FILED
SID J. WHITE
JUN 25 1992
CLERK, SUPREME COUR
By
Chief Deputy Clerk

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

DISCRETIONARY REVIEW OF CONFLICT

CERTIFIED BY THE COURT OF APPEAL, SECOND DISTRICT

INITIAL BRIEF ON THE MERITS

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SYMBOLS AND REFERENCES

The symbols and references used in this initial brief are summarized as follows:

"Petitioner" shall mean Wallace P. Harmon, as Personal Representative of the Estate of Patsy P. Williams, deceased.

"Respondent" shall mean Larry T. Williams, as Personal Representative of the Estate of R. Virgil Williams, deceased.

"Personal Representative" means Larry T. Williams, as personal representative of the Decedent's Florida domiciliary estate.

"Second Written Election" shall mean the Election to take the Elective Shares executed by the Guardian Ad Litem.

"Written Election" shall mean the Notice of Intention to Petition far Elective Share.

Citations to the Appendix will appear as "(A.____)", to indicate the page number of the Appendix to which reference is made.

Citations to the record on appeal will appear as "(R ,____)", to indicate the page number of the record on appeal to which reference is made.

STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF CASE

Petitioner seeks discretionary review of the decision of the Second District Court of Appeal certified by that court as being in direct conflict with the decision of the Fifth District Court of Appeal, pursuant to rule 9.030(a)(2)(A)(vi) of the Rules of Appellate Procedure.

This is a case in which an attorney for an elderly surviving spouse filed on behalf of the spouse an election to take the statutory elective share of her deceased husband's estate. The circuit court in Pasco County struck the written election, ruling that the election was "defective" because it had been signed only by the attorney of record, and not by the spouse and by her attorney.

On appeal, the Second District Court of Appeal affirmed with a written dissent, holding that an attorney of record for the surviving spouse had no authority to sign and file, in a probate proceeding, a written election to take the statutory elective share.

The district court's opinion was filed on March 18, 1992, and Petitioner filed a motion for rehearing and suggestions of direct conflict and of questions of great public importance.

On April 27, 1992, the Second District Court denied Petitioner's motion for rehearing, but certified its decision to be in direct conflict with the decision of the Fifth District Court of Appeal in In Re: Estate of Schriver, 441 So.2d 1105 (Fla. 5th DCA 1983), which had held that an attorney-in-fact not only had authority to sign a written election, but even had authority to actually exercise the donor-spouse's right to make the election under section 732.210, Florida Statutes. Id. at 1107.

Petitioner timely filed a notice to invoke discretionary jurisdiction with the district court on April 7, 1992 (R. __)[1]. After the district court certified conflict, Petitioner timely filed an amended notice to invoke discretionary jurisdiction with the district court. (R. __). Thereafter, this court entered an order accepting jurisdiction.

STATEMENT OF THE FACTS

Administration of Husband's Estate

On September 16, 1989, R. Virgil Williams, Jr. ["Decedent"] died at 71 years of age, survived by his elderly spouse, Patsy P. Williams ["Patsy Williams"], and two children, Larry T. Williams and Sally Crumbly. (R. 27). The Decedent's sole devise to Patsy, his wife of some 17 years, was a life estate (measured by her life) in all Florida real property (the homestead) which he owned at his death. (R. 22). He devised the rest of his probate estate to his two children, in equal shares. (R. 22).

The trial court admitted the Decedent's will to probate and appointed his son, Larry Williams, as the sole personal representative [the "Personal Representative"], (R. 28), On November 17, 1989, the Notice of Administration was published. (R. 30). The next day, Gary A. Bloom, Esquire, a Volusia County-based attorney, served a Notice of Appearance, stating that he was appearing as attorney of record for Patsy Williams, as the surviving spouse and as a beneficiary of the Decedent's estate, (R. 76).

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[1] The notice was filed in connection with Petitioner's suggestion of direct conflict and suggestion of questions of great public importance filed in the district court.

Patsy Williams' Election to Take Her Elective Share

Shortly after her husband's estate administration began, and before the Inventory was even filed,[2] Patsy Williams decided that it was in her best interest to elect to take the elective share, as opposed to taking what had been devised to her under her husbands's Will. The choice for Patsy Williams, confined in a nursing home and in need of financial support, was clear. She should take the elective share of $195,000,[3] instead of accepting nothing under her husband's patently unfair testamentary scheme.

Accordingly, on December 18, 1989, approximately one month after Notice of Administration was filed, Patsy's attorney executed and timely' filed, on her behalf, a pleading entitled "Notice of Intention to Petition For Elective Share" [the "Written Election"]. The pleading was served on Larry Williams, as the Personal Representative, and on his sister, Sally. The Written Election gave notice that Patsy Williams was "taking" against the Decedent's Will and electing her statutory share of her deceased husband's estate. It stated that Patsy Williams, through her attorney of record, would file a petition to determine (i) the statutory elective share, (ii) the assets from which elective share should be paid, and (iii) the scheduling of the payments. (R. 31). No one filed an objection to the Written

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[2] On April 3, 1990, the estate inventory, which was due to be filed on January 5, 1990, was filed some 88 days late a personal representative is required to file an inventory within sixty (60) days after the issuance of letters, which were issued to the Personal Representative on November 6, 1989. See FPR 5.340(a)).

[3] The Inventory showed the value of the Florida estate to be $650,832. It confirmed that Virgil Williams left no Florida real property from which Patsy Williams could take the life estate devised to her. (R. 36).

[4] The Written Election was served and filed within the four month period prescribed by section 732.212, Florida Statutes (1989).

Election. [5]

Appointment of Guardian Ad Litem

On November 18, 1989, the same day the Written Election was filed, Bloom served an unverified petition for the appointment of guardian ad litem under rule 5.120 of the Florida Probate Rules [the "FPR"]. The petition sought the appointment of Wallace B. Harmon (Patsy's son) as her guardian ad litem. The petition alleged that Patsy Williams was then residing in a North Carolina nursing home and that she was not capable of assisting and participating in legal proceedings in Florida due to her deteriorated physical and mental condition. No guardianship proceedings were pending involving Patsy, (R. 32-33).

Without a hearing, the trial court appointed Wallace Harmon [the "Guardian Ad Litem"] as her guardian ad litem, on April 16, 1990. (R. 37). The trial court made no findings of fact and made no adjudications regarding Patsy Williams' competency or her ability to contract. (R. 37). The order appointing the guardian ad litem simply stated that it was "necessary that the interests of Patsy Williams be represented by a guardian ad litem . . . ." (R. 37).

Personal Representative's Motion to Strike

For more than six months after the Written Election had been filed, the Personal Representative did nothing. On June 20, 1990, Larry Williams, as the personal representative, moved to strike the Written Election [the "Motion to

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[5] Appellant does not contend that those interested persons have been barred from filing an objection, even at this late date, to Patsy Williams' Written Election. Patsy's Written Election did not follow the "optional procedure" requiring the service by formal notice to all interested persons prescribed under Rule 5.360(a)(1). The interested persons may assert any grounds that they or either of them may have at the time the Personal Representative or the Appellant goes forward with the adversarial proceeding to determine the elective share.

Strike"] because (i) it did not contain the word "elect", and (ii) Patsy's attorney may not have the authority necessary to make the election. (R. 40-41, 46).

In response to the Motion to Strike, the newly appointed Guardian Ad Litem and his attorney of record executed and filed another written election [the "Second Written Election"] on July 3, 1990. The Second Written Election ratified Patsy's first election of December 18, 1989. (R. 46). Instead of withdrawing his Motion to Strike, the Personal Representative insisted that it be heard.

Two weeks later, the motion was heard, No testimony was taken and no evidence was adduced during the hearing. (A. 2). The trial court struck the Written Election based on arguments of law. After the calamitous hearing before the trial court, Patsy Williams and her Guardian Ad Litem secured a Pasco County attorney, David R. Gilmore, Esquire ["Gilmore"], who promptly filed a motion for rehearing.

On rehearing, the trial court ruled that the Written Election "did not set forth the statutory requirements", and state that the election was "invalid" because it had been signed by her attorney of record but not by the spouse -- "They simply have to jointly sign . . . ." (R. 18). The trial court struck Patsy's Written Election--without leave to amend or to otherwise cure the supposed "defect" in the Written Election. (R. 16, 18).

Review By District Court

The Second District Court of Appeal ["Second District"] affirmed the trial court's decision, holding that the spouse's attorney-of record did not have authority to sign on her behalf and file in a pending probate proceeding a *written* election to take the spouse's elective share. Acknowledging a "split of authority," the district court reasoned that a spouse's attorney-of-record in the pending

probate proceeding, unlike a spouse's attorney-in-fact under a durable power of attorney, had neither ". . . express nor implied authority to make independent decision concerning the disposition of a client's property", (A. 7). The Second District also held that the Written Election was not "substantively" an elective share election.

