

0 A 5.8.91

017
FILED
SID J. WHITE
MAR 7 1991
CLERK, SUPREME COURT
By [Signature]
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,526

JANET W. SPOHR,)
)
Petitioner,)
)
vs.)
)
ANNA M. SPOHR, WILLIAM E.)
SPOHR, JR., JOAN A. GARDNER)
and JOHN C. BERRYMAN as)
Personal Representative of)
the Estate of William E.)
Spohr,)
)
Respondents.)
_____)

RESPONDENT BERRYMAN'S BRIEF ON THE MERITS

Kenneth G. Spillias, Esq.
Leonard J. Adler, Esq.
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
777 S. Flagler Drive
Suite 310 East
West Palm Beach, FL 33401
(407) 650-7900

Attorneys for Respondent Berryman

TABLE OF CONTENTS

	<u>Page</u>
Table of Citations.....	ii
Issue Presented for Review.....	1
Preface.....	2
Statement of the Case and the Facts.....	3
Summary of Argument.....	6
Argument.....	7
Conclusion.....	12
Certificate of Service.....	13

TABLE OF CITATIONS

<u>CASES:</u>	<u>Page</u>
<u>A.R. Douglass, Inc. v. McRainey</u> , 102 Fla. 1141, 137 So. 157 (Fla. 1931).....	10, 11
<u>Crosson v. Conlee</u> , 745 F.2d 896 (4th Cir. 1984), <u>cert. denied</u> , 470 U.S. 1054 (1985).....	10, 11
<u>In re: Estate of Vickery</u> , 564 So.2d 555 (Fla. 4th DCA 1990).....	9
<u>Jones v. Allen</u> , 134 Fla. 751, 184 So. 651 (Fla. 1938).....	10
<u>Landers v. Sherwin</u> , 261 So.2d 542 (Fla. 4th DCA 1972).....	9
<u>Spohr v. Berryman</u> , 546 So.2d 241 (Fla. 4th DCA 1990), <u>jurisdiction accepted</u> , ____ So.2d ____ (Fla., January 18, 1991).....	5
 <u>STATUTES:</u>	
Section 733.16, Florida Statutes (1973).....	9
Section 733.602, Florida Statutes (1987).....	7
Section 733.603, Florida Statutes (1987).....	7
Section 733.702, Florida Statutes (1987).....	1, 8, 9; 10
Section 733.703, Florida Statutes (1987).....	10, 11

ISSUE PRESENTED FOR REVIEW

WHETHER A CLAIM BASED UPON A DECEDENT'S ALLEGED BREACH OF AN AGREEMENT TO MAKE A WILL WAS REQUIRED TO BE FILED WITHIN THE TIME AND MANNER PRESCRIBED BY FLORIDA STATUTES, SECTION 733.702 (1987) AND, IF SO, WHETHER FILING A COMPLAINT AGAINST THE PERSONAL REPRESENTATIVE OF AN ESTATE IN THE CIVIL DIVISION OF THE CIRCUIT COURT WITHIN THE THREE-MONTH CLAIM PERIOD PROVIDED IN SECTION 733.702, FLORIDA STATUTES, SATISFIES THE RIGID REQUIREMENTS OF THE FLORIDA PROBATE CODE AND CASE LAW THEREUNDER WHERE (1) A WRITTEN CLAIM OR STATEMENT OF CLAIM WAS NEVER FILED IN THE PROBATE COURT; AND (2) OTHER PARTIES INTERESTED IN THE DISTRIBUTION OF THE ESTATE'S ASSETS WERE NOT JOINED IN THE CIRCUIT COURT ACTION.

PREFACE

Respondent JOHN C. BERRYMAN, Personal Representative of the Estate of William E. Spohr, was a Defendant in the trial court and an Appellee in the District Court of Appeal. He will be referred to herein as "Personal Representative" or "Respondent Berryman." Respondents ANNA M. SPOHR, WILLIAM E. SPOHR, JR. and JOAN A. GARDNER, were the Plaintiffs in the trial court and the Appellants in the District Court of Appeal. They will be referred to herein as Respondents. Petitioner JANET W. SPOHR, was an Intervenor in the trial court and an Appellee in the District Court of Appeal. She will be referred to herein as "Petitioner" or "Janet Spohr." William E. Spohr, the decedent whose estate is the subject of the litigation at issue, will be referred to as "Decedent."

