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 REPLY BRIEF

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

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ARGUMENT

I.

THE RESPONDENT IGNORES THE RECIPROCITY OF FORMALITIES FOR EXECUTION AND REVOCATION OF WILLS

The most significant flaw in the Respondent's position is that she totally ignores the parallel relationship between execution of a will and revocation of a will. The Respondent's Answer Brief dedicates considerable effort to arguing that the Last Will And Testament of Christel D. McPeak was not a valid will because it was not properly executed. That point has already been conceded by the Petitioner and is not an issue before this Court. The Respondent then cites a number of cases decided prior to In Re: Estate of Tolin, 622 So.2d 988 (Fla. 1993) for the proposition that the intent of the testator is irrelevant unless the will is valid. Of course, Tolin stands for the principle that a constructive trust is available to effectuate the intent of the testator even though the testator did not strictly comply with the will statutes. Which returns us to the basic flaw in the Respondent's argument.

As set forth originally in the Petitioner's Initial Brief, there is no functional difference between impressing a constructive trust to cure a mistake in revocation and imposing a constructive trust to cure a mistake in execution. For purposes of legal

analysis, revocation and execution are simply the reciprocals of each other. The same Part V of Chapter 732 of the Florida Probate Code which establishes the formality 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).] The Tolin case, itself, recognizes the similarities required for the formalities of execution and the formalities of revocation. Id at 990. The Respondent's Answer Brief does not dispute the functional equivalency of these formalities. Rather, the Respondent implicitly assumes that execution of a will is somehow more significant than revocation of a will. That assumption is in error. And, it is upon that erroneous assumption that the Respondent builds her case.

The cases cited by the Respondent regarding intent and strict compliance do stand for the propositions asserted by the Respondent. But, and this is a critical "but", except as set forth hereinafter, those cases predate Tolin and must now be interpreted in light of the Tolin decision. As set forth more particularly in the Petitioner's Initial Brief, Tolin does specifically preserve the well established requirement for strict compliance with the will statutes. Id at 990. And, of course, Tolin did impose a constructive trust in order to effectuate the intent of the testator. So, the Respondent's argument that a constructive trust cannot be imposed to effectuate Mrs. McPeak's intent because she did not comply with the will statutes has already been rejected by

this Court. For the Respondent's argument to have merit, the Respondent simply must demonstrate some functional difference between the formalities required by the will statutes for revocation and the formalities required by the will statutes for execution. By failing to address this issue, the Respondent has effectively conceded there to be no functional difference.

It really does not matter whether the Respondent cites one case or one hundred cases decided before Tolin. The holding of Tolin still cannot be ignored. Before Tolin, Respondent's fundamental position may have had some merit. However, after Tolin a constructive trust clearly is available to avoid the harsh result of frustrating the testator's clear intention.

The Respondent does cite two cases decided after Tolin with regard to the issue of intent. However, both of these cases actually buttress the position of the Petitioner because they demonstrate the important distinction between mistakes of fact and mistakes of law. To set this point in context, succinct review may be appropriate. As more particularly argued in the Petitioner's Initial Brief, constructive trusts are not available to cure mistakes of law; only mistakes of fact. For example, in Tolin the mistake was one of fact; that is, whether the codicil destroyed was a copy or an original. Similarly, 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.

Therefore, a constructive trust can properly be imposed in this case just as it was imposed in Tolin.

The two post Tolin cases cited by the Respondent, in contrast, concern mistakes of law. As an aside, neither of those two cases even mention the concept of a constructive trust. However, in order to brief this issue fully for the Court, the Petitioner will complete the analysis.

In Re: Estate of Salathe, 703 So.2d 1167 (Fla. 2nd DCA 1997) has already been discussed in the Petitioner's Initial Brief. To review briefly, Salathe involved the death of a German resident who was married to but estranged from her spouse who lived in the United States. Prior to her death the decedent executed a holographic will. To the extent there was a mistake at all, the mistake by the testator in Salathe would have been one of law; not one of fact. That is, knowledge of the requirements for a valid will pursuant to the law of the controlling jurisdiction.

Similarly, In Re: Estate of Scott, 659 So.2d 361 (Fla. 1st DCA 1995) also involves a mistake of law. In Scott the testator executed a will which left her property to her sister. This same will specifically recites the testator's intent to make no provision for certain individuals. The named beneficiary predeceased the testator. Ironically, as a result of the antilapse statute, two individuals intentionally not provided for in the will succeeded to the interest of the predeceased beneficiary. The

Scott court held the "no provision for specific heirs" provision of the will was not adequate to defeat the results of the antilapse statute. As was true in Salathe, there was no mistake of fact in Scott. To the extent there was a mistake at all, the mistake would have been one of law. That is, knowledge of the ramifications of the antilapse statute.