The Second District certified that its decision conflicted with the decision of the Fifth District Court of Appeal in In Re: Estate of Schriver, 441 So. 2d 1105 (Fla. 5th DCA 1983), which held that an attorney-in-fact had unlimited authority to "exercise" the principal's right to the elective share under section 732.210(2), Florida Statutes, Id. at 1107.

UMI IY OF ARGUMENT

As to Paint I. The Second District erred when it affirmed the trial court's striking of Patsy Williams' Written Election, as a matter of law, because the Written Election had not been jointly signed by Patsy Williams' attorney and by Patsy Williams, herself. Sections 732.210 and 732.212, Florida Statues (1989), do not prescribe the manner or form for the exercise of the spouse's right to an elective share. Rule 5.360 does not require a spouse to personally sign an election. The rule permits the written election, as a "pleading", to be signed by the attorney of record (as the spouse's agent) without the personal joinder of the spouse. Rule 2.060(1) of the Florida Rules of Judicial Administration also confirms the notion of inherent authority by acknowledging that any act by an attorney of record shall be accepted as the act of the client. In applying the principles of agency, the Fifth District Court of Appeal ["Fifth District"] has held that an attorney of record for a

personal representative may execute, on the personal representative's behalf, objections to laws which are statutorily required to be executed by the personal representative or an interested person. The Fifth District has also held that a surviving spouse's attorney-in-fact (asher agent), may elect the elective share and execute the election on the surviving spouse's behalf. Under the Florida rules and general principles of agency applicable to attorneys of record, an attorney is authorized to sign a written election on behalf of his client.

As to Point 11. The Second District erred when it found the Written Election was not substantively an "election". The supposed defect in the execution of the Written Election and the choice of language in the Written Election were not substantive defects, but defects in form -- which could have been easily corrected by a simple amendment -- as exemplified by the Guardian Ad Litem preparing and filing a Secand Written Election, which ratified Patsy's former election and cured the defects, if any, in it.

As to Point 111. Florida courts have strongly supported the policy of liberality of amendments, whether the claims are filed in civil actions or probate proceedings. The Second District failed to find that the trial court erred by striking the timely filed Written Election without providing Patsy or her guardian ad litem leave to amend her election.

As to Point IV. The Second District erred when it found the court-appointed Guardian Ad Litem was not authorized to sign an election. In Edwards v. Edwards, 106 So.2d 558 (Fla. 1985), this Court held a guardian ad litem could execute a dower election. The Guardian Ad Litem's sole purpose was to represent the interest of Patsy Williams, as the surviving spouse, in her deceased husband's estate proceeding. When appointing the Guardian Ad Litem, the trial court placed no limitations on the powers it gave to the Guardian Ad Litem. It was in Patsy's best

interest to have the election executed and filed by the Guardian Ad Litem. Under section 731.302, a guardian ad litem is authorized, to the extent of the interest of the person whom the guardian ad Litem represents, to consent to any action or proceeding permitted under the Probate Code. The Guardian Ad Litem consented to Patsy's election to take the elective share, which proceeding is authorized under the Florida Probate Code.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED WHEN IT HELD A WRITTEN ELECTION UNDER SECTIONS 732,210 AND 732.212, FLORIDA STATUTES (1989), COULD NOT BE EXECUTED BY THE ATTORNEY OF RECORD OF THE COMPETENT SURVIVING SPOUSE.

No evidence was adduced and no testimony taken at either of the hearings on the personal representatives' motion to strike. The trial court ruled, as a matter of law, that Written Election was "invalid" -- not because the election to had not been made by Patsy Williams, but because the written evidence of that decision, Patsy Williams! Written Election, had been signed only by her attorney of record.[6] (R. 17-18).

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[6] During the rehearing on the Motion to Strike, the trial court made the following ruling:

> COURT: It [the "Notice of Intention to Petition for Elective Share"] 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 herself; that the attorney has no authority to do it, is not a valid

The Second District Court of Appeal affirmed the trial court's order--effectively dismissing with prejudice the surviving spouse's right to her share of her deceased husband's estate.

A supposed **defect in the form** of Patsy's Written Election was permitted to impair her right to receive approximately $195,000 -- a substantial and manifestly unjust loss to Patsy Williams (and now her estate). See FPR 5.020(a) (defect of form shall not impair substantial rights) and Feather v. Estate of Sanko, 390 So.2d 746, 747 (Fla. 5th DCA 1980) ("The thrust of the court should be to afford a fair hearing to all rather than insistence on strict compliance with technical rules.")

A review of the Florida statutes and court rules demonstrates that there is no reason, at least none prescribed by law or court rule, why a surviving spouse's attorney of record cannot sign and file on her behalf, as her agent, a pleading evidencing her decision to take the elective share. Cf., Epperson v. Rupp, 157 So.2d 537 (Fla. 3rd DCA 1963).[7] The elective share statutes are silent

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> petition, and the petition would be invalid. They simply have to jointly sign, and therefore since it was not timely with the law, there is no necessity to file an objection and there was no adversarial proceeding.

(R. 17-18) (emphasis added).

[7] In Rupp, the attorney for the personal representative signed and filed an objection to a creditor's claim against the estate. The claimant then filed a motion to strike the objection because it had not been executed by the personal representative. The trial court denied the claimant's motion to strike and the claimant appealed. In affirming the trial court's order, the appellate court stated:

> . . . [T]he appellant has demonstrated no good reason why, either under the statutes of this State or the applicable law, an attorney cannot sign an "objection" to a claim, the same as he may institute a suit for a client without the client's signature [Rule 1.5(a), Florida Rules of Civil Procedure, 30 F. S.A.], or file a claim in an estate without the client's signature [§733.16, Fla. Stat., F.S.A.]

Id. at 538.

regarding who must sign a written election.

(a) Who May "Exercise" Eight of Election

The elective share statute specifies **who may exercise** the spouse's elective share, i.e., who has the right to choose between taking the devise under the deceased spouse's will or taking an elective share in the deceased spouse's probate estate. It provides the "**right of election may be exercised: (1) [b]y** the surviving spouse, [or] (2) [b]y a guardian of the property of the surviving spouse . . . ." 6732.210, Fla. Stat. (1989) (emphasis added). The Fifth District expanded that literal statutory prescription in In Re: Estate of Schriver v. Schriver, 441 So.2d 1105 (Fla. 5th DCA 1983).

In Schriver, the surviving spouse had been left nothing under her deceased husband's will. The surviving spouse appointed her daughter as her attorney-in-fact under Florida's durable family power of attorney statute.[8] The daughter later exercised her mother's right to an elective share and signed, and caused to be filed, on her mother's behalf a pleading evidencing that decision. Id. at 1107. In reversing the trial court's denial of the Wife's elective share, the Fifth District Court of Appeal ["Fifth District"] held that an attorney-in-fact with powers such as those prescribed by statute for attorneys-in-fact of durable family powers, could validly "exercise" the spouse's personal right to an elective share under section 732.210(1),[9] Florida Statutes (1989).[10] because ". . . the act of the

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[8] See 0709.08, Fla. Stat. (1981).

[9] Hereafter all references to sections shall be to a section of the Florida Statutes (1989) unless otherwise stated.

[10] Section 732.210(1) authorizes the surviving spouse (not the guardian) to exercise the right of election. In Schriver the appellate court analogize an attorney-in-fact to a guardian. It reviewed the exercise of the statutory power by a guardian of the property under section 732.210(2) , but found it mare appropriate to find that the exercise of the power by the attorney-in-fact fell under section 732.210(1). In

[attorney-in-fact] is the act *of the* surviving spouse." Id. at 1107 (emphasis in original).

Here, Patsy Williams' attorney of record, as her agent, executed the Written Election evidencing Patsy Williams' decision to take the elective share. There was no evidence that Patsy Williams did not actually decide to make the election herself. The district court assumed, without any evidence, that Patsy Williams had not exercised the election simply because she had not signed the Written Election (A. 5-6).

(b) Who May Sign the Written Election?

Prior to the major revision of the Florida Probate Code in 1974, the statutes protecting a widow's share in the husband's estate were not silent regarding who was required to sign the dower election. A widow who desired to take dower was expressly required to **personally execute an** "instrument in writing, acknowledged or **sworn to by [her] . . . .**" §731.35(1), Fla. Stat. (1973) (emphasis added); see also 6731.35, Fla. Stat. (1969). The election in certain instances could be signed personally by the guardian of the widow. See, e.g., 61731.35, Fla. Stat. (1969).

