OA 10-6-89

IN THE SUPREME COURT OF FLORIDA

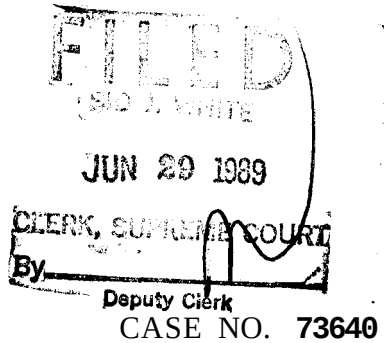
SHRINERS HOSPITAL FOR CRIPPLED CHILDREN,

Petitioner, CASE NO. 73639

vs.

LORRAINE E. ZRILLIC,

Respondent.



ESTATE OF LORRAINE E. ROMANS,

Petitioner, CASE NO. 73640

vs.

LORRAINE E. ZRILLIC,

Respondent.

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER,
ESTATE OF LORRAINE E. ROMANS

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PRELIMINARY STATEMENT

In this Brief, Petitioner, JAMES G. LLOYD, JAMES C. ERDMAN and BETTY C. MERRICK, as Co-Personal Representatives of the Estate of Lorraine E. Romans, will be referred to as the "Petitioner." LORRAINE E. ZRILLIC, the decedent's daughter, will be referred to as the "Respondent." Co-Petitioner, SHRINERS HOSPITAL FOR CRIPPLED CHILDREN, will be referred to as "SHRINERS HOSPITAL."

An Appendix containing the Circuit Court of Seminole County's order denying Petition for Order Avoiding Charitable Devise, dated December 14, 1987, the Fifth District Court of Appeal's decision reversing the Circuit Court's order, dated October 20, 1988, and a copy of decedent's Last Will and Testament, dated May 5, 1986, accompanies this Brief. These documents will be referred to by the letter "A" and page reference.

STATEMENT OF THE CASE

Respondent filed her petition with the Circuit Court, Seminole County, seeking to set aside the charitable devise to the SHRINERS HOSPITAL under Item ELEVENTH of the will of Lorraine E. Romans, deceased, (A 10-11) alleging the following:

1. The Last Will and Testament of Lorraine E. Romans, deceased, was executed within six (6) months of her date of death on July 15, 1986 and contained a charitable devise of the residuary estate to the SHRINERS HOSPITAL under Item ELEVENTH of her will not contained in any previous Will.

2. Respondent, the decedent's daughter, was one of a class of persons entitled to the benefits of Section 732.803, Florida Statutes, providing that if a testatrix dies leaving lineal descendants and the will devises part, or all, of her estate to a charitable institution, corporation, association or purpose, then such devise may be avoided in its entirety if any such lineal descendant who would receive any interest in the devise, if avoided, files written notice in the estate within four (4) months after the date letters of administration are issued.

3. Petitioner responded affirmatively contending that the decedent under the express terms of Item EIGHTH of her will (A 9), in effect, disinherited Respondent, her daughter, and therefore she lacked standing as being within the class of persons entitled to the benefits of Section 732.803, Florida Statutes.

4. The SHRINERS HOSPITAL responded affirmatively to the petition filed by Respondent, which, in addition to raising the issue of standing as set forth above, also raised as an affirmative defense that Section 732.803, Florida Statutes, was unconstitutional as violative of the equal protection cause of the

Florida and the United States Constitutions by attempting to create an unreasonable classification of beneficiaries in a decedent's estate which lacks a fair and substantial relation to the legislative object for which it was intended.

5. On October 14, 1987, a hearing was held in the Circuit Court of Seminole County on the petition of Respondent for an order avoiding the charitable devise.

6. On December 15, 1987, the Circuit Court of Seminole County entered its order denying Respondent's Petition for Order Avoiding Charitable Devise which found that she did have standing to maintain the petition but that Section 732.803, F.S., was unconstitutional (A 1-5). On January 4, 1988, Respondent filed her Notice of Appeal from the Order Denying Petition for Order Avoiding Charitable Devise with the Fifth District Court of Appeal.

7. On January 7, 1988, the Petitioner filed its notice of Cross-Appeal from the Order Denying Petition for Order Avoiding Charitable Devise.

8. On October 3, 1988, oral argument was heard by the Fifth District Court of Appeal on Respondent's appeal and Petitioner's cross-appeal.

