SUPREME COURT OF FLORIDA

CASE NO. 78,693

IN RE: ESTATE OF

CELIA KAHN,

Deceased.

SHARON ZUCKERMAN,

Petitioner,

v.

JACK ALTER, individually,

Respondent.

ON CERTIFIED QUESTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

IWITIAL BRIEF

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JURISDICTION

At least for the past 40 years, estate planners have understood that, absent specific legislation to the contrary, will substitutes were invalid unless executed with the formalities of a will. Even after Section 689,075, Florida Statutes, was adopted and changed much of the law set forth in Hanson v. Denckla, 100 So.2d 378 (Fla. 1956), reversed on jurisdictional grounds, 78 S.Ct. 1228 (1958), the execution requirements for Florida trusts in which the settlor was sole trustee remained. Florida lawyers were taught those requirements and cautioned about them by the experts in the field. See, Belcher, "Avoiding Problems Under F.S. 689.075", Real Prop., Probate & Trust Law Sect., Publ. Action Line, (1983) Vol. 10, pg.2; Lowell & Grimsley, Florida Law of Trusts § 11-6 at 168; The Florida Bar, Administration of Trusts in Florida § 2.32, at 51.

In this case, the District Court of Appeal of Florida, Third District, has undercut Florida law and thrown out the execution requirements for a Florida trust in which the settlor is the sole trustee.

Estate planners in Florida and the general public, who seem to adore this kind of trust, must know the execution requirements that make it valid. For that reason, the appellate court certified this matter to this Court. The question certified by the appellate court, however, is misleading. It provides:

WHETHER PARAGRAPH 689.075(1)(G), FLORIDA STATUTES (1987) CREATES A SINGLE TEST, OR TWO ALTERNATIVE TESTS, FOR THE VALIDITY OF AN INTER VIVOS TRUST EXECUTED ON OR AFTER JULY 1, 1969, WHERE THE SETTLOR IS THE SOLE TRUSTEE?

That question only begs the more important question:

WHAT EXECUTION REQUIREMENTS ARE PROVIDED IN SECTION 689.075(1)(G)? AND: DOES A FLORIDA TRUST IN WHICH THE SETTLOR SERVES AS SOLE TRUSTEE AND WHICH DISTRIBUTES PROPERTY ON THE SETTLOR'S DEATH, SATISFY THE STATUTORY REQUIREMENTS OF SECTION 689.075(1)(G), IF IT IS WITNESSED BY ONLY ONE PERSON, GIVEN THAT WILLS IN FLORIDA MUST BE WITNESSED BY TWO PERSONS?

STATEMENT OF CASE AND FACTS

The decedent, Celia Kahn, allegedly created a Declaration of Trust on June 11, 1982 ("trust**). The trust was a revocable inter vivos living trust in which Celia Kahn was the grantor, lifetime trustee and lifetime beneficiary. (R. 272; R. 264A-264GGG). Paragraph 1 of the trust included a testamentary provision whereby the property included in the trust would be transferred to Jack Alter on Celia Kahn's death. The trust was supposedly signed by Celia Kahn and one witness. Whether Celia Kahn actually signed her name to the trust is a matter in dispute. (R. 272; R. 264A-264GGG).

Among the assets of the trust were accounts at Norstar Brokerage Corporation (R. 152-171; R. 264A-264GGG) and 1st Nationwide Bank, (R. 264A-264GGG).

Celia Kahn died testate, leaving the residuary of her probate estate to her nieces Sharon Zuckerman and Beverly Kanter. Sharon Zuckerman and Beverly Kanter filed an action in the probate proceeding alleging fraud, undue influence and, among other

things, the invalidity of the testamentary aspects of Celia Kahn's trust. (R. 107-136). Subsequently Zuckerman and Kanter moved for summary judgment on the validity of the testamentary provisions of the trust. Attached as exhibits to the motion were the trust agreement and an order from the Circuit Court of the Seventeenth Judicial Circuit deciding similar issues in another case.

In opposition to the motion for summary judgment, Jack Alter filed an affidavit by John Chepak of Norstar Banking Corporation (R. 152-171) and an affidavit by Jack Alter (R. 177). The affidavit of John Chepak included, among other things, a copy of the trust agreement at issue in the summary judgment proceeding and indicated the account was established in accordance with and under the trust.

At the close of the hearing on the original motion for summary judgment, the court and counsel acknowledged the agreement of counsel that to the extent the trust was a grantor, revocable inter vivos trust, its testamentary provisions were invalid. (Transcript, dated November 28, 1988 at 23; R. 277). The court entered a partial summary judgment on that point (R. 180). The court reserved Alter's right to allege and prove that the June 11, 1982 writing was evidence of some other kind of trust. (R. 180).

Several months later, after more time for discovery elapsed, Zuckerman and Kanter moved for final summary judgment and included affidavits from Norstar and 1st Nationwide; excerpts from Dacey, On Trusts and a letter from Jack Alter, all of which were filed to support the argument that the trust was a

grantor, revocable, inter vivos, living trust and that Norstar and 1st Nationwide accounts were owned by the trust (R. 263-264GGG).