Unlike the antecedent statutes pertaining to dower,[11] section 732.210 does not prescribe the manner in which a spouse's exercise of her right of election must to be evidenced or memorialized. Nor does section 732.210 prescribe how or by

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Schriver the spouse's attorney-in-fact was authorized to act on behalf of the spouse, without the need to appoint a guardian of the person or guardian ad litem.

[11] In 1975, the Florida Legislature abolished the surviving wife's right to dower and the surviving husband's right to curtesy, which rights vested on the death of the spouse, 8732.111, Fla. Stat. (1976). In place of these nonreciprocal property rights, the Legislature created Florida's version of the gender-neutral statutory elective share process, which provides to a surviving spouse of a decedent domiciled in Florida the right to receive an amount equal to thirty percent (30%) of the fair market value of the decedent's probatable assets (except real property not located in Florida) after deducting certain claims. 1732.201, 732.206 and 732.207, Fla. Stat. (1989). By exercising the election, the surviving spouse renounces her rights under the will. §732.211, Fla. Stat. (1989).

whom the evidence of the election must be **executed.**

When the legislature enacted the new Florida Probate Code (including the part creating the new elective share concept), the **legislature eliminated the requirement** that the electing spouse had to personally **execute or file** the pleading or instrument evidencing that an election had been made. Compare §731.35, Fla. Stat. (1973) with 8732.202, Fla. Stat. (Supp. 1974) and 6732.210, Fla. Stat. (1989). The **legislature also eliminated the requirement** that the pleading evidencing the election **be acknowledged or verified.** Id. Indeed, only by implication does the current section 732,210 even require that the spouse's "election" (her decision to take the elective share) be evidenced by a writing. *See* 8732.210 and 0732.212, Fla. Stat. (1989).

The law of statutory construction requires Florida courts to give effect to these recent legislative changes when reviewing the manner and form of the elective share election. The omission of the requirements of a personal execution, filing, and acknowledgment or verification of the election is presumed to mean that the legislature intended the revised statute to have a different meaning than the statute had before the change. See, Cappellà v. Gainesville, 377 So.2d 658 (Fla. 1979) (a presumption exists that the legislature intended a different meaning when it omits words from a prior statute). See also, Spohr v. Berryman, 589 So.2d 225 (Fla. 1991) (the 1974 omission of the statutory provision that a lawsuit against a decedent's personal representative could act as a substitute for the filing of a claim in the probate court was indicative that the Florida legislature intended to delete that provision). The legislature's omission of the formalities in the execution of the elective share election is consistent with the adoption of the simplified Florida Probate Code, which was later implemented by corresponding changes in the new

Florida Probate Rules.[12]

The legislature also structurally changed the substantive provisions controlling the elective share statutes. It dedicated one section to those individuals who it authorized to exercise the elective share, namely, section 732.210, titled "Right of election, by whom exercisable". Section 732.210 expressly states that the right of election (to take the elective share) may be "exercised" by the spouse or by the spouse's guardian of the property.

The current version of the Uniform Probate Code, from whose ancestor the Florida Probate Code was originally crafted, clarifies that the election may be exercised by one other than the surviving spouse, viz., the spouse's conservator, guardian, or agent under the authority of a power of attorney. Uniform Probate Code §2-203(a) (1990). "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." Uniform Probate Code §2-203 comment (1990) (emphasis added).

The Second District misapplied the established decisional rules of statutory construction by finding that the elective share statute required the spouse to personally exercise the election, As Judge Campbell in his dissent opinion stated, the plain and ordinary meaning of the permissive term "may" should have been used by the Second District when canstruing section 732.210, not the mandatory term "shall". (A. 12).[13] See Brooks v. Anastasia Mosquito Control District, 148 So.2d

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[12] Hereinafter all references to "FPR" or "Rules" shall be to the Florida Probate Rules, unless otherwise stated.

[13] Apparently due to the courts' misconstruction of the term "shall", the Florida legislature during its 1992 session amended many statutes by deleting the word "shall" and replacing it with the term "must". See for example, Ch. 92-71, §1, Laws of Fla.

64 (Fla. 1st DCA 1963) (it must be assumed the legislature knows the common ordinary meaning of word, i.e., "may" denotes a permissive term and "shall" denotes a mandatory connotation).

The distinction between "may" and "shall" is clear. "May" as a general rule ~~is not~~ be treated as a command word, . . . "unless there is something in (the) context or subject matter of (the) act to indicate it was used in such sense." Black's Law Dictionary, 883 (5th ed. 1979). The word "shall" is generally a word of command excluding discretion. Id. at 1233.

Based on the Florida legislature's use of the term "may" in section 732.210, and its reliance on the Uniform Probate Code as the intellectual antecedent of the elective share statute, it appears the legislature did not intend to limit the exercise of elective share solely to the spouse and her guardian, as erroneously determined by the district court.

(c) An Attorney Is Authorized to Act for Client

The district court opined that the election right was personal and an attorney of record had no expressed or implied authority to make such an independent decision concerning a client's property rights. (A. 6-7).[14]

The rules and the law applicable to attorneys of record and their authority to act on behalf of their clients impliedly authorize a written election to be

[14] Implicit in the district court's decision is *the* supposition that the Patsy Williams' attorney of record actually exercised the right of election, and that the attorney had not been empowered by statute nor had he been delegated such power by his client to make such a decision. Yet, there was no testimony or other evidence in the record regarding who made the decision to elect. The only evidence before the trial court was the Written Election which had been signed by the spouse's attorney of record.

signed and filed by the spouse's attorney of record. In the instant case, Patsy Williams' attorney executed and filed a notice of appearance before he filed Patsy Williams' written election. (R. 76). The notice stated that he was entering an appearance in the estate administration "on behalf of Patsy Williams, as surviving spouse and beneficiary of the above captioned estate . . . ." (R. 76) (emphasis added).

The notice of appearance was a general notice, not limited in any manner permitted under rule 5.030(b). By the filing of the notice of general appearance, Gary Bloom became Patsy Williams' "attorney of record in all of the proceedings governed by [the FPR] . . . [and] in all other proceedings in the administration of the same estate . . . ." FPR 5.030(b). Under the rules applicable to this case, therefore, Bloom appeared unconditionally on behalf of Patsy Williams with respect to all matters affecting Patsy Williams as a spouse and as an interested person in the formal administration of her deceased husband's estate.

In Johnson v. Estate of Fraedrich, 472 So. 2d 1266 (Fla. 5th DCA 1985), the Fifth District held that the attorney of record for the personal representative had inherent authority, by virtue of the attorney's position as an agent for his client in the pending estate proceeding, to "sign and file" an objection to a creditor's claim. The statute applicable in Johnson only authorized the making and filing of the objection by the personal representative or an interested person.[15] Nevertheless,

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[15] Subsection 733.705(2) provides, in part, as follows:

> On or before the expiration of 4 months from the first publication of notice of administration, the personal representative or other interested person may file a written objection to any claim.. . If an objection is filed, the person filing it shall serve a copy of the objection by registered or certified mail to the address of the claimant. . . to whose claim he objects. . .

the Johnson court considered the signature of the attorney on the objection to a creditor's claim to be the signature of his client, the personal representative.

> We agree that the **attorney's signature** on the objection **was sufficient to satisfy the statutory** provision **that a "personal representative** or **other** interested person" may **file objections** to claims. Johnson argues that these are terms of art, the definitions of which the personal representative's attorney does not meet. See Section 731,201(21) and (25), Florida Statutes (1983). However, **an attorney is** generally **viewed as an agent of his client.** Epperson v. Rupp, 157 So.2d 537 (Fla. 3d DCA 1963). An act done by an agent on behalf of the principal within the scope of the agency is not the act of the agent but of the person by whose direction it is done. 2 Fla. Jur. 2d Agency and Employment § 1. The Epperson court used this agency theory to approve the action of a personal representative's attorney of record in signing and filing a similar objection. Accord In Re: Estate of Brugh, 306 So.2d 599 (Fla. 2d DCA 1975). Therefore, we find that it was not improper for the personal representative's attorney to file the objection herein.

Johnson, 472 So.2d at 1268 (emphasis added).

As Patsy Williams' attorney of record, Gary Bloom was also expressly authorized under the Rule 2.060(1)[16] of the Florida Rules of Judicial Administration to act on her behalf in initiating the proceeding for the determination of her entitlement to an elective share. Bloom was acting as Patsy Williams' agent when he signed and filed the Written Election. His act was done within the scope of his agency as his client's attorney of record in that proceeding. Thus, it became the

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§733.705(2), Fla. Stat. (1983) (emphasis added).

