SUPREME COURT OF FLORIDA

CASE NO. 78,693

IN RE: ESTATE OF

CELIA KAHN,

Deceased.

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SHARON ZUCKERMAN,

Petitioner,

v.

JACK ALTER, individually,

Respondent.

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

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# AMENDED
# REPLY BRIEF

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## SUMMARY OF ARGUMENT

In the past, this Court has adopted various positions taken in the Restatement or Restatement (Second) when Florida law had not yet addressed the particular issue. Here, Florida law does resolve the matter. Nevertheless, Alter relies on the Restatement (Second) because that hypothetical jurisdiction is the only one that will give his arguments even the slightest credibility. He must, and does, ignore or mischaracterize Florida law throughout his answer brief.

The bottom-line in this case is that having a living trust in which the settlor is the sole trustee during her lifetime, and which transfers property on the settlor's death, is identical to owning assets in your own name and on death transferring them to others through a will, except a living trust avoids probate and a will does not. In both situations, the property is totally controlled during lifetime by the person who owns it. In both situations, the owner passes property to others on death through a written instrument. In both situations, the property owners are vulnerable to fraud, undue influence, and forgery.

Why on earth would we make the execution requirements for one different from the other? Why on earth would we have strict requirements for a will and no execution requirements for the living trust in which the settlor is sole trustee during her lifetime? According to Alter: it's the right thing to do, but those notions are silly and are contrary to Florida law.

## ARGUMENT

Jack Alter's answer brief manufactures new facts not in the record, ignores or seeks to minimize Florida's case law, statutory law and legislative history on point and completely mischaracterizes Sherry Zuckerman's arguments in her initial brief.[1/]

### A. THE RECORD BELOW

Make no mistake about it, Sherry Zuckerman's pro se petition for revocation of the June 11, 1982, trust ("trust") contains several allegations against Jack Alter, including his undue influence over Celia Kahn; his forgery of the decedent's signature on a letter while the decedent was in the hospital; the improper execution of the trust; and the allegation that the

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1/ Alter's mischaracterization of facts and argument to fit his personal preference and to convince this Court of the soundness of his position rivals the White Queen's advice to Alice in Lewis Carroll's, Through The Looking-Glass, c.V:

> "Now I'll give you something to believe. I'm just one hundred and one, five months and a day."
>
> "I can't believe that!" said Alice.
>
> "Can't you?" the Queen said in a pitying tone. "Try again: draw a long breath, and shut your eyes."
>
> Alice laughed. "There's no use trying," she said: "one can't believe impossible things."
>
> "I daresay you haven't had much practice,'' said the Queen. "When I was your age, I always did it half-an-hour a day. Why sometimes I've believed as many as six impossible things before breakfast."

"trust was not signed by Celia Kahn", although the trust bears what is alleged by Jack Alter to be her signature. (R. 107-136; R. 272; R. 264A-264GGG). Contrary to what Alter would have this Court believe, this is not a case where all was right with the trust except the execution requirements were not satisfied. This case is much more and shows exactly why the execution requirements of a living trust like Celia Kahn's are so necessary. The execution issue was ripe for summary judgment and was dispositive of the case, so naturally Sherry Zuckerman brought the execution issue up for hearing in order to efficiently resolve the matter.

After two summary judgment hearings, spaced far apart in order to provide Alter time to mount a defense, the trial court really had no choice but to grant summary judgment. No genuine issue was crafted by Alter, he agreed as to the legal requirement for executing the trust, and his efforts to construct an oral or totten trust were belied by documentary evidence, appropriate affidavits and Florida law. See (R. 152-171; R. 264A-264GGG; Transcript dated November 28, 1988 at 23; R. 277).

Alter now argues that Sherry should have, and did not, plead the assets belonging to the trust. Of course that was not necessary. Her pleading was to invalidate the trust, which has the necessary effect of placing all trust assets in the probate estate. As part of the summary judgment proceeding, the issue of what assets ostensibly belonged to the trust was raised by

Alter. He filed affidavits and documents from Norstar that left no doubt that that account was established under the trust. (R. 152-171). Alter never argued below that the Norstar account was not a trust asset; nor did he plead such a fantasy.