9. On October 20, 1988, the Fifth District Court of Appeal rendered its decision holding that Section 732.803, Florida Statutes, was constitutional and that Respondent had standing to file a petition to set aside the charitable devise to the SHRINERS HOSPITAL (A 6-7).

10. The SHRINERS HOSPITAL filed a Motion for Rehearing with the Fifth District Court of Appeal on November 3, 1988 which was denied on January 4, 1989.

11. On January 25, 1989, the SHRINERS HOSPITAL filed its Notice to Invoke Discretionary Jurisdiction with the Florida Supreme Court from the decision of the Fifth District Court of Appeal.

12. On January 27, 1989, Petitioner filed its Notice to Invoke Discretionary Jurisdiction with the Florida Supreme Court from the decision of the Fifth District Court of Appeal.

13. On June **6,** 1989, the Florida Supreme Court entered its order accepting jurisdiction of both Petitioners' appeals and consolidated both cases, sua sponte.

STATEMENT OF THE FACTS

Lorraine E. Romans died testate on July 19, 1986 leaving a Last Will and Testament dated May 5, 1986 (A 8-12).

The will was admitted to probate by the Circuit Court of Seminole County pursuant to an order dated December 19, 1986 which appointed JAMES G. LLOYD, JAMES C. ERDMAN and BETTY C. MERRICK, as Co-Personal Representatives of Petitioner.

Under Item ELEVENTH of the decedent's Last Will and Testament, she devised the residue of her estate as follows:

> "ELEVENTH: All the rest residue and remainder of my estate, of whatever nature and wherever situated of which I may die seized (sic) or possessed or to which I may be entitled at the time of my death, including lapsed legacies and any property over which I have a power of appointment I give, devise and bequeath as a charitable donation to the SHRINERS HOSPITAL FOR CRIPPLED CHILDREN. This charitable gift and donation is made in memory of LESTER A. VANDEMARK and LORRAINE E. ROMANS. LESTER A. VANDEMARK was a member of Newburgh Lodge No. 309, F and AM and the KISMET TEMPLE, Hyde Park, New York, his membership number being 13970. It is my wish that my executor notify these lodges of this charitable bequest, and the amounts thereof." (A 10-11)

On February 24, 1987, Respondent, the decedent's daughter, filed with the Circuit Court of Seminole County a Petition for Order Avoiding Charitable Devise under the provisions of Section 732.803, Florida Statutes, because the decedent died within six (6) months of executing the will in which the foregoing charitable devise was made.

Formal notice of the petition was served upon the Petitioner and the SHRINERS HOSPITAL.

Petitioner responded to the petition of Respondent and raised an affirmative defense, to-wit the decedent specifically limited her share in the estate to the specific items of tangible personal property as described in Item EIGHTH of her will **(A 9)** and was, in effect, disinheriting her daughter, from any other interest or share in her estate. Therefore, Respondent was not a person within the class entitled to the benefits of Section **732.808,** Florida Statutes.

Item EIGHTH of the decedent's will specifically states:

> "I give and bequeath several sealed boxes of family antique dishes and figurines specifically designated, to my daughter, LORRAINE E. ZRILLIC, **16531** Blatt Blvd., No. **204,** Fort Lauderdale **,** Florida. I have intentionally limited her inheritance since I have contributed substantially during my life for her education and subsequent monies I have been required to expend primarily due to her promiscuous type of life. My daughter, LORRAINE E. ZRILLIC has not shown or indicated the slightest affection or gratitude to me for at least five years preceding the date of this will. My executor will know the appraised value of these antiques for estate tax purposes." (A 9)

A hearing was held before the Circuit Court of Seminole County with respect to the Petition of Respondent for Order avoiding Charitable Devise and Petitioner's affirmative defense.

Subsequent to the hearing, the Circuit Court of Seminole County issued its order denying the Petition for Order Avoiding Charitable Devise, dated December **14, 1987** (A **1-5).** It denied Respondent's petition on the basis that Section **732.803 ,** Florida Statutes, was unconstitutional but denied Petitioner's affirmative defense based on a claim of disinheritance of Respondent as the decedent's daughter based upon Item EIGHTH of the will as set forth above on the following grounds:

> "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." (A 2)

Respondent appealed the order of the Circuit Court of Seminole County to the Fifth District Court of Appeal in so far as it held Section **732.803,** Florida Statutes, was unconstitutional.