[16] Rule 2.060(1), Attorney as Agent of Client, provides: In all matters concerning the prosecution or defense of any proceeding in the court, the attorney of record shall be the agent of the client and any notice by or to the attorney or act by the attorney in the proceeding shall be accepted as the act of or notice to the client.

act of Patsy, not the act of Gary Bloom. Cf., Florida Fish Distributors, Inc. v. Norwegian Caribbean Lines, Inc., 328 So.2d 240 (Fla. 1st DCA 1976) (unsworn signature of attorney in lieu of signature of party is sufficient on a response to a request for on admission) and Hankin v. Blissett, 475 So. 2d 1303 (Fla. 3d DCA 1985) (notice of appeal, signed by the attorney's secretary [his authorized agent] was a pleading pursuant to the Florida Judicial Administration Rules).

(d) Under the Florida Probate Rules an attorney of record of a surviving spouse is authorized to sign and file a pleading evidencing the spouse's election to take an elective share.

The Second District opined, in a footnote, that the Rules were not applicable to the elective share because it is a right that comes into being by the terms of the statute that create it. (A-6.) But the elective share statute does not purport to invade the province of practice and procedure reserved to this court. Instead, the statute provides, generally, that a written election (some pleading giving notice of the fact of the spouse's "election") should be filed with the probate court having jurisdiction of the estate within the time periods prescribed. §732.212. Fla. Stat. (1989). The statute does not specify how the surviving spouse is to format and file proof of such election. The Florida legislature created the right, but prescribed no vehicle by which it must be exercised, i.e., the form for the election,[17] a procedural matter. The procedural details of preparing, serving, filing, and responding to the written election are left to the FPR for amplification and implementation.

Like other "procedural provisions" of the new Florida Probate Code, the

[17] The legislature has provided forms for a variety of purposes, e.g., deeds (§ 689.02), notice to former tenant regarding abandoned property (0715.105), and notarization of attested copy (§117.05(15)(b)).

procedural aspects of the elective share process were left to exclusive rule-making jurisdiction of the Florida Supreme Court,[18] for inclusion in the revised FPR, which became effective January 1, 1976. See generally, FPR 5.010, Committee Notes. The Florida Supreme Court promulgated rule 5.360[19] to implement the elective share, which offers absolutely no guidance regarding how a spouse is to "exercise" her substantive "right of election", or how such an exercise is to be evidenced or memorialized for the purposes of a proceeding to determine and *set* apart the elective share.

(a) The rule is **silent** regarding **who must execute** the written election which is required to be filed with the probate court.

(b) The rule contains **no requirement that the written election be verified by anyone.** See FPR 5.360; Fla. R. Jud. Admin. 2.060 (d) ("Except when otherwise specifically provided by an applicable rule or statute, pleadings need *not* be verified or accompanied by an affidavit.")

(c) The rule **does not prescribe or** require **a form which is to be used** in initiating the proceeding for the determination of entitlement to an

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[18] See Watson v. First Florida Leasing, Inc., 537 So.2d 1370, (Fla. 1989) for a discussion of steps taken by the Florida Supreme Court to promulgate rules necessary for the implementation of the new Florida Probate Code.

[19] Rule 5.360(a)(1) provides, in part, as follows:

> (1) Notice of Election. Upon the filing of an election to take elective share, at the option of the surviving spouse, a copy of the **election to take elective share,** together with a **notice** of **election, may be served on interested** persons in the manner provided for service of formal notice. The notice of election shall indicate the name and the address of the attorney for the surviving spouse and of the attorney for the personal representative, **and shall include a notice that objections to the election must be filed within 20 days from the receipt of the copy of the notice or be thereafter barred.**

(emphasis added).

elective share. See FPR 5.360 and compare FPR 5.346(c) (which suggests the use of the court-approved "model" form of fiduciary accounts, which are attached to the rule as appendix A and B).

No official probate form far a written election has been promulgated or otherwise required by the Florida Supreme Court, See Florida Probate Rules, 537 So. 2d 500 (Fla. 1988).[20] (If a form for a written election had been promulgated or approved for use by the Florida Supreme Court, the electing spouse's attorney would have had some guidance regarding the contents and signature requirements necessary to make a valid written election under rule 5.360.) Since the elective share rule provides no direction, the electing spouse's attorney must review other rules for guidance regarding the form and execution requirements of the election.

(e) **The Rules Authorize Attorney of Record to Sign Pleadings**

Practice and procedure in all probate proceedings, including the elective share process, are governed by the FPR. FPR 5.010. These rules specifically prescribe who is required to sign a "pleading" in a probate proceedings.

With respect to all parties who are represented by attorneys,[21] the rules require the attorney to sign all "pleadings." FPR 5.020. In exceptional cases

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[20] The Continuing Legal Education Committee of The Florida Bar has copyrighted and made available for sale a CLE-recommended probate form for use as a written election. See Fla. Bar Form P-4.0500; Fla. Bar Probate System (2d ed. 1990), Pleading Form No. 91, page 5.126. But neither the form nor The Florida Continuing Legal Education Committee's discussion of it, suggests that the "pleading form" is prescribed or required by law or court rule. See The Fla. Bar., Basic Practice Under Florida Probate Code, Third Edition (1988) at *289.*

[21] Rule 5.030(a) requires every guardian and personal representative to be represented by an attorney unless (i) the fiduciary is an attorney or (ii) the personal representative is the sole interested person. An attorney of record for an interested person in a probate proceeding is the attorney of record for that individual in all proceedings in that estate or guardianship proceeding unless (i) the attorney files a special appearance or (ii) the court orders otherwise. FPR 5.030(a) and (b).

which are specified in the Rules, the party (most frequently the personal representative) is also required to personally sign the pleading itself. **"Pleadings** shall be signed by the attorney of record, and **by the pleader when required by these rules."** FPR 5.020 (emphasis added).[22]

Nowhere in the FPR is the spouse required to sign any pleading or paper connected with the elective share proceeding. It would follow, therefore, that if a written election to take an elective share is a "pleading" in a probate proceeding, then the Rules themselves explicitly authorize that pleading to be signed only by the attorney of record.[23]

(f) A Written Election is a "Pleading"

What is a "pleading" in probate proceedings? Unlike the Florida Rules of Civil Procedure, the FPR do not define a "pleading" as that word is used in rule 5.020(a). Compare FPR 5.020(a) with Fla. R. Civ. P. 1.100(a). Under rule 5.020 (a) "[a]ll technical forms of pleadings are abolished." Moreover, all the Rules are required to be applied and construed so that "no defect in form" will be permitted to impair substantial rights of an interested person or party. See Feather v. Estate of Sanko, 390 So.2d 746 (Fla. 5th DCA 1980) and FPR 5.020(a). Whether

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[22] Under the FPR the personal representative, i.e., the "pleader," is required to personally sign the following "pleadings": (a) petition for administration; (b) oath of personal representative; (c) inventory; (d) accounting; (e) petition regarding sale of real or personal property; (f) petition to continue business of decedent; (g) petition to compromise or settle claim; (h) petition to purchase on credit; (i) petition for distribution and discharge; (j) resignation of personal representative; (k) petition to determine homestead; and (1) petition to determine exempt property. FPR 5.200, 5.330, 5.405 and 5.406, If a creditor wishes to extend the time for filing a claim, then that creditor is required to file and execute the petition to extend time for filing claim, which petition must include a verified statement. FPR 5.495.

[23] Judge Campbell concurred that Rule 1.150 (sic) permits the filing of the election by an attorney. (A-12)

a written election is a "pleading" in the context used in rule 5.020(a), therefore, depends on the function and use of the writing more so than its technical nomenclature or its denomination by the "pleader."

Pleadings are used to frame the actual issues for determination. Motzer v. Tanner, 561 So. 2d 1336 (Fla. 5th DCA 1990). Under rule 5.360, the written election has the function and is thus treated as if it were a pleading requesting specific relief and initiating a separate proceeding (which may become adversarial) for the determination of a spouse's elective share. The rule prescribes the procedures for (i) an early determination of entitlement to the elective share, (ii) an objection to the elective share, and (iii) a determination of the amount and time of payment of the elective share. These supplemental proceedings are first initiated by the filing of the spouse's written election. FPR 5.360(a) through (d).

A written election, like a complaint in a civil action, is the initial pleading which commences a determination proceeding under rule 5.360. Under that rule, the personal representative and all interested persons who are properly served are required to take action in relation to the written election. See Smail v. Hutchins, 491 So. 2d 301 (Fla. 3rd DCA 1986); and Menz v. Estate of Menz, 381 So. 2d 375 (Fla. 1st DCA 1980).

