IN THE SUPREME COURT OF THE STATE OF FLORIDA

Appeal No. 79,667
(DCA CASE NO. 91-01723)

WALLACE P. HARMON, as Personal Representative of the Estate of Patsy P. Williams, deceased

Petitioner

v.

LARRY T. WILLIAMS, as Personal Representative of the Estate of R. Virgil Williams, deceased

Respondent

APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

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REFERENCES TO THE RECORD AND TO THE PARTIES

Larry T. Williams, as Personal Representative of the Estate of R. Virgil Williams, deceased, will be referred to as Respondent or Mr. Williams.

Wallace P. Harmon, in both his capacity as Guardian Ad Litem of Patsy P. Williams and now as Personal Representative of her estate, will be referred to as Petitioner or Mr. Harmon.

References to the Appendix to Respondent's Answer Brief will appear as (A. ____).

References to the record before the District Court of Appeal will appear as (R. ___) in accordance with the page numbers assigned to the record used before the District Court,

Emphasis is added unless otherwise stated.

STATEMENT OF THE CASE AND FACTS

Respondent includes a full Statement of the Case and Facts because of certain omissions and errors in Petitioner's presentation. For example, contrary to Mr. Harmon's representation, the district court certified **"possible"** conflict, not direct conflict, with a decision of another district court.

The case and the facts are as follows:

1. R. Virgil Williams, Jr. ("Decedent") died in September, 1989 (R. 27). He was survived by his second wife, Patsy ("Mrs. Williams"), and his two adult children by his earlier marriage -- Larry Williams and Sally Crumbley. Mrs. Williams had been in care, in North Carolina, for many years (R. 34).

2. Probate proceedings were commenced in Pasco County, Florida (A. 19; R. 20-21).

3. His will left Mrs. Williams a life interest in <u>all</u> his real estate, which comprised of a home in Pasco County, Florida and some vacant lots in North Carolina[1/] (R. 22). These lots were adjacent to a jointly owned home, title to which automatically vested in Mrs. Williams along with significant insurance proceeds,[2/] which did not form part of the probated estate,

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[1/] Petitioner's statement that the sole devise was limited to "Florida" real property is incorrect. Likewise a factual error in Judge Threadgill's opinion is the statement that Mr. Williams owned no real property in Florida. (Pet'r Br., at 2)

[2/] Believed to be approximately $140,000.

4. In December, 1989, an attorney, Gary Bloom ("Mr. Bloom"), filed two documents with the Probate Court. The first, a Petition to Appoint a Guardian **Ad** Litem for Mrs. Williams ("Petition for Guardian") recited that she was **"not** competent to assist and participate in these proceedings due to her deteriorated physical and mental **condition."** (A. 21; R. 32). Her son by a prior marriage, Wallace B. Harmon ("Mr. Harmon"), was suggested as her guardian (R. 32). A letter from her attending physician, attesting to Mrs. Williams' incapacity, was belatedly filed by Mr. Bloom in support of his Petition for Guardian (A. 23-24; R. 34-35).

5. This addressed Mrs. Williams' condition, stating:

> Patsy Williams first became my patient several **years** ago when she was transferred from a hospital in Silva to Canton Health Care Center. At that time, she **was** not competent mentally due to Alzheimer's Disease. I am unable to give you a time frame prior to that, as to when **she** became incompetent, since this was my first contact with this lady. She has multiple severe medical problems. Her condition, of course, waxes and wanes; but even at her optimum, I do not believe that physically she would be able to tolerate a trip to Florida. If she were physically able to make the trip, her mental condition would preclude any meaningful participation in legal proceedings. The patient's diagnoses are as follows:
>
> Alzheimer's disease - severe
> Angina Pectoris
> Coronary **Heart** Disease
> Atrial Fibrillation,
> Hx. of Congestive Heart Failure
> Hypothyroidism (corrected by medication)
> Hypertension, essential
> Atherosclerosis
> HX. of Depression

Emphysema.

6. Accompanying the Petition for Guardian was a "Notice of Intention to Petition for Elected Share" ("Notice of Intention") signed only by Mr. Bloom. He stated, in total:

> YOU WILL PLEASE TAKE NOTICE that the undersigned counsel for the surviving spouse, PATSY P. WILLIAMS, will file, on behalf of the surviving spouse, a petition to determine the statutory elective shares, the assets from which said elective share shall be paid, and the scheduling of said payments. (A. 25; R. 31).

7. On April 16, 1990, Mr. Harmon was appointed guardian ad litem for his mother (A. 26; R. 37). The order making this appointment, prepared by Mr. Bloom, required Mr. Harmon to serve a copy of his oath on the "natural living guardian or guardians having legal custody of the . . . incompetent" (A. 26; R. 37).

8. On June 15, 1990, Mr. Williams, as his father's personal representative, moved to strike Mr. Bloom's Notice of Intention because it did not constitute an election (R. 42-45). In addition, he questioned Mr. Bloom's authority "to elect", given the contents of the Petition for Guardian. A hearing was set for July 16, 1990.

