OA 10-6-89

IN THE SUPREME COURT OF FLORIDA

SHRINERS HOSPITAL FOR CRIPPLED CHILDREN,

Petitioner,

vs.

LORRAINE E. ZRILLIC,

Respondent.

District Court of Appeal
Fifth District No. 88-49

/

ESTATE OF LORRAINE E. ROMANS,

Petitioner,

CASE NO. 73640

vs.

LORRAINE E. ZRILLIC,

Respondent.

/

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

REPLY BRIEF OF PETITIONER, ESTATE OF LORRAINE E. ROMANS

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

FLORIDA STATUTES

STATEMENT OF THE CASE AND FACTS

Respondent seeks to raise again her Motion to Dismiss filed in this Court and dated March 6, 1989. Such argument in the amended answer brief is wholly improper and inappropriate.

This Court on March 9, 1989 entered its order denying the Motion to Dismiss and the Rules of Appellate Procedure provide no procedure for seeking a rehearing of the denial which is what Respondent is now seeking.

Further, Respondent alleges that Petitioners' Statement of the Facts asserts argument with which she disagrees. However, she does not specifically indicate which statement or statements allegedly fall within this claim and therefore it is impossible for Petitioners to respond to this allegation.

REPLY TO AMENDED ANSWER BRIEF OF RESPONDENT, LORRAINE E. ZRILLIC

Respondent cites the Trial Court's finding that the Respondent is the sole lineal heir of the decedent and is therefore the only person eligible to take should the residuary charitable devise to the charity fail.

It is respectfully submitted that this finding of the Trial Court is in error. Because of this error Respondent's arguments generally must fail.

If, in fact, the Respondent is deemed to be disinherited under the express terms of the decedent's Will, then for purposes of taking under the intestacy statutes of the State of Florida, she would be deemed to have predeceased her mother, the decedent. However, Respondent's children, the decedent's grandchildren, who are specifically referred to in the Will, would be deemed the surviving lineal descendants of the decedent in the event of intestacy. Therefore, decedent cannot be deemed to be the sole lineal descendant of the decedent if she has been disinherited under the provisions of the decedent's Will.

The principal as enunciated as in In re: Estate of Levy, 196 So.2d 225, 229 (Fla. 3rd DCA 1967) is not applicable in this case. The decedent under her Will has fully disinherited the Respondent as an heir entitled to share in her estate. If the charitable devise were to be set aside, it would become distributable to her children, the decedent's grandchildren, as the lineal descendants under Section 732.803, Florida Statutes. Hence, there would be a total valid disposition of this decedent's estate under these circumstances which would not include Respondent.

The Respondent also cites in support of its position Rupert v. Hasting Estate, 311 So.2d 810 (Fla. 1st DCA 1975). It should be pointed out that in this

case the court indicated that the decedent "attempted" to disinherit his daughter and any grandchildren. It does not indicate why the attempt was unsuccessful nor were there any facts stated in the decision which would be helpful in this regard.

However, the fact that the decedent apparently attempted to disinherit all lineal descendants distinguishes this case from this situation. Clearly if the charitable bequest were avoided then intestacy would result. Since the decedent had attempted to disinherit all heirs, then the general principal would apply which, in effect, would permit lineal descendants to inherit under these circumstances.

Also it should be pointed out that the determination whether this Respondent is a Lineal descendant for purposes of taking the charitable devise in the event it is avoided is to be determined under Section 732.803, Florida Statutes, involving the setting aside of a charitable devise and not under the provisions of the intestate statutes of the State of Florida. Thus, the disinheritance provisions of the Will should be applied in determining the lineal descendants who " . . . would receive any interest in the devise, if avoided . . ." under the express language of Section 732.803, Florida Statutes. This determination has nothing to do with a determination of lineal descendants under the intestate statutes, including Sections 732.101 and 732.103, Florida Statutes.

