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
_____/

PETITIONER'S INITIAL BRIEF

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

WILLIAM H. PHELAN, JR.
FLA. BAR NO. 273805
BOND, ARNETT & PHELAN, P.A.
PO BOX 2405
OCALA, FL 34478-2405
(352) 622-1188
ATTORNEYS FOR THE PETITIONER

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PRELIMINARY STATEMENT

For purposes of this INITIAL BRIEF, the following abbreviations will be utilized:

The Petitioner, Bonnie Allen, will occasionally be referred to as "Petitioner" or “Allen”.

The Respondent, Margarete Dalk, will occasionally be referred to as "Respondent" or “Dalk”.

References to the RECORD ON APPEAL transmitted by the trial court to the District Court of Appeal will be cited as (R:), followed by the appropriate page number or numbers of the record. References to the record on appeal set forth in the index prepared by the Clerk of the Fifth District Court of Appeal, containing a total of 18 pages, will be cited as (5DCAR:), followed by the appropriate page number or numbers of that record.

The transcript of the final hearing, dated November 16,1999 is incorporated within the RECORD ON APPEAL as Volume III of same. Therefore, the transcript will be cited as (T:), followed by the appropriate page number or numbers of the transcript.

STATEMENT OF THE CASE

As more particularly set forth hereinafter, this case arises as a result of competing petitions for administration filed subsequent to the death of the decedent, Christel D. McPeak. Mrs. McPeak died on May 7, 1999 at Ocala, Marion County, Florida (R: 10). On or about June 9, 1999 the Petitioner herein, Bonnie Allen, filed her petition for administration with said petition being in the alternative. Succinctly stated, this petition for administration requested the trial court either to admit a will to probate or to determine Mrs. McPeak to have died intestate and establish a constructive trust requiring a personal representative to hold the assets of the estate in constructive trust for the beneficiaries set forth in the document offered for probate as a will (R: 10-16). On or about July 23, 1999 the respondent herein, Margarete Dalk, served for filing, inter alia, her counterpetition for administration (intestate). Reduced to basics, the issues pending before the trial court were: 1) whether a document purporting to be a will could be admitted to probate based upon the typed signature of the testator if facts adduced at trial proved that the testator had ratified her typed signature and 2) if not, whether a constructive trust should be imposed on the assets of the estate in favor of the beneficiaries named in the document purporting to be a will.

The case was tried on November 16, 1999. Thereafter, both parties fully

briefed both the facts and the law (R: 139-222). On December 29, 1999 the trial court entered its ORDER ADMITTING WILL TO PROBATE AND APPOINTING PERSONAL REPRESENTATIVE (R: 223-229). This order held that the document in question was admissible to probate as the Last Will and Testament of the decedent and, alternatively, that if it were not, a constructive trust would properly be imposed in favor of the beneficiaries named in the will. A copy of this order is appended hereto as Appendix 1.

On January 19, 2000 Ms. Dalk appealed the trial court's order to the Fifth District Court of Appeal (R: 240). The Fifth District Court of Appeal issued its opinion on December 15, 2000 reversing the order of the trial court (5DCAR: 10-15). A copy of this opinion is appended hereto as Appendix 2. As a part of its opinion, the Fifth District Court of Appeal certified the following question to this Honorable Court as one of great public importance:

> MAY A CONSTRUCTIVE TRUST BE IMPOSED OVER THE ASSETS OF AN ESTATE IN FAVOR OF A BENEFICIARY NAMED IN AN INVALIDLY EXECUTED WILL, WHERE THE INVALIDITY IS THE RESULT OF A MISTAKE IN ITS EXECUTION, AND THE INVALID WILL EXPRESSES THE CLEAR INTENTION OF THE DECEDENT TO DISPOSE OF HER ASSETS IN THE MANNER EXPRESSED THEREIN?

The constructive trust issue is the only issue before this Court on appeal. Stated differently, the question of whether or not the document originally offered for probate

constitutes a valid will is not before this Court.

On December 27, 2000 the Petitioner herein filed her NOTICE TO INVOKE JURISDICTION (5DCAR: 17). On January 10, 2001 this Honorable Court entered its ORDER POSTPONING DECISION ON JURISDICTION AND BRIEFING SCHEDULE (5DCAR: 18). This, PETITIONER'S INITIAL BRIEF, follows.