Jack Alter filed his own affidavit in opposition to the motion for summary judgment, which included alleged oral conversations between Jack Alter and the decedent, Celia Kahn.

The trial court heard argument of counsel (Transcript, dated July 27, 1989; R. 277) and granted the motion for summary judgment. (R. 196-197). The District Court of Appeal, Third District, reversed the trial court by opinion dated June 25, 1991, (R. 278-286). In response to Petitioner's Motion for Rehearing, the Third District entered a second opinion on September 17, 1991 and certified the issue to be of great public importance. (R. 288-298).

HISTORY OF APPLICABLE LAW

In order to decide this case, the Court will have to construe Section 689.075, Florida Statutes. The history leading up to the enactment of the statute and the sequence of amendments resulting in the present version of Section 689.075 are crucial to this Court's construction of the statute.

In the Landmark case of Hanson v. Denckla, 100 So.2d 378 (Fla. 1956), reversed solely on jurisdictional grounds, 357 U.S. 235, 78 S.Ct. 1228 (1958), this Court invalidated a revocable inter vivos trust as a result of the cumulative effect of the

settlor's reservation of the control over the trust property and the power to dispose of it on her death. Id. at 383-4. The Court found the trust to be illusory and an attempted testamentary disposition, which had only one subscribing witness and was, therefore, invalid. Id. at 385. The Court based its holding to a large extent on the Restatement of Trusts, § 56. Id. at 384.

In 1968, the District Court of Appeal, Second District, in Lane v. Palmer First National Bank and Trust Company of Sarasota, 213 So.2d 301, distinguished the facts of the case before it from those in Hanson and upheld the validity of the testamentary aspects of a revocable inter vivos trust. In Lane Court pointed out that the Restatement of Trusts, relied upon by the Court in Hanson, had been rewritten in 1959, reversing its original position. Id. at 303.

To clear up the uncertainty surrounding revocable living trusts in Florida after Lane, in 1969, the Florida Legislature adopted Chapter 69-192, Laws of Florida (§ 689.075, Fla. Stat.). Chapter 69-192 read as follow:

> AN ACT relating to declarations of trust; amended chapter 689, Florida Statutes, by adding section 689.075 to the list of powers that may be retained by the settlor of an inter vivos trust, either singly or jointly with another, without affecting its nontestamentary character; providing for retroactive application to trusts executed by persons living on the effective date of this act; providing an effective date.
>
> Be it Enacted by the Legislature of the State of Florida:

Section 1. Chapter 689, Florida Statutes, is amended by addition Section 689.075 to read:

689.075 Inter vivos trust; powers retained by settlor.

(1) An otherwise valid trust which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any of the following reasons:
(a) Because the settlor or other person or both possess the power to revoke, amend, alter, or modify the trust in whole or in part;
(b) Because the settlor or another person or both possess the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal distributed;
(c) Because the settlor or another person or both possess the power to add to, or withdraw from, the trust all or any part of the principal or income at one (1) time or at different times;
(d) Because the settlor or another person or both possess the power to remove the trustee or trustees and appoint a successor trustee or trustees;
(e) Because the settlor or another person or both possess the power to control the trustee or trustees in the administration of the trust;
(f) Because the settlor has retained the right to receive all or part of the income of the trust during his life or for any part thereof;
(g) Because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee.

(2) When the settlor is made sole trustee, the trust instrument must be executed in accordance with the formalities for the execution of wills required at the time of the execution of the trust instrument in the jurisdiction where the trust instrument is executed.

(3) The fact that any one or more of the powers specified in subsection (1) are in fact exercised once, or more than once, shall not affect the validity of the trust or its nontestamentary character.

> Section 2. This act shall became effective on July 1, 1969 and shall be applicable to trusts executed before or after said date by persons who are living on or after said date.

To a large extent, Chapter 69-192 neutralized this Court's decision in Hanson by declaring that a trust which was otherwise valid could not be held to be invalid or a "testamentary disposition" for any of the reasons listed in the statute, An important aspect of Hanson, however, continued and was codified by 69-192 for trusts like the one in this case, in which the settlor is made sole trustee. Under subsection (2), if the settlor was sole trustee, the trust instrument was required to be "executed in accordance with the formalities for execution of wills required at the time of the execution of the trust instrument in the jurisdiction where the trust instrument is executed." Although Chapter 69-192 was generally in line with Restatement (Second) of the Trusts, § 57, they were by no means mirror images of each other. Subsection (2) of 69-162 contained an execution requirement not found in the Restatement, but determined to be necessary by our Legislature.

