon two (2) cases from foreign jurisdictions, District of Columbia and Pennsylvania, which construe "mortmain" statutes as unconstitutional. Both the District of Columbia statute and the Pennsylvania statute are totally distinguishable from Section 732.803 of our Florida Statutes.

In Estate of French v. Doyle, 365 A.2d 621 (D.C. App. 1976), U.S. reh. den. 54 L.Ed.2d 238), the District of Columbia Court of Appeals tested a statute which provided that any devise or bequest to a clergyman or religious organization is invalid if made within (30) days of the testator's death. The trial court determined that the statute violated the First and Fifth Amendments to the U.S. Constitution. 365 A.2d at 621.

Initially, it cannot be overlooked that the trial court in

the case at bar determined Section 732.803, Florida Statutes, violated Section 1 of the 14th Amendment of the United States Constitution -- not the First and Fifth Amendments as in Estate of French, supra.

Secondly, Estate of French is easily distinguishable from the case at bar:

	Florida Statute	D.C. Statute
Will executed:	Within 6 months	Within 30 day
Beneficiary:	Benevolent, charitable, educational, literary, scientific, religious, or missionary institution; or country, state, county or town.	Clergyman or religious organization
	VOIDABLE	**VOID**
Who may void:	Spouse or lineal descendant	Any heir
Limitations on voidance:	Within 4 months	Not addressed

It is obvious that Florida Statute 732.803 limits its protected class to spouse and lineal descendants in order to protect the widow and children from improvident gifts made to their neglect by the testator. Taylor v. Payne, supra at 618. The District of Columbia Statute as construed in Estate of French, supra, does not fulfill the avowed statutory purpose of protecting family members from disinheritance because it does not limit the protected class to spouse or lineal descendants. Thus, the D.C. statute was held to bear no relation to a legislative object, and therefore, violated the due process clause. (365

A.2d at 625).

Secondly, in the case at bar, both the trial court and Petitioners rely upon Estate of Cavill, 329 A.2d 503 (Pa. 1974), which construes as unconstitutional a Pennsylvania statute:

> Any bequest or devise for religious or charitable purposes included in a will or codicil executed within thirty days of the death of the testator shall be invalid unless all who would benefit by its invalidity agree that it shall be valid. 329 A.2d at 504, n.1.

This statute is also easily and readily distinguishable from Florida Statute 732.803:

	Florida Statute	Pennsylvania
Will executed:	Within 6 months	Within 30 days
Beneficiary:	Benevolent, charitable, educational, literary, scientific, religious or missionary institution; or country, state, county or town	Religious or charitable purpose
	VOIDABLE	VOID
Who may void:	Spouse or lineal descendant	Any heir
Limitations:	Within 4 months	Unless all heirs agree to validate gift

Again, Florid limits th protected class to spouse and lineal descendants in order to protect the widow and children from improvident gifts made to their neglect by the testator. Taylor v. Payne, supra at 618. The Pennsylvania statute does not fulfill the avowed statutory purpose of protecting family members from testators who may be laboring under the apprehension of

impending death from disposing of their estates to the exclusion of those who are, **or** should be, the natural objects of the testator's bounty. Taylor v. Payne, supra at **618.** The Pennsylvania statute protected "any person who would benefit by its (the gift's) invalidity." 329 A.2d at 505. This means any intestate heir could object to the gift and have it voided. The Pennsylvania Supreme Court found that the statutory classification bore only the most tenuous relation to the legislative purpose. 329 A2d at 505.

The Florida Statute so limits the protected class to a spouse **or** lineal descendant so as to fulfill the avowed statutory purpose of protecting the widow and children from improvident gifts made to their neglect by the testator. Section 732.803 bears a substantial relation to this avowed legislative purpose and therefore, does not violate equal protection.

Additionally, unlike the **D.C.** or Pennsylvania statutes above, Section 732.803 requires a timely election by the widow or child to avoid the devise. More importantly, the statute contains a "saving clause" **for** a next prior will executed outside the limitation period which contains a valid charitable devise in substantially the same amount for the same purpose or to the same beneficiary. The Fifth District found this "savings clause" to be the single most important aspect of Florida's statute, distinguishing it from other similar state statutes. (R. **9).**

Respondent respectfully points out that Section 732.803, **F.S.,** is no more arbitrary or restrictive than the provisions for widow's elective share, Section 732.201; family allowance,

Section 732.403; exempt property, Section 732.402; or pretermitted spouse, Section 732.01, or children, Section 732.02, all in Florida Statutes. All of these statutes are based upon the same public policy and avowed statutory purpose--protection of spouse and children of decedents.