A Cross-Appeal from the Order of the Circuit Court of Seminole County was taken by Petitioner to the Fifth District Court of Appeal from the denial of Petitioner's affirmative defense of lack of standing by Respondent to maintain a Petition for Order Avoiding Charitable Devise.

On October **3,** 1988, oral argument on the appeals and cross-appeal was held before the Fifth District Court of Appeals. On October **20,** 1988, the Fifth District Court of Appeals issued its decision reversing the Circuit Court of Seminole County, holding that Section **732.803,** Florida Statutes, was constitutional and affirming the Circuit Court of Seminole County's holding that Respondent had standing to file a petition to set aside the charitable devise to the SHRINERS HOSPITAL.

POINTS ON APPEAL

POINT I

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN HOLDING THAT RESPONDENT, DECEDENT'S DAUGHTER, LORRAINE E. ZRILLIC, HAD STANDING TO SET ASIDE THE CHARITABLE DEVISE UNDER THE DECEDENT'S WILL PURSUANT TO SECTION 732.803, FLORIDA STATUTES, NOTWITHSTANDING DECEDENT'S EXPRESS DISINHERITANCE UNDER THE TERMS OF HER WILL IS IN CONFLICT WITH THE DECISIONS OF THIS COURT?

POINT II

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN HOLDING SECTION 732.803, FLORIDA STATUTES, CONSTITUTIONAL, IS IN ERROR IN THAT SAID SECTION IS VIOLATIVE OF THE EQUAL PROTECTION OF THE LAWS UNDER SECTION 1 OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE 1, SECTION 9 OF THE DECLARATION OF RIGHTS IN THE FLORIDA CONSTITUTION?

ARGUMENT

POINT I

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN HOLDING THAT RESPONDENT, DECEDENT'S DAUGHTER, LORRAINE E. ZRILLIC, HAD STANDING TO SET ASIDE THE CHARITABLE DEVISE UNDER THE DECEDENT'S WILL PURSUANT TO SECTION 732.803, FLORIDA STATUTES, NOTWITHSTANDING DECEDENT'S EXPRESS DISINHERITANCE UNDER THE TERMS OF HER WILL IS IN CONFLICT WITH THE DECISIONS OF THIS COURT?

Under ITEM EIGHTH of the decedent's Last Will and Testament, she specifically limited Respondent's interest in her estate to two (2) small items of tangible personal property of minimal value.

Notwithstanding this limited bequest of the decedent under the will to Respondent, her daughter, the decision of the District Court of Appeal specifically held that the Respondent had standing to file a petition to set aside the charitable devise under decedent's will, and, further, in spite of the limited devise to her under the decedent's will, she would be entitled to an intestate share in the absence of, or, if the residuary devise was avoided.

Therefore, the District Court of Appeal expressly determined that the Respondent was not disinherited under the express provisions of the decedent's will, at least to the extent any such disinheritance would apply in the event intestacy applied with respect to any assets not effectively disposed of by her will.

This decision directly conflicts with the previous decisions of this Court involving a testator's right to disinherit potential heirs to one's estate.

In Milam v. Davis, 123 So. 668 (Fla. 1929) this Court specifically held, except under limited circumstances such as a widow's dower right and the homestead rights of other heirs, including children, an heir could be excluded by

a testator from sharing in his estate by the express provisions of his will:

> "At common law, marriage alone did not cause a revocation by operation of law of a prenuptial will of a man, the wife having her dower rights notwithstanding the will. The widow may claim her dower rights against the husband's will, whether he left a child, or not, and whether the will is executed before or after the marriage. A will cannot exclude a widow from her statutory rights in her husband's estate; but an heir may be excluded by will from participating in a testator's estate other than his homestead real estate . . . ." Id at p. 673

Also, the District Court's decision is in direct conflict with this Court's decision in Hooper v. Stokes, 145 So. 855 (Fla. 1933) mot. for reh. den. 146 Fla. 668 (Fla. 1933). In this case, similar to this decedent's will, the testator left to his son a transcript of his divorce proceedings involving his wife and his son's mother and indicated that the son had given false testimony against him during the proceedings. Nothing else was devised to the son under the will.

