IN THE SUPREME COURT OF FLORIDA

Case No. **73640**
DCA-5 **88-49**

ESTATE OF LORRAINE E. ROMANS,
Deceased,

vs.

LORRAINE E. ZRILLIC

_____/

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

PETITIONERS' AMENDED BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Hereafter in this Brief Petitioners, JAMES C. LLOYD, JAMES C. ERDMAN and BETTY C. MERRICK, as Co-Personal Representatives of the Estate of LORRAINE E. ROMANS, will be referred to as "CO-PERSONAL REPRESENTATIVES." LORRAINE E. ZRILLIC, will be referred to as "LORRAINE E. ZRILLIC or daughter of decedent." The Appellee, SHRINERS HOSPITAL FOR CRIPPLED CHILDREN, will be referred to as "SHRINERS HOSPITAL."

An Appendix containing the District Court of Appeal's, Fifth District, decision rendered October 20, 1988, was previously filed with Petitioners' original Brief.

This Amended Brief on Jurisdiction is being filed in accordance with the Supreme Court's direction to file the same for the purpose of including a Summary of Petitioners' Argument.

ISSUE

Whether the Florida Supreme Court has jurisdiction to review an opinion of a District Court of Appeal which held that decedent's daughter had standing under Section 732.803, Florida Statutes, (1985), to bring a petition to set aside a charitable residuary devise notwithstanding the decedent's intention to limit her interest in the estate by the express provisions of her will?

STATEMENT OF THE CASE AND FACTS

This case arose in the Circuit Court, Seminole County, Florida, Probate Division. The decedent, LORRAINE E. ROMANS, died on July 15, 1986, leaving a Last Will and Testament, dated May 5, 1986, which was admitted to probate on December 19, 1986.

The decedent's daughter, LORRAINE E. ZRILLIC filed a petition in the Circuit Court to set aside a residuary devise under ITEM ELEVENTH of the Will of LORRAINE E. ROMANS, deceased to the SHRINERS HOSPITAL pursuant to Section 732.803, Florida Statutes.

The Circuit Court, on December 15, 1987, entered its order denying LORRAINE E. ZRILLIC'S petition. The Circuit Court determined the decedent's daughter had standing to bring the petition notwithstanding a limited bequest to her under ITEM EIGHTH of decedent's Will, but found that Section 732.803, Florida Statutes, was unconstitutional. ITEM EIGHTH of decedent's Will provides as follows:

> "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 decedent's daughter on January 4, 1988 filed a Notice of Appeal with the District Court of Appeal, Fifth District, with respect to the Circuit Court determination that Section 732.803, Florida Statutes, was unconstitutional.

On January 7, 1988, the CO-PERSONAL REPRESENTATIVES filed their Notice of Cross-Appeal with respect to the Circuit Court's determination that the decedent's daughter had standing to bring a petition to set aside the charitable residuary devise.

After oral argument on October 3, 1988, the District Court of Appeal, Fifth District, rendered its decision on October 20, 1988 reversing the Circuit Court, Seminole County, Florida, and holding that Section 703.803, Florida Statutes, is constitutional and that the decedent's daughter had standing to file a petition to set aside the charitable residuary devise under said Section. SHRINERS HOSPITAL filed a Motion for Rehearing on November 3, 1988 which was denied by the District Court of Appeal, Fifth District, on January 4, 1989.

ARGUMENT

Petitioners have filed a Notice to Invoke Discretionary Jurisdiction under the Fla. R. App. P. Rule 9.120(b) on the grounds that the decision of the District Court of Appeal, Fifth District, is in direct conflict with decisions of the Supreme Court or other District Courts of Appeal involving the right of a decedent to direct the transfer of her property in her estate after her death, including disinheriting her children and directing her estate be distributed to strangers, and that the decedent's intention in this regard controls the legal effects of testamentary dispositions in her estate.

Article V, Section 3(b)(3) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv) provides that the Florida Supreme Court may review in its discretion a District Court decision that conflicts with another District Court decision or a Supreme Court decision.

The District Court of Appeal's decision in this case specifically held that the limited bequest to decedent's daughter under ITEM EIGHTH of the Will did not prevent her taking an intestate share upon the avoidance of the charitable residuary provisions.

As a consequence, the District Court of Appeal found that the decedent's daughter did, in fact, have standing to file a Petition for Order Avoiding Charitable Devise under the provisions of Section 732.803, Florida Statutes, in the Circuit Court.

It is the position of the CO-PERSONAL REPRESENTATIVES that this finding of the District Court of Appeal directly conflicts with decisions of the Supreme Court and other decisions of the District Court of Appeal.

Under ITEM ELEVENTH of the decedent's Last Will and Testament the

residue of the decedent's estate is bequeathed to the SHRINERS HOSPITAL.

Under ITEM EIGHTH of the decedent's Will, the decedent devised certain items of tangible personal property to her daughter and then specifically stated that the bequests to her were limited for the reasons indicated.

Notwithstanding the limited bequest under the Will to her daughter, as expressly intended by the decedent, the holding of the District Court of Appeal in holding that she is still entitled to an intestate share, is in direct conflict with two Supreme Court decisions dealing with the disinheritance of heirs.

The first case, Milam v. Davis, 123 So. 668 (Fla. 1929) involved the disposition of a substantial amount of insurance proceeds payable to the decedent's estate which the trial court had determined were not subject to the decedent's debts, to the dower or other rights of his Will or to a general legacy to a charity under the Will.