STATEMENT OF THE FACTS

The Decedent, Christel McPeak, was born in Germany (T: 95). Bonnie Allen's brother met Mrs. McPeak while he was serving with the military in Germany. They fell in love, were married, and ultimately returned to the United States where Mrs. McPeak lived out her life (T: 96-100). Bonnie Allen's parents died when she was a teenager. After their deaths, Ms. Allen went to live with her brother and his wife, Christel McPeak (T: 96-97). Ms. Allen lived with her brother and the decedent until she, herself, was married (T: 97). Thereafter, she continued to maintain a close relationship with her brother and sister-in-law, Mrs. McPeak (T: 98). In effect, her brother and the decedent were a "surrogate family" for Ms. Allen (T: 98).

The respondent, Margarete Dalk, is the half sister of Mrs. McPeak (T: 145). They lived together in the same house until Mrs. McPeak was approximately 14 years

old. After World War II Mrs. McPeak lived in Munich and Ms. Dalk lived in Berlin (T: 146). Ms. Dalk did maintain some contact with her half-sister (T: 146-147). However, Ms. Dalk remained at all times a resident of Germany. As found specifically by the trial court, Mrs. McPeak's expressed intention was to leave her property to her sister-in-law, Bonnie Allen, and Bonnie Allen's daughters, Sheri Caccamo and Angela Conner (R: 223-226).

On or about March 4,1998 Mrs. McPeak consulted with Attorney Herb Baker for the purposes of making a last will and testament, living will and designation of health care surrogate, and durable power of attorney (R: 223). At that time, Mr. Baker considered himself to be "semi-retired" and maintained a limited practice out of his home primarily drafting wills and trusts for clients who were themselves retired (T: 19). During this conference, Mrs. McPeak explained to Attorney Baker her desires for distribution of her property after death. In relevant part Mrs. McPeak stated that her jewelry, personal effects and automobile were to be left to her sister-in-law, Bonnie Allen, and that the remainder of her estate was to be divided equally between her nieces, Sheri Caccamo and Angela Conner (R: 224). After this conference but before March 20, 1998 Attorney Baker instructed his wife and secretary, Jemma Baker, to prepare a last will and testament, living will and designation of health care surrogate (four duplicate originals) and durable power of attorney (three duplicate originals) for Mrs. McPeak in accordance with the instructions of Mrs. McPeak (R:

224). Prior to March 20, 1998 Mrs. Baker did prepare said documents including the numbers of duplicate originals described heretofore (R: 224).

On March 20, 1998 Mrs. McPeak met with Attorney Baker for the purpose of reviewing her last will and testament, living will and designation of health care surrogate and durable power of attorney. During this conference Attorney Baker explained the contents and effects of each document and Mrs. McPeak acknowledged that the documents as drafted complied with her wishes; specifically including her desire to leave her property to Ms. Allen and Ms. Allen's daughters (R: 224). Immediately thereafter, Mrs. McPeak and Attorney Baker met jointly with Jemma Baker and Anne E. Dick, a notary public, for the purpose of executing Mrs. McPeak's last will and testament, living will and designation of health care surrogate, and durable power of attorney. This joint meeting occurred on the screen porch of Attorney Baker's home/office (R: 224). At this joint meeting, Mrs. McPeak declared before Attorney Baker, Jemma Baker and Anne Dick that the document entitled "LAST WILL AND TESTAMENT OF CHRISTEL D. McPEAK" was, in fact, her will and that she intended to execute said document as her will (R: 225).

At the instruction of Attorney Baker, four duplicate original living wills and three duplicate original powers of attorney were prepared for execution. So, including the last will and testament, there were eight separate original documents to be executed at that time and place (R: 225). At that time and place each of the duplicate

original living wills and powers of attorney were fully executed, witnessed, and, in the case of the powers of attorney, notarized (R: 225). The "LAST WILL AND TESTAMENT OF CHRISTEL D. McPEAK" was witnessed and notarized in the present of Mrs. McPeak and in the presence of Attorney Baker, Jemma Baker and Anne Dick. However, due to confusion in circulation of multiple original documents for signature and mistake, that document was not physically signed by Mrs. McPeak (R: 17-18 and 225).

As specifically found by the trial court, at that time and place it was the intention of Mrs. McPeak to execute a will which would leave her property after her death in accordance with the provisions of the "LAST WILL AND TESTAMENT OF CHRISTEL D. McPEAK" and it was the intention of Mrs. McPeak that her property would pass after her death in accordance with the terms and provisions of said document. This finding is accepted by the District Court of Appeal (5DCAR: 12-13). Both the trial court and the District Court of Appeal recognize that Mrs. McPeak's failure to physically sign the will was due simply to a mistake (R: 225 and 5DCAR: 13).