The son sought to set aside the will. This Court in sustaining the validity of the testator's bequest against such an attack clearly enunciated the general rule regarding the disinheritance of a child by a parent:

> "Barring illegal purposes, a testator has the legal right to direct the course of his property after death. He may disinherit his children if he desires and bequeath his estate to strangers, but in any event his express intent must determine the interpretation of his will and not what others more sophisticated may think as to his moral duty . . . ." Id at p. 858

The principal was even more simply stated by this Court in its decision in Herzog v. Trust Co. of Easton, 64 So. 426, 427 (Fla. 1914) and cited in the Davis case, supra:

> ". . . An heir may be excluded by will from participation in the testator's estate."

It is the Personal Representatives' position that the limited bequest to Respondent under decedent's will did result in her disinheritance and any further participation in the decedent's estate for all purposes, including her right to any of the decedent's property by virtue of intestacy. Both the Davis case, supra, and the Stokes decision, supra, do not in any way limit the disinheritance of a testator's child under a will provision to assets distributable by virtue of its terms rather than under any resulting intestacy circumstance.

While this decedent did not expressly state that Respondent was disinherited from sharing in her estate other than as enumerated in the will, the grant of a minimal devise followed by subsequent language indicating an express limitation of any further interest in her estate has been held to be tantamount to disinheritance.

For example, in Estate of May C. Newkirk, 383 N.Y. S. 2d 466 (N.Y. Sur. Ct. 1974) the Surrogate's Court in New York specifically held that where a decedent left $100.00 to a grandson out of a total estate of $75,000.00 amounted to his disinheritance:

> ". . . Considering all of the foregoing factors, the $100.00 bequest to the petitioning adult grandson out of an estate of approximately $75,000.00, viewed in the most charitable light must be deemed to be so de minimis as to establish testatrix' strong intent to effectively disinherit petitioner." Id at p. 468

Similarly in the New York Court of Appeal's decision of In the Matter of the Estate of Julia Eckart, 348 N.E. 2d 905 (N.Y. 1976) a $50.00 bequest to the decedent's daughter under her will was also held to result in her disinheritance and from her further being entitled to share in the estate, including any property which might pass by intestacy:

> ". . . If anything, the grant of a nominal request to a close relation is the more accepted or

> customary way of indicating an intent to disinherit. Nor do we find any merit to the petitioner's argument that the disinheritance clause should have no effect on their intestate right since it only refers to 'testamentary' provisions. No meaningful distinction can be drawn between a clause which expressly leaves 'no bequest' to the contestant as in Cairo, and one which makes 'no further testamentary provision' for his benefit as here. The two clauses are essentially the same and should have the same effect." Id at p. 431

Finally there is support for this position in this Court's decision in In re Estate of William F. Zimmerman, 84 So.2d 560, 562 (Fla. 1956) which stated that $50.00 bequests to the decedent's children in his will virtually disinherited them. However, the **will** was set aside because **of a** determination that the decedent lacked testamentary capacity a factor not relevant in this situation.

Therefore, it is clear the bequest under this decedent's will to Respondent leaving a minimal bequest of two items of tangible personal property having small or minimal value followed by language of limitation with respect to any additional interest in her estate results in her total disinheritance not only for purposes of the provisions of her will but in the event of intestacy involving any portion of the decedent's estate.

In support of this position is the New Jersey Court of Chancery's decision in Sisson v. Tenafly Trust Co., 33 A.2d 298 (Ct. Ch. **N.J.** 1943). Involved was a provision under the decedent's will in which he substantially disinherited the children of a son. However, he did devise a small annuity to each grandchild which they were to receive during their minorities. The grandchildren brought a construction proceeding since a prior provision in the will created substantial trusts for each of the decedent's children and "his or her issue." The argument was that these provisions gave a right to the grandchildren, in addition to receiving only the minor annuities, to share in the

remainder interest in such trusts.

The Court, however, held otherwise:

> "This contention is unsound since the will proceeds to make it abundantly clear, and repeatedly so, that the children of Adelia would have nothing except 'the minor annuity during their minority.' For example he states: 'It is my will and I here direct that the issue of my son, Elias, by his present wife shall not be entitled to or receive any portion of the share of any deceased child under this devise.' It is a thoroughly established canon that in construing a will the intent of a testator is gathered from the four corners of the will . . . ; Johnson v. Haldane, 95 N.J. Eq. 404, 1248.63, 64 in which the rule is laid down by Vice Chancellor Backes as follows: 'In construing the will the predominant idea of the testator's mind, if apparent, is heeded as against all doubtful and conflicting provisions which might of themselves defeat it." Id at p. 300-01

Therefore, it is the position of Petitioner that the provisions of the decedent's will limiting specifically any bequest to Respondent not only results in her disinheritance under all provisions of the will but with respect to any situation in which she would be entitled otherwise to take, as, for example, in an intestate situation or by virtue of being treated as a lineal descendant under Section 732.803, Florida Statutes.