The symbol "R" shall refer to the Record on Appeal.

Statement of the Case and the Facts

In June 1953 Decedent William E. Spohr and his then wife, Anna M. Spohr, a Respondent in this case, executed an agreement in contemplation of a pending separation. The agreement provided for disposition of various marital and property rights. In the agreement was a provision that Decedent would provide for the future welfare and maintenance of Anna M. Spohr and his two children, William E. Spohr, Jr. and Joan E. Gardner, by preparing a will in which he would devise to his two children and then-wife a portion of his estate amounting to not less than one-half of the valuation of his entire estate.

William Spohr died September 10, 1986. A petition for administration of the estate was filed December 3, 1986. Decedent's testamentary instruments admitted to probate on December 5, 1986 did not bequeath to Anna M. Spohr and Decedent's two children any portion of his estate. Instead, William Spohr bequeathed his entire estate to Janet Spohr who was his surviving spouse of approximately the last thirty years of his life. (R. 199).

In Decedent's estate administration proceedings, the Notice of Administration (R. 265) was first published on January 9, 1987 (R. 269), thereby requiring Respondents to present a written claim or claims against Decedent's estate by April 9, 1987. The Notice of Administration was timely served on Respondents Anna M. Spohr, William E. Spohr, Jr. and Joan E. Gardner shortly after administration commenced, each of the

Respondents acknowledged receipt of the Notice, and a letter from the Personal Representative's counsel was mailed to each of the Respondents explaining expiration of the non-claim period and the consequences of failure to file a claim within the time period (attachment to the Proof of Service of Notice of Administration, R. 282-290).

Thereafter, Respondents' attorney filed an Entry of Appearance (R. 295) on each Respondent's behalf in the probate administration proceedings. The Notice was filed approximately a month prior to the expiration of the claim period. Respondents' attorney also filed a Statement of Claim (R. 300) in the probate administration on behalf of Respondent Anna Spohr, which statement was filed within the claim period. Said Statement of Claim described an obligation that is not the subject of these proceedings. No Statement of Claim was filed in the probate administration proceedings for the alleged obligations of Decedent asserted by Respondents here.

Respondents filed a complaint seeking to enforce the obligations asserted by Respondents here in the Civil Division of the Circuit Court on April 7, 1987, two days before expiration of the claim-filing period under the Probate Code. The litigation was filed only against the Personal Representative of the Estate (R. 47-72). The Personal Representative filed an answer to the civil complaint on April 27, 1986 (R. 75-77). In the answer, the Personal Representative raised as a bar to the action the Plaintiffs' failure to file a Statement of Claim in the probate proceedings. On June 4, 1987, a document was filed in the trial

court proceedings which provided that service of the civil complaint and summons upon the Personal Representative's attorney was waived (R. 73-74).

Pursuant to court order of June 7, 1988, Janet Spohr intervened as a Defendant in the trial court proceedings and filed pleadings and actively participated in the litigation. Janet Spohr, as the Personal Representative had done, pleaded various affirmative defenses to Plaintiffs'/Respondents' complaint including those based upon their claims being barred by the non-claim statute (R. 91).

On January 25, 1989 Janet Spohr filed a motion for summary judgment on alternative grounds (R. 117-118). On May 11, 1989 the trial court entered a summary final judgment for Defendants (R. 198-203) which provided that summary judgment was entered in favor of Petitioner Janet Spohr and the Personal Representative of the Estate. After Respondents' motion for rehearing was denied (R. 221), Respondents' complaint was dismissed with prejudice. An appeal to the Fourth District Court of Appeal ensued (R. 227-228).

On July 18, 1990, the Fourth District Court of Appeal reversed the trial court's summary judgment and remanded the case for further proceedings. Spohr v. Berryman, 546 So.2d 241 (Fla. 4th DCA 1990). On August 16, 1990, Petitioner filed a notice to invoke the discretionary jurisdiction of this Court based on conflict jurisdiction and this Court accepted jurisdiction on January 18, 1991.