Here Larry Williams apparently believed that Patsy's Written Election was a pleading, because he moved to strike it as an election that had not been timely filed. (R. 42-45). Ordinarily, motions to strike are used to strike "papers," but not pleadings unless they are sham pleadings. Motzer v. Tanner, 561 So.2d 1336 (Fla. 5th DCA 1990) and Fla R. Civ. P. 1.150.

In the context of the proceeding contemplated by rule 5.360, therefore, a written election is the initial pleading which commences the proceeding for the determination of a spouse's entitlement to an elective share. Accord, Fla. Bar

Probate System (2d ed. 1990), Pleading Form No. 91, page 5.126 (which refers to the form for the election as a "pleading"). If it waddles like a duck, quacks like a duck, is it not a duck? By such a parody of reasoning, therefore, the Written Election signed by Patsy Williams' attorney of record constituted a "pleading" sufficient for the purposes of rule 5.360 to give notice of the initiation of the proceeding to determine Patsy Williams' elective share.

Summary of Point I

Sections 732.210 and 732.212, Florida Statutes, do not prescribe the manner or form for the written evidence of the exercise by the surviving spouse of the right to an elective share, nor does it mandate the guardian or surviving spouse exercise the election. The elective share rule, Rule 5,360, does not require a spouse to personally sign a written election. The Rules permit a written election, as a "pleading," to be signed by the spouse's attorney of record, without the personal joinder of the spouse. Under the general principles of agency and the Florida Rules of Court, an attorney of record for the surviving spouse in a probate proceeding, is authorized to sign a written election on behalf of his client, the electing spouse, which act becomes the act of his client.

The district court erred when it upheld the trial court's striking of Patsy Williams' Written Election which had been signed and filed on her behalf by her attorney of record, but had not been personally signed by her. Accordingly, Petitioner requests this court to exercise its discretionary jurisdiction and enter an order (i) quashing the decision and order of the Second District Court of Appeal, (ii) approving the conflicting decision of the Fifth District Court of Appeal, as the correct decision, (iii) directing the Second District Court to remanded this case to the trial court for a determination of the amount of Patsy William's elective share

under rule 5.360(b), and (iv) granting such other relief as may be appropriate.

POINT II

THE DISTRICT COURT ERRED WHEN IT HELD THAT THE WRITTEN ELECTION OF THE SURVIVING SPOUSE WAS NOT SUBSTANTIVELY *AN* ELECTION UNDER $732.212, FLORIDA STATUTES (1989).

The trial court struck the Written Election based on what the trial court viewed as technical deficiencies in its execution (a form defect), without granting leave to amend or to otherwise cure the "found" deficiencies in the signature. The district court went one step further -- finding that the substance of the Written Election did not amount to an election under section 732.212. (A. 4-5).

The body of Patsy Williams' Written Election stated:

> **YOU** WILL **PLEASE TAKE NOTICE** that the undersigned counsel for the surviving spouse, PATSY **WILLIAMS, will file, on behalf of the said surviving spouse,** a petition to determine the statutory elective share, the assets from which said elective share shall be paid, and the scheduling of said payments.

(R. 31). (emphasis added).

The Written Election was undeniable notice to the Decedent's beneficiaries that the disinherited surviving spouse had exercised her right to take against her husband's will. It clearly stated that Patsy Williams would file a petition for the determination of the spouse's share, which was based on the implicit premise that she had already exercised her right to elect the elective share. The failure of Patsy Williams to expressly use the word "elect" or to expressly state that she had exercised her election goes to the form of the Written Election, not its substance.

The use of the words "will file," referred to Patsy's present intention

to timely file a determination petition. The term "will" is a word of certainty, " ... commonly having the mandatory sense of "shall" or "must"." Black's Law Dictionary 1233 (5th ed. 1979). It is unreasonable to assume that the Written Election could be construed -- as did the district court -- as a "petition to determine the elective share" (A. 5), or by those persons interested in the Estate as anything other than a notice of Patsy Williams' decision to elect to take the elective share. The pleading had no other purpose.

The Second District's rationale that the Written Election was not substantively an election collides with the holding of the Fifth District in Feather v. Estate of Sanko, 390 So.2d 746 (Fla. 5th DCA 1980). In Feather, the testator's daughter timely filed a "Notice of Appearance" in response to a petition to probate of her father's will. The notice stated:

> Now comes the undersigned, Frank M. Townsend, as attorney for the daughter of the deceased; namely, Beverly Hinkleman Feather, who believes, she has an interest in the estate as the daughter of the deceased. Frank M. Townsend as attorney for Beverly Hinkleman Feather, further requests an additional thirty (30) days to file pleadings.

Id. at 747. The Fifth District reasoned that it was clear that Feather, by having her attorney file the Notice of Appearance, opposed the admission to probate of her father's will, which had specifically disinherited her. The court observed that the notice may not have withstood a motion to strike, but **the daughter should have been given a seasonable chance to amend** her initial pleading or file additional pleadings, as opposed to receiving the equivalent of a default judgment. "The thrust of the court should be to afford a fair hearing to all rather than insistence on strict

compliances with technical rules." Id. at 747.[24]

In Allen v. Guthrie, 469 So. 2d 204 (Fla. 2d DCA 1985), the Second District did not insist on a strict compliance with a form for the elective share election. In Guthrie, the decedent's widow filed a document called a "notice of election", to evidence her decision to elect the elective share. Unlike the instant case, the Second District affirmed the striking of the "notice of election'!, not because of its format, but because the notice of election was filed after the election period had run. Id. at 205.

Here, Patsy Williams' attorney's failure to properly prepare the Written Election certainly should not have defeated her claim to the elective share, especially in view of Feather. A defect in the form of Patsy's election (mischaracterized in the district court as a defect in substance) has been permitted to impair Patsy's substantial rights to receive approximately $195,000. See FPR 5.020(a) (defect of form shall not impair substantial rights).

The district court's and trial court's rulings have resulted in Patsy Williams taking nothing from her deceased husband's estate, contrary to the purposes of the elective share. The outright dismissal by the trial court of Patsy's elective share claim, without according her leave to amend, was the ". . . most significant penalty possible and is not generally utilized in rule violations when less severe penalties exist." Watson v. First Florida Leasing, Inc., 537 So. 2d 1370, 1371

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[24] If the pleading constituted a valid election, there is no question of the timeliness of its filing under section 732.212, Florida Statutes. Section 732.212 requires the election be filed within four months of the first publication of the notice of administration, unless the election period is tolled or recreated and extended by the "time-enlarging circumstances" described in that section. See, Allen v. Guthrie, 469 So.2d 204, 205 (Fla. 2d DCA 1985).

(Fla. 1989).[25] E.g., Delia & Wilson, Inc. v. Wilson, 448 So.2d 621 (Fla. 4th DCA 1984) (R. 7-18).

POINT III

THE DISTRICT COURT ERRED WHEN IT REFUSED TO HOLD THAT THE SECOND WRITTEN ELECTION BELATED BACK AND WAS, THUS, TIMELY FILED.

In a state that favors liberality in amendments of pleadings, Patsy Williams (and now her estate) clearly was not accorded the right to amend the Written Election or to otherwise attempt to cure the technical execution defect on which the trial court based its ruling or the purported "substantive" language defect "found" by the Second District Court of Appeal.

In Estate of Grist, 83 So. 2d 860 (Fla. 1955), the Florida Supreme Court held that a creditor could amend her claim **even after the expiration of the statutory nonclaim period.** The Grist court underscored the general policies of Florida's probate law, namely, that (i) technical forms of pleadings are abolished, (ii) no defect in form should impair one's substantial rights, and (ii) amendments to pleadings should be liberally allowed. Id. at 866.[26] It found that a claimant, who seasonably filed a claim for a monetary sum, could amend her claim to provide for a chattel recovery after the expiration of the statutory non-claim period. Id. at 861. The Grist court reasoned that an amended claim, which had the same basis as the

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[25] If the trial court wished to penalize Patsy Williams, or her attorney, for filing a written election with a procedural defect in form, the court could have abated any action on the elective share until the corrections were properly met.

[26] Section 732.08(1), Fla. Stat., is now found in FPR 5.020(a), FPR. The Grist apinion preceded the legislature changing the Florida Probate Code to specifically authorize the amendment of claims. See 0733.704, Fla. Stat. (1989). The rule implementation of the procedure is now found at FPR 5.490(e).

first claim, sh uld relate back to the filing of the initial claim, since no additions facts would be needed to support the amended claim.

