IN THE SUPREME COURT OF THE STATE OF FLORIDA

SUPREME COURT CASE NO.: SC01-2
5DCA CASE NO.: 5D00-267
CIRCUIT COURT CASE NO.: 99-513-CP

BONNIE ALLEN

PETITIONER,

v.

MARGARETE DALK,

RESPONDENT.
_____/

RESPONDENT'S ANSWER BRIEF

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
SUPPLEMENTAL STATEMENT OF THE CASE	1
SUPPLEMENTAL STATEMENT OF THE FACTS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. THE STANDARD OF REVIEW APPLICABLE HEREIN IS WHETHER ALLEN RECEIVED DUE PROCESS AND THE FIFTH DCA APPLIED THE CORRECT LAW	6
II. THE FIFTH DCA CORRECTLY REJECTED THE CONSTRUCTIVE TRUST	7
A. The "Will" is Invalid	7
B. Since the "Will" is Invalid, the Decedent's Intent is Irrelevant and Her Property Passes to Dalk as the Sole Intestate Heir	8
C. The Decedent's Non-Testamentary Supposed Intent Cannot be Used to Disinherit Dalk	9
D. The Constructive Trust Must Fail Because Allen Has an Adequate Remedy at Law	12
E. Allen is not Entitled to an Oral Will	13
F. Estate of Tolin is Inapplicable	13
(i) This Case is not Unique	14
(ii) Unlike Estate of Tolin, the Decedent's Intent is Irrelevant	14
(iii) Estate of Tolin did not Disinherit an Heir	15
(iv) Unlike Estate of Tolin, this Case Involves Disputed Facts	15
(v) Unlike the Losing Party in Estate of Tolin, Dalk will not be Unjustly Enriched	16

(vi) Dalk's Rights Vested Before any Constructive Trust was Created 17

III. PUBLIC POLICY IS AGAINST THE IMPOSITION OF A CONSTRUCTIVE TRUST 17

CONCLUSION 23

CERTIFICATE OF SERVICE 24

CERTIFICATE OF COMPLIANCE 24

APPENDIX I, UNSIGNED LAST WILL AND TESTAMENT OF CHRISTEL D. MCPEAK

TABLE OF CITATIONS

CASES:	PAGE
Arnold v. Carmichael, 524 So.2d 464 (Fla. 1st DCA 1988)	12
Bank of South Palm Beaches v. Stockton, 473 So.2d 1358 (Fla. 4th DCA 1985)	13
Estate of Salathe, 703 So.2d 1167 (Fla. 2d DCA 1997)	12
Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995)	7
Howe v. Sands, 194 So. 798 (Fla. 1940)	19
Iles v. Iles, 29 So.2d 21 (Fla. 1947)	18
In Re: Block's Estate, 196 So. 410 (Fla. 1940)	19
In Re: Estate of Bancker, 232 So.2d 431 (Fla. 4th DCA 1970)	8
In Re: Estate of Barker, 448 So.2d 28 (Fla. 1st DCA 1984)	10, 11, 17, 22
In Re: Estate of Corbin, 645 So.2d 39 (Fla. 1st DCA 1994)	13
In Re: Estate of Dickson, 590 So.2d 471 (Fla. 3rd DCA 1991)	8
In Re: Estate of Lubbe, 142 So.2d 130 (Fla. 2d DCA 1962)	9, 15
In Re: Estate of Reid, 399 So.2d 1032 (Fla. 1st DCA 1981)	9, 15
In Re: Estate of Scott, 659 So.2d 361 (Fla. 1st DCA 1995)	10
In Re: Estate of Tolin, 622 So.2d 988 (Fla. 1993)	5, 13, 14, 15, 16
In Re: Levy's Estate, 196 So.2d 225 (Fla. 3rd DCA 1967), cert. denied, 201 So.2d 550 (Fla. 1967)	10, 16

In Re: Mooney's Estate, 395 So.2d 608 (Fla. 5th DCA 1981) 17

In Re: Neil's Estate, 39 So.2d 801 (Fla. 1949) 8

In Re: Olson's Estate, 181 So.2d 642 (Fla. 1966) 8, 17

In Re: Pratt's Estate, 88 So.2d 499 (Fla. 1956) 10, 11

In Re: Stephan's Estate, 194 So. 343 (Fla. 1940) 5, 9, 15

Johnson v. Green, 54 So.2d 44 (Fla. 1951) 13

Lake Tippecanoe Owners Association v. National Lake Developments, Inc., 390 So.2d 185 (Fla. 2d DCA 1980) 12