9. On July 9, 1990, an "Election to Take Against the Will" ("Guardian's Election") (A. 31; R. 46), signed by Mr. Harmon, was filed. However, it was not served on the personal representative

or his counsel and indeed was not the basis of any arguments advanced to the probate court.[3]

10. At a hearing on July 16, 1990, Judge Tepper granted the personal representatives' motion to strike, ruling that the Notice of Intention was not in compliance with the elective share statute (A. 32; R. 48).

11. Mr. Harmon changed lawyers. On August 10, 1990, his new attorneys moved for rehearing, arguing that the motion to strike was improper because the personal representative lacked standing to file it, that no interested party had filed an objection, and that any proceedings on an objection to Mr. Bloom's election should have been an adversary proceeding (A. 33-35; R. 51-53). Importantly, during the hearing on his rehearing motion, Mr. Harmon never claimed that the Guardian's Election was an amendment. Indeed, his counsel did not even refer to the Guardian's Election when Mr. Williams' attorney stated twice that the Guardian had done nothing since his appointment (R. 8-10).

12. The Motion for Rehearing was heard and an oral ruling denying it was made on September 11, 1990. At the end of the hearing, Judge Tepper stated that she was satisfied ". . . that the P.R. was trying to proceed to close the Estate and that there was this piece of paper floating in the file that purported to be

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[3] Though the Guardian's Election recites service to the counsel for the personal representative by certified mail an July 3, 1990, the certificate of service is defective, containing no zip code for Respondent's lawyer. Counsel for the Respondent received no copy.

a Notice to File Petition for Elective Share, and felt that the P.R. could not file closing documents until the ruling had been made on what that was, and that it was in the best interest of all of the beneficiaries that the matter be resolved" (R. 17). Judge Tepper also stated that the Notice of Intention "was not in compliance with the law. It did not set forth the statutory requirements. It did not. It was not signed by an individual who had -- the only individual who had an authority to sign that, being either the guardian ad litem for the surviving spouse or the surviving spouse itself . . . " (R. 17).

13. On September 24, 1990, the Order denying the Motion for Rehearing was entered. (A *36;* R. 61). On October 25, 1990, Mr. Harmon filed an untimely notice of appeal (the "First Appeal"). He then filed an Initial Brief which made no reference to the Guardian's **Election, let alone argue** that it amended the earlier "election."

14. Mrs. Williams died November 16, 1990. Mr. Harmon was appointed personal representative of her estate.

15. On March 22, 1991, the Second District Court of Appeal dismissed the First Appeal as untimely.

16. Mr. Harmon successfully moved the Circuit Court to set aside its September 24, 1990 order and to re-enter an identical order denying rehearing (A. 37, R. *67-68).*

17. Mr. Harmon changed attorneys again, to his present counsel, and filed a timely second appeal (R. 69-70).

18. On March 18, 1992, the district court affirmed Judge Tepper's rulings (A. 1-12). The majority opinion was written by Judge Threadgill. Judge Parker concurred with the result and wrote a separate opinion. Judge Campbell dissented. Both Judges Threadgill and Parker agreed that the Notice of Intention was not an election. Judge Threadgill wrote: "the notice of intention . . . could not as a matter of law constitute a valid election . . . the substance of the notice does not amount to an election." He also stated that, even assuming Mrs. Williams was competent, Mr. Bloom had no authority to execute an election on Mrs. William's behalf (A. 4-6).

Judge Parker thought it unnecessary to decide whether an attorney could elect for his client, but agreed no timely election was made. He stated:

> . . . [T]he Notice of Intention . . the only paper addressing the elective share filed [timely] accomplished nothing, and certainly did not serve as an election (A. 9).

Even dissenting Judge Campbell recognized that the Notice of Intention would require "amendment" (A. 12).

Finally, both Judge Threadgill and Parker agreed that the "Guardian's Election" was untimely -- being filed nearly nine months after the notice of administration.

19. On April 6, 1992 Mr. Harmon filed a Motion for Rehearing, together with a Suggestion of Questions of Great Public Importance (A. 13-15).

20. The clerk of the district court advised Mr. Harmon that his Motion for Rehearing was untimely, so Mr. Harmon moved for an

extension of time to file the rehearing motion. However, to protect his position, he also sought to invoke the jurisdiction of this Court under Article V, section 3(b)(3) of the Florida Constitution. (A. 16-17). Mr. Harmon submitted his jurisdictional brief to the clerk of this Court.

21. Then, on April 27, 1992, the district court entered its order extending the time to file the motion for rehearing and then, without requiring a response from Mr. Williams, denied rehearing, but certifying "possible" conflict with In re Estate of Schriver, 441 So. 2d 1105 (Fla. 5th DCA 1983) (A. 18). As discussed later, no "direct" conflict was certified.

22. Because of the district court's certification, in accordance with Fla. R. App. P. 9.120(d), the parties were directed to file briefs on the merits.