A recent Ohio Supreme Court case, Shriner's Hospital for Crippled Children v. Hester, 492 N.E. 2d 153 (Ohio 1986), declared Ohio's mortmain statute violative of equal protection clauses of the Ohio and U.S. Constitution. The Court determined there exists a legitimate state objective to protect testator's issue, but that Ohio's statute is not rationally related to such purpose. Prior to this decision dated April 30, 1986, the Ohio Legislature repealed its mortmain statute, effective August 1, 1985. 492 N.E. 2d at 157. This action is the province of the Ohio Legislature and also the province of the Florida Legislature.

The Florida Legislature enacted 732.803, and if it is to be modified, repealed or left untouched, this determination must be left in the hands of our Legislators.

The Ohio case is also factually distinguishable from the case herein. Respondent ZRILLIC's mother, Mrs. ROMANS, died from a lingering illness of cancer only 2-1/2 months after executing her Last Will and Testament. She executed her will under the belief that her death was near. She did not leave a prior will making a valid charitable devise in substantially the same amount for the same purpose or to the same beneficiary as was made to the Shriner's Hospital, provided by 732.803(1)(e), Florida

Statutes.

In the Ohio case, supra, the decedent, Myrtle Davis, had made a will nine (9) months prior to her death leaving a charitable devise to the Shriner's Hospital for Crippled Children. Three (3) months before her death, Myrtle Davis changed minute portions of the will -- reducing by $5,000 a niece's bequest and changing the personal representative. Davis died of natural causes. She did not execute her will under a belief that her death was near. (emphasis added).

The Ohio Supreme Court admitted that a statute designed to protect a testator's issue from disinheritance, as a result of the testator's unsound judgment or undue influence of third parties upon the testator, is a legitimate state objective. (emphasis added) 492 N.E. 2d at 156.

But, the Justices determined that the particular Ohio Statute, **R.C.** 2107.06, was not rationally related to the accomplishment of that legitimate state objective because the statute creates an irrebuttable presumption that a testator acted with unsound judgment or under undue influence if within six (6) months prior to death, the testator makes a charitable bequest.

Our Florida Statute does not create an irrebuttable presumption because it contains a "savings clause'' for a next prior will executed outside the limitation period. 732.803(1)(e), F.S.

Additionally, the Ohio statute required that charitable bequests in excess of 25 percent (25%) **of** the net probate estate be distributed per stirpes among testator's issue. 492 N.E. 2d

at 156. The Justices felt this could be used to defeat legitimate gifts to worthy organizations in favor of persons who were neither dependent upon nor closely involved in the life of the testatrix.

Clearly, the Florida statute limits its protected class to spouse and lineal descendants in order to protect the widow and children from improvident gifts made to their neglect by the testator. Taylor v. Payne, supra. Our statute envisions a legitimate state objective and one which is rationally related to the accomplishment of that objective. There is no equal protection violation.

Mississippi has a statute of mortmain, Section 91-5-31, Miss. Code (1972). Said statute limits its protected class to a spouse, child or descendant of a child. The statute limits the gift to more than one-third of the testator's estate, and limits the beneficiary to charitable, religious, educational, or civil institution.

The statute voids said gifts unless the will is executed more than 90 days prior to death. The statute excludes gifts of land, and permits said institution to hold gifts of land up to 10 years and grants a power to dispose of said land within the 10-year period.

Idaho has Section 15-2-615, Idaho Code (1979) entitled "Restriction on Charitable Devises." There is no limit to the protected class, apparently permitting any heir to invalidate a devise to any charitable or benevolent society or corporation unless the will is executed at least 120 days prior to death. The

entire statute is rendered inapplicable if death is caused by accident.

Georgia has Section 53-2-10, Off. Code of Ga. (1982), entitled "Limitation on Power to Devise to Charity to Exclusion of Spouse, Child or Descendants." This statute clearly limits the protected class to spouse, child or descendants of a child, and limits the gift to more than one-third of the estate to any charitable, religious, educational, or civil institution, unless the will is executed at least 90 days prior to death. Any devise in violation of the statute is void. The statute applies only to the first $200,000 of the estate; and not to any gifts in excess of $200,000.

Comparing the Florida statute to Mississippi, Idaho, and Georgia, Florida limits the protected class to widow and children as do Mississippi and Georgia. But Florida's statute requires timely election by a member of the protected class and contains a "savings clause" for a next prior will containing substantially the same devise executed outside the 180 days. These two aspects offer additional protection to an intended beneficiary. Additionally, Florida's Statute 732.803 is voidable. (emphasis added).