Summary of Argument

A personal representative's obligations in administering the estate are not only to those who take under the will as beneficiaries, but also to others claiming entitlement to payments, assets, or shares of the estate as creditors or as an electing surviving spouse. Although it is the personal representative's duty to defend the estate from all unjust attacks which affect the rights of those interested in the estate, the personal representative has no right or duty to appeal or defend an order which merely affects the rights of the beneficiaries and creditors of the estate as between themselves.

The Personal Representative has fulfilled his duties in contesting the claim made by Respondents and preparing to act in accordance with the trial court's order. The probate issues before this Court are issues that the Personal Representative believes have never been squarely addressed by the Florida courts. Since all Respondents and Petitioner Janet W. Spohr are adequately represented by counsel on this appeal, the Personal Representative's responsibility to the estate is to conserve the estate's assets by responding as a mere stakeholder of the estate's assets as to the issues on appeal.

Argument

Pursuant to Section 733.602, Florida Statutes (1987), a personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of the Decedent's will and the Florida Probate Code as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative is bound to use the authority conferred upon him by the Probate Code, the authority in the will and the authority of any order in proceedings to which he is a party for the best interests of interested persons. Section 733.602, Florida Statutes (emphasis supplied) (Laws 1977, c. 77-87 substituted "interested persons" for "beneficiaries of the estate"). Generally, a personal representative may proceed with the settlement and distribution of a decedent's estate without adjudication, order, or direction of the court. However, Section 733.603, Florida Statutes (1987) specifically allows a personal representative to invoke the jurisdiction of the court to resolve judicial questions concerning the estate or its administration.

In this case, the Personal Representative rightfully defended against the action brought by Respondents in the Circuit Court in an effort to preserve the assets of the estate and distribute the estate in accordance with the terms of Decedent's will. The Personal Representative, in good faith, asserted that Respondents had not complied with Part VII of the Florida Probate Code in that Respondents had not presented a written statement of

their claims with the Clerk of the Probate Court within the three-month filing period prescribed by Section 733.702, Florida Statutes (1987).

Likewise, the Personal Representative properly prepared to distribute the assets of the estate in accordance with the trial court's entry of summary final judgment for the Defendants and ensuing dismissal of Respondents' complaint.

Upon the Respondents' filing of their Initial Brief and Petitioner's filing of her Answer Brief in the Fourth District Court of Appeal, the attorney for the Personal Representative reviewed the cases cited by both sides, and following additional independent research, concluded that the particular issue addressed in that appeal - to wit: whether the filing of a complaint against the personal representative of an estate in the civil division of the circuit court within the three (3) month claim period provided in Section 733.702, Florida Statutes, satisfies the rigid requirements of the Florida Probate Code where a written claim was never filed in the probate court and other interested parties were not joined in the circuit court action - had not previously been decided. Ultimately, the Fourth District reversed the trial court without deciding the issue presented to it by virtue of its view that the claim presented to the trial court by Respondents was not one which was required to be filed within the time and manner prescribed by Section 733.702.

With respect to the applicability vel non of Section 733.702 to claims such as that presented by Respondents, the Personal Representative is unaware of any authority supporting

the distinction drawn by the Fourth District between Section 733.702 and its predecessor under the prior probate code, Florida Statutes, Section 733.16 (1973). Nor is the Personal Representative convinced that a comparison of the language in the two sections necessarily leads to the conclusion that in enacting Section 733.702, the legislature intended to remove these types of claims from its operation.

By the same token, the cases cited by Petitioner in her Brief on the Merits in this Court, do not provide direct support for her position either. First, it must be determined whether the prior cases which relied on Section 733.16 have any applicability under the revised language of Section 733.702. One of those cases - Landers v. Sherwin, 261 So.2d 542 (Fla. 4th DCA 1972) - also had a very significant factual distinction from the present case, that being that not only was a claim not filed in the probate court within the non-claim deadline but the lawsuit at issue there was also not filed within the non-claim deadline.

Second, the Fourth District's recent decision of In re: Estate of Vickery, 564 So.2d 555 (Fla. 4th DCA 1990) does not necessarily stand for the proposition asserted or inferred by Petitioner. In Vickery, a breach of contract complaint was dismissed because it failed to state a cause of action, not because it was barred by the non-claim statute. Statements of claims filed in the probate court were stricken because they were untimely. However, unlike here, there was no indication that the lawsuit was filed before the deadline or what the court's holding would have been if it had been.

