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## PRELIMINARY STATEMENT

The Petitioner files this Amended Jurisdictional Brief and Amended Appendix to reflect the district court's withdrawal of its prior opinion and its substitution of a new opinion for the prior opinion. (Apps. A & E.)

### STATEMENT OF THE CASE AND FACTS

In 1985, the decedent, Edgar Putnam, and his wife, Joann Putnam, executed mutual wills. (App. A, at 2.) Each will devised that spouse's entire estate to the survivor, and each will provided that the survivor was to devise his or her estate to the couple's five children and stepson [hereinafter referred to collectively as "the children"]. (App. A, at 2.) Each will also contained an express provision

that the survivor will not change the manner in which the residuary estate is to be distributed and that neither of us as survivors will do anything to defeat the distribution schedule set forth herein, such as disposing of assets prior to death by way of trust bank account, trust agreements, or in any other manner.

(App. A, at 2.)

After Joann Putnam's death, Edgar Putnam married Rachel. (App. A, at 2.) Edgar never made another will. (App. A, at 2-3.) Upon Edgar's death, the mutual will he had executed with his former wife was admitted into probate.

(App. A, at 2.) The children filed claims against Edgar's estate based on Edgar's breach of the mutual will. (App. A, at 3.) After objections to the claims were filed, the children filed independent actions based on breach of contract. (App. A, at 3.) The independent actions were consolidated and transferred back to the probate proceedings. (App. A, at 3.) Thereafter, the trial court entered an order declaring Rachel to be the pretermitted spouse of Edgar Putnam. (App. A, at 3.)

The trial court next entered summary judgment in favor of the children. (App. A, at 3.) The trial court found that Edgar had breached his mutual will when he married Rachel without taking appropriate steps to protect the interests of the children. (App. A, at 3.) The trial court thus concluded that the children had valid claims against Edgar's estate based on Edgar's breach of the mutual wills. (App. A, at 3.)

Significantly, the trial court held that the valid claims of the children are class 7 obligations under section 733.707, Florida Statutes (1991)<sup>1</sup>, and that Rachel's share as a pretermitted spouse is subject to those class 7 obligations. (App. A, at 3.) Accordingly, the trial court concluded that the children, like any other creditors in that class, are entitled to Edgar's entire estate less any

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<sup>1</sup> Under the current statute, the class is numbered Class 8. § 733.707, Fla. Stat. (1993).

exempt property, family allowance or homestead interests that may pass to Rachel free from claims of creditors. (App. A, at 3.)

On April 6, 1994, the Florida Second District Court of Appeal reversed the order of the trial court. (App. A.) The district court concluded that Florida's strong public policy in favor of protecting a surviving spouse "requires that the surviving spouse's elective share or pretermitted share be given priority over rights arising under an antenuptial contract of the deceased spouse." (App. A, at 8-9.) In issuing its ruling, the district court expressly recognized that its holding conflicts with the rule applied in Johnson v. Girtman, 542 So. 2d 1033 (Fla. 3d DCA 1989).

Appellee Robert Blackburn (the stepson) filed a timely motion for rehearing, a motion for rehearing en banc, and a suggestion of direct conflict. (App. B.) The Appellant, Rachel Putnam, filed a timely motion for clarification. (App. C.) The instant Petitioners filed no post-decision motions with the district court. On May 4, 1994, the instant Petitioners (who, along with Robert Blackburn, were appellees below) filed a timely notice to invoke this Court's discretionary jurisdiction.

This Court stayed proceedings pending disposition of the motion for rehearing. The district court denied Appellee Blackburn's post-decisional motions, (App. D), but has not yet ruled on the suggestion of direct conflict. The

district court granted the Appellant's motion for clarification, (App. E), and on June 10, 1994, the district court issued a substituted opinion. (App. A.)

#### SUMMARY OF THE ARGUMENT

As expressly recognized by the district court, its decision conflicts with the rule applied by the Florida Third District Court of Appeal in Johnson v. Girtman. The Johnson court rejected a surviving spouse's argument that his elective share was superior to his deceased wife's agreement with her family members to devise her property only to her siblings. The Johnson court viewed the family agreement as a valid contractual claim which, like any other creditor's valid claim, must be satisfied prior to determining the spouse's elective share. In accordance with statutorily determined priorities for distribution, therefore, the Johnson court ruled that the surviving spouse was not entitled to an elective share in the family property because the contractual claim eliminated that property from the deceased wife's estate.

The instant district court expressly chose not to follow the Johnson analysis, and chose instead to rule that a spouse's elective share is superior to rights arising by virtue of an antenuptial contract of the deceased spouse. The instant court based its decision on what the court determined was Florida's strong public policy in favor of

protecting a surviving spouse's right to receive an intestate share as pretermitted spouse.

Thus, as recognized by the district court, conflict exists as to whether Florida's public policy favoring a surviving spouse overrides both Florida's statutory scheme for distribution of property and Florida's well-established recognition that persons may make contracts to bind themselves to dispose of their own property in a particular way by will. It is particularly fitting that this Court should review this conflict of competing public policies.

#### JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the supreme court or another district court of appeal on the same point of law. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

#### ARGUMENT

**THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FLORIDA THIRD DISTRICT COURT OF APPEAL IN JOHNSON V. GIRTMAN, 542 So. 2d 1033 (Fla. 3d DCA 1989).**

The Florida Second District Court of Appeal expressly acknowledged that its decision conflicts with Johnson v.



Girtman, 542 So. 2d 1033 (Fla. 3d DCA 1989). (App. A, at 9.) Johnson concerned an agreement by brothers and sisters to devise their respective shares of family property only to their children, or, if they were childless, to their siblings. See id. at 1034-35. The dispute arose when one of the siblings, who died childless, named her surviving spouse as the sole beneficiary of her estate. See id. at 1035. The surviving spouse contended that he was entitled to his deceased wife's share of the family property on the ground that his elective share was superior to his deceased wife's agreement with her family. See id. at 1034-35.

The third district court rejected the surviving spouse's argument. See id. at 1037. The court based its conclusion on the requirement in the elective share statute that all claims and liens against the estate be deducted prior to calculating an elective share. See id. Accordingly, the surviving spouse's elective share was to be based on the assets that remained after deducting all valid claims against the estate. See id. "Claims" are statutorily defined as "liabilities of the decedent, whether arising in contract, tort, or otherwise, and funeral expenses." See id. (citing § 731.201(4), Fla. Stat. (1987)). The court found that the family agreement gave rise to a valid contractual claim that must be satisfied prior to determining the spouse's elective share. See id. Consequently, the court ruled that the contractual claim

effectively eliminated from the deceased wife's estate any interest in the family property, and that the surviving spouse was not entitled to an elective share in that property. See id.

Although the second district court specifically recognized that the Johnson analysis and conclusion "do indeed support" the children's position in the instant case, the court nevertheless chose not to follow the Johnson analysis. (App. A, at 6.) Instead, the district court chose to follow a Maryland decision, Shimp v. Huff, 556 A.2d 252 (Md. 1989).

The district court explained that the issue in Shimp was whether Lester Shimp's second wife, upon his death, was entitled to receive an elective share in Lester's estate when Lester had previously contracted, by virtue of a joint will with his first wife, to will his entire estate to others. (App. A, at 6.) The Maryland court decided that the question of priorities between a surviving spouse and beneficiaries under a contract to make a will should be resolved on the basis of the public policy that surrounds the marriage relationship and that underlies the elective share statute. (App. A, at 8.) The Maryland court pointed to that state's strong public policy in favor of protecting the surviving spouse's right to receive an elective share. (App. A, at 8.) The court concluded that the contractual claims under the joint will were subordinate to the

surviving spouse's right to receive her elective share.

(App. A, at 8.)

After reviewing the Maryland case, the district court announced that it agreed with the Maryland court's conclusion and reasoning. (App. A, at 8.) According to the district court, Florida's statutes pertaining to a surviving spouse's elective share, along with cases discussing elective share and its predecessor, dower, suggest a strong public policy in favor of protecting a surviving spouse's right to receive an elective share. (App. A, at 8.) The court concluded that this strong public policy requires the surviving spouse's elective share or pretermitted share to be given priority over rights arising under an antenuptial contract of the deceased spouse. (App. A, at 9.)

As expressly recognized by the district court, the district court's holding conflicts with the rule applied in Johnson. Because of the express and direct conflict between the decisions of the second and third district courts of appeal, this Court should exercise its discretionary jurisdiction to resolve that conflict.

This Court's review is especially appropriate because, as recognized by the second district court, public policy interpretation is at issue. Resolution of the conflict involves a judgment as to whether the public policy favoring surviving spouses may negate or supersede what appears to be the clear distribution scheme set forth in the probate

statutes. The district court's decision also raises questions about the continued viability of Florida's well-established recognition of the principle that persons may make contracts to bind themselves to dispose of their own property in a particular way by will. See, e.g., McDowell v. Ritter, 153 Fla. 50, 13 So. 2d 612 (1942). Similarly, the district court's decision makes unclear the status of the corollary rule that, if the promisor breaches his agreement to make a devise or not to revoke a will, the beneficiary of the promise or the improperly revoked will may bring an action to enforce the terms of the agreement. See, e.g., In re Estate of Algar, 383 So. 2d 676 (Fla. 5th DCA), review denied, 389 So. 2d 1107 (Fla. 1980). Thus, the interplay between competing public policy issues and their effect on statutory and case law make this a compelling case for the exercise of this court's discretionary jurisdiction.

#### CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the Petitioners' argument.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Jurisdictional Brief has been furnished by United States Mail to Teresa Cooper Ward, Esquire, attorney for Respondent Mary Rachel Putnam, 5322 Duhme Road, St. Petersburg, Florida 33708, Joseph W. Fleece, III, attorney for Petitioner Robert Blackburn, P. O. Box 330, St. Petersburg, FL 33731-0330 and Mark I. Shames, Esquire, Administrator Ad Litem, 535 Central Avenue, Suite 403, St. Petersburg, Florida 33701 this 23<sup>rd</sup> day of June, 1994.

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