This distinction between mistakes of law and mistakes of fact undergirds sound public policy. It is reasonable for equity to assist one who attempts to comply strictly with the will statutes but actually performs a physical act different than the act intended (ie: signing or destroying the wrong document); mistakes of fact. But, those situations must be contrasted with situations where one performs exactly the physical act intended but is ignorant of the consequences of that act (ie: signing a holographic will or signing a will that does not address the consequences of the antilapse statute); mistakes of law. A real danger would be created if constructive trusts were available to cure mistakes of law. That is, public policy cannot permit people simply to make up their own rules. Thus, Tolin wisely limits the imposition of constructive trusts to situations, such as the instant case, that involve mistakes of fact.

As demonstrated above, Tolin cannot be effectively distinguished from the case sub judice. Nor can Tolin reasonably be regarded as an apparition having no precedential value. To the contrary, Tolin confirms that a constructive trust should

be imposed when the clear intent of the testator is defeated as a result of a mistake of fact. That is precisely the situation presented by this instant case. Therefore, as in Tolin, a constructive trust should be imposed.

II.

THIS APPEAL DOES NOT INVOLVE CONTESTED ISSUES OF FACT.

Contrary to the assertions of the Respondent, this appeal does not involve contested issues of fact. Of course, there were some minor contested issues of fact before the trial court. However, those issues were definitively resolved by the trial court in its comprehensive and well reasoned Order Admitting Will To Probate And Appointing Personal Representative (R: 223-229). 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. 3rd DCA 1975)]. It is the function of the trial court to evaluate and weigh the testimony and evidence based upon its observation of the credibility of the witnesses appearing in the cause. Decisions of fact are reviewed by determining whether the order is supported by "competent substantial evidence." Shaw v. Shaw, 334 So.2d 13, 16 (Fla. 1976). Competent substantial evidence means 1) such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be

inferred or 2) such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. Duval Utility Co. v. Florida Public Service Commission, 380 So.2d 1028 (Fla. 1980).

The Respondent's attempt to relitigate questions of fact at this level of review is inappropriate. The trial court has already found as a matter of fact that the intention of Mrs. McPeak was 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 that it was the intention of Mrs. McPeak that her property would pass after her death in accordance with the terms and provisions of that document. (R: 225). As more particularly set forth in the Order Admitting Will To Probate And Appointing Personal Representative (R:223-229) and the Petitioner's Initial Brief, that finding of fact is supported by competent substantial evidence. Therefore, the issue of Mrs. McPeak's intent is not before the court. Instead, the only issues currently before the Court are issues of pure law. Therefore, the standard of review is de novo. [See: Armstrong v. Harris, 773 So.2d 7 (Fla. 2000)].

III.

THE EQUITABLE REMEDY OF CONSTRUCTIVE

TRUST IS APPROPRIATE IN THIS CASE

No one can reasonably dispute the axiom that equity will not intervene where there exists an adequate remedy at law. However, as with most axioms, application requires specific analysis.

The Respondent argues the Petitioner is not eligible for the equitable relief of a constructive trust because she has an adequate remedy at law. The "adequate remedy" suggested by the Respondent is an independent action for legal malpractice against the attorney who drew the will and coordinated its execution. However, the Respondent can cite no case where equitable relief was denied because there might exist some independent cause of action against a third person who is not a party to the current proceedings. Each of the cases cited by the Respondent in support of her argument involve situations where the equitable remedy sought would inure to the disadvantage of the same person or organization who would, themselves, be liable for the legal remedy of damages. For example, Lamarca v. Miami Herald Publishing, 359 F. Supp. 324 (S.D. Fla. 1975), cited by the Respondent in support of her position, is a classic case where an injunction was denied because the plaintiff could be compensated with money damages. Of course, the defendant against whom the injunction was sought is exactly the same defendant who would ultimately stand liable for money damages. Our instant case is completely different. There is no basis in the

law to deny the equitable relief of a constructive trust in this probate action simply because the Petitioner might have an independent action for malpractice against a third party.

Moreover, an "adequate remedy at law" means much more than a mere hypothetical or indirect opportunity for relief. As stated by the Third District Court of Appeal:

> In order to preclude pursuit of equitable remedies an available legal remedy must be plain, certain, prompt, speedy, sufficient, complete, practical, and efficient in attaining the ends of justice.
> Danielle, Inc. v. Jamko, Inc., 408 So.2d 735, 738 (Fla. 3rd DCA 1982)

Clearly, a potential independent action for malpractice against a person who is not a party to the proceeding below does not meet this test. The Petitioner does not have an adequate remedy at law and the trial court properly found that it would be appropriate to impose the equitable remedy of constructive trust.

Somewhat perfunctoraly, the Respondent also attempts to escape the effect of Tolin by arguing that equity should not grant relief where the mistake complained of resulted from want of care. If we were dealing with a case where Attorney Baker was attempting to invoke the principles of equity to avoid the consequences of his own error, the Respondent might have a point. But, this case has nothing to do with

Attorney Baker. Rather, this case, analogous to Tolin, involves the testator's simple and good faith mistaken belief that she had, in fact, physically signed her will. That is exactly the type of mistake which this Court held in Tolin to be an adequate predicate for imposition of a constructive trust.