Lamarca v. Miami Herald Pub. Co., 395 F.Supp. 324 (S.D. Fla. 1975) 12

Lowrimore v. First Savings & Trust Co. of Tampa, 140 So. 887 (Fla. 1931) 9

Manson v. Hayes, 539 So.2d 27 (Fla. 3rd DCA 1989) 8

Martin v. Shands, 49 So.2d 598 (Fla. 1950) 18

Moore v. Wesley E. Garrison, Inc., 5 So.2d 259 (Fla. 1941) 12

Orr v. Trask, 464 So.2d 131 (Fla. 1985) 13

Palmland Villas I Condominium Assn. Inc. v. Taylor, 390 So.2d 123 (Fla. 4th DCA 1980) 17

Rewis v. Rewis, 84 So. 93 (Fla. 1920) 19

State v. North, 32 So.2d 14 (Fla. 1947) 18

The Florida Bar v. Story, 529 So.2d 1114 (Fla. 1988) 7

Wadlington v. Edwards,
92 So.2d 629 (Fla. 1957) 12

Wright v. Sallet,
66 So.2d 237 (Fla. 1953) 18

STATUTES

§732.101(1), Fla.Stat. (1997) 5, 8, 9, 15

§732.103(3), Fla.Stat. (1997) 5, 9

Part 1, Chapter 732, Fla.Stat. (1997) 14

OTHER AUTHORITIES

Miami Law Quarterly,
Vol. IV, p. 55 (1950) 7, 14, 21

80 Am.Jur. 2d Wills §1687 (1975) 9, 15

Fla.R.App.P. 9.030(a)(2)(A)(v) 6

PRELIMINARY STATEMENT

For purposes of this Answer Brief, Bonnie Allen will be referred to as "Allen" or "Petitioner", and Margarete Dalk will be referred to as "Dalk" or "Respondent". Christel D. McPeak will be referred to as "the Decedent".

The record on appeal transmitted by the trial court to the Fifth District Court of Appeal (hereafter "Fifth DCA") will be referred to as follows: "(R: ___)". Exhibits introduced into evidence at the trial will be referred to as "(Exhibit ___)". The record on appeal in the index prepared by the Fifth DCA, containing a total of 18 pages, will be referred to as "(5DCAR: _____)".

The trial transcript dated November 16, 1999 is Volume III of the record on appeal transmitted by the trial court to the Fifth DCA and will be referred to as "(T: p. ____ l. ____)".

Dalk has appended a copy of the Decedent's unsigned will (hereafter the "will") hereto as Appendix I.

SUPPLEMENTAL STATEMENT OF THE CASE

Except for the description of the issues heard by the trial court, and the omitted matters below, Allen's Statement of the Case is accurate. The actual issues heard by the trial court were: (1) whether the unsigned, improperly witnessed and illegally notarized "will" could be admitted to probate and if not, (2) whether testimony as to the Decedent's undocumented (i.e., no valid will) supposed intent could be used to create a constructive trust that

effectively created a will and severed the Decedent's sole heir, Dalk, from her vested statutory inheritance rights.

The above constructive trust issue is the only issue before this court on appeal. Notwithstanding the trial court's finding to the contrary, the Fifth DCA declared the unsigned "will" to be invalid. The Decedent died intestate and Dalk is her sole heir.

The case was commenced in the trial court when Allen filed her Petition for Administration in the Alternative (R: 8). Dalk responded with her Answer, Affirmative Defenses and Counter-Petition for Intestate Administration, alleging that the "will" was invalid and that she was the Decedent's sole intestate heir (R: 18). Dalk later filed additional defenses (R: 31) and a reply to Allen's defenses to Dalk's Counter-Petition (R: 29).

SUPPLEMENTAL STATEMENT OF THE FACTS

Although Allen's Statement of the Facts is generally accurate, it omits certain important facts. Dalk has, therefore, supplemented Allen's Statement of the Facts hereinbelow.

Although the Decedent never signed the "will", it was improperly "witnessed" and "notarized" (Appendix I).

Attorney and Mrs. Baker admitted that their respective witness certifications were inaccurate because the Decedent never signed the document (T: p. 60, l. 17-20; p. 140, l. 5-7; p. 140, l. 15-17). Although Attorney Baker testified that the notarization was inaccurate (T: p. 61, l. 3-9), his wife admitted that it was improper (T: p. 139, l. 10-21).

Attorney Baker testified that he has a problem, because the "will" he prepared was never signed by the Decedent (T: p. 51, l. 18-21), and he could be held responsible (T: p. 52, L. 21-24). According to Dalk's grandson, Attorney Baker said that he "messed it up, and that he'll take responsibility for it" (T: p. 170, l. 7-13). After Allen gave Baker heck because the "will" was never signed (T: p. 54, l. 5-14), Baker hired lawyers to represent him (T: p. 54, l. 15-24).

