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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

PETITIONER, SHRINERS HOSPITALS FOR CRIPPLED CHILDREN'S, INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PREFACE.. 1

STATEMENT OF THE CASE AND OF THE FACTS 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

SECTION 732.803 OF THE FLORIDA PROBATE CODE IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES CHARITABLE ORGANIZATIONS OF EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 9 OF THE DECLARATION OF RIGHTS IN THE FLORIDA CONSTITUTION. 7

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Florida Constitution

Art. I, § 9, Fla. Const. 2, 4, 7, 9, 20

Art. I, § 12, Fla. Const. 10

United States Constitution

U.S. Const. Amend. XIV, § 1 . . . . . 2, 4, 7-11, 18-20

Florida Cases

Arthritis Foundation v. Beisse, 456 So.2d 954 (Fla. 4th DCA 1984) 18

Davis v. Florida Power Company, 64 Fla 246, 60 So. 759 (1913) 11

State ex rel Furman v. Searcy, 225 So.2d 431 (Fla. 4th DCA 1969) 10, 11

Taylor v. Payne, 17 So.2d. 615 (Fla. 1944) . 4, 5, 8, 9, 11, 18

Other State Cases

Estate of Cavill, 329 A.2d 503 (Pa 1974) 12, 13

Estate of French, 365 A.2d 621 (D.C. 1976), cert. denied and appeal dismissed on other grounds 434 U.S. 59, 98 S.Ct. 280, 54 L.Ed.2d 238, reh'g denied 434 U.S. 1025, 98 S.Ct. 753, 54 L.Ed.2d 773 . . . . . 5, 16, 17

Patton v. Patton, 39 Ohio St. 590 (1883) 18

Shriners Hospitals for Crippled Children v. Hester, 23 Ohio St.3d 198, 492 N.E.2d 153 (1986) 13-15, 18

Florida Statutes

Section 732.803 Florida Statutes (1985). . . 2, 3-8, 11-13, 18-20

United States Supreme Court Cases

Lalli V. Lalli, 439 U.S. 259,
58 L.Ed 503, 99 S.Ct. 518 (1978) 9, 10

Royster Guano Co. V. Virginia, 253 U.S. 412,
40 S.Ct. 560, 64 L.Ed 989 (1920) 11

PREFACE

Petitioner, SHRINERS HOSPITALS FOR CRIPPLED CHILDREN, residuary beneficiary under the Last Will and Testament of LORRAINE E. ROMANS, deceased, was respondent in the trial court and appellee in the Fifth District Court of Appeal.

STATEMENT OF THE CASE AND OF THE FACTS

The decedent, LORRAINE E. ROMANS, died on July 19, 1986, a resident of Seminole County, Florida. The decedent's sole intestate heir was her daughter, LORRAINE E. ZRILLIC, (hereinafter referred to as Zrillic).

The decedent's Last Will and Testament dated May 5, 1986, which was admitted to probate December 19, 1986, contained the following paragraph:

> EIGHTH: 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, Ft. 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 preceeding the date of this Will. My executor will know the appraised value of these antiques for estate tax purposes.

The rest, residue and remainder of her estate was then devised to the SHRINERS HOSPITALS FOR CRIPPLED CHILDREN, (hereinafter

referred to as Shriners). No takers in default of the residuary devise were named in the decedent's will. Shriners is a benevolent or charitable institution.

Zrillic, under Section 732.803 Florida Statutes (1985), filed her written notice to avoid the residuary devise and petitioned the trial court for an Order Avoiding Charitable Devise. Shriners and the Co-Personal Representatives of the estate filed timely responses to the Petition and each raised the same two (2) affirmative defenses to the Petition: Lack of standing on the part of Zrillic and the constitutionality of Section 732.803 Florida Statutes (1985).