In 1971, the Legislature became concerned about the validity of trusts executed outside of Florida by persons ultimately dying domiciled in Florida and reworded the provision requiring declarations of trusts to be executed in accordance with the

formalities of will executions.[1/] After the 1971 amendment, Section 689.075(1)(g) read as follows:

> Section 1. Paragraph (g) of subsection (1) of section 689.075, Florida Statutes, is amended to read:
>
> 689.075 Inter vivos trusts; powers retained by settlor.--
>
> (1) An otherwise valid trust which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any of the following reasons:
>
> . . .
>
> (g) Because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee; provided, however, that at the time the trust instrument is executed it is either valid under the laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdictions.

Ch. 71-126 § 1, Laws Of Fla.

Subsequently, in 1973, this Court decided Castellano v. Cosgrove, 280 So.2d 676 (Fla. 1973). In Castellano, this Court held Section 689.075's retroactive application was an unconstitutional impairment of contracts. In addition, the Court determined that Section 689.075 was intended to apply only to real property, not personalty.

In direct response to Castellano, Section 689.075 was once again amended to clarify that it applied, and had always intended to apply, to both personal property and real property. To overcome the constitutional attack, the effective date was

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[1/] This provision was also moved from subsection (2) to (1)(g).

also modified. Generally, the section remained effective with respect to trusts executed prior to the effective date, but the requirement of execution in accordance with the formalities for the execution of wills was made applicable only to trusts executed after July 1, 1969, the original enactment date. The 1975 legislation provided:

> Section 1. Section 689.075, Florida Statutes, 1974 Supplement, is amended to read:
>
> 689.075 Inter vivos trusts; powers retained by settlor.--
>
> (1) A trust which is otherwise valid, including but not limited to a trust the principal of which is composed of real property, intangible personal property, tanaible personal property, the possible expectancy of receiving as a named beneficiary death benefits as described in s. 733.808, or any combination thereof, and which has been created by a written instrument shall not be held invalid or an attempted testamentary disposition for any one or more of the following reasons:
>
> (a) Because the settlor or another person or both possess the power to revoke, amend, alter, or modify the trust in whole or in part;
>
> (b) Because the settlor or another person or both possess the power to appoint by deed or will the persons and organizations to whom the income shall be paid or the principal distributed;
>
> (c) Because the settlor or another person or both possess the power to add to, or withdrawn from, the trust all or any part of the principal or income at one time or at different times;
>
> (d) Because the settlor or another person or both possess the power to remove the trustee or trustees and appoint a successor trustee or trustees;
>
> (e) Because the settlor or another person or both possess the power to control the trustee or trustees in the administration of the trust;

(f) Because the settlor has retained the right to receive all or part of the income of the trust during his life or far any part thereof;

(g) Because the settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee; provided that at the time the trust instrument is executed it is either valid under the laws of the jurisdiction in which it is executed or it is executed in accordance with the formalities for the execution of wills required in such jurisdiction.

. . .

(4) This section shall be applicable to trusts executed before or after July 1, 1969 by persons who are living on or after said date. However, the requirement of conformity with the formalities for the execution of wills as found in subsection (1)(g) shall not be imposed upon any trust executed prior to July 1, 1969.

Section 2. The amendment of s. 689.075, Florida Statutes, by section 1 of this act is intended to clarify the leaislative intent of s. 689.075 at the time of its original enactment, that s. 689.075 applies to a11 otherwise valid trusts which are created by written instrument and which are not expressly excluded by the terms of such section, and that no such trust shall be declared invalid for any of the reasons stated in subsections (1) and (3) of such section regardless of whether the trust involves or relates to an interest in real Property.

. . . .

Ch. 75-74 §§ 1-2, Laws of Fla.

Section 689.075 has not been amended since 1975.

Many of Florida's trust law experts have written commentary on Section 689,075 generally, as well as specifically on what they opine to be the continued requirement of execution of certain trusts in accordance with the formalities for execution of wills. See Belcher, William S., "Avoiding Problems Under F.S. 689.075", Real Prop., Probate & Trust Law, Sect., Publ.

Action Line, (1983) Vol. 10, pg. 2; Lowell & Grimsley, Florida Law of Trusts, § 11-6; Hart, "Inter Vivos Trust: Unanticipated Connotations," 46 Fla. R.J. 16 (1972); Emanuel, "Revocable Trusts - Do They Solve Or Create Problems?," 46 Fla. B.J. 78 (1972); Roth "Rebirth of the Revocable Trust in Florida," 44 Fla. B.J. 82 (1970).

SUMMARY OF ARGUMENT

There were *two* summary judgment hearings in his case. During the first hearing, Jack Alter agreed that provisions of a grantor trust, in which the settlor was the sole trustee, that attempt to distribute trust property upon the settlor's death were invalid if the trust was not executed by two witnesses, as with wills. An order was prepared and signed accordingly. During the second summary judgment hearing we proved that the brokerage and bank accounts at issue were part of the decedent's grantor trust in which she was settlor and sole trustee and which attempted to distribute trust assets upon her death. Accordingly, summary judgment was entered. On the basis of Alter's agreement and the order accordingly entered after the first summary judgment hearing, the second summary judgment should have been affirmed.