After leaving the March 20, 1998 meeting with Attorney Baker, Jemma Baker and Anne Dick, Mrs. McPeak delivered a manila envelope to her neighbors, Frank and Mary Pruitt, and told them the envelope contained a living will, a power of attorney and her "will". This envelope was given to the Pruitt's for safe keeping with

instructions from Mrs. McPeak that it be delivered to Bonnie Allen in the event of Mrs. McPeak's death. This envelope was opened once by Mrs. McPeak during her lifetime to remove a box of jewelry. Otherwise, the envelope remained closed until Mrs. McPeak's death with nothing else being removed or inserted. Shortly after Mrs. McPeak's death the envelope was delivered by the Pruitts to Bonnie Allen who opened the envelope in Mrs. Pruitt's presence and discovered the "LAST WILL AND TESTAMENT OF CHRISTEL D. McPEAK" which is the subject of this action (R: 226). This case followed.

As an aside, during the course of this litigation the estate of Christel D. McPeak has been administered by an independent attorney, Robert Landt, who has served as Personal Representative. By stipulation and agreement, Mr. Landt has marshaled the assets of the estate, undertaken those actions necessary to deal with creditor's claims and generally brought the estate to the point where it is ripe for distribution. Also by agreement and stipulation of the parties, no money or assets have been distributed to any beneficiary pending the final result of this appeal. Without regard to this Court's ultimate decision on the merits, neither party is contesting Mr. Landt's authority to have acted as Personal Representative nor is either party requesting this Court to reverse that portion of the ORDER ADMITTING WILL TO PROBATE AND APPOINTING PERSONAL REPRESENTATIVE which appointed Mr. Landt and authorized him to move forward with administration.

SUMMARY OF THE ARGUMENT

The only issues currently before this Court are issues of pure law. Most obviously, the basic issue and the question certified by the District Court of Appeal is whether a constructive trust may be imposed over the assets of an estate when a purported will is invalidly executed as a result of a mistake and the invalid will expresses the clear intention of the decedent. The standard of appellate review for a pure question of law is de novo.

The decedent, Christel D. McPeak, attended a will signing conference on March 20, 1998. At that time, under instructions from her attorney, Mrs. McPeak physically signed seven original documents. However, due exclusively to a mistake of fact made during the will signing conference, Mrs. McPeak's attorney erroneously concluded that Mrs. McPeak had also signed her will. This scenario is analogous to that presented by In re: The Estate of Tolin 622 So.2d 988 (Fla. 1993).

The attempted revocation of a codicil to a will in Tolin is simply the reciprocal to Mrs. McPeak's attempted execution of a will. The same part V of Chapter 732 of the Florida Probate Code which establishes the formalities for execution of wills or codicils also establishes the formalities for revocation thereof. There is no functional difference between impressing a constructive trust to cure a mistake in revocation and impressing a constructive trust to cure a mistake in execution.

As established by Tolin, a constructive trust should be imposed when the clear intent of the testator is defeated as a result of a mistake in fact. Like Mr. Tolin, any failure by Mrs. McPeak to complete all formalities was a mistake of fact. That is, after she physically signed seven original documents her lawyer erroneously determined that she had completed all actions necessary to cause her declared will to be properly executed. This is no different than Mr. Tolin's lawyer (New York, retired) erroneously determining that Mr. Tolin had completed all actions necessary to cause his codicil to be revoked by act. Therefore, as in Tolin, a constructive trust should be imposed in this case.

The District Court of Appeal erred in determining that imposition of a constructive trust would, in effect, validate an invalid will. This Court's decision in Tolin specifically preserves the well established requirement for strict compliance with the will statutes. However, while preserving the strict compliance standard, this Court also avoided the inequitable result of frustrating the testator's clear intent. Tolin itself confirms that imposing a constructive trust is not equivalent to creating a will.

For purposes of a constructive trust analysis, the correct test for unjust enrichment is whether or not the beneficiary truly intended by the decedent to receive his or her property is receiving that property. If not, unjust enrichment occurs. As found by the trial court, Mrs. McPeak's clear intention was to have her property pass

in accordance with the term of her will even though the will was not validly executed. Therefore, unjust enrichment will occur if a constructive trust is not imposed.