Perhaps the principal is best stated in the Supreme Court of Pennsylvania's decision in In re Estate of Louis Little, 170 A.2d 106, 107 (Pa. 1961):

> ". . . It seems to be often forgotten that a man (who has testamentary capacity) can disinherit his children and his closest relatives, except his wife, and can give his own property to such individuals and to such charities and to such objects of his bounty as he desires, subject only to the limitation that the gift cannot be in violation of law or of the Constitution or of clearly established public policy . . . ."

In this case the disinheritance of Respondent by the decedent followed by a gift of her residuary estate to the charity is not in violation of any law of the State of Florida; of its Constitution; or of any clearly established public policy. Further, the decisions of this Court in the Davis and Stokes cases, supra, clearly support this conclusion.

Therefore, Respondent, even if deemed to have standing to bring a petition under Section 732.803, Florida Statutes, because of her disinheritance under the decedent's will may not be treated as a lineal descendant entitled to take the charitable devise if it were avoided.

Section 732.803, Florida Statutes, provides in relevant part:

> "(1) If a testator dies leaving lineal descendants or a spouse and his will devises part or all of the testator's estate:
>
> (a) To a benevolent, charitable, educational, literary, scientific, religious, or missionary institution, corporation, association, or purpose,
>
> . . .
>
> the devise shall be avoided in its entirety if one or more of the lineal descendants or a spouse who would receive any interest in the devise, if avoided, files written notice to this effect in the administration proceeding within four months after the date letters are issued, ..."

The critical issue is whether Respondent under this Statute is a lineal descendant "who would receive any interest in the devise, if avoided . . ." It is Petitioner's position that she is not.

As indicated above, the provisions of decedent's will clearly disinherited Respondent for all purposes, including taking any devise or other interest in her estate except as specifically enumerated in the will. Therefore, she is effectively disinherited as a "lineal descendant" "who would receive any

interest in the devise, if avoided", for purposes of Section 732.803, Florida Statutes.

A case almost squarely in point with this conclusion is the New York decision in In the Matter of the Estate of Mary Cairo, 312 N.Y.S. 2d 925 (Sup. Ct. App. Div. 2d Dept. 1970) which was subsequently affirmed by the New York Court of Appeals in 272 N.E. 2d 574 (N.Y. 1971).

The decedent under her will left the residue of her estate to three (3) named charities in equal shares. She also specifically provided:

> "I make no bequest to my grandson, Joseph L. Cairo, and I make no bequest to my daughters-in-law, Antoinette Cairo and Audrey Cairo, for good and sufficient reason . . . ." Id at p. 927

The grandson then instituted a proceeding in the New York Surrogate's Court under its Statute (Section 5-3.3 Estates, Powers and Trust Law (EPTL)) which provided that a testamentary gift to charity was valid only to the extent of one-half (1/2) of a decedent's estate if the disposition were contested by an issue or parent who would receive pecuniary benefits if he or she were successful in contesting the devise. The Appellate Division held the grandson had no standing to bring a petition where the decedent specifically named the grandson and specifically indicated she was making no provisions for him:

> "Of course, there could be a failure or lapse if the gift were contested by someone who stood to benefit by a successful contest. But here is where the deceased's intent comes in: her will made clear she wanted no part of her estate to go to respondent Cairo. Her estate was to go to her sister and charity. To allow respondent Cairo to contest would be to acknowledge the possibility of a sharing in the estate and this would be contrary to the deceased's intent . . . ." Id at pp. 927-28

A similar result was also reached in New York in the Estate of May

C. Newkirk case, supra, where the minimal bequest of **$100.00** to a grandson was deemed to result in his disinheritance as a descendant for purposes of making an election to set aside one-half (1/2) of the charitable devises.

Also the same result was reached in the Estate of Julia Eckart, supra, where again a $50.00 minimal bequest to a son and daughter resulted in the son being unable to set aside one-half (1/2) of a charitable bequest by virtue of his disinheritance as a descendant under the terms of the decedent's will.