With respect to the issue that was presented to the Fourth District by the parties, the Personal Representative reasserts its position that the issue has not been previously decided.

For example, the Personal Representative agrees with Petitioner Janet Spohr that the cases cited by Respondents in their Fourth District brief in support of their position are distinguishable from the case at hand as explained in Petitioners' Fourth District Answer Brief. However, the Personal Representative also notes that Jones v. Allen, 134 Fla. 751, 184 So. 651 (Fla. 1938) and A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 137 So. 157 (Fla. 1931) are distinguishable because in both of those cases, the respective court was considering a statute that specifically stated that the claim or demand shall be sworn to and presented to the county judge of the county granting letters testamentary or of administration of an estate. A.R. Douglass, 137 So. at 158; Jones, 184 So. at 652.

Here, the applicable statute required only that the claim be "presented." See Section 733.702, Florida Statutes (1987). Section 733.703, Florida Statutes (1987), setting forth the form and method of presenting a claim, states only that a creditor shall file with the Clerk a written statement of the claim. The statute does not require that the claim be filed with the Clerk of the Probate Court.

For that reason, the Personal Representative also questions the authority of Crosson v. Conlee, 745 F.2d 896 (4th Cir. 1984) cert. denied, 470 U.S. 1054 (1985). In Crosson the

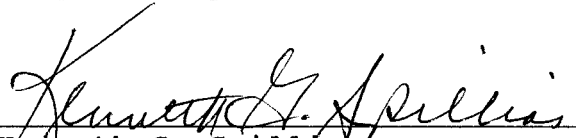
United States Court of Appeals, Fourth Circuit, found that a claim is presented by filing a written statement with the Clerk of the Probate Court in the county in which the executor qualified, citing Section 733.703, Florida Statutes. The Circuit Court furthermore found that the filing of a suit against the executor does not satisfy the presentment requirement of the non-claim statute, citing A.R. Douglass, 137 So. at 159. Although the Crosson court apparently was interpreting the same version of the non-claim statute applicable in this case, it apparently based its decision on the wording of the predecessor non-claim statute. Therefore, the Personal Representative believes that a Florida Court may choose not to follow Crosson.

Because the Personal Representative has determined that the precise issues before this Court have not yet been decided, his duty is to appear before the Court as a stakeholder of the claimed assets of the estate.

Conclusion

The Personal Representative is bound to use the authority conferred upon him for the best interests of interested persons, and owes duties of loyalty and avoidance of conflict not only to beneficiaries but to creditors. Where judicial questions arise concerning claims against the estate, the Personal Representative may call upon the court to resolve the questions. Here, the Personal Representative believes that the questions raised on appeal have not been squarely addressed by the Florida courts. Therefore, the Personal Representative respectfully awaits determination by this Court.

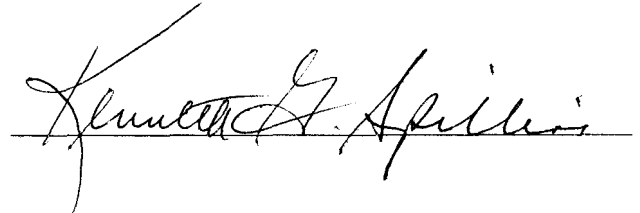
Respectfully submitted,



Kenneth G. Spillias
Florida Bar No. 253480
Leonard J. Adler
Florida Bar No. 393444
Attorneys for Respondent
John C. Berryman, Personal
Representative of the Estate
of William E. Spohr
GREENBERG, TRAUIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P.A.
777 S. Flagler Drive
Suite 310 East
West Palm Beach, FL 33401

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Freeman W. Barner, Jr., Esq., counsel for Petitioner Janet W. Spohr, Cromwell, Pfaffenberger, Dahlmeier, Barner & Griffin, 631 U.S. Highway One, Suite 410, North Palm Beach, Florida 33408, and to Peter Matwiczuk, Esq., counsel for Respondents Anna M. Spohr, William E. Spohr, Jr. and Joan A. Gardner, 140 Royal Palm Way, Suite 206, Palm Beach, Florida 33480, by U.S. mail this 6th day of March, 1991.

A handwritten signature in cursive script, appearing to read "Kenneth G. Spiller", is written over a horizontal line.