In addition to being unsigned, improperly witnessed and illegally notarized, the "will" has other deficiencies. One "beneficiary's" name was misspelled, and another's was wrong (T: p. 112, l. 5-12). According to the death certificate of the Decedent's pre-deceased husband (Exhibit 7) and the testimony of Dalk's grandson, the Decedent's supposed address is also wrong in the "will" (T: p. 172, l. 23-25; p. 173, l. 1-12). Specifically, "200 Street Road" does not exist (T: p. 172, l. 5-7).

Dalk is the Decedent's surviving half-sister (T: p. 10, l. 11-14; p. 145, l. 17-18). The Decedent had no other siblings (T: p. 149, l. 18-20). Her parents (T: p. 148, l. 21-25) and husband pre-deceased her (T: p. 149, l. 8-10), and she never remarried (T: p. 149, l. 11-13; p. 128, l. 12-17). She never had children (T: p. 149, l. 14-15; p. 128, l. 18-19) nor adopted any (T: p. 149, l. 16-17).

The Decedent grew up in Germany (T: p. 145, l. 21-25; p. 146, l. 1-14), where holographic wills are valid (R: 33; R: 34). On December 22, 1996, the Decedent signed such a will (Exhibit 5) and

thereafter delivered it to Manfred Noetzel, the longtime boyfriend of Dalk's daughter, Dagmar Gohlke (T: p. 153, l. 20-25; p. 154, l. 1-21; p. 155, l. 20-22). Ms. Gohlke and Mr. Noetzel are the beneficiaries named therein (Exhibit 5; T: p. 153, l. 23-25; p. 154, l. 1).

Dalk and the Decedent remained very close through the years, with Dalk visiting Florida many times and speaking by telephone with the Decedent twice every week (T: p. 128, l. 20 through p. 130, l. 21; p. 146, l. 9 through p. 148, l. 20). Notwithstanding Allen's assertions, Dalk was much closer to the Decedent than Allen, and Allen only attempted to become close to the Decedent after the Decedent's husband died, during the last years of her life (P. 130, l. 8-21).

Allen called witness Margarete Mazur three times before the trial, which made Mrs. Mazur uncomfortable. Allen also lied to Mrs. Mazur about the location of estate assets (T: p. 133, l. 4-25; p. 134, l 1-24), and failed to follow a court order requiring delivery of all estate assets to the Decedent's curator (T: p. 111, l. 1-25).

SUMMARY OF ARGUMENT

After the Decedent died, the trial court admitted her unsigned will to probate. This "will" is a mix of false witness certifications and oaths, a blank signature line, a false notary oath and an illegal notary seal. The Fifth DCA reversed and declared the "will" invalid.

Dalk is the Decedent's biological half-sister. The Decedent had no surviving spouse, children, parents or other siblings. Dalk is the Decedent's sole intestate heir.

Due to an alleged mistake and the Decedent's unwritten supposed intent that her property pass to the "beneficiaries" in the "will", the trial court disinherited Dalk with a constructive trust. The Fifth DCA also reversed this part of the trial court's order. Although never specifically noted, the trial court found, necessarily, that the Decedent intended to disinherit Dalk.

In disinheriting Dalk, the trial court disregarded §§732.101(1) and 732.103(3), Fla.Stat. (1997) and years of jurisprudence. Once a will is declared invalid, the testatrix' intent is not controlling, and her property passes to her heirs at law. In Re: Stephan's Estate, 194 So. 343, 344 (Fla. 1940).

Based on In Re: Estate of Tolin, 622 So.2d 988 (Fla. 1993), the trial court alternatively approved a constructive trust based on undocumented purported intent of the Decedent. Estate of Tolin is inapplicable, as there is no testamentary language before this Court to determine the Decedent's intent. Further, Estate of Tolin neither created a will nor disinherited an heir. Such case is otherwise inapplicable herein.

Attorney Baker committed malpractice, which is not a reason to disinherit an heir and validate an invalid will.

No Court should determine testamentary intent without a writing executed pursuant to the will statute. A constructive trust based on testimony as to the Decedent's supposed testamentary

intent will expose Florida's elderly population to potential fraud, and legitimate heirs may lose their lawful inheritances.

A duly executed will is essential to determine a decedent's true intent to dispose of her assets in a certain manner; anything less than a valid will lacks true testamentary intent and renders the "intent" suspect. The statutes and jurisprudence have created a threshold respecting testamentary intent-the existence of a valid will-which threshold should never be discarded for the sake of being "fair and equitable". To avoid future fraud, this threshold must remain intact.

ARGUMENT

I.

THE STANDARD OF REVIEW APPLICABLE HEREIN IS WHETHER ALLEN RECEIVED DUE PROCESS AND THE FIFTH DCA APPLIED THE CORRECT LAW

The standard of review for a pure question of law is de novo. However, there are issues of disputed facts before this Court, so de novo review, suggested by Allen, is not the correct standard.