SUMMARY OF THE ARGUMENT

The first issue is one of jurisdiction. "Direct conflict" has not been certified, and the "possible conflict" relates to a non-dispositive issue. Put another way, even if the issue of Mr. Bloom's authority to sign the so-called election had been decided in Mr. Harmon's favor, the result would be the same because the district court ruled that Mr. Bloom's filing did not constitute an election.

Were it not for this unusual certification which operated to bypass the submission of jurisdictional briefs, Respondent believes this Court would never have accepted jurisdiction because the district court's dispositive rulings that: (1) the Notice of Intention was not an election, (2) the Guardian's Election was untimely and (3) even the Guardian's election was improper, would not give rise to jurisdiction under Article V, section 3(b)(3), of the Florida Constitution because there is no "express and direct" conflict with any other district court or supreme court opinion on the same question of law. Importantly, these dispositive issues have not been certified by the district court, they are correctly decided and no conflict exists between these conclusions and any of the decisions cited by Mr. Harmon.

Indeed, Judge Threadgill's opinion - although unnecessary to the disposition of this case - that the election to take against the will is personal and must be executed by the surviving spouse or a guardian of the property is also correct. Judge Threadgill's approach follows the express language of

section 732.210, Florida Statutes and does not conflict with the Schriver decision or any other decision of this Court or any district court.

ARGUMENT

POINT I

THE DISTRICT COURT HAS NOT CERTIFIED DIRECT CONFLICT AND THERE IS NO OTHER CONSTITUTIONAL BASIS FOR SUPREME COURT JURISDICTION

Some confusion has arisen because of the unusual form of certification by the district court. A5 a result of the operation of Fla. R. App. P. 9.120(d), the usual procedure regarding jurisdictional briefs has been avoided, the parties being directed to file briefs on the merits.

Respondent questions whether such review is proper, just because the district court certified "possible" conflict on a non-dispositive issue. As such, this case presents an unusual question of constitutional law relating to the jurisdiction of this Court. Of course, this Court's jurisdiction is not unlimited. Article V, Section (3)(b) of the Florida Constitution, in pertinent part, provides that this Court

> (3) May review any decision of a district court of appeal that . . . expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law;
>
> (4) May review any decision of a district court of appeal . . . that is certified by it to be in direct conflict with another district court of appeal.

As a threshold question, the issue is whether the use of the language "possible" conflict by of the district court was effective as a certification of direct conflict, so giving a basis for discretionary jurisdiction under Art V, §3(b)(4), Fla. Const.

A. AS A NON-DISPOSITIVE ISSUE IS INVOLVED, TREATING THE EQUIVOCAL CERTIFICATION OF POSSIBLE CONFLICT AS A CERTIFICATION OF DIRECT CONFLICT CONTRAVENES THE PURPOSE OF CERTIFICATION PROCESS.

The certification process was designed to provide for the efficient and effective adjudication of questions concerning jurisdiction, not to bypass consideration of them entirely. The principal justification for the special treatment accorded certified cases is that three district court judges with an intimate knowledge of the case have carefully screened the jurisdictional questions. Ben F. Overton, District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities, 35 U. Fla. L. Rev. 80, 87 (1983). See also Ben F. Overton, A Prescription for the Appellate Caseload Explosion, 206 Fla. St. U. L. Rev. 205, 231 (1984). Certification of direct conflict substantially affects how a case is treated by this Court. The litigants do not file jurisdictional briefs, Fla. R. App. P. § 9.120(d). Almost all certified cases are accepted for review on the merits. Overton, District Courts of Appeal, supra, at 87. Because of these significant consequences, Respondent suggests that a certification of conflict should not only be clear, express, and unambiguous but must also involve a dispositive issue in the case.

Here, only **"possible"** conflict has been certified.[4] The rationale for that equivocal certification is unclear, perhaps deliberately so, because (1) the **"conflict"** involves the non-dispositive issue of whether an attorney at law alone may make and execute a written election and (2) the case in supposed conflict **did** not even involve an attorney at law and is easily distinguished. Given this background, it is unlikely that the district court intended to certify direct conflict, especially as Judge Threadgill had expressly distinguished Schriver, thus recognizing no direct conflict (A. 7). In fact, even Mr. Harmon recognized there was no direct conflict. In a Suggestion of Questions of Great Public Importance Filed with the district court on March 6, 1992, he asserted that the issue on which conflict with Shriver is now alleged was one "of first impression, not having been directly decided by an appellate court in this State." (A. 13-15, ¶¶ 1(a), 2.)

Clearly the district court's certification does not manifest a clear and unambiguous determination of actual direct conflict. Respondent respectfully suggests that treating an equivocal certification as a vehicle for avoiding the customary jurisdictional examination violates the very policies supporting certification of direct conflict.

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[4] The district court denied rehearing and certified only "possible conflict" with In re Estate **of Schriver, 441 So.2d** 1105 (Fla. 5th DCA 1983) **(A. 18)**

B. AN EQUIVOCAL CERTIFICATION OF POSSIBLE CONFLICT SHOULD NOT OPERATE TO CREATE JURISDICTION UNLESS THERE ARE INDEPENDENT GROUNDS FOR JURISDICTION.