On December 14, , Seminole County Circuit Judge C. Vernon Mise, Jr., entered his Order Denying the Petition for Order Avoiding Charitable Devise. The trial court found Zrillic had standing to avoid the charitable devise but declared Section 732.803 Florida Statutes (1985), unconstitutional on the grounds that it denied Shriners equal protection of the laws under Section 1 of the 14th Amendment to the United States Constitution and under Article I, Section 9 of the Florida Constitution.

From this final order Zrillic filed an appeal and the Co-Personal Representatives filed a cross appeal from the denial of their defense based on standing. After hearing oral arguments, the Fifth District Court of Appeal in their Opinion filed October 20, 1988, found that Zrillic had standing but held that the trial court erred in holding Section 732.803 Florida

Statutes (1985), unconstitutional under the federal and state equal protection clauses, reversed the order and remanded.

On November 3, 1988, Shriners filed a Motion for Rehearing. The Fifth District Court of Appeal in their Order dated January 4, 1989 denied Shriners Motion.

On January 27 1989, Shriners filed its Notice to invoke the Discretionary jurisdiction of the Florida Supreme Court and on June 21, 1989 the Florida Supreme Court entered its Order Accepting Jurisdiction and Setting Oral Argument.

SUMMARY OF ARGUMENT

Section 732.803 Florida Statutes (1985), commonly referred to as Florida's mortmain statute, is unconstitutional because it violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and Section 9 of the Declaration of Rights in the Florida Constitution. Although the predecessor to this statute survived scrutiny by this court on the issue of due process in Taylor v. Payne, 17 So.2d. 615 (Fla. 1944), the Taylor case never addressed the issue of equal protection. In Taylor, the Florida Supreme Court was only concerned with the due process clause of the Fourteenth Amendment when it decided whether the right to receive and dispose of property by Will was a fundamental right. The equal protection issue, that is, whether the statute bears a rational relationship to a legitimate government purpose, was not decided in the Taylor case.

The Fourteenth Amendment to the United States Constitution provides that no State shall "... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The courts have consistently interpreted this clause to mean that no state may enact legislation that does not have a reasonable relationship to

the object and purpose intended by such legislation. The legislative purpose of Section 732.803 Florida Statutes (1985), is to protect the surviving spouse and children of the decedent from improvident bequests to charities contained in Wills of decedents made within six months of testator's death.

The underlying reason why charities have been singled out in mortmain statutes can be traced back to the middle ages when the church and the salvation it purportedly dispensed had an overwhelming grip on the populace. It was conceived that the mortmain statute would protect the widow and surviving children from overreaching by the church's threat to withhold absolution until the dying testator made a testamentary devise to the church. This same rationale has been carried forward into modern times to justify the mortmain statutes.

In the instant case, the Trial Court ruled that Section 732.803 Florida Statutes (1985), was unconstitutional because it did not afford the Shriners Hospitals for Crippled Children equal protection under the law. Specifically, the Trial Court found:

> ... that Section 732.803 bears no rational relationship to the legitimate government purpose enunciated in Taylor v. Payne, supra. ... Furthermore, it creates an irrebuttable presumption that charitable devises made within the statutory period are the product of undue influence, yet leaves untouched devises to noncharitable beneficiaries who are in an equal or better position to influence the testator. For the latter devises, undue influence or lack of testamentary capacity must be proven. There is no rational explanation for this difference in treatment. Estate of French, 365 A.2d 621 (D.C. 1976), cert. denied and appeal dismissed on other grounds 434 U.S. 59, 98 S.Ct. 280, 54 L.Ed.2d 238, reh'g denied 434 U.S. 1025, 98 S.Ct. 753, 54 L.Ed.2d 773.

The Fifth District Court of Appeal reversed the Trial Court by holding Section 732.803 Florida Statutes (1985), constitutional in that it did not violate the equal protection clause of the Fourteenth Amendment.

When constitutionally scrutinized, mortmain statutes no longer bear a rational relationship to their underlying purpose. Section 732.803 Florida Statutes (1985), only protects against overreaching by "a benevolent, charitable, educational, literary, scientific, religious or missionary institution, corporation, association or purpose." 0732.803, Fla. Stat. (1985). What Section 732.803 Florida Statutes (1985), fails to protect against are unscrupulous lawyers, doctors, nurses, housekeepers, companions or a myriad of other people more inclined to unduly influence a testator than those entities specified in the statute.