A surviving spouse's elective share is, essentially, a claim against the decedent's estate. In Re: Udell's Estate, 482 So. 2d 458 (Fla. 4th DCA 1986), As in Grist, the Second Written Election was based on the same claim for relief as the initial Written Election, Thus, under Grist rationale, the district court should have allowed the Second Written Election to relate back to *the* timely filed Written Election, instead of affirming the trial court's striking the Written Election without granting leave to amend.

The trial court's refusal to recognize the surviving spouse's right to amend in this case was tantamount to a dismissal with prejudice of the timely claim of Patsy Williams for her rightful share of her husband's estate. The motion to strike the Written Election in this probate proceeding was analogous to (i) a motion to dismiss raising the adequacy of a complaint, or (ii) a motion for default raising the adequacy of paper filed or not filed[27] in response to a complaint. In a civil action, if the claimant does not properly state all the allegations necessary to state a claim for relief, the trial court may dismiss the pleading. It is an abuse of jurisdiction, however, for the trial court to dismiss such a pleading with prejudice, without providing the claimant an opportunity to amend the pleading, unless the pleading is clearly not amendable or the claimant has abused the amendment privilege. E.g., Highlands County School Board v. K. D. Hedin Construction, Inc., 382 So. 2d 90 (Fla. 2d DCA 1990); Thompson v. McNeil Company, Inc., 464 So. 2d 244 (Fla 1st DCA 1985); Delia & Wilson, Inc. v. Wilson, 448 So.2d 621 (Fla. 4th DCA 1984). As in the Grist probate proceeding, when the party amends a pleading, the amended pleading

[27] Even with a motion for default, the defending party may file a responsive pleading at any time prior to the entry of a default judgment. E.g., Lake Tower, Inc. v. Axelrod, 216 So.2d 86 (Fla. 4th DCA 1968).

relates back to the filing date of the original pleading. Fla. R.Civ.P. 1.190(c).

Here, Patsy Williams did not delay in the amending of her Written Election. Her guardian ad litem executed and served the Second Written Election on July 3, 1990, ~~two weeks after~~ the Personal Representative served the Motion to Strike on June 20, 1990, and 13 days before the first hearing on the Motion to Strike. (R. 40, 41, 46). Moreover, Patsy did not abuse her amendment privilege -- the Second Written Election was her first amendment to the election. *Cf.*, Clifford Ragsdale, Inc. v. Morganti, Inc., 356 So.2d 1321 (Fla. 4th DCA 1978).

The Second Written Election, which was on the form "adopted" by the Second District,[28] contained the operative word "elect" -- the magic term of art -- and it included the signatures of both Patsy Williams' attorney and her duly appointed Guardian Ad Litem. (R. 46).

Nevertheless, the Second District found the Second Written Election to be untimely filed. It based its conclusion of law on the rationale of Allen v. Guthrie, an inapplicable elective share case. (A. 4). In Guthrie, the Second District affirmed the striking of a widow's "notice of election" which had been filed after the election period had run. No pleadings or papers were filed by the surviving spouse during the election period, as was done in the instant case. There was no pleading to which a later filed notice could relate back. The Guthrie election" is not analogous to the Second Written Election, which was filed as an amendment to, and ratification of, the timely filed Written Election.

In the instant case, if the trial court had permitted Patsy Williams to

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[28] J. Parker, in his concurrence, implied that the elective share election should be in the form promulgated by The Florida Bar (A. 9). See R. Kelly, The Florida Bar Probate System at 5.125-127, Pleading Form No. 90 and 91 (2d ed. 1990).

[29] The Guthrie court stated that "finality in the administration" was of paramount importance in determining the timeliness of the election.

amend her Written Election, the amendment would not have delayed unduly the orderly administration of this taxable estate. When drafting the elective share statutes the legislature specifically contemplated situations where the surviving spouse should be permitted to file the election after the normal four-month election period had run. It provided for the election share to be filed 40 days from the date of termination of a proceeding, if the proceeding or matter affected the estate subject to the elective share. §732.212, Fla. Stat (1989).

Larry Williams as the personal representative of this taxable estate was not required to file a petition for discharge until 12 months from the due date of the federal estate tax return which was due on June 16, 1990. FPR 5.400(c). Accordingly, the petition for discharge would not be due to be filed until one year later on June 16, 1991, long after the occurrence of the hearing and rehearing on the Motion to Strike. Thus, no prejudice or delay in the administration of the decedent's estate would have occurred had the trial court not struck the Written Election.

The role of the lower courts should be to afford a fair hearing to all interested parties,[30] including Patsy Williams, rather than to insist on the strict compliance with technical rules , which resulted in an O'Henry ending for an elderly spouse. See Feather, 390 So.2d 746 (Fla. 5th DCA 1980). Such error should be corrected.

POINT IV

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[30] Both of Virgil Williams' children had been legally notified in a timely fashion of Patsy Williams' decision to elect. Neither of these interested parties objected to their step-mother's claim for the elective share. Cf., Scutieri v. Estate of Revitz, 510 So.2d 1053 (Fla. 3d DCA 1987). (The trial court abused its discretion when it refused to relax the statutory three-month time period for filing a statement of claim against the estate, a guideline for judicial procedure, when the lawsuit had been pending at the decedent's death and the personal representative was promptly substituted as a party.)

THE DISTRICT COURT ERRED WHEN IT HELD THAT THE GUARDIAN AD LITEM OF A SURVIVING SPOUSE COULD NOT EXECUTE THE WRITTEN ELECTION UNDER §732.212, FLORIDA STATUTES (1989).

The Second District held that a guardian ad litem for the surviving spouse could not execute the spouse's election to take the elective share. (A. 6-7).[31] Without a hearing, the trial court entered an order appointing Patsy's son as the guardian ad litem to represent the interest of Patsy Williams in the Decedent's estate proceedings. The trial court placed no limitations on the powers it gave to the Guardian Ad Litem.

No one objected to the broad order appointing the Guardian Ad Litem. The Guardian Ad Litem was empowered by the court to do anything necessary to represent the interest of Patsy Williams in her deceased Husband's estate proceeding. Cf., Woolf v. Reed, 389 So.2d 1026 (Fla. 3rd DCA 1980) (administrator ad litem becomes solely responsible to the estate for the administration of its affairs entrusted to him by the court, and thus, supplants the authority of the personal representative). Had the Guardian Ad Litem not executed and caused to be filed the Second Written Election he would have been subject to liability for breach of fiduciary duty.

The Second District's decision that a spouse's guardian ad litem could not execute the elective share election is in direct conflict with Edwards v. Edwards,

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[31] In support of its decision, the appellate court paralleled to the legislative's definition of a "limited guardian" in Chapter 744 (the Florida guardian statutes) to a guardian ad litem. Under that definition, a limited guardian can exercise those legal rights specifically designated by court order, §744.102(8)(a), Fla. Stat. (1989). This analogy is without merit. A limited guardian may be appointed only after a petition for determination of incapacitated has been filed pursuant to Chapter 744 and a hearing held on such petition. In the instant case, the guardian ad litem was appointed to represent Patsy's interest; no limitations were imposed by the trial court.

106 So.2d 558 (Fla. 1958), the trial court's ruling, and the rules of statutory constructions (as argued in Point I).

In Edwards, this court held that the guardian ad litem for a widow[32] could file the dower election on behalf of the widow. The 1951 dower statute which was at issue in Edwards, like the elective share statutes in the instant case, expressly authorized only the widow or the widow's guardian of her property to file the election to take dower, The dower statutes and the elective share statutes are silent regarding whether the spouse's guardian ad litem could execute and file the election.[33]

The legislature, however, has granted broad powers to a guardian ad litem to perform certain identified duties in the administration of a decedent's estate. After the petition for administration has been filed, a guardian ad litem can, to the extent ~~of the~~ interest of that person the guardian ad litem represents, waive any

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[32] In Edwards, a guardian ad litem was appointed because the surviving spouse was eighty years old, confined to a hospital, and mentally incompetent. Id. at 559. No order was entered adjudicating the incompetency of the surviving spouse. In the instant case , Patsy was also confined to a North Carolina nursing home. There were no pending competency proceedings regarding Patsy's mental condition. Without an evidentiary hearing, the trial court entered an order appointing Wallace B . Harmon as the guardian ad litem because it was "necessary that the interest of Patsy Williams be represented by a guardian ad litem."

[33] The statute which was construed by the Edwards' court provided:

> The guardian of a widow suffering under disabilities, may, at any time during which the widow might have done so, file an election on behalf of the widow to take dower in lieu of the provisions of the will of her husband or under the law of descent and distribution, and thereupon the county judge shall grant or deny such election as the best interest of the widow may require.