Dalk has not found a case defining the appropriate standard of review when this Court receives a certified question from a district court in a case involving disputed questions of fact and law. Allen has, however, already had a trial and a full appeal and she is not entitled to another full appeal. Although this case does not involve certiorari jurisdiction, it does involve the discretionary jurisdiction of this Court. See Fla.R.App.P. 9.030(a)(2)(A)(v). Dalk respectfully submits that the appropriate standard of review is whether Allen received due process and the

Fifth DCA applied the correct law. See Haines City Community Development v. Heggs, 658 So.2d 523 (Fla. 1995).

II.

THE FIFTH DCA CORRECTLY REJECTED THE CONSTRUCTIVE TRUST

A. The "Will" is Invalid

The "will" is a mix of false witness certifications, false witness oaths, a blank signature line, a false notary oath and an illegal notary seal. Although Allen characterized Attorney Baker's actions as a mistake, this Court has sanctioned an attorney for similar actions. In The Florida Bar v. Story, 529 So.2d 1114 (Fla. 1988), this Court suspended an attorney for 30 days because before his client executed a will, (1) the witnesses' signatures attesting to the testator's execution had already been obtained and (2) the notarized statement that the witnesses had signed in the presence of the testator had been executed.

Allen's attempt to validate an invalid will was rejected by the Fifth DCA because it was not supported by law:

> **"Every attorney whose practice includes the frequent drafting of wills dreams of the will, executed in his office with all the formality that a prosperous client could afford, which turns up after testator's death without a signature. It happens occasionally; but when it does, the will cannot be admitted to probate, even if three subscribing witnesses testify that the testator declared it to be his will in their presence and that they were all under the impression that he had signed it."**

Miami Law Quarterly, Vol. IV, p. 55 (1950).

Strict compliance with statutory requirements is a prerequisite for the valid creation of a will. In Re: Estate of Bancker, 232 So.2d 431, 433 (Fla. 4th DCA 1970). The "obvious intent" of the will statute is to ensure that the will is authentic and avoid fraud. In Re: Olson's Estate, 181 So.2d 642, 643 (Fla. 1966). The purpose of the statute is to assure that the testatrix signed the will, and to provide assurance that the signature was properly affixed to the document; where the statutory formalities are not complied with, that assurance is missing. Manson v. Hayes, 539 So.2d 27, 28 (Fla. 3rd DCA 1989). The Fifth DCA found that a constructive trust would validate an invalid will, and that no case law supports such result (5DCAR:14).

In the only previously reported attempt to probate an unsigned will in Florida, this Court declared the will invalid. In Re: Neil's Estate, 39 So.2d 801 (Fla. 1949). No reported Florida case has validated an invalid will. Rather, Florida courts have consistently held that the will statute is to be strictly construed. Estate of Bancker, supra; In Re: Estate of Dickson, 590 So.2d 471, 472 (Fla. 3rd DCA 1991) ("strict compliance with statutory requirements is a prerequisite for the valid creation . . . of a will").

B. Since the "Will" is Invalid, the Decedent's Intent is Irrelevant and her Property Passes to Dalk as the Sole Intestate Heir

§732.101(1), Fla.Stat. (1997), provides, in relevant part, "that [a]ny part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as described in

the following sections of this code". §732.103(3), Fla.Stat. (1997), which governs distribution of the Decedent's property, states, in relevant part, that "the entire intestate estate . . . descends . . . to the decedent's . . . sister".

It is well settled that once a will is declared invalid, the testatrix' intent is no longer controlling, and her property must pass to her intestate heirs. In Re: Stephan's Estate, 194 So. 343, 344 (Fla. 1940) ("The statute of descents applies to any property of a decedent not lawfully disposed of by will . . ."); In Re: Estate of Reid, 399 So.2d 1032, 1033 (Fla. 1st DCA 1981) ("once a will is declared invalid, the testator's intent is no longer controlling and the property must pass according to the law of intestate succession"); In Re: Estate of Lubbe, 142 So.2d 130, 137 (Fla. 2d DCA 1962); 80 Am.Jur. 2d Wills §1687 (1975); §732.101(1), Fla.Stat. (1997).

Dalk is the Decedent's biological half-sister. The Decedent died without a surviving spouse, children, surviving parents or other siblings. Pursuant to §732.103(3), Fla.Stat. (1997), Dalk is the Decedent's sole intestate heir. Half-sisters are deemed full sisters under Florida's intestacy laws. Lowrimore v. First Savings & Trust Co. of Tampa, 140 So. 887, 890 (Fla. 1931).