Further, Section 687.075(1)(g) is a specific deviation from the ~~Restatement~~ and the ~~Restatement (Second)~~. That statutory provision in effect follows a portion of this Court's decision in Hanson v. Denckla requiring execution of certain trusts with the formalities of a will. Contrary to the appellate court's opinion

below, from the initial adoption of 689.075 in 1969 to this date, after several amendments to the statute, Restatement (Second) of Trusts, § 57, has never been fully adopted by the Legislature, which preferred to continue to require execution of trusts with the formalities of wills in certain instances.

Section 689.075(1)(g) was amended to protect settlors of trusts, executed in other states and countries in accordance with foreign laws, from dying intestate, just because the settlor eventually moved to Florida and Florida law then controlled. Neither Section 689.075, nor any statute since its adoption, ever changed the requirement that Florida trusts be executed in accordance with the formalities of wills, if, as here, the settlor is the sole trustee and the trust distributes property upon the death of the settlor. There is nothing at all peculiar about our Legislature telling Floridians how they will execute their trusts, while at the same time being tolerant of the laws of other jurisdictions. ***See***, e.g., §732.502(2), Fla. Stat.

ARGUMENT

I. JACK ALTER AGREED BELOW THAT A FLORIDA GRANTOR TRUST IN WHICH THE SETTLOR WAS THE SOLE TRUSTEE WAS INVALID FOR PURPOSES OF MAKING A TESTAMENTARY DISPOSITION UNLESS THE TRUST WAS EXECUTED WITH THE FORMALITIES FOR EXECUTION OF WILLS.

The appellate court below completely left out of its opinion that Jack Alter admitted one witness' signature was insufficient in Florida to validate the post-death provisions of Celia Kahn's June 11, 1982 Trust. Indeed, at the initial summary judgment hearing, Jack Alter had two attorneys present

to represent him, Alan Kluger, Esquire, and Alan Cohn, Esquire, who represents Alter, as Personal Representative of the Estate of Celia Kahn. On Page 23 of the November 28, 1988 hearing transcript, the following occurs, beginning at line 9:

Mr. Cohn:	I think they both have common ground. Let me just ask one question. Do you both agree there can be no written trust, Grantor trust, that makes an attempted testamentary disposition that's not executed in accordance with the formalities?
The Court:	Everybody agrees with that?
Mr. Cohn:	You both agree with that?
Mr. Goldman:	Yes.
The Court:	We all agree, including me. We all agree with that.
Mr. Kluger:	Yes.

Alter was only concerned with being able to come back into Court and argue that the Norstar Account was actually held in an oral trust or a Totten trust, rather than Celia Kahn's June 11, 1982 Living Trust. On Page 24 of the same transcript, lines 12-14, Alan Kluger, Esquire, on behalf of Alter, when asked again if he agreed, stated:

Mr. Kluger:	I need to see it (the proposed Order) in writing. As long as I'm not prejudiced to argue an oral trust and to argue a Totten trust of this account.

That was the stipulation of the parties and the appellate court erroneously lost sight of it. See Markow v, Alcock, 356 F.2d 194, 198 (5th Cir. 1966) (generally, parties entering

into stipulations during the course of proceedings are estopped from subsequently taking positions inconsistent with the stipulation); Hill v. Winn-Dixie Stores, 721 F.Supp. 1226, 1232 (M.D.Fla. 1989) (where counsel stipulated to amount of damages, damage amount agreed to would be upheld, even if erroneous, because of stipulation).

II. THE LEGISLATIVE HISTORY OF SECTION 689.075 CLEARLY INDICATES THAT A TRUST EXECUTED IN FLORIDA IN WHICH THE SETTLOR SERVES AS SOLE TRUSTEE MUST BE EXECUTED IN ACCORDANCE WITH THE FORMALITIES FOR EXECUTION OF WILLS.

When Section 689.075 was first enacted in 1969, the Legislature made it abundantly clear that trusts in which the settlor served as sole trustee were required to be executed in accordance with the formalities for the execution of wills in the jurisdiction in which the trust was executed.[2/] Although the section listed seven specific powers which, if retained by the settlor, would not invalidate the trust, the provision allowing the settlor to serve as sole trustee was singled out for special treatment. Unlike the other six powers, allowing the settlor to serve as sole trustee creates the potential for a

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2/ Subsection (2) of 689.075, Fla. Stat. (1969) read:

> When the Settlor is made sole trustee, the trust instrument shall be executed in accordance with the formalities for execution of wills required at the time of the execution of the trust instrument in the jurisdiction where the trust instrument is executed.

one-party instrument disposing of the settlor's property after death. Recognizing that such a trust possessed the same risks of fraud as a will, the Legislature required the trust be executed in accordance with the formalities for execution for wills.

According to the appellate court below, "The thrust of the statute [was] to adopt the position of the Restatement (Second) of Trusts, § 57." (R. 284). The appellate court ignored the fact, however, that Section 689.075 differs from §57 of the Restatement (Second), both in the 1969 version of 689.075 and today, in its specific requirements for execution of a trust in the case of a settlor serving as sole trustee.