When the equal protection test is applied to Section 732.803 Florida Statutes (1985), it becomes clear that this statute violates the Fourteenth Amendment and the Trial Court's decision declaring Section 732.803 Florida Statutes (1985), to be unconstitutional should be upheld and the Fifth District Court of Appeal's decision should be reversed.

ARGUMENT

SECTION 732.803 OF THE FLORIDA PROBATE CODE IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES CHARITABLE ORGANIZATIONS OF EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 9 OF THE DECLARATION OF RIGHTS IN THE FLORIDA CONSTITUTION.

Section 732.803 Florida Statutes (1985), is unconstitutional because it violates the equal protection clause as contained in the Fourteenth Amendment to the United States Constitution.

Section 732.803 Florida Statutes (1985), provides as follows:

> (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,
> (b) To this state, any other state or country, or a county, city or town in this or any other state or country, or
> (c) To a person in trust for any such purpose or beneficiary, whether or not the trust appears on the face of the instrument making the devise,
>
> 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 4 months after the date letters are issued, unless:
> (d) The will was duly executed at least 6 months before the testator's death, or
> (e) The testator made a valid charitable devise in substantially the same amount for the same purpose or

> to the same beneficiary, or to a person in trust for the same purpose or beneficiary, as was made in the last will or by a will or a series of wills duly executed immediately next to the last will, one of which was executed more than 6 months before the testator's death.
>
> (2) The testator's making of a codicil that does not substantially change a charitable devise as herein defined within the 6-month period before the testator's death shall not render the charitable gift voidable under this section.

8732.803, Fla. Stat. (1985).

Section 1 of the Fourteenth Amendment to the United States Constitution provides in part that:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

The leading case in Florida on the constitutionality of Florida's mortmain statute [presently Section 732.803 Florida Statutes (1985)] is Taylor V. Payne, 154 Fla. 359, 17 So.2d 615 (1944). The Florida Supreme Court in Taylor, addressed only the due process issue in holding that the right to dispose of property by will is not an inherent right nor one that is guaranteed by the fundamental law. The Florida Supreme Court reasoned that since the right to dispose of property by will was totally statutory this right could be taken away altogether, if the legislature deemed it necessary, without constitutional

violation. The question of equal protection, that is whether the two classes created by the statute bear a rational relationship to the purpose of the underlying statute was never discussed in Taylor. The Court in Taylor found that the purpose of the statute was 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 their estates to the exclusion of those who are, or should be, the natural objects of the testator's bounty.

Taylor, 17 So.2d at 618.

The Court in Taylor never went beyond the basic premise that the right to inherit is totally a creature of statute not subject to constitutional limitation of due process. The Court did not consider nor rule on the proposition that all laws are subject to the constitutional scrutiny of equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Section 9 of the Florida Declaration of Rights.

In Lalli v. Lalli, 439 U.S. 259, 58 L.Ed 503, 99 S.Ct. 518 (1978), the United States Supreme Court was faced with the constitutionality of a New York Statute which involved some proof requirement on illegitimate children who would inherit from their fathers. The Court found:

> The primary state goal underlying the challenged aspect of sec. 4-1.2 is to provide for the just and orderly disposition of property at death. We long have recognized that this is an area with which the States have an interest of considerable magnitude.

Lalli, 439 U.S. at 268, 99 S.Ct. at 524, 58 L.Ed.2d at 511.

Justice Powell writing for the majority, in recognizing that probate statutes are subject to constitutional scrutiny wrote:

> ... Our inquiry under the Equal Protection Clause does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenurous that it lacks the rationality contemplated by the Fourteenth Amendment.

Lalli, 439 U.S. at 273, 99 S.Ct. at 527, 58 L.Ed.2d at 514.

