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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 REPLY BI

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REPLY TO ARGUMENT I

In the "Historical Background" of the Respondent's Answer Brief great pains are taken to argue that Section 732.803 Florida Statutes (1985), is not technically a "mortmain statute". The statute in question, however, has generally been referred to during its existence as Florida's mortmain statute. Regardless of what it is called, Section 732.803 Florida Statutes (1985) violates the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

The Florida Supreme Court ruled in Taylor v. Payne, 154 Fla 359, 17 So.2d 615 (1944), that Florida's mortmain statute did not violate the Due Process clause of the Fourteenth Amendment since the right to receive and dispose of property by will was not a fundamental right and therefore the state legislature could abolish the right to inherit by will or could vary the way one takes under a will in any way it so desired. What the Taylor Court failed to address was the concept of equal protection, i.e. once the legislature decides to enact a law, any classifications created by that law must bear a rational relationship to a legitimate government purpose. Equal protection for state is guaranteed by the Fourteenth Amendment to the United States Constitution.

As an illustration the legislature could enact a law which provides that only blonde, blue eyed people can inherit under a will. This does not violate the due process clause of the Fourteenth Amendment because as Taylor held the right to receive

and dispose of property by will is not a fundamental right, thus the legislature could enact such a law. Obviously the classification created by the law bears no rational relationship to any governmental purpose, therefore, it violates the Equal Protection clause of the Fourteenth Amendment.

The same argument holds true for Section 732.803 Florida Statutes (1985). There is no rational basis for allowing a devise to a benevolent, charitable, educational, literary, scientific, religious or missionary entity contained in a will made within six months of the date of the testator's death to be automatically voided at the election of the surviving spouse or lineal descendants who would have received the devise, if voided.

There are only several states which still have "mortmain statutes" namely Florida, Georgia, Mississippi, and Idaho. In recent years many state's mortmain statutes have been held unconstitutional several of which are cited in Petitioner's Initial Brief and which the Respondent tries to distinguish in her Answer Brief.

The Respondent's primary argument in her Answer Brief is that the Florida mortmain statute, Section 732.803 Florida Statutes (1985), is totally distinguishable from the mortmain statutes held unconditional in 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, and Estate of Cavill, 329 A.2d 503 (Pa. 1974).

The Respondent argues that French is clearly distinguishable from the case at hand because French found the District of Columbia's mortmain statute unconstitutional as violating the First and Fifth Amendments to the United States Constitution, whereas the Trial Court in the instant case found Florida's mortmain statute unconstitutional under the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment, by its express terms, applies to state action. Thus, the Trial Court was correct in applying the Equal Protection clause of the Fourteenth Amendment to a state statute. The Equal Protection clause of the Fifth Amendment applies to Federal action. Thus, the Appellate Court for the District of Columbia was correct in applying the Equal Protection clause of the Fifth Amendment to Congressional action, i.e. District of Columbia statutes enacted by authority of Congress. There is no real distinction between the Equal Protection clause provided by the Fifth and Fourteenth Amendments to the United States Constitution; the former applies to federal action and the latter to state action.

The Court in French specifically did not address any First Amendment issues. French 365 A.2d at 623. The Court only addressed the issue of whether the statute violated due process and equal protection. The Respondent erroneously claims that the Court in French held that the statute bore no relation to a legislative object, and therefore, violated the due process clause. Respondent's Answer Brief at 8. The Court in French held that the classification established by the statute had no

rational relationship to the purpose of the legislation and thus denied religious legatees equal protection of the law. French, 365 A.2d at 624 (emphasis added). The Court stated;

> The equal protection guarantee 'requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.'

French, 365 A.2d. at 623; citing Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172, 92 S.Ct. 1400, 1405, 31 L.Ed.2d 768 (1972).

Continuing, the Court stated the "statute in question creates 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. "There is no ground of difference that rationally explains the different treatment of religious entities." French, 365 A.2d at 624. It is clear that the Court held that the statutory classification was not rationally related to the avowed statutory purpose of protecting family members.

The Respondent has not cited any cases, made any arguments, or set forth any rational explanation why family members must be protected from improvident testamentary bequests to charities and religious organizations and not from improvident, but not unduly influenced gifts to doctors, lawyers, friends, or nurses, even thought such a gift leaves the spouse and lineal dependents with nothing. The Respondent has also not set forth any rationale, nor is there any, why family members must be protected from improvident testamentary bequest to charities made five months

and twenty-nine days before a testator's death and not be equally protected from improvident inter vivos gifts made minutes prior to death or an improvident bequest made six months and one day before a testator's death. These classifications are arbitrary and irrational and can not stand the rigors of constitutional scrutiny in light of either of the Equal Protection clauses.