The trial court found that Section 732.803 crated four (4) distinct classes. (Pet. App. **B**). The trial court determined that equal protection is denied SHRINER's because the six-month time period arbitrarily divides testator into two (2) classes and charities into two (2) classes. This is clearly erroneous since 732.803 divides only testators into two groups by time

limitation. According to Taylor v. Payne, supra, the right to receive or dispose of property by will is at all times subject to legislative regulation and control as such a right does not emanate from organic law. 17 So.2d at 617.

The trial court found that Section 732.803 bears no rational relationship to the legitimate government purpose enunciated in Taylor v. Payne, supra. (Pet. App. **B** at para. 11). Yet Taylor v. Payne, supra, itself found the statute valid and constitutional. The trial court relied upon Lalli v. Lalli, 439 U.S. 259, 58 L.Ed. 2, 503, 99 S.Ct. 518 (1978) to support its supposition that ''laws governing the passage of property after death must be at least rationally related to a legitimate government purpose." (Pet. App. B., para. **10).** The United States Supreme Court, in Lalli, supra, agreed that a New York statute did not violate the equal protection clause by discriminating on the basis of illegitimate birth. The statute under scrutiny allowed an illegitimate child to inherit from his intestate father only if a court of competent jurisdiction, during his father's lifetime, had entered an order of filiation declaring paternity. (emphasis added).

What is **of** interest in citing this case is that four **(4)** Justices dissented, partially supporting their dissent by explaining that to protect estates from belated claims **by** unknown illegitimates (the legitimate state interest), the state could provide for publication notice and a short limitations period for filing claims. 58 L.Ed.2d at 504.

Of course, the case is not factually on point with the case

at bar but is useful to show that even the dissenters felt the statute's unconstitutionality could be cured partially by publication and a short limitations period for filing claims.

There are even more protections in 732.803, F.S., for both the testator and charities than in the constitutionally-upheld New York statute construed above.

Florida cases interpreting F.S. 732.803, or its predecessor statute, F.S. 731.19, include Ruppert v. Hastings, 311 So.2d 810 (Fla. 1st DCA 1975), which involved a daughter, who had no contact with the deceased for 30 years, except for one insulting telephone call, successfully set aside a devise to the American Legion. The deceased died within one month of the execution o the will and disinherited his daughter and any grandchildren. The court voided the charitable devise and said:

> We are bound by the plain language of Florida Statute 731.19, as passed by the Florida Legislature. 311 So.2d at 811.

In 1984, the Fourth District Court of Appeals reviewed Section 732.803, F.S. in Arthritis Foundation v. Beisse, 456 So.2d 954 (Fla. 4th DCA 1984). The Court found the statute to be constitutional:

> Appellants challenge the constitutionality of Section 732.803, Florida Statutes (1983). We hold that Section 732.803 is constitutional under the authority of Taylor v. Payne. (citations omitted). 456 So.2d at 954.

Additionally, the Legislature, in its wisdom, has not repealed this statute but instead substantially amended it in 1957 and re-enacted it with a new format and substantial enlargement as part of the Florida Probate Code in 1975. In re-

enacting the statutory provision, the Legislature not only restated the section to conform to the format of the new Probate Code, but also shortened the period for notice of avoidance from eight (8) months to four (4) months and removed the previous exemption for institutions of higher learning.

The statute has not been changed since 1975. No authority is cited to demonstrate that the court has grounds to invade the legislative thicket to change the law. Arthritis Foundation v. Beisse, 456 So.2d 954 (Fla. 4th DCA 1984) (Brief for Appellee at 7, 8, Case No. 84-286).

Respondent respectfully submits that the Fifth District, which correctly reversed the trial court, refused to invade the legislative thicket and to change the law. Our judicial system is required to follow the laws of Florida and to uphold them. This is a legislative matter, and if the law is to be changed, it can be done by the Florid Legislature. The trial court had no authority to reverse Taylor v. Payne, supra, and to substitute its opinion for this Court's.

Secondly, Section 732.803, Florida Statutes, has, as its state objective, the protection of family members -- a spouse or lineal descendants, from improvident gifts made to their neglect by testators. The statute as written is rationally related to this legitimate government purpose and not in violation of the equal protection clause.

Third, Section 732.803, F.S., was not repealed by the enactment of the Florida Probate Code in 1975.