In holding that a widow's dower rights applied against such insurance proceeds notwithstanding the then insurance exemption statute, other heirs, including children by the express provisions of his Will, could be excluded from participating in his estate:

> "At common law, marriage alone did not cause the 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 as 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

The second decision of the Supreme Court in direct conflict with the decision of the District Court of Appeal is Hooper v. Stokes, 145 So. 855 (Fla. 1933). This is a case which is extremely comparable in facts to this case.

Under George C. Hooper's Will he left to his son, George T. Hooper the following bequest:

> "To my son, George T. Hooper, I bequeath a transcript of the divorce proceedings of Maude G. Hooper against me. This transcript contains the false testimony that he gave against me. I trust that an occasional perusal of same will recompense him for any pecuniary loss that his act has caused him. Furthermore, I direct that the Executor of my estate procure from each legatee, as named above, an affidavit that he or she will under no circumstances render any financial aid to the above mentioned George T. Hooper. The share or shares of any legatee who refuses to make such an affidavit shall revert to the Childrens Home Society of Florida, at Jacksonville." Id at p. 856

The Supreme Court in sustaining the validity of this bequest against an attack by the son stated the following to be the general rule with respect to a disinheritance by a parent of a child:

> "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.

Thus, it is the position of the CO-PERSONAL REPRESENTATIVES that the language of ITEM EIGHTH of decedent's Will clearly resulted in the disinheritance of her daughter for the purpose of determining the distribution of the assets subject to administration under her Will. Even assuming that the daughter had standing to bring a petition to set aside the charitable devise under the provisions of Section 732.803, Florida Statutes, because of the language of ITEM EIGHTH of the decedent's Will, she should have been deemed to have predeceased the decedent and therefore not entitled to an intestate share if there were an avoidance or absence of the residuary devise to the SHRINERS

HOSPITAL.

By failing to give a full recognition to the decedent's clear expression of disinheritance of her daughter under ITEM EIGHTH of the Will the District Court of Appeal is in direct conflict with the decisions in both the Davis Case, supra., and the Stokes Case, supra.

Furthermore, since the rendition of the decision in the Stokes Case, supra., there have been no other decided cases which would limit a decedent's right to disinherit children as set forth in each of these decisions except with respect to rights under the homestead property law. Therefore, the decision of the District Court of Appeal in this case would appear to engraft an additional exception to this right of the decedent to dispose of her estate not supported by the decisions of the Supreme Court.

The decision of the District Court of Appeal, Fifth District, also is in direct conflict with decisions of the Supreme Court or other District Courts of Appeal holding that the intention of a testatrix controls the legal effect of her testamentary dispositions.

The holding of the District Court of Appeal that if the residuary devise to the charity were set aside, then, notwithstanding the limited bequest to the decedent's daughter under the Will, she would still be entitled to take an intestate share contradicts the clear intention of the decedent in this case and is in direct conflict with previous decisions of the Supreme Court and the District Courts of Appeal.

In the Stokes Case, supra., the Supreme Court clearly stated that the express intention of the decedent:

> ". . . must determine the interpretation of his will . . ." Id at p. 858

The decision of the District Court of Appeal in this case ignored

entirely the express intention of this decedent with respect to limiting the interest which her daughter was to receive from her estate.

The decision by Judge Glickstein In Re Estate of Herman, 427 So.2d 195 (Fla. 4th DCA 1982) is also in direct conflict with this decision. In this case the decedent's will and an intervivos trust agreement both expressly provided that no provision was made in either instrument for the decedent's daughter. The decedent's daughter brought a petition under Section 732.803(1), Florida Statutes, to set aside a charitable devise. In sustaining the trial court's determination that because the daughter was not a specified person who would receive any interest in the charitable devise if it were avoided, and, therefore, had no standing to file a petition, the District Court of Appeal specifically pointed out one of its reasons for reaching this conclusion were the applicable provisions of Section 732.6005(1), (1977), Florida Statutes:

> ". . . Fourth, and perhaps most important, Section 732.6005(1), Florida Statutes (1977) stated:
>
> The intention of the testator as expressed in his will controls the legal effect of his dispositions.
>
> For whatever reason, it is plain the testator intended his daughter receive no part of his estate. Accordingly, we affirm the trial court's decision for the reasons recited herein." Id at p. 197

SUMMARY OF ARGUMENT

The limited bequest to the decedent's daughter under ITEM EIGHTH of the Will clearly results in disinheritance of her daughter based upon the express principles as enumerated in the Supreme Court decisions in the Davis case, supra, and the Stokes case, supra. Such disinheritance is effective for determining the distribution of decedent's assets in the event of intestacy which would arise even if the decedent's daughter has standing to bring a petition to set aside the charitable devise under Section 732.803, Florida Statutes.

Further the decedent's intention to disown her daughter as expressly set forth in ITEM EIGHTH of her Will should be given effect and should therefore control the disposition of her estate under these circumstances as required under Section 732.6005(1), Florida Statutes, and affirmed in the Stokes case, supra, and the Herman case, supra.

CONCLUSION

The District Court of Appeal's, Fifth District, opinion holding that the decedent's daughter had standing to bring a petition under Section 732.803, Florida Statutes, notwithstanding the limited bequests to her under the decedent's Will is expressly and directly in conflict with decisions of the Florida Supreme Court and other District Courts of Appeal. The Florida Supreme Court has jurisdiction under these circumstances and should review the opinion of the District Court of Appeal, Fifth District.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Brief of Petitioners on Jurisdiction, together with the separate Appendix, has been furnished by U.S. mail, postage prepaid, to the following this 13th day of February, 1989:

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