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SUPREME COURT OF FLORIDA

KATHLEEN STEELE,

Plaintiff/Appellant/Movant,

vs.

CASE NO.: SC22-1342
Lower Tribunal Case No.: 20-11656

KILOLO KIJAKAZI,
Acting Commissioner of Social Security,

Defendant/Appellee.
_____/

REPLY BRIEF OF APPELLANT/MOVANT

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ARGUMENT

I. Whether Under Florida Law, is P.S.S. "provided for" in the Decedent's Will Within the Meaning of Fla. Stat. §742.17(4)

The Appellee, in her Brief, did not follow the order established by the 11th Circuit in its certified questions to this Court. Instead, the Appellee reversed the order of the issues certified and attempted to restate them as argument rather than identify them as issues. In a non-responsive fashion, the Appellee will discuss at pages between page 10 and the top of page 25, of its Brief why a will does not create intestacy rights, which as will be seen below, is not what is to be addressed for the purposes of aiding the 11th Circuit.

Finally, at page 25 of the Appellee's Brief, there is mention made of why Mr. Steele's will "did not provide for the Claimant".

The first argument is one that has never been raised before at any level of the proceedings. The Appellee believes that when Mr. Steele stated in his will, "...later born or adopted children", that these two (2) different situations could be combined. The will did not say "later adopted". He cannot adopt a child after he is deceased. He can have a child born to him after he is deceased because of the advances of science. There is

simply no evidence to support such idea and in fact it is the position of the Appellant that such argument has been waived to the extent that it is even relevant. Adoption was never an issue in this case.

Whether the child here was not "later born" as contained in Mr. Steele's will has never been an issue also. The Court should look at the plain language and context of the will. There is no limit as to time of conception by Mr. Steele in his will and thus the opinions of Mr. Adcock and Dr. Pabon are very important.

At the bottom of page 25 of the Appellee's Brief the Appellee attacks the opinions rendered by Mr. Adcock. Mr. Adcock, as was noted in the Initial Brief to this Court, was a former president of the St. Petersburg Bar Association and a former member of the Board of Governors of The Florida Bar. Mr. Adcock was not speculating. He had prepared the will which was recognized by the ALJ. [AR. p. 17] Further, the Appellee takes one statement by Mr. Adcock out of context as previously noted in the Appellant's Brief. It is very clear what Mr. Adcock believed as shown in the second half of the sentence quoted by the Appellee. Mr. Adcock stated, referring to the future use of Mr. Steele's sperm:

> "…But I am sure that it was in his mind that it might be used after his death." [AR. p. 61]

Mr. Adcock firmly believed that Mr. Steele was very devoted to his wife and further believed that the pregnancy was considered to be planned. Mr. Adcock also stated as well that he felt Mr. Steele would be most disturbed to find that his second child had been excluded from children's death benefits. [AR. p. 61]

In conclusion, after such limited argument, the Appellee, at page 26, will state the following:

> "The wage earner's will should have no bearing on the outcome of this case given the plain language in §742.17(4)."

This seems to be an acceptance by the Appellee of the fact that the child in this case was provided for in the will by Mr. Steele, but was unimportant despite the statute actually requiring a will. The Appellee is right about one thing, it is the plain language that should be followed in both the will and §742.17(4) Fla. Stat. A reasonable common sense reading of both Mr. Steele's will and the statutory law should be utilized. The child was "provided for" in the will as shown by its own language and the documents supplied by Mr. Adcock and Dr. Pabon.

The Appellee states in her Brief that wills do not create intestate rights and that the inheritance rights mentioned in the statute are not

intestacy rights. This flies in the face of what the ALJ, or Administrative Law Judge, of the Appellee, determined in that the ALJ stated that Florida courts would probably use §742.17(4) to determine intestacy rights [AR p. 16]. The Appellee will mention that only rights created through a will would be the way to interpret §742.17(4) (emphasis supplied).

This completely fails to recognize Florida law, which when properly applied as noted by the State of Florida's Brief, intestacy rights will be found for the child in this case.