In addition, Respondent is in error in arguing that the provisions of Paragraph EIGHTH of the decedent's Will effectively removes the Respondent from the class of persons, i.e. a lineal descendant who would be entitled or has standing to bring a petition for an order avoiding a charitable devise. On the contrary it is the argument of Petitioners, even assuming Respondent has standing to bring a petition to set aside the charitable devise, since she has

been removed as a lineal descendant under the provisions of Section 732.803, Florida Statutes, by virtue of the language set forth in Item EIGHTH of the decedent's Will, she would not be a person who would be entitled to take the devise if it were avoided.

Further, it is Petitioners' position that the language of Item EIGHTH of the Will does more than merely evidence an intent to disinherit. In fact, by its express language it removes the Respondent from the class of persons, i.e. a lineal descendant, entitled to take under Section 732.803, Florida Statutes, if the charitable devise were set aside.

This position is consistent with this Court's decision involving a decedent's right to disinherit lineal descendants as set forth under Milam v. Davis, 123 *So.* 673 (Fla. 1929) and Hooper v. Stokes, 145 *So.* 855 (Fla. 1933). Respondent does not in any way argue that this right is not applicable in this case, or that the right itself is subject to an additional exception under Section 732.803, Florida Statutes.

Respondent also argues that Petitioners' argument must fall because in the Trial Court the estate did not take the position that Respondent had no standing to bring a petition to determine exempt property pursuant to Section 732.402, Florida Statutes. Clearly this issue is improperly raised in connection with this appeal since the record from both the Fifth District Court of Appeal and the Trial Court contains no material relevant to this issue nor was it specifically considered or discussed in either of the opinions rendered. Unless the record shows to the contrary, it must be presumed that the transmitted record contains all of the proceedings of the lower courts material to points presented for decision in the appellate court. Maistrosky v. Harvey, 133 So.2d 103 (Fla. 2d DCA 1961).

However, even assuming Respondent were entitled to make such an argument, Section 732.402, Florida Statutes, can be avoided by a decedent by specifically devising the tangible property subject to the exempt statutes to third parties. Since the decedent did not choose to do so in this case, it can be argued, that in addition to the two small items devised under the Will, she also elected to allow the daughter to receive exempt property as provided for under the statute.

Respondent further argues that if intent is relevant in exercising rights under Section **732.803,** Florida Statutes, the statute would never be used. This conclusion is reached by first stating that any testamentary gift to a lineal descendant or a spouse would necessarily imply that such an individual is to receive no other benefit under the terms of the decedent's Will. It is submitted that if these were the facts then intent should not apply. Since it is not clear what the intent of the decedent is from a Will provision which merely devises certain assets to a lineal descendant or spouse, i.e. without any other Limiting language, general construction principals would clearly preclude the imposition of intent to disinherit for other purposes involving the Will or the estate.

However, that is not the case in this estate or under this decedent's Will. Item EIGHTH of her Will clearly enunciated that the Respondent was not to benefit from her estate other than as set forth specifically in her Will. This situation is clearly distinguishable from the above hypothetical factual position.

The Will of the decedent does not disinherit all of her grandchildren as lineal descendants. Therefore, if the charitable devise were set aside they would still be entitled to take as lineal descendants under Section **732.803,** Florida Statutes. Hence Respondent's conclusion that no one would ever have standing under the statute is not correct.

Basically, Respondent's argument although not expressly stated, is that the language of Item EIGHTH of decedent's Will does not disinherit Respondent as a lineal descendant under the provisions of Section 732.803, Florida Statutes so that in the event the devise were set aside she would be a person entitled to take. However, Respondent does not expressly or clearly make such an allegation, but on the contrary admits " . . . that the Will says what it says pursuant to Paragraph EIGHTH . . ." (Respondent's Amended Answer Brief at p. 25). Thus, Petitioners' claim of disinheritance is effective for all purposes in administering this estate except as specifically limited by the Court's decision in the Davis case, supra, and Stokes case, supra.