Public policy supports imposition of a constructive trust in this case. The imposition of a constructive trust will harmonize and avoid any conflict between the doctrine of strict compliance with the will statutes and the doctrine that the testator's intent should control. The Petitioner recognizes that imposition of a constructive trust in probate cases should be rare and occur only in situations where a mistake in fact operates to defeat the decedent's clear intent. A decision in favor of the Petitioner in this case is not at odds with that premise. A careful reading of Tolin confirms that a constructive trust can be imposed only when two tests are met: 1) there is a mistake of fact and 2) the testator's true intent is clear. Both elements of this test are satisfied by the instant case. Therefore, a constructive trust should be imposed.

ARGUMENT

I.

THE STANDARD OF REVIEW APPLICABLE TO THIS APPEAL IS DE NOVO.

The trial court entered its ORDER ADMITTING WILL TO PROBATE AND APPOINTING PERSONAL REPRESENTATIVE on December 29, 1999. This order contained detailed findings of fact which were accepted by the District Court of Appeal without objection. Most significantly, in its Findings of Fact numbers 5 and 17 the trial court found that the decedent's intent was to leave her property in accordance with the terms of the document purporting to be her last will and testament (R: 224, 226). Clearly, an appellate court should not substitute its judgment for that of the trial court regarding Findings of Fact [See: Manufacturer's National Bank of Hialeah v. Canmont International, Inc., 322 So.2d 565 (Fla. 3d DCA 1975)]. Therefore, there is not an issue of disputed fact before this Court on appeal.

Rather, the only issues currently before this Court are issues of pure law. Most obviously, the basic issue and the question certified by the District Court of Appeal is whether a constructive trust may be imposed over the assets of an estate when a purported will is invalidly executed as a result of a mistake and the invalid will expresses the clear intention of the decedent. The standard of appellate review for a pure question of law is de novo. [See: Armstrong v. Harris, 733 So.2d 7 (Fla. 2000)].

II.

THE DISTRICT COURT OF APPEAL ERRED IN FAILING TO IMPOSE A CONSTRUCTIVE TRUST.

The defect in Mrs. McPeak's execution of her will was exclusively due to a mistake of fact made during the will signing conference. Specifically, Attorney Baker, after observing Mrs. McPeak physically sign seven original documents, erroneously concluded that Mrs. McPeak had also signed her will thereby completing all actions necessary to cause her declared will to be properly executed. The trial court's uncontested findings of fact confirm what occurred. In a relatively informal atmosphere with relatively crowded surroundings, a total of eight (8) original documents were being circulated for signature. Each of these documents were to be signed physically by Mrs. McPeak and each of the documents were to be notarized, witnessed or both. Mrs. Baker's testimony is right on point. That is, somehow in the confusion of this moment an "accident" occurred and Mrs. McPeak simply did not physically sign the will. (T. 142). However, as is clear from the uncontradicted testimony of numerous witnesses and as found by the trial court, she intended to do so. Moreover, she declared to other disinterested witnesses that she had done so. In fact, Mrs. McPeak did physically sign at least seven (7) other original documents. The implication, confirmed by the trial court's ruling and the District Court of Appeal opinion, is obvious; everyone involved thought Mrs. McPeak had physically signed her original will even if, in retrospect, she did not do so. Simply stated, Mrs.

McPeak's intent to make her will was frustrated by Attorney Baker's mistake of fact.

This scenario is analogous to that presented by In re: The Estate of Tolin, 622 So.2d 988 (Fla. 1993). In Estate of Tolin, the testator attempted to revoke a codicil to his will by physically destroying the original codicil. Upon the advice of his neighbor, a retired New York attorney, Mr. Tolin destroyed what he thought to be the original codicil. In fact, what Mr. Tolin destroyed was a copy of the codicil. After ruling that physical destruction of a copy did not revoke the codicil, this Court imposed a constructive trust on the assets of the estate in favor of the beneficiaries who would have taken if the codicil was revoked. This Court stated:

> The next issue we address is whether a constructive trust should properly be imposed when a testator fails to effectively revoke a codicil because of a mistake of fact which prevented the testator from fulfilling the requirements of section 732.506. A constructive trust is properly imposed when, as a result of a mistake in a transaction, one party is unjustly enriched at the expense of another. Id. at 990.