C. The Decedent's Non-Testamentary Supposed Intent Cannot be Used to Sever Dalk's Inheritance Rights

Due to an alleged mistake and the Decedent's non-testamentary supposed intent, the trial court disinherited Dalk, thereby committing reversible error. Although never specifically noted,

the trial court found, necessarily, that the Decedent intended to disinherit Dalk. Since the "will" is invalid, the Fifth DCA properly reinstated Dalk's statutory inheritance rights. In Re: Estate of Barker, 448 So.2d 28, 31 (Fla. 1st DCA 1984); In Re: Levy's Estate, 196 So.2d 225, 229 (Fla. 3rd DCA 1967), cert. denied, 201 So.2d 550 (Fla. 1967) ("in order to cut off an heir's right to succession a testator must do more than merely evidence an intention that the heir shall not share in the estate - he must make a valid disposition of the property"); In Re: Estate of Scott, 659 So.2d 361 (Fla. 1st DCA 1995).

In Estate of Barker, supra, an attorney redrafted a will and mistakenly omitted a residuary clause. This was a mistake of fact, not a mistake of law. The court cited In Re: Pratt's Estate, 88 So.2d 499 (Fla. 1956), and other cases, and awarded the residuary estate to the intestate heirs. Evidence of the alleged mistake was properly disallowed because the residuary property was not conveyed by a will and there were no conflicting provisions of a valid will before the court.

Estate of Barker, supra, held (1) that the power to disinherit a legal heir can only be exercised by a valid will; (2) that all unwilled property is governed by the statutes of descent; (3) that a court cannot make a will; (4) that a court cannot produce a distribution that it thinks is more equitable; and (5) that a court cannot consider extrinsic evidence of mistakes and the testatrix' supposed intent to disinherit an heir.

Estate of Barker, supra, also held that a court cannot inquire what a testatrix meant to say. "[T]he inquiry is not what the testatrix meant to say, but what she meant by what she did say" in a will. Estate of Barker, supra at 32. In the absence of a valid will, the trial court improperly considered parol evidence of the alleged mistake and the Decedent's supposed intent. See In Re: Pratt's Estate, supra at 504 ("The law of wills is calculated to avoid speculation as to the testator's intent and to concentrate upon what he said" in his will "rather than what he might, or should, have wanted to say".)

Allen may dodge the intestacy issue by arguing that the question in Estate of Barker was whether a court could insert a clause in an otherwise completed will. Alternatively, Allen may attempt to distinguish Estate of Barker by arguing that the trial court did not speculate on the Decedent's intent and supply testamentary language. These arguments, if made, are meritless. Since the critical threshold for determination of testamentary intent-the existence of a valid will-has not been crossed, no testamentary intent is involved herein. Simply put, there is no testamentary document or language to consider in this case. The trial court improperly validated the otherwise invalid "testamentary" language in the "will". By determining the Decedent's supposed intent in the absence of a valid will and thereby judicially supplying all purported "testamentary" language, the trial court committed reversible error, which was properly corrected by the Fifth DCA.

In Estate of Salathe, 703 So.2d 1167 (Fla. 2d DCA 1997), a decedent signed an unwitnessed holographic will, and expressly disinherited her estranged spouse. Apparently due to her mistaken belief that such wills are valid, the decedent violated Florida's will statute, thereby making her will invalid. Despite the apparent mistake and the decedent's clear written intent to disinherit her husband, the court declared the will invalid and conveyed her property to her husband via the intestacy statutes. Since the "will" is also invalid, Dalk is entitled to the Decedent's property as her sole heir, as noted by the Fifth DCA (5DCAR:13).

D. The Constructive Trust Must Fail Because Allen has an Adequate Remedy at Law

Allen, as a "beneficiary" in the "will", can sue Attorney Baker for malpractice. See Arnold v. Carmichael, 524 So.2d 464 (Fla. 1st DCA 1988). Accordingly, Allen has an adequate remedy at law, which precludes the equitable constructive trust. See Lamarca v. Miami Herald Pub. Co., 395 F.Supp. 324 (S.D. Fla. 1975) (equitable relief not justified where injury is compensable by money damages); Wadlington v. Edwards, 92 So.2d 629, 631 (Fla. 1957) ("A constructive trust is a remedy which equity applies"); Lake Tippecanoe Owners Association v. National Lake Developments, Inc., 390 So.2d 185, 187 (Fla. 2d DCA 1980) ("The court may not exercise its equity powers when there is an adequate remedy at law"); Moore v. Wesley E. Garrison, Inc., 5 So.2d 259 (Fla. 1941) ("a court of equity will grant . . . relief . . . provided that no adequate remedy can be had at law").

Also, Attorney Baker's malpractice is an improper basis for equitable relief. Johnson v. Green, 54 So.2d 44, 46 (Fla. 1951) ("equity will not grant relief where the mistake complained of resulted from the want of care or that degree of care and diligence which could be exercised by persons of reasonable prudence under the same circumstances").