Clearly, statutes which may not be subject to procedural due process scrutiny are nevertheless subject to and must comply with the equal protection clause of the Fourteenth Amendment.

As was pointed out in State ex rel Furman v. Searcy, 225 So.2d 431 (Fla. 4th DCA 1969), both the 14th Amendment and Section 12 of the Declaration of Rights (now Section 9) contained in the Florida Constitution

> ...guarantee the concept of substantive due process to citizens of the State of Florida as a safeguard against state actions. The phrase 'due process of law' when applied to substantive rights as distinguished from procedural rights means that a state or municipality is

> without right to deprive a person of life, liberty or property by an act having no reasonable relationship to any proper governmental purpose.

Furman, 225 So.2d at 433.

The Equal Protection Clause of the 14th Amendment does not prohibit the States from legislating in a way which treats different classes in different ways as long as the different treatment is not wholly unrelated to the objective of that statute. The Taylor case never decided whether the classification had a rational relationship to the purpose of that statute. The Florida Supreme Court did not consider whether the classification was reasonable or arbitrary and whether it rested upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced would be treated alike. See, Royster Guano Co. v. Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed 989 (1920). The Florida Supreme Court held in Davis v. Florida Power Company, 64 Fla 246, 60 So. 759 (1913).

> The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person, or class of persons, from being singled out as a special subject for arbitrary and unjust discrimination and hostile legislation.

Davis, 60 So. at 766.

Section 732.803 Florida Statutes (1985), has created two classifications of beneficiaries, the first being comprised

of benevolent, charitable, educational, literary, scientific, religious or missionary institutions named in a will made within six months of the testator's death and the other class being all other beneficiaries. This leads to the constitutional question of whether this distinction between beneficiaries is reasonable and whether the differences between the two has some fair and substantial relation to the object and purpose of the legislation.

In the first class, Section 732.803 Florida Statutes (1985), renders invalid any otherwise valid charitable gifts included in a will made by the testator within six (6) months of his death if within 4 months of the issuance of a letter of administration, a written avoidance is filed by a lineal descendant or a spouse who would receive an interest in the devise, if avoided. In substance, this amounts to an irrebuttable presumption that the devise was the product of undue influence. In the second class, the devise can only be avoided by establishing and proving that such devise was the product of undue influence.

The Pennsylvania Supreme Court, in analyzing its mortmain statute which was similar to that of Florida's, except that it had a 30 day period as opposed to a 6 month period, stated in Estate of Cavill, 329 A.2d 503 (Pa 1974):

> ...the statutory classification bears only the most tenuous relation to the legislative purpose. The statute strikes down the charitable gifts of one in the best of health at the time of the execution of his will and regardless of age if he chances to die in an

> accident 29 days later. On the other hand, it leaves untouched the charitable bequests of another, aged and suffering from a terminal disease, who survives the execution of his will by 31 days. Such a combination of results can only be characterized as arbitrary. ...
>
> Because the statute sweeps within its prohibition many testamentary gifts which present no threat of the evil which the statute purports to minimize, it is substantially over inclusive. Since the statute also leaves unaffected many gifts which do present such a threat, it is substantially under-inclusive. We are thus compelled to conclude that it lacks a fair and substantial relation to the legislative object. Therefore, the Equal Protection Clause forbids us to give it any effect.

Cavill, 329 A.2d at 506.

It is clear that the Pennsylvania Court had no trouble deciding that there was no rational basis for the distinction between wills executed within 30 days of death which named a charity as a beneficiary and a similar will executed more than 30 days before the testator's death. The distinction is even more compelling in Florida which requires the testator to survive at least 6 months after making his will in order for a devise to a charity to be safe from an attack under Section 732.803 Florida Statutes (1985).

The Supreme Court of Ohio also had occasion to determine the unconstitutionality of its mortmain statute in Shriners Hospitals for Crippled Children v. Hester, 23 Ohio St.3d 198, 492 N.E.2d 153 (1986).