Possible conflict was certified on the issue of whether an attorney alone may exercise or execute an election to take the statutory elective share on behalf of a surviving spouse. This issue is ancillary because both the probate court and the district court recognized that the document filed by the lawyer did not constitute an election. Had Judge Threadgill expressed no opinion on that issue, no basis for jurisdiction under the Florida Constitution. Art. V, §§ 3(b)(3), 3(b)(4), Fla. Const.

So far as Respondent has been able to determine, when a district court has been equivocal regarding conflict, this Court, when granting review, has made a specific findings that an actual direct conflict does exist. In each such case, **the issue has** been dispositive. For example, Broward County v. Finlayson, 555 So. 2d **1211 (Fla. 1990), aff'g, 533** So. 2d 817 (Fla. 4th DCA 1988) where the district court did not certify conflict, but its opinion recognized "that our conclusion may well be in conflict with Sigman v. City of Miami . . . to the extent that it is, we must respectfully disagree with our sister court" 533 So. 2d at 818. This Court found actual conflict and accepted jurisdiction under section 3(b)(3). Importantly, the issue presented -- should a county be liable for prejudgment interest -- had to be determined to resolve the Finlayson case.

Likewise, in State v. **Weller**, 590 So. 2d 923 (Fla. **1991),** aff'g in part, and rev'g in part 501 So. 2d 1291 (Fla. 4th **DCA**

1986), this Court found direct and express conflict when the district court had "noted possible conflict". Again, the issue presented - the propriety of jury instructions on lesser offenses - had to be resolved, i.e. it was a dispositive issue. Similarly, in AIU Ins. Co. v. Block Marina Investment Co., 544 So. 2d 998, 999 (Fla. 1989), quashing 512 So. 2d 1118 (Fla. 3d DCA 1987), the district court certified its decision "as possibly in conflict with United States Fidelity & Guarantee Co." 512 So. 2d at 1120 n.4. There the issue was whether an insurance company's failure to give timely notice of coverage defenses prohibited the insurer from later denying coverage, even though the policy did not cover the type of loss. The issue was dispositive. While this Court took jurisdiction on the basis of certified conflict, Art. V, § 3(b)(4), Fla. Const., there was no in depth discussion of the adequacy of the certification because this Court specifically found: "We perceive conflict between the two decisions." Indeed, conflict was clear, the issue was dispositive and the district court opinion was quashed.

Thus, this case squarely presents the question of whether this Court should ignore the usual jurisdictional review and proceed on the merits, when both the form and the substance of the certification suggest no real conflict exists and the "certified conflict" does not even involve a dispositive issue. Respondent respectfully suggests that certification of "possible conflict" on a non-dispositive issue should be the subject of substantial scrutiny, before this Court determines whether to

accept jurisdiction to review on the merits under Art. V, § 3(b)(4), Fla. Const.

C. THERE IS NO CONFLICT, DIRECT OR POSSIBLE, WITH IN RE ESTATE OF SCHRIVER

In re Estate of Schriver, 441 So. 2d 1105 (Fla. 5th DCA 1983) determined that an attorney-in-fact, acting under a properly executed durable family power of attorney could exercise the right of election to receive the elective share on behalf of the surviving spouse. The Schriver court explained its reasoning as follows:

1. Durable family powers of attorney were legislatively created as a means by which the family members could help a potentially disabled or incompetent person in handling business and property matters. **Id.** at 1106.

2. The power to act under a durable family power of attorney is limited to only certain family members - spouse, parent, child, brother or sister. **Id.** at 1106.

3. Durable family powers of attorney have the beneficial effect of avoiding the time, expense and embarrassment involved in having to establish guardianship for incompetent persons. **Id.** at **1106.**

4. The language of section 709.08, Florida Statutes which creates the Durable Family Power of Attorney, grants the holder extensive powers over property rights and does not expressly preclude the exercise of the election under section 732.210, Florida Statutes.

Frankly, it is difficult to understand why the district court even viewed its opinion as being in **"possible"** conflict with Schriver. Here, no **durable** family power **of** attorney is involved, or for that matter any similar document suggesting Mr. Bloom was specifically empowered to act **by** Mrs. Williams. Further, Schriver did not even involve an **"election"** by an attorney at law, let alone one who also sought a guardian for his "client" based on the client's incompetency. Indeed, in his opinion, Judge Threadgill expressly distinguished Schriver, correctly noting that an attorney-at-law has neither the express nor implied authority to make independent decisions concerning the disposition of a client's property (A. 7). See, for example, Rushing v. Garrett, 375 So. 2d 903 (Fla. 1st DCA 1979). Obviously, the powers granted by a durable family power of attorney are, by statute, extensive and quite different from the relationship between an attorney and client.