The Fifth DCA correctly reversed the trial court, which improperly used a constructive trust to overrule the will statute, the intestacy statutes and the cases construing such statutes. See Orr v. Trask, 464 So.2d 131, 135 (Fla. 1985) ("[c]ourts of equity have no power to overrule established law"); Bank of South Palm Beaches v. Stockton, 473 So.2d 1358, 1361 (Fla. 4th DCA 1985) ("whenever a given point of law is clearly covered by established legal principles, equity cannot interfere and disregard these principles").

E. Allen is not Entitled to an Oral Will

Allen wants this to be the first Florida case wherein an intestate heir is disinherited by a constructive trust. If this Court wishes to disinherit Dalk, it must utilize the Decedent's supposed verbal statements, thereby erroneously creating an oral will. See In Re: Estate of Corbin, 645 So.2d 39, 42 (Fla. 1st DCA 1994) ("Florida does not recognize oral wills").

F. Estate of Tolin is Inapplicable

In support of a constructive trust, Allen cites In Re: Estate of Tolin, 622 So.2d 988 (Fla. 1993). To apply the Estate of Tolin result in favor of Allen, this Court must ignore a comprehensive

statutory scheme (will statute and intestacy statutes) and overrule years of jurisprudence. The narrow Estate of Tolin opinion is inapplicable, and it did not disinherit an heir by validating an invalid will.

(i) This Case is not Unique

In an attempt to liken this case to Estate of Tolin, Allen argues that the facts herein are unusual and unique. This Court noted that Estate of Tolin involved "unique and undisputed facts". Estate of Tolin, supra at 991. While some facts in this case are unusual, the determinative facts are neither unusual nor unique. Specifically, the Decedent never signed the "will" and Dalk is her sole heir. The "will" is invalid and the Decedent's estate is subject to a common occurrence-intestate distribution.

Intestacy is so common that an entire statutory scheme is devoted thereto. See Part 1, Chapter 732, Fla.Stat. (1997). Many Florida cases have upheld the rights of intestate heirs like Dalk. Allen attempts to dodge the intestacy issue by arguing that this case is unique.

The factual situation herein, involving an unsigned will, "happens occasionally". See Miami Law Quarterly, supra. Also, Estate of Tolin did not involve intestacy or disinheritance of an intestate heir. Allen cannot change the routinely encountered facts that the Decedent died intestate, with Dalk as her sole heir.

(ii) Unlike Estate of Tolin, the Decedent's Intent is Irrelevant

Estate of Tolin involved a valid will and this Court focused on the decedent's intent expressed therein. However, the intent of

the Decedent is irrelevant because the threshold to consider intent-the existence of a valid will-is not present herein. It is well settled that once a will is declared invalid, the testatrix' intent is no longer controlling, and her property must pass to her intestate heirs. In Re: Stephan's Estate, supra; In Re: Estate of Reid, supra; In Re: Estate of Lubbe, supra; 80 Am.Jur.2d Wills §1687 (1975); §732.101(1), Fla.Stat. (1997).

(iii) Estate of Tolin did not Disinherit an Heir

Estate of Tolin did not disinherit an heir like Dalk. That case involved valid testamentary documents, and the statutes of descent were never considered. The rule "once a will is declared invalid, all of the property passes to the intestate heirs" was not modified by Estate of Tolin. Since the rule is codified in §732.101(1), Fla.Stat. (1997) and this Court recognized it in Stephan's Estate, supra, Dalk submits that this Court did not intend to reverse it in Estate of Tolin.

(iv) Unlike Estate of Tolin, this Case Involves Disputed Facts

Allen argues that the Decedent intended to convey her assets pursuant to the unsigned "will". Dalk submits, without admitting that intent is relevant, that the Decedent intended to convey her property pursuant to her hand made will (Exhibit "5"). Although this will lacks witnesses and is therefore invalid, at least the Decedent signed it (Exhibit 5). If this Court deems the Decedent's intent to be relevant, Dalk submits that this signed will is more probative of the Decedent's supposed intent than the unsigned "will". In any event, the hand made will, signed by the Decedent,

demonstrates disputed facts herein, as opposed to Estate of Tolin, which involved "undisputed facts".

A review of the trial transcript reveals many other factual disputes, too numerous to cite herein. The nature of Allen's relationship with the Decedent is disputed, with Dalk contending that such relationship was distant until the last few years of the Decedent's life. Further, whether Allen has unclean hands (precludes equitable relief) is disputed, with Dalk contending that Allen lied about estate assets, withheld estate assets from the curator and manipulated trial witnesses.