At the summary judgment hearing, Alter also raised for the first time the argument that the 1st Nationwide Account was a totten trust account and not an asset of the June 11, 1982, trust. That argument was belied by 1st Nationwide's records and affidavit, which were not controverted. (R. 264A-264GGG).

Thus, the issue of what assets belonged to the trust was raised by Alter, not Sherry, and the matter was easily resolved by documentation furnished by Alter, Norstar and 1st Nationwide.

**B. ALTER'S STIPULATION**

According to Alter, his agreement regarding the execution requirements of a trust was all a big misunderstanding. He spends several pages of his brief spinning a tale about what he really meant arid what he really said. See answer brief at 4. But what he really meant and what he really said were recorded and his position was made crystal clear by both sets of lawyers he had representing him at the summary judgment hearing. See initial brief at 13; (R. 277). And Alter cannot renege on his stipulation. See Markow v. Alcock, 356 F.2d 194, 198 (5th Cir. 1966).

**C. ALTER WANTS THIS COURT TO IGNORE FLORIDA LAW**

Alter concentrates most of his brief on convincing this Court that it should ignore or change Florida case law,

statutory law and legislative history in favor of the Restatement (Second) of Trusts, sections 56 and 57. Assuming this Court wanted to change Florida case law, statutory law and legislative history, and had the power to do it under our Constitution, why would it adopt Restatement (Second) sections 56 and 57?

Section 56, according to the Restatement (Second) Comment to § 56, does not apply to a traditional living trust like Celia Kahn's, where she is settlor, sole trustee, lifetime beneficiary, and she names a beneficiary to take on her death. By adopting Sections 56 and 57 from the hypothetical Restatement (Second) jurisdiction and by not following Florida law, living trusts, the estate planning darling of the 1980's and 90's, conceivably would not need witnesses, would not need the signature of the settlor, and, indeed, would in most cases not even need to be in writing. Yet these living trusts function, after the death of the settlor, exactly as a will. They are will-substitutes and the only true distinction between a living trust and a will is that the trust is meant to avoid probate.[2/]

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2/ Regardless of the nomenclature used, be it "testamentary" or some other reference to the transfer of property at the death of its owner, the function of a will and living trust on the death of the property owner, are no different. Alter spends several pages of his brief stoking up an argument on the word "testamentary," and the difference between it and the transfer of property at death, but there is no distinction that makes a difference here.

Certainly there has been no talk of eliminating the requirements for executing a will. See § 732.502, Fla. Stat. And execution requirements still have a valuable function even if they do not stop every fraud or other malfeasance related to the transfer of property. See Estate of Olsen, 181 So.2d 642, 643 (Fla. 1966); initial brief at 24-25.

The policy behind the Restatement (Second) provisions may make sense in certain situations, but certainly not with respect to a trust in which the settlor is the sole trustee and the trust passes property at death (the quintessential will-substitute). Indeed, our own legislature requires a trust to be executed with the formalities of a will where the trustee and settlor are the same person and the trust property is transferred on the settlor's death. See Initial Brief at 14-24. This Court cannot ignore the fact that our Legislature has spoken on the subject; the Court is not operating in a vacuum with no Florida law to apply.

Alter tries to make his argument for Restatement (Second) more palatable by arguing that Sherry's whole position rests on the viability of Hanson v, Denckla and the Restatement (Second) should simply replace Hanson. What brief did Alter read? Sherry's argument is based primarily on Florida statutory law, legislative history and the fact that our Legislature decided to tailor and adopt its own statute, 689.075, rather than rely on the Restatement or Restatement (Second). See initial brief at 14-25.

We do not discount the significance of Hanson, however. Indeed, Hanson makes some good points regarding the execution of documents and those good points were intentionally incorporated in section 689.075, which was otherwise designed to emasculate Hanson. Alter wants to steer this Court clear of Florida's Legislative activity in response to Hanson, since it undercuts Alter's argument that Florida needs Restatement (Second) to fill a non-existent void in our law.

### D. STATUTORY CONSTRUCTION

Alter contends that reading Section 689.075 as Sherry does makes a portion of the statute meaningless. That is not true. The statutory language at issue, although not perfectly written, has significant meaning and purpose, And the Legislature made that purpose clear throughout its history of treating this issue. See initial brief at 14 - 21.