The Respondent argues, as did the opinion of the Fifth District Court of Appeal, that the statute held unconstitutional in Cavill, is substantially different from Section 732.803 Florida Statutes (1985). The Respondent bases this argument on her claim that the Pennsylvania statute; 1) automatically voids the bequest to charities; 2) contains no limitation on objecting to the bequest, and most important to the Respondent and the Appellate Court, 3) contains no "saving clause". Respondent's Answer Brief at 9,10. As Petitioner, SHRINERS HOSPITAL FOR CRIPPLED CHILDREN, pointed out in its Motion for Rehearing filed in the Fifth District Court of Appeal, all three claims are erroneous. More specifically, Title 20 Section 2501 of the Pennsylvania statutes [held unconstitutional in Estate of Cavill. 459 Pa. 411, 329 A.2d. 503 (1974)] does not automatically void the charitable bequest, but requires that an objection be filed by someone who would benefit by its invalidity within six months of the probate of the will. The Pennsylvania statute clearly contains a "savings clause" which provides in part;

> ... Unless the testator directs otherwise, if such a will or codicil could revoke or supercede a prior will or codicil executed at least 30 days before the testator's death,

> and not theretofore revoked or superseded and the original of which can be produced in legible condition, and if each instrument shall contain an identical gift for substantially the same religious or charitable purpose, the gift in the later will or codicil shall not be subject to objection.

Pa. Stat. Ann. tit. 20, § 2501(1).

Respondent's basis for her claim that the Pennsylvania mortmain statute does not contain a savings clause is the statutory language of P.L 89 § 7(1) of 1947 contained in footnote 1 of Cavill. Section 2501(1) became effective July 1, 1972. Because the testator died when the 1947 act was in effect the lower court in Cavill was correct in applying the 1947 act. However, the Supreme Court of Pennsylvania clearly stated; "[s]ince section 7(1) [the 1947 statute] and section 2501(1) [the 1972 statute] are identical in effect, our analysis of section 7(1) is equally applicable to section 2507(1). Cavill, 329 A.2d at 504 n. 1.

The Court in Cavill specifically held that the mortmain statute was unconstitutional because it violated the Equal Protection clause. The Court in Cavill stated:

> [the statute] divides testators into two classes. One class is composed of those testators whose wills provide for charitable gifts and who die within 30 days of executing their wills. The other class is composed of those testators who either make no charitable gifts or survive the execution of their wills. The statute renders invalid any charitable gifts made by a testator in the first class if any person 'who would benefit by its invalidity' objects. In all other cases, one who wishes to invalidate a

> testamentary gift must prove lack of testamentary capacity or undue influence.

Cavill, 329 A.2d at 505.

The Court in Cavill held that the statutory classification bore only the most tenuous relation to the legislative purpose. Cavill, 329 A.2d at 505. The Court in holding both section 7(1) and 2501(1) unconstitutional clearly recognized that the existence of a savings clause could not cure the equal protection problem.

The classification created by the Florida Statute is substantially the same. Just as in the Pennsylvania mortmain statute, the savings clause in the Florida mortmain statute does not make the classification any less irrational. The Respondent argues that the Florida Statute so limits the protected class to a spouse or lineal descendant so as to fulfill the avowed statutory purpose of protecting the widow and children from improvident gifts made to their neglect by the testator. Respondent's Answer Brief at 10. The Respondent, again cites no cases or advances no arguments to explain why establishing a protected class makes the classification created by the statute less arbitrary or less irrational.

The Respondent further argues that Section 732.803 Florida Statutes (1985) is no more arbitrary or restrictive than the provisions for widow's elective share, family allowance, exempt property or pretermitted spouse or children. While it is agreed that these provisions have as their purpose the protection of the

spouse and the children of a decedent, the method used in these statutes to accomplish this purpose is fundamentally different from that used in Florida's mortmain statute. Not one of the provisions cited by the Respondent creates a irrational classification. Each provision treats similarly situated testators and beneficiaries the same.

The Respondent attempts to distinguish Shriner's Hospitals for Crippled Children v. Hester. 23 Ohio St.3d 198, 492 N.E.2d 153 (1986), on the grounds that the decedent in Hester did not execute her will under a belief that death was near. The decedent in the instant case, the Respondent claims, executed her will under a belief that her death was near. While this argument appears enticing, under Section 732.803 Florida Statutes (1985), the actual belief, or intent of the testator is irrelevant. It does not matter under the Florida mortmain statute whether the testator was under a belief death was near or was killed suddenly without prior warning. The only inquiry under the statute is whether the will containing the bequest to a charity or religious organization was executed within six months of the testator's death. This is precisely what makes the mortmain statute's classification irrational.

While Section 732.803 Florida Statutes (1985), may relate to a legitimate state objective, the classification created by the statute is not rationally related to the accomplishment of that objective. This violates the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and

Article I, Section 9 of the Florida Constitution. Therefore, Section 732.803 Florida Statutes (1985) is unconstitutional.

The Respondent relies on several District Court cases holding that Section 732.803 Florida Statutes (1985), is constitutional. However, these cases including Rupert v. Hastings, 311 So.2d 810 (Fla. 1st DCA 1975), and Arthritis Foundation V. Beisse, 456 So.2d 954 (Fla. 4th DCA 1984) completely rely on Taylor v. Payne, 17 So.2d 615 (Fla. 1944). Taylor must be revisited, and the equal protection issue that was not addressed in Taylor should now be addressed by this Court.

REPLY TO ARGUMENT II

Petitioner, SHRINERS HOSPITALS FOR CRIPPLED CHILDREN does not reply to Respondent's Answer to the standing argument advanced by the Personal Representative of the Estate of Lorraine E. Romans, as the Personal Representative is best suited to reply to this argument.