In support of **his** position that an **"agent"** can make the election for Mrs. Williams, Mr. Harmon has relied on the Uniform Probate Code (Page 13 of Harmon Brief). He cites, with his own emphasis added, "If the election is not **made** by the surviving spouse personally, it can be made on behalf of the surviving spouse by the spouse's conservator, guardian or **agent**." This is not true. It is an incomplete quote. The sentence does not end

with "agent.", it continues "under the authority of a Power of attorney."[5]

Clearly this case involves quite different issues and there is no conflict, direct or possible, with Schriver. **As** such, there is no basis **for jurisdiction** under Article V, Section **3(b)**(4) of the Florida Constitution.

POINT II

THE DISTRICT COURT'S DISPOSITIVE RULING THAT THE NOTICE OF INTENTION TO PETITION FOR ELECTIVE SHARE WAS NOT AN ELECTION WAS CORRECT AND CONFLICTS WITH NO OTHER DECISION

The questions posed to the probate court by the personal representative were whether, on **its** face, the Notice of Intention to Petition for Elective Share was a proper and timely election, coupled with whether an attorney could make that election on behalf of an incompetent spouse. A valid election has to filed within 4 months from the date of the first publication of notice of administration, here by March **17, 1990. § 732.212,** Fla. Stat. The four month rule is strictly applied, Allen **v.** Guthrie, 469 So. 2d **204 (Fla. 2d DCA 1985)** (Widow residing in out-of-state nursing home who was ignorant of death of spouse could not assert right outside the four month **period).** There, at page 205, the Court stated "[a]n apt analogy may be drawn between dower and the elective share. A surviving spouse has no right to an elective share absent a timely election to take that share."

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[5] A copy of the relevant page is included in Respondent's Appendix at A. **38.**

All three district court judges agreed that Mr. Bloom's Notice of Intention was not an effective election. Judge Threadgill analyzed this matter in depth (A. 4-6) noting that case law draws a clear distinction between the election itself and the later filing of a petition to determine the elective share. ***See,*** Smail v. Hutchins, 491 So. 2d **301 (Fla. 3d DCA 1986)** which emphasized the personal nature of the election, noting that the election is personal and may only be exercised by the surviving spouse during her lifetime. In contrast, once the surviving spouse has exercised her personal right, her death **does** not preclude the hearing of a petition to determine that share. Id. at 302.

Likewise, Judge Parker expressed the view that the Notice of Intention "accomplished nothing and certainly did not serve as an election" (A. 9). Even dissenting Judge Campbell recognized that **"amendment"** was needed (A. 12).

Contrary to the Petitioner's argument, (Pet'r Br. at 25), Allen v. Guthrie, contains no discussion of the **"form"** of the notice of **election.** However, that court did state:

> A surviving spouse has no right to an elective **share absent** a **timely election** to take that share. Order and finality in **the** administration of estates, as is reflected in section 732.212's time limits, are paramount concerns; and failure to elect within the period prescribed by the Legislature bars a claim.

Allen, 469 *So.* 2d at 205-06.

Notably, Mr. Bloom did not make use of the preferred procedure for making an election set forth in **Fla.** R. **P. & G. P.**

5.360(a)(1), which would have required him to include specific language requiring any objections to the **"election"** to be served within twenty (20) days of service of the Notice of Intention. This is a further indication that the Notice of Intention was not intended to be an election, but the forerunner to a later election to be filed by **the** guardian.

Mr. Harmon is incorrect when he claims that the district court's rationale **"collides"** with the holding in Feather v. Estate of Sanko, 390 So. 2d 746 (Fla. 5th DCA 1980). Feather did not involve the elective share, but rather the admission of a will to probate. It has little or no similarity to this case. There, faced with a 20 day deadline to **file** an answer to a Petition to Admit a Will to Probate, Feather's attorney filed **a** timely notice of appearance which expressly requested 30 additional days to file pleadings. He also telephoned the Will proponent's attorney and told him of his need for more time. The other lawyer advised he would be unable to represent the proponent in a contest because he had prepared the Will **and would** be a necessary witness. Then, without notice to Feather or **her** attorney, he scheduled an ex parte hearing and **had the Will** admitted to probate. No such questionable practice exists here. The district court reversed the probate judge's refusal to permit Feather to file pleadings to challenge the admission of the will to probate, stating:

> The 20 day period established by the statute and rule is . . . extremely short. It is. . . certainly not analogous to a statute of limitations period of time or a period of

> "nonclaim" . . . . The trial court could have granted Feather's motion . . . and should have done so under the circumstances. Id, at 747-48.

Here, in contrast, the four month period for filing a timely election is analogous to the nonclaim statutes, Allen v. Guthrie, 469 So. 2d 204. Feather has no relevance to the issue of the adequacy of Mr. Bloom's Notice of Intention. Certainly, it presents no direct or express conflict on the same question of law, a condition for jurisdiction. Art. V, § 3(b)(3), Fla. Constitution.

