IN THE SUPREME COURT OF FLORIDA

LORRAINE E. ZRILLIC,

Appellant/Cross Appellee,

vs.

Case No. **73,639**
DCA-5 **88-49**

ESTATE OF LORRAINE E. ROMANS,
Deceased,

Appellee/Cross Appellant,

and

SHRINERS HOSPITALS FOR CRIPPLED
CHILDREN,

Appe11ee

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

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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ATTORNEYS FOR PETITIONER
SHRINERS HOSPITALS FOR
CRIPPLED CHILDREN

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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 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 Fla. Stat. § 732.803, filed her written notice to avoid the residuary 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 Fla. Stat. § 732.803.

On December 14, 1987, Seminole County Circuit Judge C. Vernon Mise, Jr., entered his Order Denying the Petition for Order Avoiding Charitable Devise. The trial court declared Section 732.803, Florida Statutes 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. After hearing oral arguments the Fifth District Court of Appeal in their Opinion filed October 20, 1988, 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.

SUMMARY OF ARGUMENT

Florida Statute 732.803, commonly referred to as Florida's Mortmain Statute, is unconstitutional as it violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. Although the predecessor to this Statute has 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 bore a rational relationship to a legitimate government purpose, was not decided in the Taylor case.

In the instant case, the Trial Court ruled that Florida Statute 732.803 was unconstitutional in that 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. It invalidates charitable devises made by testators who are in the best of health, who then die in an accident within six months of the devise, yet leaves untouched devises by terminally ill testators who die sixty-one days after the devise. Estate of French, 365 A.2d 621 (D.C. App. 1976) (U. S. rehearing denied 54 L.Ed.2d 238, Estate of Cavill, 459 P.A. 411, 329 A.2d 503, 505-506 (1974). 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, supra.

The Fifth District Court of Appeal reversed the Trial Court by holding 732.803 constitutional in that it did not violate the equal protection clause of the Fourteenth Amendment.

As the District Court of Appeal expressly found Fla. Stat. 732.803 constitutional, the Florida Supreme Court has discretionary jurisdication to review this case pursuant to Fla. R. App. P. Rule 9.030 (a)(2)(A)(i) and (ii).

As the equal protection argument has never been decided by this Court as it pertains to Fla. Stat. 732.803 and in light of the fact that Florida is one of only four states that still has a Mortmain Statute, this case and the issues presented herein are ripe for judicial review by the Florida Supreme Court.

ARGUMENT

Petitioner, SHRINERS HOSPITALS FOR CRIPPLED CHILDREN, has filed a Notice to Invoke Discretionary Jurisdiction under the Florida Rules of Appellate Procedure Rule 9.120(b) on the grounds that the decision of the Fifth District Court of Appeal expressly declares valid a state statute, to wit; section 732.803, Florida Statutes (1985) [hereinafter referred generally as a "mortmain" statute], and expressly construes a provision of the state and federal constitutions, to wit; the equal protection clause of the 14th amendment to the United States Constitution and section 9, article I of the Florida Constitution.

Article V section 3(b)(3) of the Florida Constitution and Rule 9.030 2(A)(i) and (ii) of the Florida Rules of Appellate Procedure provide that the Florida Supreme Court may review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution.

The Fifth District Court of Appeal reversed the trial court's holding that section 732.803, Florida Statutes (1985) was unconstitutional under the federal and state equal protection clauses. The Fifth District Court of Appeal expressly found that the statute was rationally related to its purpose. Thus, by implication the Court necessarily expressly found the statute constitutional. In Cantor V. Davis, 489 So.2d. 18 (Fl 1986), The Florida Supreme Court stated that; "[t]he district court's expressly finding section 768.56 to be constitutional conveyed

jurisdiction to this Court. Art. V, section 3(b)(3), Fla. Const." Cantor 489 So.2d at 20. This case is clearly on point. Therefore, this court has jurisdiction.

Further, the Fifth District Court of Appeal construed the equal protection clauses of the state and federal constitution to require a rational relationship between the statute and its purpose. Upon this construction the Court found the Statute constitutional. Thus the Court expressly construed a provision of the state and federal constitutions

The Fifth District Court of Appeal based its holding in part on this Court's decision in Taylor v. Payne, 154 Fla. 359, 17 So.2d 615 (1944), appeal dismissed 323 U.S. 666, 65 S.Ct. 49, 89 L.Ed. 541 (1944). Since the time that the Taylor case was decided the law on a national level has undergone a significant change. Most states have either ruled their "mortmain" statute unconstitutional or repealed it including Pennsylvania, who's Supreme Court found it to be unconstitutional even though it had a savings clause substantially similar to Florida's. The Fifth District Court of Appeal claimed that the existence of a savings clause was the most important difference between Florida's "mortmain" Statute and those in other states in which "mortmain" statutes have been held unconstitutional. It is clear that the District Court of Appeal did not consider Pennsylvania statute 20 Pa. Co. St. Section 2507(1) [held unconstitutional in Cavill Estate, 459 Pa. 411, 329 A.2d 503 (1974)] even though it was expressly pointed out on the Motion for Rehearing.

Further, this Court in Taylor only addressed the due process issue. In that case, this court held that the "mortmain" statute was not subject to due process as the "right to receive or dispose of property by last will and testament is not an inherit right, nor is it one that is guaranteed by the fundamental law." Taylor, 17 So.2d. at 617 Although section 732.803 may not be subject to "due process" scrutiny, it is nevertheless subject to equal protection under the law scrutiny. The issue of equal protection as afforded by the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution has never been decided by the Florida Supreme Court as it relates to Florida Statute § 732.803 and its predecessors. This is a question of great public importance that should be addressed by this court.

Florida along with Mississippi, Idaho, and Georgia are in a vast minority in maintaining such an outdated and ineffective attempt to protect testators, surviving spouses, and lineal descendants from improvident charitable bequests. This is even more obvious in light of the new probate code with its flexible approach to protection of the testator from all sources of undue influence. Section 732.6005(1), Florida Statutes (1985), states: "The intention of the testator as expressed in his will controls the legal effect of his dispositions." This statutory provision was not in effect in 1944 when Taylor was decided. The enactment by the legislature of the new probate code with its sole focus on the testator's intent has in effect implicitly

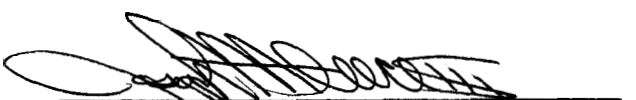
repealed the "mortmain" statute, which can negate provisions of a testator's will which presumably express the actual intent of that testator.

The Florida "mortmain" statute in substance creates an irrebuttable presumption that any devise made to a charity within six months of the testator's death was the product of undue influence. Other bequests including those to unscrupulous non-charities even if made within minutes of the testator's death can be avoided only by establishing and proving that such devise was the product of undue influence. This dichotomy creates two classes of beneficiaries. First, charities to whom a bequest is made within six months of the testator's death and Second, charities to whom a bequest is made more than six months prior to the testator's death and all other beneficiaries. Only the first class is irrationally singled out to be subject to such an irrebuttable presumption.

CONCLUSION

The Fifth District's opinion expressly declares valid Florida Statute **732.803.** The Florida Supreme Court has jurisdiction and should review the Fifth District's opinion on the merits and decide this issue of great public importance.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Petitioner's Amended Brief on Jurisdiction 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 13th day of February, 1989.

JOSEPH W. FLEECE, III, ESQUIRE