Respondent also cites In re: Estate of Herman, 427 So.2d 195 (Fla. 4th DCA 1982) in support of its position. However, the case would appear to support Petitioners' position. If, in this case, the charitable devise were set aside or avoided, Respondent, as the decedent's daughter, would receive no interest in it, by virtue of Item EIGHTH of the decedent's Will. This would also be true even if the charitable residuary devise failed entirely and were to pass by intestacy since it would then pass to the Respondent's grandchildren, the deemed surviving lineal descendants. Such a result is comparable to that in the Herman case, supra.

The decision in Gorn v. Temple B'nai Israel, 520 So.2d 118 (Fla. 2d DCA 1988), cited by Respondent for the proposition that the intent of the decedent is irrelevant under Section 732.803, Florida Statutes, is not applicable to this case. First, the decision cites no facts which the Trial Court relied upon in "seeking to fulfill the testator's intent." Second, it is not clear at all that the question of disinheritance by the testator was even involved in the case. Third, as discussed above, it is Petitioners' position that in this case the

decedent's intention should not be an issue under the language of Item EIGHTH of her Will which expressly and clearly limits the Respondent's right to benefit in her estate and requires no imputation of intention to reach such a result. The barring by the decedent of Respondent, as her daughter and a lineal descendant, from taking an avoided charitable devise under the provisions of Section 732.803, Florida Statutes, is merely another example of numerous devices which have been uniformally recognized by the courts on many occasions for avoiding the effect of this statute, including provisions which provide for a gift over to a third party in the event an attempt is made to set aside the charitable devise.

For example, in In re Estate of Shameia v. First National Bank in St. Petersburg, 257 So.2d 77 (Fla. 2d DCA 1972) a decedent's daughter was barred from instituting an action under this statute where if the charitable devise were set aside it would pass to collateral heirs of the decedent under the residuary estate. Also in In re Estate of Katz, 528 So.2d 422 (Fla. 2d DCA 1988) the statute was held unapplicable to a charitable disposition made in an inter vivos trust referred to in a pour over will executed within six months of the testator's death. The same result is reached in this case albeit by a different route and no valid argument has been made by Respondent to distinguish the similar result except on highly technical grounds.

Further, by sustaining Petitioners' position it basically upholds the decedent's right to disinherit a lineal descendant except in very limited circumstances as approved by this Court for many years.

Perhaps there is no more appropriate support for this position then the following discussion of the predecessor section to Section 732.803, Florida Statutes set forth from this Court's opinion in Taylor v. Payne, 17 So.2d 615,

618 (Fla. **1944):**

> " . . . Being a limitation upon the broad statutory right or privilege given to all people universally to dispose of their accumulations at death according to the individual desires, the statute should be given such construction only as will secure full protection of those persons designed to be shielded by its provisions (citations omitted) and yet at the same time **allow** as much effect as possible to be given to the cardinal rule for the construction of wills: That the intention of the testator shall prevail unless violative of some positive or settled rule of law to the contrary."

It is submitted it is Petitioners' position that Respondent is not entitled to the charitable devise under the decedent's Will if it were avoided by virtue of the limiting language of Item EIGHTH of decedent's Will fully and completely comports with this general principal enunciated in the Payne case, supra.

CONCLUSION

The decision of the Fifth District Court of Appeal's decision was in error in holding that Respondent was the sole lineal descendant of decedent entitled to take the charitable devise under her Will if avoided under Section **732.803,** Florida Statutes. The decedent disinherited Respondent by the express language of Item EIGHTH of her Will. Such disinheritance was effective to remove Respondent from any benefits in her estate, including the right to share in the charitable devise if avoided, in accordance with the long standing right of a decedent to do as confirmed by this Court in the Davis case, supra, and Stokes case, supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioners/Co-Personal Representatives of the Estate of Lorraine E. Romans, has been furnished by U.S. Mail, postage prepaid, to the following this 11th day of August, 1989.

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