In Trustees of the Internal Improvement Fund v. Lobean, 127 So. 2d 98, 100-01 (Fla. 1961), this Court defined direct conflict as:

> antagonistic principals of law must have been announced . . . based on practically the same facts. The conflict must be obvious . . . [It] must result from an application of law to facts which are in essence on all fours, without any issue as to quantum and character of proof.

No such conflict exists here. As such, Respondent believes this Court should not even be reviewing the adequacy of Mr. Bloom's notice, recognized as deficient by all three district court judges. While Mr. Harmon may not like the district court's ruling that no timely election was made, it was his delay in obtaining his own appointment as guardian which is the source of his problem. The failure to make a timely election was recognized by the district court and its ruling is not in direct or express conflict with other decisions on the same question of

law. As Mr. Harmon cannot overcome this threshold issue, no further review is needed.

POINT III

THE DISTRICT COURT'S FINDING THAT THE ELECTION FILED BY THE GUARDIAN AD LITEM WAS UNTIMELY IS CORRECT AND CONFLICTS WITH NO OTHER DECISION

While Mr. Harmon does not contest that his July 9, 1990, election was untimely, he asserts (Petitioner's Point 111) that the Guardian's Election was an "amended election" which related back to the Notice of Intent.

Mr. Harmon's argument, that any defects in the Notice of Intention could have been, and were cured by the Guardian's Election is meritless. Indeed, this "amendment" argument is the fruit of the fertile mind of Mr. Harmon's current counsel. The Guardian's Election (which the district court found was untimely because it was filed well outside the four month period) does not purport to be an amendment, was unaccompanied by a motion to amend, and was never brought to the attention of the probate court. Further, as a guardian's election, it has been rendered moot by the death of Patsy Williams prior to the court's determination that it was in her best interest to elect, In re Estate of Pearson, 192 So. 2d 89 (Fla. 2d DCA 1966).

Notwithstanding that no request to "amend" was ever made, Mr. Harmon argues that the probate court erred in granting the Motion to Strike the Notice of Intention to Petition for Elective Share without granting leave to "amend" to make an election.

At no time during the consideration of the original motion, the motion for rehearing, or the First Appeal, was any mention ever made of the Guardian's Election, let alone treating it as an **"amendment."** As stated previously, no copy of the Guardian's Election was received by the attorney for the personal representative. Indeed, on two occasions during **the** oral argument on the rehearing, counsel for the personal representative expressly stated to the probate court that nothing had been filed by the guardian.[6] These statements were not contradicted in any way by Mr. Harmon's attorney, nor was any request to amend made by the attorney for the Guardian **Ad** Litem. Not having been raised below, this is not a proper argument to even raise an appeal.[7] Perkins v. Scott, 554 So. 2d **1220 (Fla. 2d DCA 1990);** Myrick v. Smith, 522 So. 2d 885 (Fla. 2d DCA 1988). Moreover, even if amendment were allowed, the entire issue would be moot because of Mrs. Williams' intervening death.

Thus, there is no merit to the argument that the trial court abused its discretion in failing to permit the amendment of the earlier so-called **"election"** filed by Mr. Bloom. Rather, the Court quite properly struck Mr. Bloom's Notice of Intention as an irrelevant item, since it was not an election.

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[6] "There is nothing in the Court file from either the widow or the guardian of the property" (R. *8);* **"There** is nothing in the file from the widow or from the guardian" **(R. 10).**

[7] As such, Judge Campbell's dissent, which would allow amendment, ignored the time honored rule that an argument should first be raised at the trial, not the appellate level.

Contrary to Petitioner's argument, Estate of Grist, 83 So. 2d *860* (Fla. 1955) does not present any conflict, and it **did** not even address any issue relating to the elective share. Rather, it dealt with an amendment to a claim. There, the amended claim was identical to the original, except for the remedy sought, and the original was recognizable **as a** claim. Here, there was no initial election to amend and, as previously stated, no timely request to amend was made. Again, Mr. Harmon's arguments are without merit and respondent submits that Mr. Harmon has failed **to present a basis for this Court to recognize on conflict** jurisdiction. Art. V, § 3(b)(3), Fla. Const.

POINT IV

THE DISTRICT COURT WAS CORRECT WHEN IT HELD THAT A GUARDIAN-AD-LITEM HAS NO AUTHORITY TO MAKE AN ELECTION AGAINST A WILL. FURTHER, MRS. WILLIAMS' DEATH HAS MOOTED THE ENTIRE ISSUE.

The decision to award the "elective share" following election by a guardian of the surviving spouse is a two-step process. Recognizing the limited power of a guardian of the property to make the election, section 732.210, Florida Statutes, provides:

> 732.210 Right of election; by whom exercisable.
>
> The right of election may be exercised:
>
> (1) By the surviving spouse.
> (2) By a guardian of the property of the surviving spouse. The court having jurisdiction of the probate proceeding shall determine the election **as** the best interests of the surviving spouse require.