Since the child was provided for in a will, which again the Appellee apparently does not contest, then the child is recognized as the decedent's child and becomes an heir per Florida Statute §732.103(1). The heir also becomes a lineal descendant, as mentioned in the will at [AR p. 62] and per Florida Statute §731.201(9). As a descendant, such child would then be able to receive property intestate per Florida law at Fla. Stat. §732.103(1). See State of Florida Brief, pp. 8 – 11. A person can receive property both under a will and by intestate. Aldrich v. Basile, 136, So. 3d 530, 534-535. The foregoing should result in an affirmative answer to the 11th Circuit's question that clearly P.S.S. was "provided for" in Mr. Steele's will.

II. Whether if the Answer is Yes, Does Florida Law Authorize the Posthumously Conceived Child Who is Provided For in the Decedent's Will to Inherit Intestate the Decedent's Property

Specifically, the question is whether, if the answer to the first issue is in the affirmative, which it is, whether Florida law would authorize the posthumously conceived child, who is provided for in the decedent's will to inherit intestate the decedent's property. Specifically, this is a question with regard to Florida law as it applies to a specific Florida Statute, that is §742.17(4). It is not meant to be a question to be treated as a law review article or a treatise.

The Appellee took several pages criticizing the amicus brief filed by the State of Florida as to what various jurisdictions have said or not said. Although interesting, this is not the question. The State of Florida properly submitted a Brief to this Court to assist the Court with regard to the background principles of inheriting under Florida law, particularly as they would refer to the interpretation of §742.17(4). The State of Florida, in a very well written Brief, shows how and why §742.17(4) came into being. The State of Florida believes that it has a tremendous interest in what the Federal Government has done in this case, in that the State of Florida must

oppose any group or organization which infringes upon the categorical deprivation of intestacy rights for an entire class of children based upon a misinterpretation of Florida law.

The essential point of what the State of Florida did in its Brief, was to show the national trend with regard to the issue concerning children who were conceived by *in vitro* fertilization after the death of the decedent. Interestingly, after much discussion, the Appellee admits that her position would only be true in a minority of states at footnote 7 on pages 22 and 23. The Brief filed by the State of Florida was done to aid this court in its review of this case by providing background, context and history to reach a proper interpretation of the statute in question, §742.17(4).

The Appellant agrees with the State of Florida in that it is important to look at the plain language of the statute in question itself and look at the effects of the wording of such statute. The Appellee takes confusing positions on this subject. He will say that no words should be added to statutes. Yet, at page 12 he will add the word “through” and previously inserted the word “only” which are not in §742.17(4). This is after admitting that inheritance rights could apply to intestacy as well.

By its own description, §742.17(4) concerns inheritance. Specifically, it would concern the inheritance of children who were conceived after the death of the decedent. In order to make sense of this statute, one must know that the *in vitro* fertilization in this case must be done at the behest of a commissioning couple per Fla. Stat. §742.13(2). This couple, by definition, must be people intended to be the parents of such child. Having a will which provides for the child in question is of extreme importance in that it is required by Fla. Stat. §742.17(4) unlike the view by the Appellee in her Brief to this court at page 26. Why is the will so important? If the child is provided for in a will, then such child, per Florida law, becomes an heir to the decedent, that is a child of the decedent per Florida Statute as noted above. Further, it is a writing, as required in other jurisdictions, showing the intent of the decedent as mentioned in the State of Florida's Brief. In the will, the later born child is specifically to be treated as a lineal descendant or descendant of the decedent. When such child is listed as a descendant, or lineal descendant, both by will and by Florida Statute, then such child would be able to receive any property not disposed of by will per Fla. Stat. §732.103(1). That means such child is eligible to receive property intestate or other inheritance rights, such as homestead.

What the State of Florida was very upset about in this case is that the Federal Government's misrepresentation of the statute will lead to an entire class of children not being able to receive any type of benefits whatsoever. It is beyond belief to think that the Florida Legislature would have had a statute created concerning inheritance and would then not allow any child to not inherit. If a child was not provided for in a will the child would receive nothing, including any intestate property, to which the Appellant and State agree. In addition, the Appellee would take the position that the child would not be able to take intestacy property even if the child was provided for in a will. This would mean that one must conclude that it was the Florida Legislature's intention to discriminate against such unborn children with regard to receiving benefits to which other children would be entitled. This statute, §742.17(4), was enacted almost 30 years ago and there have been numerous legislatures since then and none of them have ever taken such position. Why? It is because our courts in this state needed to have some basis to distribute property based upon the new technology addressed by the State of Florida in its Brief, which occurred in this case.