### E. ALTER'S TOTTEN TRUST THEORY

On page 20-25 of his brief, Alter suggests to this Court that the 1st Nationwide account can be at the same time both a Totten trust account and an asset of the June 11, 1982 written trust created by Celia Kahn. To get there, Alter shows you only part of the Totten trust statute, Section 658.58, Florida Statutes, and he ignores the true nature of Totten trusts.

The 1st Nationwide account was established by Celia Kahn as trustee of her own written living trust, dated June 11, 1982. (R. 264A-264GGG). Nothing in the record controverts that fact.

According to Florida law, under those circumstances, you cannot have a Totten trust. Indeed Section 658.58, Florida Statutes, cited by Alter as controlling, 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's gutting of Alter's Totten trust theory no doubt explains his failure to quote from or otherwise fully present Section 658.58 to this Court.

Instead Alter cites a legion of Totten trust cases that discuss the fact that you can have such a trust in Florida and you can revoke it in many ways. Initial Brief at 18-19. According to the cases Alter cited, however, a Totten trust is nothing more than a presumption established to handle those circumstances where the existence of a trust is not made clear by a separate written trust instrument and a Totten trust may be established in instances where a deposit is made in the depositor's own name. In re Totten, 179 N.Y. 112, 71 N.E. 748, 752 (Ct. App. 1904); Seymour v. Seymour, 85 So.2d 726 (Fla. 1956); Serpa v. North Ridge Bank, 547 So.2d 199, 200 (Fla. 4th DCA 1989). Obviously, even without our Florida Statute, this Court would not apply the presumption in the face of the title

of the 1st Nationwide account, which indicates the existence of a separate trust and indicates that the account was held not by Celia Kahn, but Celia Kahn as trustee of the June 11, 1982, trust.

**F. ALTER'S AFFIDAVIT**

Alter filed his own affidavit to try and defeat summary judgment. The affidavit made several statements regarding Celia Kahn's alleged intent regarding the trust. To begin with, this Court should recognize that the affidavit did not contravene Sherry's motion for summary judgment. Indeed, the execution of the trust was as it was, regardless of Celia Kahn's intent. On pages 13-14 of his answer brief, Alter concedes the point and states that the trial court's ruling striking Alter's affidavit has no material bearing on the legal issues presented here, there is no need for us to make it the subject of a separate issue on appeal. It is enough that the Court understand at this point that the affidavit was superfluous.

Further, the affidavit contained hearsay statements of the decedent, statements violative of the Dead Person's Statute, section 90.602, Florida Statutes and was otherwise insufficient. The trial court correctly struck the Alter affidavit pursuant to Rule 1.510, which requires that affidavits include facts "admissible in evidence". See Montejo Investments, N.V. v. Green Companies, Inc. of Florida, 471 So.2d 158 (Fla.3d DCA 1985).

Although he concedes his affidavit was immaterial to the proceedings below, Alter, the alleged "fox in the henhouse", would have this Court believe it was he who the Dead Person's Statute protected and the statute was waived. Of course Alter in his individual capacity was not protected under Section 90.602; to the contrary, he is exactly the person the statute is designed to protect us from.

Further, Sherry did not offer evidence of the subject-matter of alleged oral communications between Alter and Celia Kahn, thereby waiving the statute. No evidence was taken at all; Sherry did not offer oral communications; and the trust was reviewed by the trial court only for purposes of observing how it was executed and its nature as a living trust, in which the settlor was the sole trustee and which passed property on the settlor's death. Indeed, Celia Kahn's intent and communications, although important to the overall case against Alter, had nothing to do with the summary judgment proceedings as Alter himself concedes.

## CONCLUSION

For the reasons expressed in the initial brief and this reply brief, the decision of the District Court of Appeal of Florida should be reversed in favor of the trial court's

decision, and the matter should be remanded to the trial court for execution on the final summary judgment.

Respectfully submitted,

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BY: _____
ROBERT W. GOLDMAN

**CERTIFICATE OF SERVICE**

I CERTIFY that a true copy of the foregoing has been furnished by mail to JOEL D. EATON, ESQUIRE, 25 W. Flagler Street, Miami, Florida 33130 and ALAN COHN, ESQUIRE, 2021 Tyler Street, P.O. Box 279010, Hollywood, Fla. 33022-9010, this 26th day of May, 1992.

_____
ROBERT W. GOLDMAN

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