And, the Fourth District Court of Appeal has recently upheld

the statute as constitutional. Arthritis Foundation v. Beisse, supra.

The Fifth District must be affirmed.

ARGUMENT

11. WHERE THE DECEDENT SPECIFICALLY LIMITS THE INHERITANCE OF A DAUGHTER AND A LINEAL DESCENDANT UNDER SPECIFIC PROVISIONS OF HER LAST WILL AND TESTAMENT WHICH, IN EFFECT, DISINHERIT SUCH DAUGHTER AND LINEAL DESCENDANT, DOES SHE THEREAFTER HAVE STANDING AS ONE OF A CLASS OF PERSONS ENTITLED TO THE BENEFITS OF SECTION 732.803, FLORIDA STATUTES, TO BRING A PETITION FOR ORDER AVOIDING CHARITABLE DEVISE UNDER THE SPECIFIC PROVISIONS OF THAT SECTION?

Pursuant to the Order Denying Petition for Order avoiding Charitable Devise (Pet. App. B), the trial court aade the following correct finding:

> 5. That the Petitioner, LORRAINE E. ZRILLIC, does have standing to maintain a Petition for Order Avoiding Charitable Devise. As the sole lineal heir of the Testatrix, she is the only person eligible to take should this residual charitable devise fail. The intent of the Testatrix to severely limit Petitioner's interest in the estate does not deprive Petitioner of standing, since the effect of Section 732.803, Florida Statutes, is to render intent irrelevant. (App. 2).

This is a correct finding and is supported by FLorida case law construing Section 732.803, Florida Statutes.

In Ruppert v. Hastings, supra, the testator executed a will on February 16, 1974, and died less than one month later on March 10, 1974. In his will, he attempted to disinherit his daughter and any grandchildren on the basis that his daughter ignored him for thirty years except for one insulting telephone call. He devised his entire estate to the American Legion. His daughter petitioned the court to avoid the charitable devise based upon Section 731.19, Florida Statutes (predecessor to 732.803, Florida Statutes). The trial court had correctly set aside the charitable devise, and the First District Court of Appeals affirmed, stating:

> We are bound by the plain language of Florida Statute 731.19 (now 732.803), as passed by the Florida Legislature. It might well be that the results of this case are completely opposite to the testator's intentions; however, we conclude that the lower court was correct in setting aside the subject will as mandated by Florida Statute 731.19.
> Affirmed. 411 So.2d at 811.

The test for standing is set forth specifically in Section 732.803, Florida Statutes. The Petitioner must be:

(1) a lineal descendant or a spouse; or

(2) a lineal descendant or a spouse who would receive any interest in the charitable devise, if avoided.

It cannot be denied that Respondent, LORRAINE E. ZRILLIC, is the natural daughter and lineal descendant of the deceased, LORRAINE E. ROMANS. As such, Respondent ZRILLIC, as a lineal descendant, would receive an interest in the failed charitable devise, if avoided. When the charitable devise is avoided, as it should have properly been in the trial court, the entire residuary clause fails, and the residual estate then descends pursuant to the laws of intestate succession:

> 732.101 Intestate Estate -
> (1) Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in the following sections of this Code.
>
> 732.103 Share of Other Heirs -
> The part of the intestate estate not passing to the surviving spouse under S. 732.102, or the entire intestate estate if there is no surviving spouse, descends as follows:
>
> (1) To the lineal descendants of the decedent. Section 732.101 and 732.103, Florida Statutes.

The Petitioners take the position that pursuant to Paragraph EIGHTH of the will, decedent ROMANS limits her

daughter's inheritance, and in fact, expresses an intention to so limit her daughter's inheritance, resulting in a form of disinheritance. Petitioners reduce the words expressed in Paragraph EIGHTH to the erroneous conclusion that such limitation effectively removes Respondent ZRILLIC, from the class **of** person, i.e., lineal descendants, entitled to bring a petition for an order avoiding a charitable devise.

The argument propounded by Petitioners must clearly fail. Petitioners did not argue in the trial court that Respondent ZRILLIC had no standing to bring a Petition *to* Determine Exempt Property on January 6, 1987, pursuant to Section 732.402, Florida Statutes. An order directing the personal representative to surrender furniture valued at $1,700.00 and an automobile valued at $12,500.00 to Respondent ZRILLIC as the decedent's surviving child was entered, without objection from Petitioners, by the trial court on February 12, 1987.