Under the Restatement (Second) view, no particular formalities are required for execution, even for one-party trusts. Restatement (Second) of Trusts, § 57, comment h. That is not true of Section *689.075* and never has been. Although the language of Section 689.075 was changed slightly and the execution provision was moved from Subsection (2) to Subsection (1)(g), the fact remains that Section 689.075 has always had an execution requirement not found in the Restatement (Second).

Given that Section 689.075 as originally enacted in 1969 would have required two witnesses to the execution of the trust in this case, the question is whether any of the amendments to the statute changed that requirement or whether some new law was created, which changes the result.

The only amendment which arguably could have had an effect on the execution requirement was the 1971 amendment, In 1971, the provision was changed from:

> (2) When the settlor is made sole trustee, the trust instrument shall be executed in accordance with the formalities for execution of wills required at the time of the execution of the trust instrument in the jurisdiction where the trust instrument is executed.

Ch. 69-192, Laws of Florida;

to:

> (g) Because the Settlor is, at the time of the execution of the instrument, or thereafter becomes, sole trustee; provided, however, that at the time the trust instrument is executed it is either valid under the laws of the jurisdiction in which it is executed or is executed in accordance with the formalities for the execution of wills required in such jurisdiction.

Ch. 71-126, Laws of Florida,

The legislative history behind the 1971 amendment indicates the legislature was concerned with trusts validly executed outside of Florida which would be invalidated by this provision if the persons died domiciled in Florida. The following is an excerpt from testimony given by Representative Johnson on the floor of the Florida House of Representatives on April 30, 1971 related to the 1971 amendment:

> REPRESENTATIVE JOHNSON:
>
> What this does is prevent many people who come to Florida, and this happens in a number of cases, a person will retire, come to Florida and within 12 months will be dead. And, this prevents that person from dying intestate when he didn't intend to. He created an estate plan to give his estate the proper consequences to his beneficiary and for taxes and everything

> else and perhaps he has not had the chance to visit one of our outstanding attorneys in this state. But this prevents him from dying intestate. And that is the only application of the law.3/

Obviously, the Legislature was concerned that other states might have less strenuous requirements for execution of one-party trusts than Florida and that settlors who executed the trusts in accordance with their state's laws, but not in accordance with their state's laws for executions of wills, would have invalid trusts under Florida law. For example, North Carolina might require three witnesses to a will, but, for some reason, it may have a statute an grantor trusts requiring only one witness to the settlor's signature on a trust. Under the pre-1971 version of 689.075, if the North Carolina Settlor executed his trust only in accordance with North Carolina's trust law, moved to Florida with his North Carolina trust and died without changing it, the trust would be invalid. That is because the trust did not meet North Carolina's requirement for the execution of wills.4/ Through the 1971 Amendment, Florida law was changed to accept trusts which were validly executed in other jurisdictions or, alternatively, trusts which were executed in accordance with the

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3/ The entire transcript of Representative Johnson's testimony on the House floor is attached as Appendix I.

4/ We have no idea whether North Carolina has such a statute, but we use this hypothetical example to illustrate the problem which the Legislature cured by the 1971 amendment.

formalities for execution of wills in the jurisdiction where executed.

The Legislature's desire to express a policy of how Floridians will execute a document, while at the same time being tolerant of the laws of other jurisdictions is not unusual. For example, on the heels of the 1971 amendment to **689.075, a** similar revision was made to the Probate Code regarding **the** execution of wills. Historically, a will was not valid in Florida, even if it was valid in the state where it was executed, if the will was not executed in accordance with the laws of Florida in force at the time of its execution. See § 731.07, Fla. Stat. **(1973).** In 1974, Florida amended this provision to recognize the validity of wills, other than holographic and nuncupative wills, executed outside of Florida "if valid under the laws of the state or country where the testator was at the time of execution." Ch. **74-106, Laws of** Florida; § 732.502(2), Fla. Stat.

Certainly, the language in 689.075(1)(g) which the Legislature **adopted** in **1971** could have been clearer. What is clear from **the** legislative history, however, is that the Legislature never intended to change the requirement that Florida trusts, in which the settlor was sole trustee, be executed with **the** formalities of a Florida will. This Court expressed the Same view in Hanson. And it was the only part of Hanson the Legislature did not change by statute. There is no law of this state that provides anything less than two witnesses to the execution of a trust in which the settlor is the only trustee. The similar revisions made to the Probate Code further evidence

the Legislature's concern only with not over-burdening those persons moving to Florida (the bulk of the population) with Florida's own requirements for execution. As Representative Johnson said in the floor debates already quoted, without such changes to Florida law, a great number of intestacies would result.

If the legislature wanted ta adopt all of the Restatement in 1969, it could have done so. If the Legislature wanted to adopt the Restatement (Second) while it was amending Section 689.075, it could have done so. If the Legislature wanted to change the law of Florida and say that there are no formalities for the execution of a trust in which the settlor is the sole trustee and that distributes the settlor's property after death, or just one witness will do, the Legislature could have said so. But it did not.