Edwards v . Edwards, 106 So. 2d 558 , 560 (quoting section 731.35(2), F. S.A.)

right, (ii) waive any notice, (iii) waive the filing of any document, exhibit or schedule required to be filed, and (iv) consent ta any actions or proceedings which may be required or permitted ~~under the~~ Probate Code. 0731.302, Fla. Stat. (1989)[34] (emphasis added). The elective share is a property right created by the Probate Code. Accordingly, under section 731.302, a guardian ad litem can waive a surviving spouse's right to the elective share, or alternatively, consent to the elective share proceeding which is permitted by the code. Based on the Edwards rationale, therefore, and the Florida Probate Code, the Guardian Ad Litem had the authority to properly execute and file the Written Election on Patsy's behalf.

CONCLUSION

The Fifth District and the Second District are on divergent courses in the interpretation of the elective share statute. The Second District, laden with stale concepts germinated in the dower era, has construed rigidly the elective share statutes to require a specific election form, i.e., one signed by the surviving spouse and stating, "I elect to take an elective share in the decedent's estate." Nothing, absolutely nothing else will do. The district court's construction that the attorney of record for the surviving spouse cannot execute on one's behalf the election to take the elective share conflicts with the plain and ordinary meaning of statute, which states that the right of the election may be exercised by the surviving spouse or guardian of the property.

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[34] Section 731.303, Fla. Stat. (1989) was recently revised in 1992 by the Florida Legislature to expressly state that a person who is under a legal disability who is not otherwise represented is found by an order to the extent that his interest is represented by another party having the same or greater quality of interest in the proceeding. Subsection 5 of that section has been revised to include the appointment of a guardian ad litem to represent the interest of any other person otherwise under a legal disability. Ch. 92-200, §3, Laws of Florida.

It also directly conflicts with the decision of the Fifth District that the surviving spouse's attorney-in-fact, as an agent of the surviving spouse, is empowered to execute the elective share election, on behalf of the surviving spouse and the personal representative's attorney-at-law, as an agent of the personal representative, is empowered to execute an objection to a claim, which statutorily is required to be executed by the personal representative. The rigid construction favored by the Second District Court will impair the rights of surviving spouses, if not impoverish, some spouses on the death of their spouse, and result in malpractice actions against *those* attorneys who practice in the jurisdiction of the Second District.

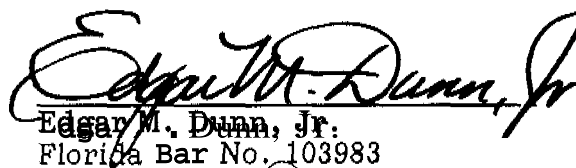
The modern approach of the Fifth District in interpreting the elective share statutes is more in keeping with the purpose of the Florida Probate Code and, specifically, legislative purpose of the elective share statute, When the Florida legislature eliminated the concepts of dower and curtesy, it also eliminated those technicalities associated with the execution of the statutory election. In their place. the legislature substituted the gender-neutral elective share process under which a surviving spouse or his agent could elect by filing a notice evidencing that spouse's intent to take the elective share.

The Second District's decision that the substance of the Written Election in this case was not an election to take the elective share directly conflicts with the Fifth's District decision in Feather when it acknowledged a mere notice of appearance as a pleading or paper which evidenced an objection to the probate of a decedent's will. The Second District's pronouncement of curtesy law that the substance of the Written Election was not an election also conflicts with the general policy of the Florida Probate Code, namely, a defect in form should not impair one's substantial rights,

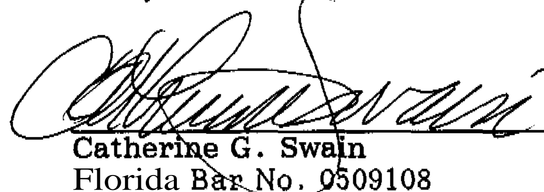
The Written Election clearly notified, in writing, the personal representative and beneficiaries of the Decedent's estate that the surviving spouse had made the election. Why else would Patsy's attorney file the Written Election that a petition to determine the elective share would be filed? The Second Written Election executed by the guardian ad litem, as authorized by the Edward's decision, should have related back to the time of the filing of the initial election, like the amended creditor's claim did in Grist.

Had this case been decided by the Fifth District, and not the Second District, the trial court's decision would have been reversed and the Second Written Election would have been deemed to be a timely filed election to take the elective share. The county in which a decedent is domiciled should not affect whether the decedent's surviving spouse is granted the elective share.

In view of the foregoing, Petitioner respectfully requests that this court exercise its jurisdiction and enter an order. Accordingly, Petitioner requests this court to exercise its discretionary jurisdiction and enter an order (i) quashing the decision and order of the Second District Court of Appeal, (ii) approving the conflicting decision of the Fifth District Court of Appeal, as the correct decision, (iii) directing the Second District Court to remanded this case to the trial court for a determination of the amount of Patsy William's elective share under rule 5.360(b), and (iv) granting such other relief as may be appropriate.



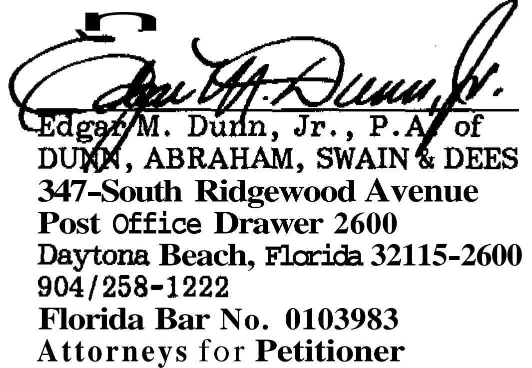
Edgar M. Dunn, Jr.
Florida Bar No. 103983



Catherine G. Swain
Florida Bar No. 0509108

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was furnished, by mail, to Hywel Leonard, Esquire, of CARLTON, FIELDS, WARD, et al., at Post Office Box 3239, Tampa, Florida 33601, attorney for Larry T. Williams, as Personal Representative of the Estate of R. Virgil Williams, deceased, this 22nd day of June, 1992.



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Florida Bar No. 0103983
Attorneys for Petitioner

c: Mr. Wallace B. Harmon

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

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

Appellant,

v.

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

Appellee.

CASE NO. 91-01723

Opinion filed March 18, 1992.

Appeal from the Circuit Court for Pasco County; Lynn Tepper, Judge.

Edgar M. Dunn, Jr. and Catherine G. Swain of Dunn, Webster & Swain, Daytona Beach, for Appellant.

Hywel Leonard and William L. Grassenbacher of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for Appellee.

THREADGILL, Judge.

Wallace P. Harmon, personal representative of the estate of Mrs. Patsy P. Williams (Patsy), deceased, appeals a final order rendered in the administration of the estate of her

deceased husband, R. Virgil Williams, striking her notice of intention to file a petition for an elective share. The effect of the order was to cause a forfeiture of Patsy's elective share. We affirm.

Seventy-one year old R. Virgil Williams, Jr. died testate at his North Carolina residence, survived by his spouse, Patsy, and two children from a previous marriage, Larry T. Williams and Sally W. Crumbley. Larry was appointed personal representative in probate court in Pasco County.

The will gave his wife Patsy a life estate in "all real property" he owned in Florida at the time of his death, The remainder in the real property plus his residuary estate was devised to his children, Larry and Sally, in equal shares. Virgil, however, owned no Florida real property at the time of his death.

Patsy's attorney filed a pleading entitled "Notice af Intention to Petition for Elective Share" within the time to file an election. The notice stated that the attorney would file a petition to determine the widow's statutory elective share, the assets from which it would be paid, and the scheduling of payments.

On the same day, *the* attorney filed a petition for the appointment of Wallace B. Harmon, Patsy's son by a previous marriage, as her guardian ad litem because Patsy was in a North Carolina nursing home and not capable of assisting and

participating in legal proceedings in Florida due to a deteriorated physical and mental condition. No competency proceedings were pending. Four months later, Patsy's attorney filed a letter signed by Patsy's physician in North Carolina, which stated that Patsy had severe medical problems (including heart disease, respiratory tract infections, emphysema and Alzheimer's disease) and would be physically unable to travel and participate in the administration of her deceased husband's estate. The physician speculated that if she did go to Florida, her mental condition would probably preclude any "meaningful participation" in the proceedings.

A month later, the trial court appointed Patsy's son guardian ad litem. There was no hearing - thus no findings of fact or adjudication as to Patsy's competency.

Six months after the notice of intention had been filed and the time to file an election had expired, the personal representative moved to strike it. Patsy's guardian ad litem immediately filed a written election executed by both himself and Patsy's attorney. The trial court heard argument and granted the motion to strike. The trial court held the notice of intention insufficient to constitute an election and the election filed by the guardian ad litem untimely. Although the order cites no grounds, the oral pronouncements at the hearing include statements that the notice was defective because Patsy had not personally signed it.