IV.

INTESTATE SUCCESSION DOES NOT CREATE SOME SPECIAL RIGHT OBVIATING OTHERWISE UNJUST ENRICHMENT.

The Respondent continues to misapprehend the application of the "unjust enrichment" component of the Tolin test. As suggested originally in the Petitioner's Initial Brief, the basic flaw in the Respondent's analysis in this regard is the Respondent's insistence upon ascribing some superior dignity to rights deriving from intestate succession. In fact, there is no valid basis for suggesting that someone who receives an inheritance through intestate succession enjoys any greater status or protection than someone who receives an inheritance through a will. Both intestate heirs and testate beneficiaries enjoy the same status and protection under the Florida Probate Code.

The Respondent is correct in her insistence that an intestate heir is entitled to specific inheritance rights once an estate is determined to be intestate. However, the

Respondent fails to address the reciprocal point raised originally in Petitioner's Initial Brief. That is, 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: In Re: Estate of Flohl v. Flohl, 764 So.2d 802 (Fla. 2nd DCA 2000)]. The implication for the Respondent's argument is clear. Reduced to basics, the Respondent argues that because she has some vested inheritance rights once the will is determined to be invalid, a constructive trust cannot be imposed. However, following the reasoning of the Respondent, once the attempted revocation of Mr. Tolin's codicil was determined to be invalid, his property equally 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. But, this Court did impose a constructive trust in Tolin. Imposing a constructive trust in the instant case no more violates some "right" held by an intestate heir than the Tolin constructive trust violated a collateral "right" of a testate beneficiary.

V.

IMPOSITION OF A CONSTRUCTIVE TRUST IS CONSISTENT WITH GOOD PUBLIC POLICY

The public policy considerations of this case merit careful consideration and debate. Candidly, the arguments advanced by the Respondent regarding the potential for abuse of constructive trusts in probate cases do have merit. The Petitioner has already addressed those concerns in the Petitioner's Initial Brief. Without reiterating points already made, the gravamen of the Petitioner's position in this regard is that concerns for potential abuse will be satisfied if this Court crafts a narrow opinion confirming that constructive trusts will be imposed only in situations where there is a mistake of fact (rather than law) and the testator's true intent is clear.

Apparently in an effort to rebut the efficacy of the "clear intent" prong of this suggested limitation, the Respondent sets forth several potential factual scenarios where unethical attorneys could engage in criminal conduct in order to utilize the constructive trust theory to defeat the actual intent of a testator. Realistically, if someone is willing to commit fraud, theft, and other crimes in order to obtain the assets of an estate, there probably are circumstances under which that goal can be accomplished. However, that is equally true whether the issue is a pseudo-constructive trust or otherwise.

For example, the basic scenario described in the Respondent's Answer Brief involves a lawyer using various devices to create a defective will in order to generate a constructive trust in favor of a "beneficiary" who is actually a co-conspirator. Why

would this assumed felonious attorney go to all the trouble described in the Respondent's scenario? If the attorney wanted to accomplish the goal postulated by the Respondent and if that attorney was dishonest enough to undertake the crime, is there not a much easier and more direct method? For example, it would be much easier and more direct for the hypothetical dishonest attorney simply to draw the will any way he or she wanted it to read, forge the signature of the testator and then recruit the same dishonest "witnesses" and "beneficiary" already assumed in the Respondent's hypothetical scenario. In addition to being easier and more direct, this scheme would have an even greater potential for success because, assuming the formalities are met, the will would be presumptively entitled to probate.

The simple fact is this: so long as human nature is imperfect there will never be any system or safeguard that is totally free from abuse. That is and will remain true no matter how this case is decided. It is reasonable and proper for this Court to consider the potential for abuse. As stated above, the Petitioner has already set forth a workable standard which will minimize the practical danger in this regard. In contrast, it is not reasonable for the Respondent to suggest that the legitimate public policy interest of effectuating the testator's clear intent should be sacrificed based upon a parade of horribles.

As with most public policy issues, there should be some balancing of interests in situations potentially involving application of constructive trust. So long as this

Court's opinion clearly maintains the twin requirements of a mistake of fact and clear proof of the testator's true intention, imposition of a constructive trust in this case properly balances the competing interests. To rule otherwise would retreat from the good public policy principles established by Tolin. That is, equity can intervene in cases such as the case sub judice to do justice without compromising the legitimate need for strict compliance with the will statute.

CONCLUSION

As set forth more particularly in the Petitioner's Initial Brief, a constructive trust should be imposed on the assets of Mrs. McPeak's 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 arguments raised by the Respondent in opposition to that position are not persuasive. Therefore, the Petitioner requests 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 copy of the foregoing has been furnished by U.S. Mail to: Christopher J. Klein, Esq., BAUR, WOODBRIDGE, REUS & KLEIN, ESQ., 100 North Biscayne Blvd., Suite 2100, Miami, Florida 33132 this ___ day of March, 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.

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