It would seem that after Respondent filed her Petition for Order Avoiding Charitable Devise, to revise the estate's perception of standing due to words of limitation set forth in decedent's will, is a classic disingenuous argument. Apparently, Petitioners thought it acceptable to part with only $14,200.00 worth of goods to Respondent, but the residuary clause, **of** apparent greater value, is another matter. It should appear obvious that the arguments used to support Petitioner's refusal to acknowledge Respondent's clear standing to bring her Petition for ORder to Avoid Charitable Devise, are the exact same arguments which could have been raised in Respondent's Petition

to Determine Exempt Property, and were not.

Petitioners have clearly waived their argument on the issue of standing by failure to raise it prior to Respondent's attempt to avoid the charitable devise. If the trial court had found Respondent had no standing to avoid the charitable devise, the finding would have been grossly incongruous with the trial court's order on exempt property.

The Fifth District found no merit to the cross-appeal regarding Respondent's standing:

> We find no merit to the cross appeal, which attacks the trial court's determination that appellant had standing to file the subject petition. Notwithstanding appellant's limited bequest under the will, she would be entitled to her intestate share upon the avoidance or absence of the residuary clause

to Paragraph EIGHTH. One could logically conclude that the decedent, LORRAINE E. ROMANS, preferred the SHRINERS HOSPITAL over her own daughter by providing a more bountiful gift to the SHRINERS HOSPITAL than to her own daughter. If,intent were relevant in exercising the options provided by Section 732.803, Florida Statutes, the Statute would never be used. By providing a gift to a lineal descendant or spouse, the decedent has stated what he or she clearly intends for the spouse or lineal descendant and thus decedent's intentions are clear; if the decedent fails to include a spouse or lineal descendant, the descendant has shown that he or she intended to disinherit said spouse or lineal descendant. Therefore, no one would ever have standing, pursuant to Section 732.803, if the Petitioners' view

were to prevail.

The conclusion to be drawn from the above logic is that in order to be effective at all, and of any use at all, Section 732.803 must be construed exactly as the trial court found, "the effect of Section 732.803, Florida Statutes, is to render intent irrelevant." (Pet. **App.** B).

It cannot be overlooked that one of the legislative purposes of Section 732.803, Florida Statutes is:

> to protect the widow and children from improvident gifts made to their neglect by the testator; the design of the statute being obviously to prevent testators who may be laboring under the apprehension of impending death from disposing of their estates to the exclusion of those who are, or should be, the natural objects of the testator's bounty. Taylor v. Payne, supra at 618.

Can there be any doubt that the decedent, LORRAINE E. ROMANS, was laboring under the apprehension of impending death when she prepared her will, attempting to improvidently dispose of her estate to the exclusion of her daughter and grandchildren? She died of breast cancer two months and two weeks after execution of her will. She had been suffering from breast cancer for three (3) years prior to death. Factually, Section 732.803 was instituted expressly for situations such as the case at bar.

Petitioners rely upon In Re: Estate of Herman, 427 So.2d 195 (Fla. 4th DCA 1982), in correctly construing the ruling of the Fourth District Court of Appeal. The Court did not refuse a daughter's request to avoid a charitable devise because the daughter was disinherited in the will, and thus had no standing to attack the devise, as Petitioners promote. The court refused

to avoid the charitable devise because if the charitable devise were avoided, the daughter would receive no interest in it. (emphasis added. Therefore, the daughter failed to meet the two-pronged standing test set forth in **732.803**, Florida Statutes. The daughter was clearly a lineal descendant: but, she would not have received an interest in the charitable devise, if avoided, because the residuary estate would not pass by way of intestacy to her as there was a taker in default. That is, pursuant to Section 732.604(2), Florida Statutes, "**if** the residue is devised to two or more person and the share of one of the residuary devisees (the charitable devise) fails for any reason, his share passes to the other residuary devisee,..."

In herman, supra, there were two thrusts, A and B. The charitable devise was tucked into Trust B. The residue **of** the estate was made up of all assets devised to the trustee-wife. **427** So.2d at **196**. The court determined that Section 732.604(2), Florida Statutes, applied and controlled in the court's ruling, not **732.803**. Since the court concluded tat a "trustee" was not intended to be "devisee" pursuant to the logical construction of 732.604(2), the residuary could not fail pursuant to 732.604(2) because 732.604(2) specifically controls "residuary devisees.:"

Therefore, Herman, supra, has absolutely no application to the case at bar as it does not even construe Section **732.803** regarding standing, but construes Section 732.604(2) regarding what should occur when the share of one residuary devisee fails.