The Ohio Supreme Court first focused on the legislative intent of the Ohio mortmain statute. In a footnote, the court recognized that originally mortmain statutes:

> ... came into being as a means of preventing the acquisition of vast amounts of real property by religious orders which would be inclined to hold such property in perpetuity, under a 'dead hand', thereby preventing the economic and efficient use of the land.

Hester, 23 Ohio St.3d at 201 n.2, 492 N.E.2d at 155 n.2.

The Court then went on to discuss the purpose of modern mortmain statutes and recognized that:

> Modern mortmain statutes are directed toward the testator who executes his will under the belief that his death is near. Generally, the purpose of these statutes has been to prevent such a testator from disposing of his estate, as a result of unsound judgment or undue influence, in a manner that is prejudicial to his next of kin. Because it was felt that certain individuals and organizations were in a position to benefit from the execution of a will by a 'death-bed' testator, bequests to these individuals and organizations have been singled out in mortmain statutes as being invalid, either in whole or in part.

Hester, 23 Ohio St.3d at 201, 492 N.E.2d at 155.

Next, the Ohio Supreme Court recognized that:

> ... the protection of a testator's issue from disinheritance, as a result of the testator's unsound judgment or the undue influence of third parties upon the testator, is a legitimate state objective. Our analysis narrows, therefore, to the question of whether R.C. 2107.06 is rationally related to the accomplishment of that objective.

Hester, 23 Ohio St.3d at 201, 492 N.E.2d at 156.

In reaching its conclusion that the Ohio mortmain statute was unconstitutional, the Court noted that the statute deprived a small class of beneficiaries of their testamentary bequests even though in the great majority of cases such bequests

were legitimate and not within the scope of the statute's objective. Next, the Court considered the fact that the statute created an irrebuttable presumption that a testator who made a charitable bequest in a will that was executed within six months prior to death either lacked testamentary capacity or was under undue influence. The Court noted:

> Such " ...'irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments,' especially when they are 'not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination.'" Hall v. Rosen (1977), 50 Ohio St.2d 135, at 142, 363 N.E.2d 725 [4 O.O. 3d. 336] (Justice William B. Brown, dissenting, quoting Vlandis V. Kline [1973], 412 U.S. 441, 446 and 452, 93 S.Ct. 2230, 2233 and 2236, 37 L.Ed.2d 63). ... the creation of the aforementioned irrebuttable presumption, in spite of the existence of "reasonable alternative means" for determining whether the testator acted with unsound judgment or under undue influence, evinces a lack of rationality in the operation of the statute.

Hester, 23 Ohio St.3d at 202, 492 N.E.2d at 156.

The Ohio Supreme Court also noted that the mortmain statute failed to address inter-vivos death bed transfers. Finally, the Court pointed out that clergymen, physicians, attorneys and nurses are often times in a position to influence the death bed testator but are not encompassed within the purview of the statute. In reaching its ultimate conclusion of unconstitutionality, the Court stated that the Ohio mortmain statute was not rationally related to the accomplishment of a legitimate state objective.

Furthermore, in Estate of French, supra, the Court ruled that the mortmain statute under scrutiny was unconstitutional because it violated the 1st and 5th Amendments to the United States Constitution (state legislation was not involved hence no discussion of the 14th Amendment).

In Estate of French, supra, the District of Columbia Court of Appeals acknowledged that the mortmain statute under consideration created "... two classes of beneficiaries: one class composed of clergymen and religious institutions and a second class encompassing all other beneficiaries." French, 365 A.2d at 623. That Court crystallized the issue before it as whether this classification bore any rational relationship to the purpose of the statute. The court also enunciated what the statutory purpose was, namely:

> ... to preclude 'deathbed' gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations.

French, 365 A.2d at 622.

The Court concluded that the classification established by the mortmain statute had no rational relationship to the purpose of the legislation and hence it denied religious legatees equal protection of the law. In reaching its conclusion that the statute in question arbitrarily provided different treatment for similarly situated legatees, the Court noted that the statute ...