The opinion of the District Court of Appeal below implicitly marginalizes Tolin by perfunctorily concluding, "(t)here is no similarity between the 'unique' facts of Tolin, and those here" (5DCAR: 14). With all respect to the lower tribunal, that conclusion is not correct. Obviously, the holding in Tolin is limited by its facts; nearly all cases are. Equally obviously, the facts of Tolin are quite unusual; as are the

facts of the instant case. In practical application, this means that constructive trusts in will contests should not be expected to occur often. However, the mere fact that such circumstances are unusual does not mean that a constructive trust should not be imposed where appropriate. Nowhere in the Tolin decision does this Court suggest that its opinion should not be regarded as binding precedence in factually similar cases.

Actually, the factual scenario presented by Tolin is very analogous to our current case. Tolin involved the attempted revocation of a codicil to a will where our instant case regards the attempted execution of a will; each simply is the reciprocal of the other. The same Part V of Chapter 732 of the Florida Probate Code which establishes the formalities for execution of wills or codicils also establishes the formalities for revocation thereof [cf: §732.502 Fla. Stat. (2000) and §732.505 - .506 Fla. Stat. (2000)]. In fact, this Court in Tolin recognized the similarities required for formalities of execution and for revocation. Id. at 990.

Tolin held quite clearly that failure to comply strictly with the formalities requisite for revocation by act rendered the attempted revocation of the codicil by physical destruction ineffective. Id. However, in order to avoid the harsh result of frustrating the testator's clear intention this Court then invoked the equitable remedy of constructive trust. The District Court of Appeal should have followed the example

set by this Court and followed by the trial court. As recognized by the District Court of Appeal, Mrs. McPeak's "clear intention" was to have her property pass in accordance with the terms of the will which, due to mistake, was invalidly executed (5DCAR: 15). The District Court of Appeal erred in not imposing a constructive trust.

Contrary to the opinion of the District Court of Appeal, there is no functional difference between impressing a constructive trust to cure a mistake in revocation and impressing a constructive trust to cure a mistake in execution. The petitioner and her daughters are in a position identical to that of the original beneficiary in Tolin. Just like Mr. Tolin, Mrs. McPeak's intent to have her property pass under the terms of what she believed to be her will is clear. Also like Mr. Tolin, any failure by Mrs. McPeak to complete all formalities was the result of a mistake of fact. That is, after she physically signed seven original documents her lawyer erroneously determined that she had completed all actions necessary to cause her declared will to be properly executed. This is no different than Mr. Tolin's lawyer (New York, retired) erroneously determining that Mr. Tolin had completed all actions necessary to cause his codicil to be revoked by act. Lastly, like Mr. Tolin, Mrs. McPeak's intent will be frustrated if a third party, (ie: Mrs. Dalk), is unjustly enriched as a result of this mistake. Therefore, as in Tolin, a constructive trust must be imposed in this case.

At the risk of redundancy, the petitioner does feel constrained to address one specific issue raised by the District Court of Appeal in this regard. Particularly, the

District Court of Appeal stated, "(o)rdering a constructive trust here would, in effect, be validating an invalid will, and we have found no case law which supports such result" (5DCAR: 14). This appears to be the same concern Justice McDonald was expressing in his special concurrence in Tolin joined by Justice Kogan and then Chief Justice Barkett. However, with the upmost respect to the District Court of Appeal and the concurring Justices in Tolin, imposing a constructive trust is not the same as making a will.

To the contrary, the majority opinion in Tolin does specifically preserve the well established requirement for strict compliance with the will statutes. Id. at 990. As correctly recognized by the District Court of Appeal below, strict compliance is important to insure the authenticity of the will and to avoid fraud and imposition in its execution (5DCAR: 12). However, at the same time the majority opinion in Tolin preserved the strict compliance standard, it also avoids the inequitable result of frustrating the testator's clear intent. Tolin itself confirms that imposing a constructive trust is not equivalent to creating a will.

The District Court of Appeal's attempt to avoid the implication of Tolin by determining that imposition of a constructive trust would "validat(e) an invalid will" is a distinction without a difference. Applying the same logic to the Tolin case, this Court's decision to impose a constructive trust would, by necessity, have to be said to have validated an invalid revocation. However, this Court specifically rejected that

linkage. Id. at 990. Just as the Tolin decision used the vehicle of a constructive trust to avoid an inequity arising from a mistake in revocation, so also should a constructive trust be used in this case to avoid inequities arising from a mistake in execution.