In other words, the residuary of Herman's estate, did not, or would it, fail, and therefore there was no way the daughter

wold take by intestacy.

Taking by intestacy is the key factor in meeting the second prong of the two-pronged test for 732.803 -- if the charitable devise were avoided, would it place the devise into an intestacy situation, and if so, would the Petitioner take by intestacy.

In the case at bar, the answer is clearly in the positive. The residuary devise, pursuant to Paragraph ELEVENTH of the will (Pet. App. A), does not devise the residue to a trustee, and thus is factually distinguishable from Herman, supra: and secondly, the ROMANS will did not provide a taker-in-default.

Careful and well-reasoned draftsmanship could possibly have saved SHRINERS HOSPITAL's charitable gift. If LORRAINE E. ROMANS have given her charitable devise to a trustee in trust for the SHRINERS HOSPITAL, or had she provided for an alternate taker-in-default, the argument that Respondent was not a member of the class of persons who would take (by intestacy) if the bequest fails, may have had some merit.

Such is not the set of facts before this Court. Clearly, if the residuary devise to the SHRINERS HOSPITAL fails, the residue would have to be distributed in accordance with the rules governing intestate succession. And, it is this very important fact which gives Respondent, LORRAINE E. ZRILLIC, standing to bring her Petition to Avoid Charitable Devise.

As recently as April 27, 1988, Section 732.803 was construed by the Second District Court of Appeals in Gorn v. Temple B'Nai Israel, 13 FLW 1033 (Fla. 2d DCA April 27, 1988). The Second District reversed the trial court which had denied a petition

filed by testator's son to avoid a charitable devise made within six (6) months of death to Temple B'nai Israel. Intent of the testator was held irrelevant:

> The facts before us which need not be detailed in expressing our conclusion to reverse the trial court, disclose a codicil executed within the 6-month period preceding the testator's death. The effect of the codicil was to convert potential gifts to charitable entities into actual bequests. Because that conversation occurred less than six months from death, Section 732.803(1), Florida Statutes (1985), renders the charitable gifts voidable. Accordingly, as well meaning as the trial court was in seeking to fulfill the testator's intent, the manifest effect of the foregoing statutory provision cannot be overcome. We reverse... 13 **FLW 1033.**

In conclusion, intent of the testator is irrelevant. The Fifth District must be affirmed.

CONCLUSION

Both the trial court and the Fifth District were in determining and finding that the effect of Section 732,803, Florida Statutes, is to render intent irrelevant. The trial court correctly found standing as to Respondent ZRILLIC but drew the incorrect conclusion as to the validity of Section 732.803, Florida Statutes. It stands without serious dispute that a trial court does not have the power to overrule current, effective, and controlling law set forth by this Honorable Court in Taylor v. Payne, supra, that Section 732.803, Florida Statutes (one of its predecessor statutes, 731.19), is constitutional.

The Fifth District's reversal of the conclusion of the trial court of the unconstitutionality of Section 732.803, F.S., must be affirmed for the reasons stated above.

Respectfully submitted,

LINDA CHAMBLISS, ESQ.
Co-counsel for Respondent
707 S.E. Third Avenue
Ft. Lauderdale, FL 33316
(305) 524-1401

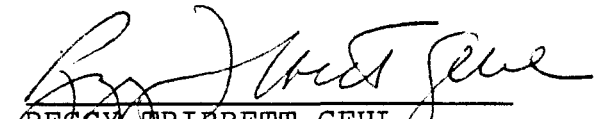
PEGGY TRIBBETT GEHL, ESQ.
Co-counsel for Respondent
1322 S.E. Third Avenue
Ft. Lauderdale, Fl 33316
(305) 463-6600

By: PEGGY TRIBBETT GEHL
Fla. Bar No. 222437

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 27th day of July, 1989, to Lawrence Dolan, Esq., Attorney for Petitioners/Co-Personal Representatives, 500 E. Jackson St., Orlando, FL 32801; William Belcher, Esq., Attorney for Petitioners SHRINERS, P.O. Box 330, St. Petersburg, FL 33731; and Linda Chambliss, Esq., Co-counsel for Respondent, 707 S.E. Third Ave., Ft. Lauderdale, Fl 33316.

PEGGY TRIBBETT GEHL, ESQ.
Co-counsel for Respondent
1322 S.E. Third Avenue
Ft. Lauderdale, FL 33316
(305) 463-6600

By: 
PEGGY TRIBBETT GEHL
Fla. Bar No. 222437