> ... establishes an irrebuttable presumption that certain bequests to clergymen or religious organizations are the result of undue influence. Many persons who may be in an equal position to influence the testator, such as lawyers, doctors, nurses, and charitable organizations, are not included in the statute. A gift to any of these persons is valid unless undue influence or lack of testamentary capacity is proved. There is no ground of difference that rationally explains the different treatment accorded religious entities.

French, 365 A.2d at 624.

If the purpose of the statute is to protect the families of the testator from being improvidently influenced by a certain charity or other entity as specified by statute by creating an irrebuttable presumption of invalidity, why is it limited solely to those types of entities? If the purpose of the legislature was to protect families of the testator from alleged undue influence by non-family persons, a rational statute would invalidate all devises made within 6 months to persons other than the protected parties (the surviving spouse or lineal descendants). By limiting the avoidance only to devises to specific types of entities, the legislature has clearly created two classes which do not have a rational relationship to the legislative intent of the statute. If the mortmain statute were not in force, all devises (even those to charities) would be subject to attack on the grounds of undue influence. An attack on a will because of undue influence requires that the undue influence be alleged and proven. All devises should be treated equally. Under the mortmain statute, however, charitable devises

are automatically invalidated by the mere filing of a notice, thus denying the charitable devisees their day in court. Only Florida, Georgia, Idaho and Mississippi of the 50 United States still have mortmain statutes.

It is interesting to note that the Mortmain Statute in Ohio previously had been held to be constitutional in Patton v. Patton, 39 Ohio St. 590 (1883) but until Shriners Hospitals for Crippled Children v. Hester (supra), the Ohio Supreme Court had never scrutinized that statute with the equal protection analysis. A parallel situation presently exists in Florida. The leading case in Florida is the 1944 case of Tavlor v. Payne (supra) which upheld Florida's mortmain statute as being constitutional. As in Ohio, the Florida Supreme Court has never scrutinized the mortmain statute in light of the equal protection clause of the Fourteenth Amendment until the instant case.

Although the Fourth District Court of Appeal in Arthritis Foundation v. Beisse, 456 So.2d 954 (Fla. 4th DCA 1984), upheld the constitutionality of Section 732.803 Florida Statutes (1985), it relied exclusively on the Florida Supreme Court's ruling in Tavlor as authority for its decision. The Fourth District Court of Appeal, unlike the Trial Court in the instant case, failed to consider the equal protection argument.

Section 732.803 Florida Statutes (1985), must now be constitutionally scrutinized in the light of the equal protection clause of the Fourteenth Amendment. Florida's mortmain statute possesses a legitimate state objective in protecting family

members. The statute, however, creates two classes of beneficiaries and such distinction between the two bears no rational relationship to the purpose of the statute.

Florida's mortmain statute is a relic of ancient law, no longer serving any valid purpose by its creation of an irrebuttable presumption that devises made within 6 months of death to eleemosynary institutions are the product of undue influence. All other bequests, including those to a dishonest doctor, nurse, lawyer or housekeeper, must be attacked on the grounds of undue influence and the allegations proven before those bequests can be set aside.

As there is no rational relationship for the distinction between beneficiaries, the Florida Supreme Court must find Section 732.803 Florida Statutes (1985), violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and is therefore unconstitutional.

CONCLUSION

For the reasons set forth herein, Section 732.803 of The Florida Probate Code does not meet the test of equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and Section 9 of the Declaration of Rights in the Florida Constitution and should not therefore be given effect.

Respectfully Submitted,

By: William S. Belcher
WILLIAM S. BELCHER, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Petitioner's Initial Brief have been furnished by United States Mail to Peggy Tribbett Gehl, Esquire at 1322 SE 3rd Avenue, Fort Lauderdale, Florida 33316; Linda Chambliss, Esquire at 707 SE 3rd Avenue, Fort Lauderdale, Florida 33316 and to Lawrence B. Dolan, Esquire at 500 East Jackson Street, Orlando, Florida 32801, this 30 day of June, 1989.

JOSEPH W. FLEECE, III, ESQUIRE