The same two step process existed for **"dower"**, the **predecessor of** the elective share. There the law was clear. First, a timely election had to be made by the guardian, then the court had to decide if the election should be allowed. Edwards v. Edwards, 106 **So. 2d 558 (Fla. 1958).** If the spouse died before the determination was made, the **"election"** failed. In re Estate of Pearson, 192 So. 2d 89 (Fla. 2d **DCA** 1966).

Notwithstanding **the** clear language **of** the statute requiring that the election be made by the guardian of the property, Mr. Harmon argues that Edwards v. Edwards, 106 So. **2d 558 (Fla. 1958)** permits a guardian ad litem to exercise the personal election. (Petitioner's Point IV). Aside from the fact that this argument conveniently ignores that no timely election was made by any guardian, it also ignores that the statutes involved **are worded** differently. Edwards construed a statute which allowed **"the** guardian" to elect for an incompetent widow. **§ 732.35(2) Fla.** Stat. **(1957).** The present statute now specifies that the "guardian of the property" may elect. § 732.210. Fla. Stat. (1989). Moreover, even if this Court were to accept Mr. Harmon's argument and treat him as a "guardian of the **property,"** the remainder of the ruling in Edwards would render this entire appeal moot. Edwards' central holding was that a guardian's election merely begins the **process** by which the court determines whether an election would be in the spouse's interest. The intervening death of the spouse, prior to such court approval, extinguishes her rights. The same approval **procedure** applies

today by statute -- a guardian's election has to be approved by **the** court prior **to** the ward's death or else it fails. § 732.210(2), Fla. Stat.; In re Anderson's Estate, 394 So. 2d 1146 (Fla. 4th DCA 1981).

Thus, even if one assumes that the Guardian's Election of July 3, 1990, denominated as his Election Against the Will, was timely and otherwise proper (which it was not), it was, pursuant to §732.210(2) just the first step in a process which required the court to determine whether an election should be made in the best interest of the incompetent surviving spouse.[8] Of course, the probate court made no such determination, nor did Harmon ever seek such a determination. **Indeed,** as previously noted, the issue of the validity of the Guardian's Election has been raised for the first time in the second appeal. The intervening death of Patsy P. Williams in November 1989 has **mooted** the entire issue of an election. The reason is simple -- the elective share is intended to provide for the surviving spouse, **not** to augment the surviving spouse's estate for the benefit of her heirs. In re Pearson's Estate, 192 So. 2d 89, (Fla. 2d DCA 1966); In re Anderson's Estate, 394 So. 2d **1146** (Fla. 4th DCA 1981).

While Pearson dealt with the elective share's predecessor, dower, its ruling resolves the issues raised here. There, the surviving spouse was left nothing under the will of her **deceased** husband. She was adjudicated mentally incompetent shortly after

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[8] On rehearing, Mr. Harmon's earlier counsel even made reference to the statutory requirement that the Court determine **whether** the election was in the spouse's best interest. (R. 12).

his death, and her guardian filed an election of dower on her behalf. Prior to the court's action on the guardian's petition for assignment of dower, the widow died. Her executor sought to proceed to obtain dower, which was denied. On appeal the district court affirmed, noting that the guardian's **"election"** is not an election but merely the initiating instrument requesting that the court elect[9] and stated, at page 92:

> It must be remembered that the purpose for dower is to insure ample provision for the widow's personal needs and comfort. When the widow dies no like purposes remains. If a competent widow dies before electing, such right to elect dies with her . . . . If an incompetent widow dies, and her election through her guardian has not been ruled upon, her election is null and void since the guardian's power terminates at the ward's death, 15 Fla. Jur. Guardian and Ward Section 36, and so does the power of the court to act in her place.

Here, the lower court never determined that election was in the best interest of her deceased Patsy P. Williams, and, in fact, her guardian (and heir) never even sought such a determination. The issue of her elective share is now moot because the purpose of that provision is not to augment Mrs. Williams' estate for Mr. Harmon's benefit. Anderson is to the same effect, expressly applying Pearson to the elective share **procedure.**

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[9] The same procedure is followed under section 732.210(2), Florida Statutes.

POINT V

IN ANY EVENT, JUDGE THREADGILL'S VIEW THAT MR. BLOOM COULD NOT EXECUTE AN EXECUTION FOR MRS. WILLIAMS WAS CORRECT

This entire appeal is based on Mr. Harmon's fallacious argument that Patsy Williams decided that it was in her best interest to elect to take the elective share.[10] Of course, no record support is cited for this statement, and its falsity is starkly revealed by the letter of her attending physician which Mr. Bloom filed with the probate court. The doctor stated he had known Patsy Williams for several years and that she was already mentally incompetent when he first met her -- how long before that he could not say. Mr. Harmon's response is to ignore this letter which, after all, was the basis for his appointment as guardian-ad-litem. However, once the "question" about Mrs. Williams "competence" is even considered, the fundamental flaws in Mr. Harmon's points on appeal become all the more obvious.