A trust in which the settlor serves as her own trustee during her life and then makes testamentary distributions is the functional equivalent of a will. Absent a statute to the contrary, Florida law still requires that will substitutes be executed with the formalities of a will. Hanson So. 2d at 384. Section 689,075 codified that requirement in 1969 for all trusts and never intended to change it for Florida trusts.

III. THE 1975 AMENDMENT TO SECTION 689.075 CONFIRMED THE LEGISLATURE'S INTENT IN THE ORIGINAL 1969 ENACTMENT AND THE 1971 AMENDMENT.

Contrary to the district court of appeal's opinion, we do

not suggest that Section 689.075(4) controls the disposition of this case; but the Legislature's interpretation of its own law can hardly be ignored, The provision reads:

> **(4)** This section shall be applicable to trusts executed before or after July 1, 1969 by persons who are living on or after said date. However, the reauirement of conformity with the formalities for the execution of wills as found in Subsection (1)(g) shall not be imposed upon any trust executed Prior to July 1, 1969.

§ 689.075(4), Fla. Stat. (1989) (underlined language added by Ch. 75-74, Laws of Florida).

Admittedly, Subsection (4) is an effective date provision, but the amendment to this subsection in 1975 offers evidence of the meaning of the controlling provision, (1)(g). Indeed, one of the foremost authorities on trust law in Florida interprets this provision to require the continued compliance with the formalities for execution of wills:

> Subsection "4" provides that the requirement of conformity with the formalities for the execution of wills found in Paragraph 1(g) shall not be imposed upon any trust executed prior to July 1, 1969.
>
> It would follow, therefore, that any such trust executed after July 1, 1969 in the State of Florida must be executed in accordance with the formalities required for execution of a will.

Belcher, "Avoiding Problems Under F.S. 689.075," Real Prop., Probate & Trust Law Sect., Pub. Action Line, (1983) Vol. 10, pg. 2.

In 1973, this Court in Castellano had declared Section 689.075's requirement of execution of one-party trusts in conformity with the formalities for will executions to be unconstitutional to the extent it applied retroactively.

Notwithstanding the 1971 amendment, which the Third District Court of Appeal suggests nullified the execution requirement, the Legislature felt compelled to respond to Castellano and amend Subsection (4) of the statute to make the provision regarding execution of trusts apply prospectively. If the requirement of execution of one-party trusts in accordance with the formalities for execution of wills no longer existed in 1975 as a result of the 1971 amendment and Floridians were free to use the Restatement (Second) anything goes approach to trust execution, the Legislature would have had no need to change the effective date.

Further, when referring to the provision in (1)(g), the Legislature summarized it as a provision requiring conformity with the formalities for execution of wills. § 689.075(4), Fla. Stat. The Legislature's later action in 1975 should be given great weight in determining the intent of the 1971 legislation. Mt. Sinai Hospital of Greater Miami, Inc. v. Weinberaer, 517 F.2d 329, 338, modified 522 F.2d 179 (5th Cir. 1975); State v. Williams, 417 So.2d 755, 758 (Fla, 5th DCA 1982).

IV. THE DISTRICT COURT OF APPEAL'S INTERPRETATION OF SECTION 689.075(1)(g) RENDERS THE PROVISION MEANINGLESS.

Under the district court of appeal's interpretation of Section 689.075(1)(g), a one-party trust is valid if either executed in accordance with the required formalities for an inter vivos trust or the formalities for the execution of wills. (R. 285, 294, 298). So far so good. In our previous North Carolina hypothetical, the alternative forms of execution set up by the

statute work to uphold the North Carolina trust properly executed under North Carolina Law. In Florida, however, where there is no "law" created by the legislature to offer an alternate form of execution in cases where the settlor is sole trustee, and, therefore, there is no choice for executing the trust. The formalities for executing a will are required by Section 689.075(1)(g).

The appellate court attempted to create an alternative execution requirement by adopting the Restatement (Second), even though our Legislature refused to do so. And the appellate court's creation renders Section 689.075(1)(g) meaningless, if not absurd, for Florida trusts.

Under Florida law, a person can create an inter vivos trust (no testamentary aspects) in personalty with no witnesses; indeed, it is not necessary that the settlor sign the instrument creating the trust. Bay Biscayne Co. v. Baile, 75 So. 860, 73 Fla. 1220 (1917); In re Estate of Pearce, 481 So.2d 69 (Fla. 4th DCA 1985). In the case of most trusts, this liberal approach is harmless. When a trust is used as a will substitute, however, the absence of required witnesses or other formalities surrounding execution opens the door to fraud.

Dating back to the 17th century, wills were required to be executed with certain formalities, the most important of which was the presence of witnesses. The Legislature, since then, has always recognized a will's inherent risk of fraud and forgery resulting from the testator's lips being sealed by death on the date the issue ultimately arises.