(v) Unlike the Losing Party in Estate of Tolin, Dalk will not be Unjustly Enriched

In Estate of Tolin, this Court used a constructive trust to avoid unjust enrichment. The dispute involved an art guild and a beneficiary in a valid will, and whether a codicil was revoked by destroying a copy thereof. In Estate of Tolin, the testator's intent was relevant due to the existence of a valid will, and the Court considered such intent to avoid unjust enrichment. Unlike the losing party in Estate of Tolin, Dalk will not be unjustly enriched if she inherits the Decedent's property. Rather, Dalk will inherit property that she is entitled to under the intestacy statutes and jurisprudence. In fact, the constructive trust requested by Allen will improperly void Dalk's vested inheritance rights, which is the antithesis of unjust enrichment. Since the only way to disinherit Dalk is by a valid will, which is not present, Dalk cannot be unjustly enriched by receiving the Decedent's property. See In Re: Levy's Estate, supra; In Re:

Estate of Barker, supra. Dalk will, however, be unjustly penalized if this Court imposes a constructive trust.

(vi) Dalk's Rights Vested Before Any Constructive Trust was Created

Allen may argue that Dalk's inheritance rights never vested, or that a constructive trust arose before Dalk's inheritance rights. Dalk's inheritance rights, however, vested before the creation of any constructive trust. See In Re: Mooney's Estate, 395 So.2d 608 (Fla. 5th DCA 1981) (intestate's death is event that vests heir's right to intestate property); Palmland Villas I Condominium Assn. Inc. v. Taylor, 390 So.2d 123 (Fla. 4th DCA 1980) (constructive trust comes into existence on date of court order creating same).

III

PUBLIC POLICY DEMANDS REJECTION OF A CONSTRUCTIVE TRUST

In Olson's Estate, supra, this Court noted that the intent of the will statute is to assure that every will is authentic, and to avoid fraud. Allen wants this Court to overlook the will and intestacy statutes, and simultaneously ignore Florida jurisprudence. Allen's constructive trust theory invites fraud against legal heirs and others, and the Fifth DCA should therefore be affirmed.

Allen admits that historically our jurisprudence has properly required significant formality to make a will. Allen also argues that our system properly permits people to determine disposition of their assets after death. Allen is correct, provided that the

"people" who determine disposition of such assets after death are testators with valid wills, not third parties who testify as to the decedents' supposed intent to execute invalid wills.

Allen argues that the Decedent's intent should control. Dalk submits that if the Decedent's intent had been expressed in a valid will, it would control. However, the Decedent's intent is irrelevant because it cannot be gleaned from a duly executed testamentary document. The Decedent's supposed intent is non-testamentary and should not control herein due to the absence of a valid will.

This Court has repeatedly stressed the importance of a testator's intent in construing a will. However, this Court has also repeatedly held that the testator's intent only governs if it can be gleaned from a valid will. Wright v. Sallet, 66 So.2d 237 (Fla. 1953) ("in construing a will the court should give effect to the intent of the testator if that can be gleaned from its contents"); Martin v. Shands, 49 So.2d 598 (Fla. 1950) ("the intention of the testatrix governs, as we have often said, and that intention must be ascertained from the language employed in the testament"); State v. North, 32 So.2d 14 (Fla. 1947) ("It is the duty of the court to give effect to such intention from the entire will where it can be ascertained from the will. It is the intention which the testator expresses in his will that controls and not that which he may have had in his mind"); Iles v. Iles, 29 So.2d 21 (Fla. 1947) ("in construing a will, it is the intention which the testator expresses in the will that controls and not that

which he might have had in mind when the will was executed"); In Re: Block's Estate, 196 So. 410 (Fla. 1940) ("the intention of the testator is the all important factor in the construction of a will; . . . this should be gleaned from the will if possible, and . . . parol evidence may not be resorted to except in case of ambiguity"); Howe v. Sands, 194 So. 798 (Fla. 1940); rehearing denied, 195 So. 609 (Fla. 1940) (while "the intention of the testator is the polar star to guide in the construction of the will . . . it is the intention which the testator expresses in his will that controls and not that which he may have had in his mind"); Rewis v. Rewis, 84 So. 93 (Fla. 1920) ("a will cannot be construed by a mere conjecture as to the intention of the testator; but it is the intention which the testator expresses in his will that controls, and not that which he may have had in his mind").

It would be a radical change to allow parol evidence of a decedent's supposed intent to disinherit a legal heir without the existence of a valid will. Without a valid will, such intent has long been irrelevant in Florida. If Allen's constructive trust theory prevails, this Court will have reversed the well settled rule that intent is irrelevant without a valid will. Also, this Court will have reversed its numerous prior opinions requiring testamentary intent to be determined from language in a valid will.