Based upon the foregoing, it is therefore the position of Petitioner that the express language of decedent's will clearly disinherited Respondent for all lawful purposes, including intestacy and as a Lineal descendant entitled to receive any interest in the charitable devise under decedent's will if avoided pursuant to Section **732.803,** Florida Statutes, even if she is deemed to have standing to bring such a petition under the provisions of the Statute. Such treatment is consistent with and in conformity with this Court's previous decisions involving disinheritance as set forth in Davis and Stokes, supra.

This is not a case where, if Respondent were deemed to be disinherited as a lineal descendant, and, if the charitable residuary devise were, in fact, avoided and intestacy resulted that Respondent might necessarily still take by virtue of being the sole lineal descendant and intestate heir.

The will clearly indicates that the decedent was also survived by grandchildren who if Respondent is deemed to no longer be a lineal descendant by virtue of disinheritance would be "Lineal descendants" who, if they had filed a petition, would have been entitled to have the charitable devise set aside and to share in the avoided bequest. However, for whatever reason, the grandchildren did not file any such petition within the four (4) month period provided for under the Statute.

Even assuming arguendo that there had been no charitable residuary devise but the residuary provisions had otherwise failed, and Respondent had been disinherited by the terms of the decedent's will, then the residue would have passed by intestacy to the grandchildren. This circumstance is clearly distinguishable from cases where Respondent might still take by virtue of being the sole intestate distributee upon the failure of the residuary provisions.

This was the case in the decision of Reid v. Whitfield, 399 So.2d 1032 (Fla. 5th DCA 1981) cited by the Court of Appeal in its decision in this case. In that case the sole surviving lineal descendant of the decedent was entitled to an intestate share even though the will provided for a minimal $20.00 per month annuity where the residue failed because it contained no remainder provision.

It is also to be pointed out that the Court did recognize that the intention of the decedent was a primary factor in construing any will but once the will is held to be invalid the testator's intent is no longer controlling. In this case the decedent's will was not determined to be invalid nor, in fact, is the residuary provision for the SHRINERS HOSPITAL invalid. It is voidable only by virtue of the provisions of Section 732.803, Florida Statutes, by those parties who would receive any interest if avoided.

Clearly Respondent's position in this case is substantially different from that of the sole surviving lineal descendant in the Reed case, supra.

The District Court of Appeals also cited in support of its decision that Respondent had standing the decision in Rupert v. Hastings' Estate, 311 So.2d 810 (Fla. 1st. DCA 1975). Again, this case is distinguishable because it clearly indicates that the decedent in that case "attempted to disinherit his daughter . . ." Id at p. 811. For whatever reason, and such reasons are not enunciated in the decision, he was unsuccessful. Thus, his daughter was still a lineal

descendant under the provisions of the statute entitled to receive an interest in the avoided charitable devise.

Finally, the District Court of Appeals also cited in support of its decision In re Barker's Estate, 448 So.2d 28 (Fla. 1st. DCA 1984). The case involved a will which contained no residuary clause and left $1.00 each to four (4) legal heirs. The Court found that since there was no residuary provision in the will that this did not indicate ". . . that she did not wish her residuary estate to be distributed to her legal heirs as intestate property. In other words, the $1.00 bequest in her second will to four of her legal heirs do not necessarily indicate an intent to 'disinherit' even those four, much less the remaining heirs who were not named in the $1.00 bequest or otherwise." Id at p. 31.

Clearly the situation in this case is distinguishable from the situation in the Barker case, supra. The language of this will clearly evidenced an intent to and did, in fact, disinherit Respondent. There was a full and valid residuary devise to the charity subject only to its avoidance by filing of a petition by the appropriate lineal descendant.

Particularly relevant is a case, not cited by the District Court of Appeal in its decision, In re Estate of Herman, 427 So.2d 195 (Fla. 4th DCA 1983). In this case the decedent on the same date executed a will and a revocable living trust. At his death, after devising certain personal property, the residue was distributable to his wife as Trustee of the trust. There was specific language in the will that no provisions were being made under either the will or trust for the decedent's daughter which, as is clear from the opinion the Court, was determined to be, in effect, a disinheritance.