In presenting his argument on who may exercise and execute the election, Mr. Harmon ignores that the document filed by Mr. Bloom was not an election, but instead stated that Mr. Bloom would file a petition. Florida has recognized the significant distinction between the election itself, which is personal to the surviving spouse or guardian of the property (§ 732.210 Fla. Stat.) and the petition to determine the extent of the spouse's share, which is a "mechanical" procedure, once the valid election

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[10] "Shortly after her husband's estate administration began . . . Patsy Williams decided that it was in her best interest to elect to take the elective share . . . " (Pet'r Br., at 3).

is exercised, Smail v. Hutchins, 491 So. 2d 301 (Fla. 3d DCA 1986). Indeed, this simple distinction may explain Mr. Bloom's actions. He knew well that he had to have the guardian make the timely election on Mrs. Williams' behalf **because,** as was obvious from the Petition to Appoint the Guardian, **she could** not **do so** herself. However, no timely action was taken. **If** Mr. Harmon thought otherwise, he would not have sought his own appointment as guardian. Of course, in advancing his argument, Harmon is forced to both assert, but at the same time, disavow Mr. Bloom's authority. He relies on Mr. Bloom's **"authority"** to execute the **"election"** yet disavows the significance of Mr. Bloom's uncontested request for the appointment of a guardian, based on Mrs. Williams' incompetence. He cannot have **it** both ways.

Judge Threadgill chose not to address Mrs. Williams competency, but to **"presume"** it (A. **4**). Instead, he relied on the text of section 732.210, Florida **Statutes,**[11] Smail v. Hutchins, 491 So. 2d 301 (Fla. 3d DCA **1986),** and other authority such as an Annotation, Election by Spouse to Take Under or Against Will as Exercisable by Agent or Personal Representative, **83** A.L.R.2d 1077 **(1962),** to support his **conclusion** that the election is personal to the spouse or her guardian, and could not be executed by a lawyer claiming to **act** for her **(A. 6-7)**. He was correct **as** a matter of law. Judge Parker saw no need to resolve this **issue** but noted **that** even The Florida Bar's Form for an

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[11] Fla. Stat. § 732.210 provides that the election may be made by either the surviving spouse or the guardian of the property of the surviving spouse.

election provides "a separate signature line for the surviving spouse" (A. 9 n.3).

Respondent has cited no authority directly on point, which allows an attorney either to exercise or execute the statutory election. Of course, Mr. Harmon's earlier noted incomplete and so misleading quotation from the Uniform Probate Code [12/] does not support his position, because it would require express written authorization by Mrs. Williams to Mr. Bloom in the form of a power of attorney.

Finally, no conflict exists with Johnson v. Estate of Fraedrich, 472 So. 2d 1266 (Fla. 5th DCA 1985), where the Court agreed that a personal representative's attorney could file an objection to a claim on behalf of the personal representative. The statutory provision involved (§ 733.705, Fla. Stat.) provided that "a personal representative or other interested person may file an objection to a claim.". The district court rejected the argument that the personal representative had to "make" the objection. The clear distinction with this case is that Fraedrich involved no "personal right" and the filing of the objection was much like the "mechanical" filing of the petition to determine the extent of the elective share, a distinction drawn in Smail, 491 So. 2d 301.

[12/] Discussed in detail at page 16 of this brief.

CONCLUSION

Notwithstanding the district court's unusual certification of conflict, this court does not have jurisdiction over this case pursuant to Article V, Section 3(b)(4) of the Florida Constitution. No direct conflict exists on a dispositive issue.

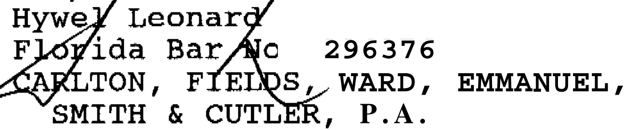
The so-called **"election"** made by Mr. Bloom was not, on its face, an election, whether or not it was authorized by the incompetent Mrs. Williams. The later election by the guardian ad litem was untimely i.e., well outside the four month period required by Section 732.212, Florida Statutes and, further, the guardian's election was not executed by the "guardian of the property" as required by Section 732.210, Florida Statutes.

Lastly, Mr. Harmon's **"amendment"** theory fails for two reasons. First, there was no earlier election to be amended and second, he never sought to amend, belatedly raising the issue only on his second appeal.

Respondent respectfully suggests that this Court (1) should refuse to accept jurisdiction of this case or, (2) if jurisdiction is accepted, affirm the district court's opinion. In the event that this Court determines that Mr. Bloom's so-called election may be valid, or may be amended, this case must be referred back to the probate court for determination of Mrs. Williams, competency. If she was not competent, Mr. Bloom could not elect for her and, of course, an election for an incompetent spouse has to be approved by that court, and the election will

fail if the surviving spouse has died prior to court approval being obtained.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Edgar M. Dunn, Jr., Esquire, Dunn, Abraham, Swain & Dees, 347 South Ridgewood Avenue, Post Office Drawer 2600, Daytona Beach, Florida 32115-2600, this 3rd day of August, 1992.

Attorney