Similarly, a revocable inter vivos trust that transfers property after death, especially one in which the settlor serves as sole trustee, possesses the same risks of fraud as a will. Such trusts, which are commonly used as will substitutes today, generally allow the settlor to use the trust property as his own during his lifetime and pass the remainder interest to other persons on the settlor's death. If these will substitutes are valid without the signatures of witnesses or other formalities to insure authenticity, as the appellate court insists, then the Legislature's effort to retain execution requirements after Hanson has been gutted; and we are left with the absurdity that a will requires two witnesses and the trust, with settlor at the helm, making testamentary distributions, requires nothing but an expression of intent, oral or otherwise. Such a trust walks, talks and smells like a will; why treated differently? Our Legislature refused to.

V. DISTRICT COURT OF APPEAL'S INTERPRETATION VIOLATES GENERAL RULES OF STATUTORY CONSTRUCTION.

The district court of appeal interprets the proviso of Section 689.075(1)(g) to require a trust executed in Florida in which the settlor is the sole trustee to be either: (1) executed in accordance with Florida law regarding execution of wills or (2) "otherwise valid" under Florida law. (R. 285, 294, 298). Section 689.075 as a whole, however, only applies to trusts which

are "otherwise valid" under Florida law. Section 689.075(1) provides:

> A trust which is otherwise valid . . . shall not be held invalid or an attempted testamentary disposition for any one or more of the following reasons: . . . .

If the appellate court's "two alternatives" interpretation of the proviso is correct, then, contrary to its opinion, the "otherwise valid under Florida law" alternative must refer to a law that might be created which would specifically address the execution of trusts in which the settlor was the sole trustee. That interpretation follows not only because the proviso applies only to the circumstances addressed in Subsection (1)(g) (one-party trusts), but also because any other interpretation would render the language in (1)(g) as nothing more than a redundant restatement of the "otherwise valid" language at the beginning of Section 689.075(1). See Cliento v. State, 377 So.2d 663 (Fla. 1979); State v. Rodriguez, 365 So.2d 157 (Fla. 1978) (statutes must be interpreted to give effect to every clause in it and to avoid a construction which would render words surplusage).

Florida has not created any other law on the execution of trusts in which the settlor is sole trustee. And for the reasons previously expressed, it probably never will.

VI. THE REQUIREMENT THAT CERTAIN FLORIDA TRUSTS BE EXECUTED WITH THE FORMALITIES OF A WILL IS NOT HYPERTECHNICAL

Before the appellate court below, Alter complained that the requirement of having two witnesses validate a trust, rather than one, was draconian and hypertechnical. We agree that the

requirement is an old, time-honored one, but it is not an irrational technicality. The purpose of having two witnesses to a document "is to assure its authenticity and to avoid fraud and imposition." Estate of Olson, 181 So.2d 642, 643 (Fla. 1966). Wills have had the requirement in Florida for many, many years and the legislature has never seen fit to change the requirement. Mortgages are another example where a certain number of witnesses are needed and any deviation from the appropriate number will not carry the day.

VII. THE 1ST NATIONWIDE ACCOUNT IS A PROBATE ASSET AND COULD NOT HAVE BEEN A TOTTEN TRUST.

The appellate court decided it need not reach the arguments raised below related to the bank account owned by the trust, in view of the appellate court's decision, We certainly do not abandon our claims to that account. The trial court correctly ruled that the 1st Nationwide account belonged to Celia Kahn's trust during Celia's lifetime, and, because the testamentary portion of the trust was invalid, the account passed under Celia Kahn's will.

Jack Alter's letter to Sherry Zuckerman that was attached as exhibit G to the second motion for summary judgment plainly states that the bulk of Celia Kahn's assets were left in "a living trust," not several trusts. The affiant from 1st Nationwide likewise swore that "a living trust" was provided by Celia Kahn when she opened her 1st Nationwide account as trustee. The only "living trust" that has ever been offered, alleged or defended in

this action was the one allegedly signed by Celia Kahn on June 11, 1982, which is included in the Appendix to Alter's Initial Brief. The "living trust" referred to by the 1st Nationwide affiant was also dated June 11, 1982.

The transcript of the July 27, 1989, hearing on our motion for summary judgment shows that we used the 1st Nationwide affidavit for several purposes, including to evidence that the 1st Nationwide account was property of Celia Kahn's 1982 trust with the faulty testamentary provisions. Transcript page 7, lines 7-13; page 8, lines 4-7. In further argument to the trial court, we again asserted that the 1st Nationwide account was owned by the June 11, 1982, trust we had challenged and that that fact was uncontroverted. See, e.g., transcript page 12, lines 1-11.

At the hearing, however, Alter did not even attempt to controvert the case we made with respect to the 1st Nationwide account; no affidavit, no argument, nothing at all. Alter did start to challenge the 1st Nationwide affidavit as it was presented to the trial court, but he withdrew the challenge and never renewed it.