The daughter sought under Section 732.803(1), Florida Statutes, to set aside the charitable bequest provided for under the living trust agreement

following the decedent's death. The decision upheld the trial court's finding that because the daughter was not a specified person who would receive any interest in the bequest if it were avoided she had no standing to file the petition. In effect, the decision held that the two trusts created under the living trust following the decedent's death and designated Trusts A and B constituted the residuary estate under the will. If the charitable portion in Trust B failed, the assets would pass to Trust A. Thus, the daughter would not receive any interest in the devise if it were avoided.

Similarly in this case, if the Respondent were successful in setting aside the residuary devise, since she has been disinherited by the decedent under the express provisions of her will, she is not a lineal descendant who would receive any interest in the devise if avoided.

Further, the decision is also relevant because it cites in support of its findings Section 732.6005(1), Florida Statutes, which provides:

> "The intention of the testator as here expressed in his will controls the legal effect of his dispositions."

The Court then concludes:

> "For whatever reasons, it is plain the testator intended his daughter receive no part of his estate . . ." Id at p. 197.

This Section merely codifies the long standing rule of construction which was stated succinctly by this Court in In re Barrett's Estate, 33 So.2d 159, 160 (Fla. 1948):

> "The cardinal rule in construing a will is to execute the plain intention of the testator . . ."

Therefore, Respondent, as an excluded and disinherited lineal descendant, is not entitled to receive any interest in the charitable residuary devise if it were avoided under Section 732.803, Florida Statutes and her petition

to **set aside the charitable devise** to **the** SHRINERS **HOSPITAL should be denied.**

ARGUMENT

POINT II

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN HOLDING SECTION 732.803, FLORIDA STATUTES, CONSTITUTIONAL **IS** IN ERROR IN THAT SAID SECTION IS VIOLATIVE OF THE EQUAL PROTECTION OF THE LAWS UNDER SECTION **1** OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE **1,** SECTION 9 OF THE DECLARATION OF RIGHTS IN THE FLORIDA CONSTITUTION?

The Statement of the Case and Statement of Facts previously set forth herein **(pp.** 2-7) are incorporated herein by reference.

The SHRINERS HOSPITAL is filing its Brief involving this point on appeal which is the point raised by it when it filed its notice to invoke the discretionary jurisdiction of this Court. The position taken by SHRINERS HOSPITAL therein is hereby adopted by Petitioner.

The Petitioner's position in this regard is **similar** to that of the SHRINERS HOSPITAL and a more extended exposition in this Brief would only be duplicative in nature.

SUMMARY OF ARGUMENT

Under Item EIGHTH of decedent's Last Will and Testament, the Respondent, decedent's daughter, is effectively disinherited for all purposes in sharing in the decedent's estate which this decedent was entitled to do pursuant to this Court's decisions in the Davis case and Stokes case, supra.

Under the specific provisions of Section 732.803, Florida Statutes, a lineal descendant of the decedent who would receive any interest in the SHRINERS HOSPITAL charitable devise under Item ELEVENTH of her will would be entitled to file a petition to have said charitable bequest set aside. However, Respondent, in this case, having been effectively disinherited by the decedent, must be deemed to have predeceased the decedent for all purposes involving distribution of her estate. Therefore, even if Respondent were deemed to have standing to bring a petition, she is not a lineal descendant who would receive any interest in the charitable devise if it were avoided.

This case is distinguishable from those cases involving a void residuary interest under a decedent's will which passes to intestate heirs. The devise to the SHRINERS HOSPITAL is voidable and not void and can only be avoided by a lineal descendant who would share in the devise if it were avoided such as a grandchild of the decedent. Respondent is not such a lineal descendant.

Further, decedent's intent is relevant in determining the interest Respondent takes in her estate.

Therefore, Respondent is not entitled, in the event the charitable devise of the SHRINERS HOSPITAL were avoided, to receive a distribution of the residuary estate under the applicable provisions of Section 732.803, Florida Statutes.

CONCLUSION

The provisions of Item EIGHTH of the Last Will and Testament of Lorraine E. Romans were effective to disinherit Respondent for all purposes involving distributions from her estate and is in accord with the previous decisions of this Court. Therefore, both the Circuit Court of Seminole County and the Fifth District Court of Appeal decisions were in error in holding that Respondent had standing to bring a petition to avoid the charitable devise to the SHRINERS HOSPITAL under Item ELEVENTH of the will.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner, Estate of Lorraine E. Romans, together with the separate Appendix, has been furnished by U.S. Mail, postage prepaid, to the following this 29th day of June, 1989.

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