IN THE SUPREME COURT OF FLORIDA

MARY ANN VIA, as Personal Representative of the Estate of Edgar R. Putnam, deceased, MARY ANN VIA, individually, PAUL DAVID PUTNAM, JOSEPH EDGAR PUTNAM, RICHARD LEE PUTNAM, RONALD ROY PUTNAM and ROBERT BLACKBURN,

Petitioners,

vs.

MARY RACHEL PUTNAM,

Respondent.

Case No. 83,660

PETITIONER, ROBERT BLACKBURN'S, JURISDICTIONAL BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida
Case No. 93-01780

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TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA CASES

OTHER STATES CASES

OTHER AUTHORITIES

PREFACE

Petitioner, ROBERT BLACKBURN, along with Mary Ann Via, individually and as personal representative of the Estate of Edgar R. Putnam, deceased, Paul David Putnam, Joseph Edgar Putnam, Richard Lee Putnam and Ronald Roy Putnam were the appellees in the case below.

Mary Ann Via, Paul David Putnam, Joseph Edgar Putnam, Richard Lee Putnam and Ronald Roy Putnam have previously filed their jurisdictional brief with the Supreme Court.

Robert Blackburn joins with these other Petitioners in seeking the Florida Supreme Court to invoke its discretionary jurisdiction on the basis that the decision rendered by the Second District Court of Appeal expressly and directly conflicts with a decision of another District Court of Appeal.

Petitioner, when citing to the Opinion of the Second District Court of Appeal shall so designate by (O-).

STATEMENT OF THE CASE AND THE FACTS

Petitioner, Robert Blackburn, adopts the Statement of the Case and the Facts as set forth by the other Petitioners in their Jurisdictional Brief.

Petitioner would also state that his Motion for Rehearing that was pending before the Second District Court of Appeal was denied on June 10, 1994. Also on that date, the Second District Court of Appeal entered a substituted opinion clarifying its opinion filed April 6, 1994.

SUMMARY OF ARGUMENT

The opinion rendered by the Second District Court of Appeal on June 10, 1994 in the case of Putnam v. Via is expressly and directly in conflict with a rule of law previously adopted by the Third District Court of Appeal in the case of Johnson v. Girtman, 542 So. 2d 1033 (Fla. 3d DCA 1989).

ARGUMENT

Article V, section 3(b)(3) of the Florida Constitution gives the Florida Supreme Court discretionary jurisdiction over cases that expressly and directly conflicts with a decision of another district court of appeal.

In The City of Jacksonville, Florida, v. Florida First National Bank of Jacksonville, 339 So. 2d 632 (Fla. 1976) in a concurring opinion, Justice England noted:

> Years ago this Court identified two basic forms of decisional conflict which properly trigger the exercise of our jurisdiction under what is now Article V, Section 3(b)(3) of the Florida Constitution. In Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla.1960), the court unanimously held that alleged conflict may exist either (1) where an announced rule of law conflicts with other appellate expressions of law, or (2) where a rule of law is applied to produce a different result in a case which involves 'substantially the same controlling facts as a prior case.'

In the case of Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla.1960) that court recognized that "under the first situation the facts are immaterial. It is the announcement of a conflicting rule of law that conveys jurisdiction to us to review a decision of the District Court of Appeal."

In the case now before this Court the first category applies as the Second District Court of Appeal has announced a rule of law which is expressly and directly in conflict with a rule of law previously adopted by the Third District Court of Appeal in the case of Johnson v. Girtman, 542 So. 2d 1033 (Fla. 3d DCA 1989).

In its opinion, the Second District states that "While we believe there are significant differences between the facts in Johnson and the facts in the instant case, we have to agree with the appellees that the analysis of the court in Johnson and its conclusion do indeed support the appellees' position. Nevertheless, we choose not to follow the Johnson analysis

in this case." (O-6) That court went on to state "We recognize that our holding here conflicts with the rule applied in Johnson v. Girtman." (O-9)

In Johnson the rule of law adopted by the Third District is that a beneficiary of an agreement not to revoke a will has a valid claim which must be satisfied prior to determining the elective share. This rule of law was predicated on Florida Statute 732.207 which provides as follows:

> The elective share shall consist of an amount equal to 30 percent of the fair market value, on the date of death, of all assets referred to in s. 732.206, computed after deducting from the total value of the assets:
> (1) All valid claims against the estate paid or payable from the estate; and
> (2) All mortgages, liens, or security interests on the assets.

In Johnson the Third District Court of Appeal recognized that third party beneficiaries to an agreement to make a will are no different than other claimants and by statute creditors have priority over the surviving spouse's elective share.

In Putnam the Second District totally ignored Florida Statute 732.207 and the Johnson holding and announced its own rule of law that "the surviving spouse's elective share or pretermitted share be given priority over rights arising under an antenuptial contract of the deceased spouse." (O-9)

The Second District Court of Appeal relied heavily on the Maryland case of Shimp v. Huff, 556 A.2d 252 (Md 1989) which held that there is a strong public policy in favor of protecting the surviving spouse's right to receive an elective share. Shimp v. Huff expresses the minority view of the different states as noted in Gregory v. Estate of H. T. Gregory, 866 S.W. 2d 379 (Ark. 1993) In Gregory v. Estate of H. T. Gregory the Arkansas Supreme Court was faced with a factual situation similar to the present case. In resolving that case in favor of the third party beneficiaries rather than the surviving spouse that court held:

> We are confronted with two competing public policies in this case - the right of a couple to contract to make mutual wills that are irrevocable and that dispose of both estates to third party beneficiaries, and the right of a surviving spouse to take an elective share. The states are divided on this issue although the majority view appears to favor the third party beneficiaries.
> 866 S.W. 2d at 382

In Florida we are now faced with the Third District Court of Appeal having adopted the majority view and the Second District Court of Appeal having adopted the minority view on this rule of law. In the area of conflict of decisions it is a primary function of the Supreme Court to stabilize the law by review of decisions which form patently irreconcilable precedents. Florida Power & Light Co. v. Bell, 113 So. 2d 697 (Fla. 1959)

CONCLUSION

The opinion of the Second District Court of Appeal in the Putnam case is expressly and directly in conflict with the rule of law as set forth by the Third District Court of Appeal in Johnson v. Girtman. It is important to bring uniformity to the laws of Florida and as such the Florida Supreme Court should invoke its jurisdiction and decide whether Florida will follow the majority or minority view as to this rule of law.

JOSEPH W. FLEECE, III, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished by U.S. Mail to Teresa Cooper Ward, Esquire of 5322 Duhme Road, St. Petersburg, Florida 33708; Michael R. Riemenschneider, Esquire of 1825 S. Riverview Drive, Melbourne, Florida 32901; and to Mark I. Shames, Esquire of 535 Central Avenue, Suite 403, St. Petersburg, Florida 33701, this 14th day of June, 1994.

JOSEPH W. FLEECE, III, ESQUIRE