Our second motion for summary judgment, with the affidavits attached, was served on May 8, 1989. (R. 263-264GGG). The hearing was not held until July 27, 1989. So, there was plenty of notice of our position and plenty of time to take discovery and compile a contravening affidavit. Alter took no action.

After we came forward with evidence supporting our motion for summary judgment, Alter could not simply rest on "paper

issues" or hypotheses and expect to survive the motion. **Paae** v. Staley, **226 So.2d 129, 130 (Fla.** 4th DCA 1969); Morton v. Maston, 181 So.2d 575 (Fla. **3d** DCA 1966); banders v. Milton, 370 So.2d **368, 370 (Fla.** 1979) ("But once he tenders competent evidence to support his motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. It is not enouah for the opposing party merely to assert that an issue does exist." (emphasis added.).

The affiant from 1st Nationwide had first hand knowledge of the account at issue and the Bank's procedures. Among other things, the affiant swore that "the documentation in our files indicates this account was not set up as a Totten trust. Indeed, totten trust accounts at our Bank were not then and are not now worded in the same manner as this account."

Alter will insist that as a matter of both substance and form, the bank account was in the name of Celia K. Kahn **as** trustee for the benefit of Jack Alter, which is exactly what is needed to create a valid Totten Trust. Alter's memory of the title of the account, however, is faulty, and the resulting mischaracterization of the account is crucial. In fact, the account **was** established by Celia Kahn, as trustee for the benefit of Jack Alter pursuant to a trust dated June 11, 1982, and the trust was a written "living trust." (R. 264A-264GGG). Those facts are not controverted in the record.

According to Florida law, under those circumstances, you cannot have a Totten trust. Indeed, Section 658.58, Florida Statutes, provides that one may have a Totten trust by including

"in trust for" or similar language in the account title so long as ". . . no other or further notice of the existence and terms of a legal and valid trust than such description shall have been given in writing to the bank, ..." (Emphasis added.). In this case, both the account title and the 1st Nationwide affidavit clearly show the existence of the separate June 11, 1982 living trust and the Bank had notice of it. (R. 265A-264GGG). The statute eliminates Alter's Totten trust theory.

Further, we were not required as movants to disprove every conceivable inference that Alter's vivid imagination might conger up, Indeed, it is not happenstance that Rule 1.510, Florida Rule of Civil Procedure, and case law pertaining to summary judgments refer to "genuine" issues of fact. Harvey Building, Inc., v. Haley, 175 So.2d 780, 782 (Fla. 1965) (movant not required to "exclude every possible inference that the opposing party might have other evidence to prove his case.").

We have already pointed out that at the trial level, Alter's arguments had nothing to do with the possibility of a second living trust agreement. Instead Alter's arguments focused on the prayer that the 1st Nationwide account was a Totten Trust.

The Totten Trust theory was likewise belied by uncontroverted evidence. (Transcript of hearing dated July 27, 1989, at 22-26).

CONCLUSION

Jack Alter agreed at the trial level that the testamentary aspects of the June 11, 1982, trust were invalid if it was considered a grantor trust in which the settlor was the sole

trustee. That should have ended this case at the district court of appeal, and that fact should end this case for the particular litigants.

Further, the appellate court's decision should be reversed, and the summary judgment affirmed, for the other reasons set forth in this initial brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this brief was served by U. S. mail on Joel D. Eaton, Esquire, 25 W. Flagler Street, Miami, Florida 33130 and Alan Cohn, Esquire, 2021 Tyler Street, P.O. Box 229010, Hollywood, FL 33022-9010, this 21 day of December, 1991

_____
Robert W. Goldman

SUPREME COURT OF FLORIDA

CASE NO. 78,693

IN RE: ESTATE OF

CELIA KAHN,

Deceased.

SHARON ZUCKERMAN,

Petitioner,

v.

JACK ALTER, individually,

Respondent.

APPENDIX TO INITIAL BRIEF

House Floor Debate
April 30, 1971
Re: House Bill 1297

Testimony by Representative Johnson:

"Mr. Speaker, ladies and gentlemen, in 1969 we passed a bill which provided for protection of lifetime trusts from attack on certain grounds, among them that the person who created the trust was **the . . .** [whereupon the Speaker of the House interrupted Mr. Johnson to obtain the attention of other House members]. Among them was that a trust would not fail for the reason that the person who created the trust was also the sole trustee. And it provided that this was true if the trust was executed according to the law of execution for wills. Now what this amendment **does** is **says** that provided that at the time of creation of the trust being executed, it is either valid under the laws of this state or in the jurisdiction in which it was executed in the first place. What this does is prevents many people who come to Florida, and this happens in a number of cases, a person will retire, come to Florida, and within twelve months will be dead. And, this prevents that person from dying intestate when he didn't intend to. He created an estate plan to give his estate the proper consequences to his beneficiary and far taxes and everything else and perhaps he has not had the chance to visit one of our outstanding attorneys in this state. But this prevents him from dying intestate. And that is the only application of the law.".

Appendix I