The concept of unjust enrichment also merits specific analysis. In proceedings below the Respondent has argued that Ms. Dalk possesses some specific rights to intestate succession. Although not a major component of the District Court of Appeal's analysis, this argument does appear to have been accepted by the District Court of Appeal which stated:

> 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. See In re Stephen's Estate, 194 So. 343 (Fla.1940). (5DCAR: 13)

However, both the Respondent herein and the District Court of Appeal below failed to appreciate the implications of Tolin as regards that premise.

Pursuant to probate law, once a will or codicil is determined to be valid, the testator's property must pass in accordance with the terms of the will [See: Estate of Flohl v. Flohl, 764 So.2d 802 (Fla. 2dDCA 2000)]. So, following the reasoning of the Respondent and the District Court of Appeal below, once the attempted revocation of Mr. Tolin's codicil was determined to be invalid, his property would have been required to pass in accordance with the terms of the codicil not properly revoked. And, further following that reasoning, it would not be proper to avoid that inequitable

result through the use of a constructive trust. And yet, that is exactly what this Court did in Tolin. The point is obvious, imposing a constructive trust in the instant case no more makes an invalid will valid than the Tolin decision rendered an invalid revocation valid.

Which returns us to the concept of unjust enrichment. The argument of the Respondent, implicitly accepted by the District Court of Appeal, is that Ms. Dalk is not unjustly enriched because she would be the intestate heir. Part of the difficulty with this argument may be with the connotation of the phrase "unjust enrichment". No one is suggesting that Ms. Dalk's enrichment would be unjust in the sense that she did anything wrong. Of course, that was equally true of the Broward Art Guild, Inc. which was the beneficiary under the codicil to Mr. Tolin's will. Obviously, misconduct by the beneficiary is not the test for the "unjust enrichment" element of a constructive trust analysis. Rather, the correct test for unjust enrichment is whether or not the beneficiary truly intended by the decedent to receive his or her property is receiving that property. If not, unjust enrichment occurs.

The answer in this case, as in Tolin, is clear. Strict application of the will statute without more in Tolin would have resulted in a frustration of the clear intent of the decedent; stated differently, unjust enrichment. Therefore, a constructive trust was properly imposed. Similarly, strict application of the will statute without more in this case will likewise result in a frustration of Mrs. McPeak's clear intent; again,

unjust enrichment. Therefore, as in Tolin, a constructive trust should be imposed in this case as well. The District Court of Appeal erred in failing to impose a constructive trust. The opinion below should be reversed.

III.

PUBLIC POLICY SUPPORTS IMPOSITION OF A CONSTRUCTIVE TRUST

For many years our jurisprudence has required significant formality in the making of a will. That is as it should be. As recognized by the District Court of Appeal below, strict compliance is important to insure authenticity and to avoid fraud and imposition (5DCAR: 12). At the same time, in recognition of private property rights, our system properly strives to permit people to determine disposition of their material wealth after death as well as in life. That is to say, the decedent's intent should control. Where a mistake of fact renders a probate document invalid these two doctrines, strict compliance and decedent intent, come into potential conflict. In such situations, the equitable remedy of constructive trust provides a fair and reasonable means of avoiding or resolving any conflict between the two doctrines. That is good public policy.

The Respondent argued below that to allow a constructive trust in this case would, in effect, open the flood gates to probate of anything resembling a will. That argument held sway in the District Court of Appeal. Let there be no confusion, the

Petitioner is not arguing that a constructive trust can be used in any situation where some evidence suggests the subjective intent of the decedent was different than that which would be accomplished by strict application of the will statute. To the contrary, the Petitioner concedes and submits herewith that imposition of a constructive trust must be rare and occur only in situations where the mistake of fact is clearly proven. No reasonable person would suggest that the vehicle of a constructive trust should be used as a substitute for proper execution of wills. Certainly, the Petitioner is not requesting this Court to render any decision which could be misconstrued as eroding the doctrine of strict compliance.

Should this Court determine that equity demands imposition of a constructive trust in this case, the Petitioner respectfully suggests that two points could be articulated in the opinion which will make clear the limits to which the decision can be applied. Actually, both points are already a part of the Tolin opinion. They are: 1) a constructive trust can be imposed only in situations where there is a mistake of fact and 2) the testator's true intent is clear.