In this case, the Appellee's own Administrative Law Judge rendered an opinion that he believed that §742.17(4) was the proper statute utilized

with regard to confirming intestacy rights in Florida. The Appellee told the 11th Circuit this in her Brief, that the ALJ opinion should be followed. The legislature in this case, because of the uniqueness of the situation, needed to provide in the statute concerning posthumously conceived children, conditions which were not required in other sections of Florida law, including the Florida Probate Code.

Specifically, as noted in the Appellant's Initial Brief, there are three (3) preconditions or conditions precedent in order for a child, such as the one in this case, to receive benefits from the estate of their father. The first is there must be a commissioning couple, which per definition at Fla. Stat. §742.13(2), means that it was intended that such people were the individuals who were intended to be the parents of such child. This condition is met in this case with Mr. and Mrs. Steele. Second, the commissioning couple must have had an *in vitro* fertilization procedure performed which would result in a child being conceived after the death of the decedent, which occurred in this case. Finally, the child must be provided for in a will. As was stated in the State of Florida's excellent Brief to this Court, one of the issues that occurred nationwide, which has to be addressed in some fashion, is having a statement written by the decedent

such that the courts would feel comfortable with validating the relationship and the rights of the child to the property of its father, the decedent.

The significant point as to the last condition precedent was addressed clearly by the State of Florida in its Brief at pp. 16 and 17.

Although the Appellee felt at one point that legislative intent was not important since the plain words of the statute were sufficient, at page 16 of their Brief, the Appellee raises the issue of legislative intent.

Legislative intent must be examined by looking at the plain meaning of the words of the statute, the context, and the history of the statute. In this case, aside from not adding words to the statute, there is the meaning of the word "unless" which is specifically raised by the 11th Circuit in the question certified to this Court.

Pursuant to Fla. Stat. §742.17(4), the child shall not be eligible to claim, that is file a claim, against the decedent's estate unless he is provided for in a will (emphasis added). Thus, the child takes nothing if he is not provided for in the decedent's will. The word "unless" in this case must be viewed in its plain meaning. The plain meaning of the word "unless" is except on condition that. The word "unless" in this case is a disjunctive conjunction. It introduces a condition which, if true, categorically

negates the clause that precedes it. See State v. Byars, 823 So. 2d 740, 742 (Fla. 2002). There is no indication of inheriting only through a will or except to the extent that it is by will, which the Appellee would add. The interpretation offered by the Appellee is not supported by law. See Pub. Serv. Comm'n of N.Y. v. Mid-La. Gas Co., 463 U.S. 319, 326 – 327, n.8 (1983). It is improper to add such limitations as the Appellee proposes. See State of Florida Brief at pp. 22 – 26.

Clearly, by looking at the plain words of §742.17(4), and not adding words which are not present, the context in which the statute was written, and the history provided from the House Committee on Health Care (see State Brief at pg. 22) one gets an accurate picture of what §742.17(4) means.

A child such as the one in this case will be able to file a claim against the intestate estate of his father like any other child if the child meets the criteria set forth in §742.17(4).

All three (3) conditions precedent of §742.17(4) are therefore met in this case. Thus, it is the Appellant's contention that the second certified question to this court should, again, be answered affirmatively in its response to the 11th Circuit.

CONCLUSION

Based upon the foregoing, it is the position of the Appellant that the answer to the questions propounded to this court by the 11th Circuit should both be answered in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10, 2023, a true and correct copy of the foregoing has been delivered by electronic service through Florida Courts E-Filing Portal to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to *Fla.R.App.P. 9.120(a)(2)(B)*, we hereby certify that this brief has been prepared using 14-point proportionally spaced font, Arial, and that the text of the brief, excluding those sections that need not be counted under *Fla.R.App.P. 9.120(a)(2)(E)*, totals 2,563 words.

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