On rehearing, the trial court ruled that the notice of intention "did not set forth the statutory requirements" and that it was "invalid" because it had been signed by Patsy's attorney of record but not by the spouse.

First, we dispose of the question concerning the validity of the election by the guardian ad litem. The trial court held the election invalid because it was untimely. This ruling is supported by our decision in Allen v. Guthrie, 469 So.2d 204 (Fla. 2d DCA 1985), which held that equitable considerations may not be used to enlarge the four-month statutory period for a surviving spouse to elect a statutory share.

The main issue on appeal is whether the notice of intention to file a petition for an elective share could be construed as a widow's election pursuant to section 732.210, Florida Statutes (1989). We conclude that it cannot. Although the parties debate the issue of Patsy's competency to contract, we do not address it because her incompetency was never established by due process of law, and she is thus presumed competent., § 90.601, Fla. Stat. (1989); Zabrani v. Riveron, 495 So.2d 1195 (Fla. 3d DCA 1986).

We find that the notice of intention to petition for elective share, the only document purporting to be an election that was timely filed, was defective and could not as a matter of law constitute a valid election. Although the trial court's ruling is based solely on the defective execution of the notice,

we would also find that the substance of the notice *does* not amount to an election. The body of the notice reads:

> You will please take notice that the undersigned counsel for the surviving spouse, PATSY P. WILLIAMS, will file, on behalf of the said 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.

Thus, the notice merely recites the attorney's intention to file a petition on Patsy's behalf. An election and petition are not the same, See Smail v. Hutchins, 491 So.2d 301 (Fla. 3d DCA 1986); see also Fla. R. P. & G. P. 5.360.

In Smail, the court clarified *the* distinction between filing an election and filing the petition for determination of elective share. The near-universal rule is that an election is personal and may only be exercised by the surviving spouse during his or her lifetime. See Annotation, Election by Spouse to Take under or Against Will as Exercisable by Agent or Personal Representative, 83 A.L.R.2d 1077 (1962). This is not the case with the filing of a petition for determination of the elective share. Once the widow files the election, the filing of the determination petition was a mechanical, prescribed act which cauld be exercised by the widow's attorney, See Smail, 491 So.2d at 303.

Although the trial court's order granting the motion to strike the notice of intention does not address the substance of

the notice, it found the notice ineffective as an election because it was not signed by the surviving spouse.

We conclude that the trial court was correct in ruling that the signature of an attorney at law may not constitute the act of the surviving spouse for an election. Section 732.210, Florida Statutes (1989), provides that the right of election may be exercised by the surviving spouse or tha guardian of her property.[1] The right of election is personal. *See* Smail, 491 So.2d at 302. Although there appears to be no law on the issue in Florida, authority in other jurisdictions is split as to whether the right may be exercised by an agent, such as an attorney at law, on behalf of the surviving spouse. Annotation, 83 A.L.R.2d at 1077. Notwithstanding the split of authority the statute unambiguously requires a competent surviving spouse to make the election. § 732.210, Fla. Stat. (1989); *see* Smail, 491 So.2d at 302.[2]

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1 § 732.210, Fla. Stat. (1989): 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 proceedings shall determine the election as the best interests of the surviving spouse require.

2 Florida Rule of Probate and Guardianship Procedure 5.020(a) provides that pleadings shall be signed by the attorney of record, and by the pleader when required by the rules of probate. We do not believe that it is applicable to an election. An election is a right that cones into being by the terms of the statute creating it. *See* Allen v. Guthrie, 469 So.2d 204, 205 (Fla. 2d DCA 1985).

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As Patsy was never declared incompetent the provision in the statute pertaining to execution by a guardian of the property *is* not relevant here. We note as an aside that a guardian ad litem is, by definition, not authorized to exercise control and dominion over the ward's property as does a guardian *of* the property. See § 744.102(9), Fla. Stat. (1989). Thus, neither the attorney acting as agent nor the guardian ad litem's signature could satisfy the statute.

We distinguish In Re Estate of Schriver, 441 So.2d 1105 (Fla. 5th DCA 1983), which held that an attorney-in-fact under a durable power of attorney with unlimited authority could exercise the principal's right to an elective share. See § 709.08, Fla. Stat. (1989). Property subject to a durable power of attorney includes all real and personal property of the donor. Id. An attorney at law, on *the* other hand, has neither express nor implied authority to make independent decisions concerning the disposition of a client's property.

The appellant also alleges that the personal representative violated his fiduciary duty in moving to strike the notice of intention. A personal representative is prohibited from taking a position for or against the award of an elective share. See Fla. R. P. & G. P. 5.360 (committee note). Thus, the question arises whether Patsy would have received an elective share notwithstanding that it was invalid had the personal representative not contested it. The trial court found that the personal representative, although a beneficiary under the will,

did not make the motion for personal gain but to obtain the court's guidance in the administration of the estate. This finding is supported by the record; thus, there is no basis upon which we may find an abuse of discretion.

We therefore affirm the order striking the notice of intention to file a petition for elective share.

In light of our decision, we need not discuss the appellant's remaining issues on appeal.

Affinned.

PARKER, J., Concurs specially.
CAMPBELL, A.C.J., Dissents with opinion.

PARKER, Judge, Concurring.

I concur with the result reached by Judge Threadgill. Although I agree with Judge Campbell that a motion to strike the Notice of Intentian to Petition for Elective Share was not the proper motion to file, it is of no consequence to the outcome of this case, as will be discussed below. Further, in my opinion, it is unnecessary for this court to address whether an attorney can sign and file an election for his client to take an elective share because in this case no timely election was made,[3]

The probate rules state that the surviving spause who seeks to take an elective share shall file a copy of the election, together with a notice of election, and serve the same on interested persons. Fla. R. P. & G. 5.360. Florida law limits the time of election to four months from the date of first publication of notice of administration. § 732,212, Fla. Stat. (1989). In this case, I believe the Notice of Intention to Petition for Elective Share, filed by the attorney of the surviving spouse, as the only paper addressing the elective share filed during the authorized four-month window, accomplished nothing and certainly did not serve as an election. I disagree with Judge Campbell that Mrs. Williams now may file an amendment which could relate back to the filing date of the notice.

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[3] I note in a publication of The Florida Bar that the form for an election to take elective share provides a separate signature line both for the surviving spouse and for the attorney of the surviving spouse. See R. Kelly, The Florida Bar Probate System, at 5.126-.127 [Pleading Form No. 91] (2d ed. 1990).

Finally, in my opinion, the trial court, without the motion to strike and after the four-month period had expired, could have ruled the paper filed was not sufficient to authorize the payment of the elective share.

CAMBPELL, Acting Chief Judge, Dissenting.

I would reverse the order granting the motion to strike as I conclude "striking" the pleading without allowing the right to amend was not proper. A motion to strike a pleading in its entirety is addressed to sham pleadings. Fla. R. Civ. P. 1.150.

The court in Slatko v. Virgin, 328 So.2d 499, 500 (Fla. 3d DCA 1976), held in regard to a motion to strike as fallows:

> Pursuant to this rule and its predecessor, it has been held that in arder to justify the striking of a pleading for being sham or false, it must be so undoubtedly false as not to be subject to a genuine issue of fact, In other words, a pleading may be stricken as a sham only where it is shown to be palpably or inherently false. A hearing on a motion to strike is not a hearing to try the issues but to determine whether there are any genuine issues to be tried. Meadows v. Edwards, Fla.1955, 82 So.2d 733; Guaranty Life Ins, Co. of Florida v. Hall Bros. Press, 138 Fla. 176, 189 So. 243; Rhea v. Hackney, 117 Fla. 62, 157 So. 190; Sapienza v. Karland, Inc., Fla.App.1963, 154 So.2d 204, and see 25 Fla.Jur., Pleadings §§ 33 and 133.

A motion to strike should not be granted because of inartful pleadings or correctable omissions. Moreover, I find that Florida Probate Rule 5.020(a) provides that "[p]leadings shall be signed by the attorney of record, and by the pleader when required by these rules." The rules did not require Mrs. Williams to sign her notice of intent to petition for elective share. The majority interprets section 732,210, Florida Statutes

(1989), as "unambiguously" requiring a competent surviving spouse to make the election. As I read section 732.210, it says the right of election "may" be exercised by the surviving spouse or a guardian of the property of such a spouse. That statute being permissive rather than mandatory, I conclude that Rule 1.150 permits such a filing by an attorney. I would reverse and remand this case and would direct the trial court to permit amendments to Mrs. Williams' election and to thereupon proceed.