Distinction between mistakes of fact and mistakes of law is critical. In Tolin, the mistake was one of fact; that is, whether the codicil destroyed was a copy or an original. In the instant case, the mistake was also one of fact; that is, whether the last will of Mrs. McPeak was one of the documents she physically signed. Neither involves mistakes of law. For example, if Mr. Tolin had been told that destruction of

a copy was adequate or if Mrs. McPeak had been advised that she did not need to sign her will, the mistake would have been one of law. If either of those situations had occurred, we would not have a mistake of fact and; hence, not an appropriate scenario for imposition of a constructive trust.

The District Court of Appeal was concerned by the case of In re Estate of Salathe, 703 So.2d 1167 (Fla. 2DCA 1997). (5DCAR: 14). However, the "mistake of fact" requirement renders Salathe inapplicable to the constructive trust analysis. Salathe involved the death of a German resident who was married to but estranged from her spouse who lived in the United States at the time of her death. Prior to her death the decedent executed a holographic will. In the opinion below, the District Court of Appeal correctly recognizes that no mention of a constructive trust was made in Salathe even though the holographic will was clear as to the decedent's intent. While the Salathe case is silent as to whether the issue was even raised, it is clear that imposition of a constructive trust in that case would have been erroneous. There was no mistake of fact in Salathe. To the extent there was a mistake at all, the mistake would have had to have been one of law. That is, knowledge of the requirements for a valid will pursuant to the law of the controlling jurisdiction. Pursuant to the holding of Tolin and good public policy, a constructive trust is not available to cure mistakes of law. Therefore, the Salathe case has no applicability to the issue currently before this Court.

Secondly, a constructive trust should be imposed only where the decedent's intent is "clear". In Tolin, the clarity of the decedent's intent was determined by stipulated facts. In the instant case, as recognized by the District Court of Appeal, the clarity of Mrs. McPeak's intent was determined by specific and detailed findings of fact by the trial court. Therefore, in this case as in Tolin, a constructive trust properly should be imposed.

Returning to the broader question of public policy, what should be the holding in subsequent cases if there is a mistake of fact which appears to frustrate a decedent's intent but that intent is not "clear"? The Petitioner respectfully suggests that a constructive trust would not be appropriate in that circumstance. The apprehension of the Respondent and the District Court of Appeal concerning the potential for abuse of constructive trusts in probate cases does have merit. Certainly, imposition of a constructive trust should be the rare exception; not the rule. By unambiguously reinforcing the requirement that the decedent's intent be "clear", this Court can avoid any concern regarding overuse of constructive trusts in probate cases.

At the most basic, this Court will through its decision determine whether or not equity can intervene in the extraordinarily rare case where the decedent's clear intent would otherwise be defeated by a mistake of fact. As demonstrated by Tolin, equity can so intervene to do justice without compromising the legitimate need for strict compliance with the will statute. Imposition of a constructive trust was good public

policy in Tolin. And, imposition of a constructive trust in order to do justice in the instant case likewise will be good public policy.

CONCLUSION

As found by the trial court and recognized by the District Court of Appeal, the defective will of March 20, 1998 expresses the clear intent of Mrs. McPeak with regard to distribution of her property after death. The defect in execution of this will was due exclusively to a mistake of fact; that is, her attorney's erroneous conclusion that she had signed her will at the same time she signed seven separate original documents.

Therefore, as in Tolin, a constructive trust should be imposed on the assets of the estate so that the assets are held for and delivered to those persons who would have taken under the will absent the mistake of fact. The Petitioner prays this Honorable Court to remand this case to the District Court of Appeal with directions that, upon remand to the trial court, a constructive trust be imposed on the assets of the estate for the benefit of Bonnie Allen, Sheri Caccamo and Angela Conner.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to Christopher J. Klein, Esq., BAUR, WOODBRIDGE,

REUS & KLEIN, ESQ., 100 North Biscayne Blvd., Suite 2100, Miami, Florida 33132 this 5 day of February, 2001.

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(2), the undersigned certifies that this brief is being submitted in Times New Roman 14-point font.

By: /s/ William H. Phelan, Jr.

William H. Phelan, Jr.
FL Bar No.: 273805
BOND, ARNETT & PHELAN, P.A.
Post Office Box 2405
Ocala, Florida 34478
(352) 622-1188
(352) 622-1125 facsimile
Attorneys for Petitioner

APPENDIX 1

ORDER ADMITTING WILL TO PROBATE AND APPOINTING PERSONAL REPRESENTATIVE

APPENDIX 2

OPINION
FIFTH DISTRICT COURT OF APPEAL
DECEMBER 15, 2000