A decedent's true testamentary intent can never be conclusively determined in the absence of a writing actually signed by her. As such, "intent" determined without a valid will should never be sufficient to disinherit an heir.

An opinion of this Court validating Allen's constructive trust theory would invite future fraud because the required elements, mistake of fact and supposed intent, could too easily be "proven" by the testimony of "disinterested" witnesses. Such an opinion would gut the existing statutory schemes and overrule years of jurisprudence.

Allen's theory could easily be advanced by future schemers, with devastating results. For example, a friend or relative of an elderly person could ask an unsuspecting attorney to prepare a durable power of attorney, declaration regarding life prolonging procedures, designation of health care surrogate and will for the elderly person, who is too infirm to visit the attorney. The elderly person could be presented with and sign, in the presence of the friend and relative, the common and relatively innocuous durable power of attorney, declaration regarding life prolonging procedures, and designation of health care surrogate. The elderly person is not presented with the will; alternatively, the real will is destroyed. After the elderly person dies, the friend and relative create a new will, sign it as "witnesses", and testify that the decedent claimed to have signed the "will" and intended to sign and that her failure to sign was caused by a mistake of fact similar to Attorney Baker's alleged mistake. To avoid the deadman's statute, neither the friend nor the relative would be named as beneficiaries in the "will". The "will" and testimony are later used to create a constructive trust in favor of "beneficiaries" and there are many potential victims, including

intestate heirs or legitimate beneficiaries named in prior valid wills. This scenario is plausible, as Florida residents have repeatedly demonstrated their creativity in taking advantage of the elderly.

According to the Miami Law Quarterly article cited above, occasionally a will that an attorney thought was properly executed by his client turns up later, after the client's death, without the testatrix' signature. Allen's theory, if approved, would give an attorney in this bind a roadmap to avoid malpractice. In practice, assuming an otherwise honest attorney, this may not be such a bad result. However, suppose the attorney lacks scruples, is in possession of (and destroys) the original will, recruits "witnesses" and a "beneficiary" (to share the profits with, preferably offshore), and concocts the whole scheme, and the decedent is a millionaire whose intestate heirs are destitute. The trial court imposes a constructive trust, and the ruling is sustained on appeal. The crooks get the money, and the intestate heirs get nothing. Similar horror stories have occurred, and their prevention demands that Allen's theories be rejected.

Allen's theories should, of course, be rejected for other reasons. The will and intestacy statutes are relatively uniform throughout the United States, and they should not be abrogated or tinkered with. The cases construing such statutes are likewise uniform, and such jurisprudence should not be disregarded. Also, while a decedent's intent expressed in a valid will is crucial, a decedent's non-testamentary intent should never be considered by

any court without a valid will. Such "intent" should continue to be deemed irrelevant in the absence of a valid will. Also, parol evidence of a decedent's supposed intent should be ignored unless there is ambiguous language to be construed in a valid will.

A valid will is the only way to conclusively ensure that a decedent truly intended to dispose of her assets in a certain manner; anything less than a valid will lacks true testamentary intent and renders the "intent" suspect. The statutes and jurisprudence have created an important threshold respecting the determination of testamentary intent-the existence of a valid will-and this threshold should never be discarded for the sake of being "fair and equitable". Estate of Barker, supra, is a well reasoned decision that precludes courts from writing wills and utilizing non-testamentary "intent" to reach a supposed fair result, and its rationale should be used to reject Allen's claims for failure to cross the threshold. To avoid future fraud, this threshold-the existence of a valid will-must remain etched in our jurisprudence, without being eroded.

Finally, Allen's pleas for a narrow opinion should be rejected, as such an opinion will still encourage future fraud. There are too many possible permutations of "mistake of fact" and "clear intent". Even a narrow opinion of this Court will likely be stretched and distorted in the future, with potentially devastating results.

CONCLUSION

The Fifth DCA properly rejected Allen's constructive trust theory. Once the Decedent's will was declared invalid, her supposed intent became irrelevant, and her property must pass to Dalk as her intestate heir. Since there is no valid will herein, there is no testamentary intent or language to consider. The critical threshold has not been crossed. The Decedent's supposed intent is non-testamentary, based upon parol evidence and therefore irrelevant. Accordingly, the district court's rejection of Allen's constructive trust theory should be affirmed.

Dalk respectfully requests that this Honorable Court affirm the Fifth DCA and instruct that this cause be remanded to the trial court for entry of an order granting Dalk's Counter-Petition for Intestate Administration. Alternatively, Dalk respectfully requests that this Court enter an order declining review of the Fifth DCA's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to William H. Phelan, Jr., Esq., P.O. Box 2405, Ocala, Florida 34478 this ____ day of February, 2001.

By:_____
Christopher J. Klein

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(2), the undersigned certifies that this brief is being submitted in Courier New 12-point font.

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